REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.41 OF 2008

IN THE MATTER OF THE ESTATE OF MUIGA MIGAYO (DECEASED)

(An appeal arising from the judgment of L.W. Gicheha (Mrs.) – SRM in Thika Chief Magistrate's Court Civil Case No.453 of 2003 delivered on 3rd March 2006).

CHARLES MBUGUA NJUGUNA……....APPELLANT

VERSUS

HARRISON GATUTHU MUIGA……1ST RESPONDENT

TABITHA WAIRIMU MUIGA…….2NDRESPONDENT

JUDGMENT

The Appellant was aggrieved by the decision of the trial court in which the said court distributed the properties that comprise the estate of the deceased to the beneficiaries. The properties that are the subject of dispute are: LR. No. Loc.16/Mwagu/148, LR.No. Loc.16/Mwagu/310 and LR. No. Loc.16/Kiarutara/111. In her considered judgment, the trial court (L. W. Gicheha – SRM) made the following findings:

> ***"It is therefore really not in dispute that the deceased did indicate his final wishes in the book marked as exhb.1. The court will usually not ignore the deceased wishes unless it is shown that the deceased state of mind was not capable of making such wishes or the record is forged. But if it is obvious that he did record his final wishes willingly and was in good health and further was present I find (no) reason why the court should not follow his final words."***

The court then proceeded to distribute the three properties to the beneficiaries. The Appellant challenged this decision in his memorandum of appeal. The memorandum raises seventeen (17) grounds of appeal which may be summarized thus:

The Appellant was aggrieved that the trial court had made a finding that it was relying on the wishes of the deceased to distribute the estate of the deceased yet in actual fact the court proceeded to distribute the suit properties contrary to the wishes of the deceased. The Appellant was aggrieved that, in distributing the estate of the deceased, the court skewed the distribution in favour of the 3rd family to the detriment of

the 1st and 2nd families. The Appellant is of the view that the court should have distributed the estate of the deceased in such a manner that each family gets an equal share. The Appellant was aggrieved that the decision of the trial court had resulted in some beneficiaries being uprooted from the portions of land where they had lived and cultivated since the time of the death of the deceased. The Appellant fault the trial magistrate for reaching a decision that was against the weight of evidence that was adduced by the parties in court. The Appellant was finally aggrieved that the trial court failed to consider the justice of the case in arriving at the decision to distribute the properties that comprise the estate of the deceased to the beneficiaries. For the above reasons, the Appellant prayed for the appeal to be allowed, the decision of the trial court set aside, and for the court to distribute the properties that comprise the estate of the deceased in accordance with the wishes of the deceased.

At the hearing of the appeal, this court heard oral rival arguments made by Mr. Kiruki for the Appellant and Tabitha Wairimu Muiga, the 2nd Respondent. Mr. Kiruki submitted that the trial court erred when it distributed the estate of the deceased. He explained that the trial court ignored the provisions of the Will which had been produced as an exhibit in the case. He urged the court to consider the Will which had been written in Kikuyu – a translation was provided to the court. He stated that according to the said Will, the Appellant was supposed to inherit eleven (11) acres of the parcel of land known as LR. No. Loc.16/Kiarutara/111. The trial court distributed this property to three (3) beneficiaries contrary to the wishes of the deceased. He explained that in the said Will, the other beneficiaries who inherited LR. No. Loc.16/Mwagu/148 was in accordance with the Will. He was aggrieved that instead of benefitting from 7.78 acres he got 0.2 acres. He stated that the trial court gave the 2nd Respondent fourteen (14) acres instead of four (4) acres as provided in the Will. Learned counsel submitted that the trial court should have taken into consideration the principle of equality i.e each house was supposed to inherit eighteen (18) acres or thereabout. Instead, the 3rd house ended up getting 25.8 acres while the 1st house got 16.8 acres and his family (2nd house) got 12.5 acres. He urged the court to issue the grant of probate on the basis of the Will and redistribute the properties that comprise the estate of the deceased in accordance with the Will. In that regard, he submitted that the lower court decision should be set aside.

On her part, the 2nd Respondent submitted that the deceased had three wives. The 1st wife had two sons. The 2nd wife had 1 son. The 3rd wife had three sons. She stated that the deceased had distributed the suit parcels of land during his life time. The first son got 12 acres. The second son got 11 acres. The third son got 10 acres. The sons who followed were each given 7 acres each. Another son got 4 acres. The 2nd Respondent got 4 acres. She stated that no wife was given land. The deceased bequeathed land to only his sons. She explained that the deceased distributed the land in the manner that he did because he did not want problems with his sons especially with the Appellant. She stated that her three sons got more land because of their number. She took issue with the fact that the Appellant now sought to rely on the wishes of the deceased yet when those wishes were first disclosed at the Chief's Office, the Appellant was unwilling to abide by it. She urged the court to disallow the appeal because, in her view, the distribution by the trial court was fair.

This court has carefully considered the fact of this case and the grounds of appeal put forward by the Appellant. It has also considered the submission made by the parties herein in support of their respective opposing positions. This being a first and final appeal in accordance with **Section 50(1)** of the **Law of Succession Act**, the duty of this court is to reconsider and to reevaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court must always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any finding regarding the demeanour of the witnesses **(**see **Selle –Vs- Associated Motor Boat Co. Ltd. & Another [1968] E.A. 123** at Pg 126). The issue for determination by this court is whether the trial court reached the correct verdict in distributing the properties that comprise the estate of the deceased to the beneficiaries.

The deceased to whose estate these proceedings relate died on 16th September 1988. According to the Appellant, the deceased had indicated his wish on how the estate of the deceased was to be distributed. That wish was written in an exercise both in Kikuyu. This court has perused the said Wish in its English translation. It was not clear to the court whether the deceased was expressing an actual Wish to distribute

his properties to beneficiaries or was commenting generally on the welfare of his family. This court does not think that the document produced as the Wish of the deceased fulfills the legal requirement that would compel this court to abide by it. The actual dispute between the Appellant and the Respondents is the mode of that should be adopted by the court in distributing the estate of the deceased. Whereas the Appellant prefers the properties that comprise the estate of the deceased to be distributed in accordance with the three houses (wives) of the deceased, the Respondents are of the view that the estate should be distributed in accordance with the six sons of the deceased. Both the Appellant and the Respondents agree that the daughters of the deceased should not benefit from the estate. The daughters of the deceased are not complaining. All of them are married and are settled in their respective matrimonial homes. The reason why the Appellant wants the estate of the deceased to be distributed in accordance with the houses of the deceased is because he is the only son in his mother's house. The third house has three sons while the first house has two sons. If the mode of distribution proposed by the Appellant is adopted, the Appellant will end up getting a disproportionate larger acreage of land as compared with his step brothers. The three sons of the third house will end up getting a lesser share than what is justly due to them.

This court is not persuaded by the argument advanced by the Appellant. **Section 38** of the **Law of Succession Act** provides that where the deceased had surviving children, the net estate of the deceased shall be distributed among them equally. What the Appellant desires is a mode of distribution that would favour him to the detriment of his step brothers. In the context of these succession proceedings, the Appellant cannot seek to benefit from an accident of birth *i.e.* the fact that he is the only son of his mother while seek to punish the sons of the 2nd Respondent by virtue of the fact that they are more in their house. This court finds no merit with the appeal lodged by the Appellant. If the court were to allow the same, it would result in an injustice to other beneficiaries of the estate of the deceased.

The upshot of the above reasons is that the appeal lacks merit and is hereby dismissed with costs to the Respondents. The estate of deceased shall be distributed as ordered by the trial court. The Thika Subordinate Court File is ordered returned to Thika for the administrators to proceed with the distribution of the estate to the beneficiaries as ordered by the trial court. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2014.

L. KIMARU

JUDGE