REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 137 of 2006

GRACE MUTHONI NDILINYEI………………..…..…..….APPELLANT

VERSUS

CHARLES GITONGA MURIUKI……..…………………RESPONDENT

(An Appeal from the Judgment and Decree of Hon. Mrs. G. A. M'masi,

Senior Resident Magistrate, in Nyahururu P.M.Succ. C.NO.106 OF 2004)

JUDGMENT

The facts in this appeal are largely undisputed. For instance, it is not controverted that;

(i) the deceased Ngilenyei Sojai also known as Nkinyai Ole Sunjoi was survived by one widow, Grace Muthoni Ngilenyei, (the appellant).

(ii)the appellant, had four children with the deceased, namely Francis Mugo Ndelenyei, Hannah Wangui Ngilenyei, Margaret Nyaguthii Muiruri and Mary Nyambugi Ngilenyei.

(iii)the appellant has a son, James Maina Ngilenyei, who is not a biological son of the deceased but who was taken on and supported by the deceased and in terms of Section 29(b) of the Law of Succession Act, was his dependant.

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(iv)the deceased was also married to Jane Mumbi who left him and finally passed away before he married Grace.

(v)Jane Mumbi had a son with the deceased. That son is Charles Gitonga Kariuki (the respondent).

(vi)the deceased died on 4th September, 1999 at the age of 98 years, according to a copy of the death certificate in this file.

(vii)the deceased left only one parcel of land, namely L.R. No. NYANDARUA/SHAMATA/209 measuring approximately 10 acres (the suit property).

(viii)at the stage of confirmation of the grant of representation which had been issued jointly to the appellant and the respondent, both parties disagreed on the mode of distribution. Each filed an affidavit of protest. The court below heard one protest by way of *viva voce* evidence.

The court was persuaded that the deceased having been married to the appellant and the respondent's mother, constituting two households, that it was equitable to share the suit property equally between the two households.

This aggrieved the appellant who preferred this appeal, citing seven (7) grounds which I have summarized as follows:

i) that the learned magistrate erred in finding that there were two (2) households when the mother to the respondent had predeceased the deceased;

ii) that the learned magistrate erred in ordering that the suit property be shared between the respondent on the one hand (alone) and the appellant on the other hand with all her five (5) children;

iii) that the learned magistrate erred in failing to consider the appellant's rights under Section 35 of the Law of Succession Act;

iv) that by the learned magistrate's failure to identify the beneficiaries of the estate and their respective shares, a miscarriage of justice was occasioned;

v) that the learned magistrate discriminated against the appellant and her family;

vi) that the decision of the learned magistrate was against the weight of the evidence; and

vii) that the learned magistrate failed to appreciate that it is the appellant and her children who have been in occupation of the suit property, which they have extensively developed.

As I have already observed, the contention is on the mode of distribution. While the respondent had proposed that the suit property be subdivided into two with him taking one half and the appellant the other half, the appellant on the other hand insisted on the respondent, her (appellant's) children and herself getting equal shares. Both sides submitted that their respective positions were based on Section 40 of the Law of Succession Act.

The learned trial magistrate in her interpretation of that provision held that:

"***The court upon considering the evidence adduced and the provisions of Section 40(1) and (2) of Chapter 160 Laws of Kenya, finds that the estate of the deceased should be shared equally among each household whereupon further sharing among the children in each house would take place. Hence the share of the first household should devolve wholly in the 1st petitioner/protestor as the only surviving child her (sic) of the said household."***

The effect of that decision was that the respondent took 5 acres of the suit property, while the reminding 5 acres was to be share by the appellant and her five children.

Before I consider the mode of distribution of the deceased person's estate as envisaged under section 40 of the Law of Succession Act, I intend to dispose of the first ground of this appeal to the effect that the trial magistrate erred in finding that there were two households when the mother to the respondent had predeceased the deceased.

The fact of the deceased having been married to the respondent's mother and the respondent being her son with the deceased, is not controverted. The term house is defined in Section 3 of the Law of Succession Act to mean:

"……***.a family unit comprising a wife, whether alive of dead at the date of the death of the husband and the children of that wife"***

The house of Jane Mumbi existed even though she was dead and was represented by the respondent.

I turn to Section 40 aforesaid. It provides:

"***40.(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each***

house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Section 35 to 38."

I have noted that each party in this appeal has given different interpretation to this provision. In order to understand the mischief underlying this provision it may be useful to see the thinking of the 1967 Commission of the Law of Succession. It is that thinking that informed the inclusion of this provision by the Legislature as Section 40 in the Law of Succession Act.

The Commission first noted that in Islamic Law, the fact that the deceased was polygamist makes no difference to the rules of intestate succession since the widow's share, one eighth or one quarter, depending on whether or not there are children, is simply divided equally amongst the widows. The Commission went on to observe that there were complications posed by the rules of division in customary law where the estate is shared equally among the houses irrespective of the number of children in each house. The Commission concluded that this rule is highly unfair and discriminatory.

Before making the recommendation which was lifted from the report and is now Section 40(1) and (2) of the Law of Succession Act, the Commission made the following remarks:

"***We think that it is necessary, for the purpose of determining beneficial interest to make a division of the net estate between the*** "*houses*"***. This accords with customary law and will work out well in practice since the property of each*** *"house"* ***is normally treated as independent and separate from the other. As to the mode of division, we have already stressed that the present system of equal division, irrespective of the number of children in each*** *"house"* ***is inequitable. We believe that the fairest division would be one based on the number of children in each*** *"house"* ***but also adding to the number of children, the wife as an additional dependant especially to cater for the wife who has no children. This would mean that a*** *"house"* ***with a wife and one child would count as two units and a*** *"house"* ***with a wife and no children as one unit, etc. In making the division, we think it necessary to take into account any property that***

had been allotted to the "*house*" ***by the husband before he died. Having made the division between***

the "*house*"*,* ***the rule of distribution within the*** *"house* ***would be as in a monogamous household."***

Division of the net estate of the deceased polygamist as enacted in Section 40 aforesaid and as explained in the foregoing paragraph takes two levels. The first level involves division between the houses and the second level within a respective house between the widow and her children.

In the matter before me, the first house has one unit represented by the respondent and in the second house there are six units, five children and the widow. It must also be noted that Section 40 does not provide that the net estate be divided equally between the units.

Indeed under Section 27 of the Law of Succession, the court has a complete discretion in the division and distribution of the estate, guided by the number of units and such matters as those enumerated under Section 35(4) and 42 of the Law of Succession Act.

In a leading judgment in the case of **Mary Rono** **V**. **Jane Rono & William Rono, Civil Appeal No.66 of 2002**, Waki, JA agreed with the trail judge in

that appeal that in seeking a fair distribution of the deceased's net estate, the court has a discretion which must be exercised judicially and on sound

legal and factional basis. While concurring with the judgment of Waki, JA, Omolo, JA developed those arguments

further as follows:

“……***while I broadly agree with that judgment, I nonetheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the law of Succession Act Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of deceased person must inherit equal portions of the estate where such a deceased died intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act. Section 40 (1) of the Act provides that:***

‘ ***where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.’***

“My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If parliament had intended that there must be equality between houses, there would have been no need to provide in the Section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

In the circumstances of this court, namely, that the respondent left the suit property long time ago and only returned in 1964 to build a temporary house which he abandoned in 1967; that he has five (5) acres of land at Muruai – plot No.63; that the deceased too did not live on the suit

property; that for years the suit property was in exclusive use and occupation of the appellant and her children. Taking all these and the applicable law into account, I come to the conclusion that the learned magistrate erred in adopting a narrow interpretation of Section 40 of the Law of Succession Act, thereby making inequitable division of the deceased person’s net estate to the dependants.

Before I conclude, it was submitted for the respondent that both Masaai and Kikuyu customary laws recognize equality in the distribution of the estate of a polygamous deceased person. It was agreed that the deceased was Maasai, although the appellant appeared to suggest that he was a half Masaai and a half Kikuyu. Whatever the case, the application of customary law is expressly excluded under the Law of Succession Act, except in specific areas a may be gazetted by the Minister and only in respect of agricultural land and crops or livestock. There was no evidence that the area where the suit property is situated has been gazetted.

I come to the conclusion that the appeal must succeed for all the reason stated above. The same is allowed and the order of the court below distributing the estate equally between the two houses set aside and substituted thereof with an order that the parcel of land known as **NYANDARUA/SHAMATA/209** measuring approximately ten (10) acres shall

be subdivided into two with two (2) acres allocated to the respondent and the remaining eight (8) acres to the 2nd house of the appellant. It is now for that house to decide how the eight (8) acres will be distributed within the house.

The costs of this appeal and that of the court below shall be borne equally by both the appellant and the respondent.

DATED, SIGNED and DELIVERED at NAKURU this 6th day of July, 2009.

W. OUKO

JUDGE