

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 33 OF 2002

FRANCIS MUNGAI WAINAINA.....1ST
APPELLANT

JOSEPH NGOTHO WAINAINA.....
2ND APPELLANT

JOHN KIMANI WAINAINA.....
3RD APPELLANT

GRACE NJOKI
NDUNGU.....4TH APPELLANT

VERSUS

JAMES NJUGUNA WAINAINA.....RESPONDENT

JUDGMENT

Simon Wainaina Wanyangi, the deceased to whose estate these proceedings related died on 28th July 1997. On 10th March 1998, the Respondent James Njuguna Wainaina petitioned the Kiambu Subordinate Court in **Succession Cause No.63 of 1998** to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. In the petition, the Respondent listed the following as dependants of deceased: John Kimani Wainaina, Ndungu Wainaina, Wanjiru Wainaina, Mungai Wainaina, Ngigi Wainaina and James Njuguna Wainaina. The only property comprising the estate of the deceased was listed as LR. No.Komothai/Kiratina/166 (hereinafter referred to as the suit property). The grant was issued to Francis Mungai Wainaina, John Kimani Wainaina, Grace Njoki Ndungu and James Njuguna Wainaina on 28th June 1999. A dispute arose between the dependants regarding how the estate of the deceased should be distributed. Whereas the Appellants insisted that the deceased had, prior to his death, distributed the said property to the beneficiaries to the extent that all the beneficiaries had already settled in their respective portions, the Respondent was of the view that the suit parcel of land should be distributed equally among all the dependants of the deceased.

In a Ruling delivered on 2nd November 2001, J.G. Kingori (then SRM) had this to say in respect of the dispute:

“There is an attempt to prove the existence of an oral Will wherein the deceased was alleged to have apportioned the land between his six children. This was allegedly done in 1993. The deceased according to the death certificate submitted died on 28/7/97 several years after the time of the alleged oral Will. The deceased did not die within three (3) months of making the Will. The alleged oral Will is therefore invalid. It cannot give the eldest son 1½ acres as claimed, some 1 acre and others ½ acres. The deceased died intestate. The law is that the deceased’s children should share the estate equally irrespective of whether they are male or female or their positions in the family. I would therefore confirm the grant herein and order that all the six beneficiaries including the daughter share the land equally.”

The Appellants were aggrieved by this decision. They duly filed an appeal to this court. An appeal against the decision of the Subordinate Court in a succession dispute to the High Court is contemplated under

Section 50(1) of the Law of Succession Act. In their memorandum of appeal, the Appellants raised several grounds challenging the decision of the Subordinate Court. The grounds can be summarized thus: the Appellants were aggrieved that the trial court had failed to take into consideration the fact that the deceased had already distributed his property prior to his death and therefore there was no need for the said property to be distributed again upon his death. They were aggrieved that the trial court had failed to properly weigh the evidence adduced by the Appellants and the Respondent and therefore reached the erroneous decision finding in favour of the Respondent. The Appellants were aggrieved that the trial court had gone ahead to distribute the property that comprised the estate of the deceased without taking into consideration the fact that all dependants save for the Respondent had accepted the proposed mode of distribution. In the premises therefore, the Appellants prayed that the decision of the Subordinate Court be set aside and substituted by a decision of this court distributing the suit property in the manner that the deceased allocated to his children prior to his death.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court, noting that that court had the opportunity of seeing and hearing the witnesses, before arriving at its independent determination whether or not to uphold the decision of the trial court. During the hearing of the appeal, the Appellants, who were unrepresented, more or less reiterated their position before the trial court. In the submission made on their behalf by Joseph Ngotho (one of the Appellants), the Appellants stated that the deceased prior to his death had already distributed his property to his children. He showed the court a copy of an application that had been presented by the deceased to the Land Control Board seeking to subdivide the land. The application was approved. The deceased had proposed to distribute the suit parcel of land into seven (7) portions. A Surveyor was instructed to subdivide the land. The land was duly subdivided. He showed the court a copy of the subdivision plan. According to the plan, the suit parcel of land was to be subdivided into various portions measuring between 1 acre and 0.5 acres. It was clear to this court that if each dependant were to inherit the respective portions that the Appellants argue the deceased indicated, some of the beneficiaries would get larger portions of land while others would get less. The beneficiaries are six (6) in number. The subdivided portions are seven (7). It is not clear from the Appellant's submission which beneficiary is to benefit from the seventh parcel of land. Despite these differences in the subdivided parcels of land, the Appellants insist that the court should adopt the deceased's wish. On his part, the Respondent argued that there was no reason why some beneficiaries should get larger portions than others. The Respondent urged the court to uphold the decision of the Subordinate Court and direct that the suit parcel of land be distributed equally between all the six (6) beneficiaries of the deceased.

The issue for determination by this court is whether the Appellants made a case for this court to interfere with the decision of the trial court in respect of the proposed mode of distribution of the suit property. It was common ground that the parties to this appeal are agreed on who the dependants of the deceased are. The dispute before the Subordinate Court and before this court is in regard to the mode of distribution to be adopted. Whereas the Appellants argue that the deceased had distributed the suit parcel of land to the dependants prior to his death, the Respondent is of the view that the court should equally distribute the suit parcel of land to the dependants.

It was evident from re-evaluation of the facts of this case that the deceased indeed had attempted to distribute the suit property to the dependants. However, he did not manage to complete the distribution before his death. This court took into consideration the fact that, at the time of his death, the deceased was 90 years of age. It cannot therefore be ruled out that he was influenced by some of the dependants to effect the subdivision in the skewed manner that favoured some of the dependants to the disadvantage of others. As was the distribution was incomplete, this court cannot fault the Subordinate Court when it directed that the suit property be distributed equally among all beneficiaries of the deceased. This decision is in tandem with **Section 38 of the Law of Succession Act** that provides that:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

In the premises therefore, this court finds no merit with the appeal lodged by the Appellants. The same is

hereby dismissed but with no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2014

L. KIMARU

JUDGE