



IN THE COURT OF APPEAL

AT NYERI

(Coram:Gicheru, Kwach & Muli JJ A)

CIVIL APPEAL NO. 33 OF 1991

BETWEEN

WAIRIMU GATHUTHE.....APPELLANT

AND

1. THEURI WAMBUGU

2. GATHONI GATHUTE.....RESPONDENTS

(Appeal from the judgment and decree of the High Court of Kenya at Nyeri (Tunoi, J) dated the 8th October, 1990

in

HCC Appeal No 3 of 1990)

JUDGMENT

Wairimu Gathute (the appellant), Theuri Wambugu (the first respondent) and Gathoni Gathute (the second respondent) applied to the Resident Magistrate's Court at Nyeri for a grant of letters of administration intestate of the estate of Kago Kimere (the deceased) who died on 28th October, 1968. Wairimu and Gathoni were daughters in law of the deceased. Wambugu is the deceased's son. A temporary grant was given to the appellant on 14th November, 1986 and on 6th September, 1988, she applied to the Court for confirmation of this grant.

As is clear from section 71(1) of the Law of Succession Act (cap 160), the application for confirmation of the grant is to empower the distribution of any capital assets by the holder of the grant. In the affidavit in support of the application for confirmation of the grant, the appellant named the two respondents and herself as the persons beneficially entitled and also set out their respective shares over two parcels of land left by the deceased namely Muhito Njuiruini/137 and Muhito/Muyu/239. Although we cannot find in the record an affidavit of protest filed under rule 40(6) of the Probate and Administration Rules, there is evidence that the appellant's application for confirmation was resisted by both respondents.

When the application came before the Deputy Registrar on 5th May, 1989, it was stood over to 26th May, 1989, for the parties to try a settlement. On 26th May, 1989, it could not be heard and it was adjourned to 18th August, 1989. On that date, it was again stood over to enable the parties to try a settlement out of the

Court with the help of clan elders. An award of some sort was filed which was then read on 29th September, 1989 in the presence of the parties. The appellant did not like it at all and on 6th October, 1989, she applied to set aside the award on the grounds that the Assistant Chief who acted as umpire is a relative of the first respondent and that some of the arbitrators spoke in English, a language which she, an illiterate person, neither understands nor speaks. The Deputy Registrar dismissed the application on the ground that the appellant had not served it on the umpire against whom she had made certain allegations. Being aggrieved by that decision, the appellant appealed to the superior court. The judge dismissed the appeal on 8th October, 1990 noting that the parties had on 18th August, 1989, by consent agreed to refer the dispute to clan elders for arbitration and that the involvement of the Assistant Chief had not occasioned any injustice or prejudice to the appellant.

The appellant has now appealed to this Court raising two major issues of law, namely, that there was no order in the subordinate court formally referring the matter to arbitration and that consequently, the purported award in the subordinate court was not an award in law. This was also the submission before us by Mr Waweru who appears for the appellant. We have checked the record of proceedings before the Deputy Registrar on the two dates when the order of reference to arbitration is alleged to have been made but we could not find any such order or an application by the parties under order 45 rule 1 of the Civil Procedure Rules to refer the matter in difference between them to arbitration. All that was said was that the application was stood over to enable the parties to try to reach an amicable settlement with the assistance of clan elders. There was clearly no order referring the dispute to arbitration and the so called award filed in Court was a nullity and the Deputy Registrar should have set it aside when the appellant asked him to do so. And having not done so, the judge should have allowed the appellant's appeal and set aside the award.

Section 71(2) of the Law of Succession Act sets out what the Court to which an application for confirmation is made or to which any dispute in respect thereof is referred is supposed to do. There is a *proviso* to the sub-section which provides:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the Court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

The Deputy Registrar was enjoined by express provisions of the law to hear and determine the application for confirmation of the grant as well as to satisfy himself as to the respective identities and shares of all persons beneficially entitled. In purporting to delegate this duty to the arbitrators, he abdicated his statutory responsibility.

For these reasons, we allow this appeal and set aside the judgment and decree of Tunoi, J (as he then was) and in *lieu* thereof make an order quashing the award and remit the application for confirmation of the grant made by the appellant to the High Court to be heard and determined by the judge as required by sections 48 and 71 of the Law of Succession Act and the relevant provisions of the Probate and Administration Rules.

The appellant will have the costs of the appeal.

Dated and Delivered at Nyeri this 12th day of May 1994.

J.E.GICHERU

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JUDGE OF APPEAL

R.O.KWACH

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JUDGE OF APPEAL

M.G.MULI

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JUDGE OF APPEAL

I certify that this is a true copy
of the original.

DEPUTY REGISTRAR