Ramaita & another v Ramaita (Civil Appeal 545 of 2019)
[2025] KECA 300 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 300 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 545 OF 2019

MSA MAKHANDIA, SG KAIRU & LA ACHODE, JJA

FEBRUARY 21, 2025

BETWEEN

JUDITH NAYIAI RAMAITA ..... 1ST APPELLANT

MICAH RAMAITA SOLITEI ..... 2ND APPELLANT

AND

JAMES KOOTE RAMAITA ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) dated 11th February, 2019 in HC. Succ. No. 71 of 2015)

JUDGMENT

1. This appeal arises from the judgment and decree of the High Court at Kajiado (R. Nyakundi, J.) delivered on 11th February 2019 by which that court distributed the estate of Ramaita Solitei, deceased (who was polygamous) equally among all eighteen heirs of the estate of the deceased. Based on the Memorandum of Appeal, the appellants' grievance with the judgment and decree is that in distributing the estate in the manner that he did, the learned judge failed to take into account that the family of the first house of the deceased had control of, and benefitted from, the estate for over 30 years after the death of the deceased; that the first house had been provided for by the deceased prior to his death and had enjoyed an advancement which should have been taken into account during confirmation of the grant.

2. The background, in brief, is that the deceased, Ramaita Solitei, died intestate on 17th April 1985, in Kajiado, Kenya. He was polygamous with two wives, namely, Rikoine Ene Ramaita Solitei (1st house) and Tepenoi Ene Ramaita Solitei (2nd house). The first house had 10 children while the second house had 6 children. The estate consists of a large parcel of land (777 hectares) known as Title Number Kajiado/Kaputiei South/10 and a Plot No. 7, Sultan Hamud.

3. Based on a petition for letters of administration intestate dated 13th August 2014, a Grant of letters of administration intestate was issued by the High Court at Machakos on 4th May 2015 to Judith Nayiai Solitei, Micah Ramaita Solitei, James Koote Ramaita, and Nkoisaen Ramaita Solitei.

4. By their Summons for confirmation of Grant dated 31st March 2016 the appellants, Judith Nayiai Solitei and Micah Ramaita Solitei, applied for confirmation of the grant. In the affidavit in support, they proposed that the property Kajiado/Kaputiei South/10 be transferred and distributed equally between the two widows, Rikoine Ene Ramaita Solitei and Tepenoi Ene Ramaita Solitei, with each of them getting 388.5 hectares and each of them to in turn "distribute to herself and her children". They further proposed that Plot No. 7, Sultan Hamud be divided between the widows in equal shares.

5. In an affidavit of protest against confirmation of the grant, the respondent James Koote Ramaita objected to the mode of distribution proposed by the appellants. He asserted that the mode of distribution of an intestate estate of a polygamous person such as the deceased should be that the estate is divided among the houses according to the number of children in each house but also adding any wife surviving the deceased as an additional unit to the number of children. Consequently, he proposed each unit of the families should get 43.16667 hectares of Kajiado/Kaputiei South/10 and 1/18 of Plot No. 7, Sultan Hamud.

6. Viva voce evidence was taken during the hearing. The respondent as the protester testified first and was cross examined after which he closed his case. Judith Nayiai Solitei, who was referred to by the name Judith Pareno, testified on behalf of the appellants after which the court directed that it would undertake a site visit. The court subsequently directed that the widows be summoned to attend as witnesses. Both testified and were cross examined.

7. The appellants' case was that the 2nd house was historically disadvantaged; that the 1st house received a larger share of cattle at the time of the deceased's death, leaving the 2nd house destitute; that the 1st house occupied and used the vast portions of the land for decades, while the 2nd house was limited to approximately 40 acres; that the 1st widow was more favoured by the deceased; that this unequal benefit enjoyed by the 1st house should be considered as an "advancement" to the 1st house and therefore justify an equal division of the properties under Section 42 of the *Law of Succession Act*.

8. The respondent's case on the other hand was that the estate should be divided equally among all the dependants with each dependant, including the two widows, receiving an equal share of the land, approximately 43.16 ha each, and that the plot in Sultan Hamud should be sold and proceeds divided equally among all dependants.

9. The learned judge of the High Court considered the evidence and submissions. He found that the evidence of the alleged discriminatory distribution of cows was weak and not proved; that it was difficult to establish the deceased's intention regarding claims of favouritism of the 1st house; that all the dependants were adults by the time the proceedings commenced, making retrospective equity considerations inappropriate; and that a significant portion of the land was unoccupied and could be distributed equally.

10. Basing his decision on Section 40 of *Law of Succession Act*, the learned judge directed that the estate to be divided among the houses based on the number of children plus the surviving spouse from that house as an additional unit. The court found no evidence that the deceased had gifted any property during his lifetime, therefore Section 42 was not applicable. In the result, the court ruled in favour of the respondent's proposed mode of distribution and ordered that Land Parcel No. Kajiado/Kaputiei South/10 be divided equally, with each of the 18 beneficiaries receiving 43.16667 hectares; and that

Plot No. 7 Sultan Hamud be sold and the proceeds divided equally among the 18 units (16 children plus 2 surviving wives). Hence, the present appeal.

11. During the hearing of the appeal before us, Mr. Maina, learned counsel appeared for the appellants while Mr. Koin Lompo, learned counsel, appeared for the respondent. They relied entirely on their respective written submissions.

12. The essence of the appellants argument is that distribution by the learned judge is unjust on the grounds that the 1st house unjustly benefited disproportionately from the deceased's assets compared to the 2nd house; that during the deceased's lifetime and after his demise, the 1st house enjoyed a significantly greater advantage from the deceased's assets; that there is a significant age gap between the children of the 1st house and those of the 2nd house; that by the time the deceased died, the children of the 1st house were already adults and had greater access to education and enhanced opportunities while those of the 2nd house were minors and hence the need and justification for a slightly larger share of the estate; that after the deceased's death, the 1st house benefited disproportionately from this livestock; and that in addition the 1st house had greater access to the land while the 2nd house was restricted. Moreover, it was submitted that, the respondent had allowed the status quo to continue for almost 30 years without taking out the grant as the 1st house continued to benefit from the estate during that time.

13. It was submitted that the learned judge erred in failing to consider the disparity in benefits enjoyed by the two houses when deciding on the distribution of the estate. In that regard, it was urged that Section 42 of the *Law of Succession Act* which requires that any property given during the deceased's lifetime be considered when distributing the estate should apply.

14. In opposition, it was submitted for the respondent that the appeal is wholly without merit. In relation to the livestock, it was submitted that evidence was led to show that the deceased distributed the herd of cows between the widows and their children prior to his death; that each widow had their own cows before, during, and after the death of the deceased and the issue of livestock was settled prior to the deceased's passing and that the High Court was right in determining the matter on that basis.

15. As regards the age gap of the children of the 1st and 2nd houses, it was submitted that the evidence show that at the time of the deceased's death, only three of his sixteen children were adults; that in any event the children of the 1st house would naturally be older than those of the 2nd house on account of the 1st house having found themselves earlier in the life of the deceased and should not be condemned because of being born earlier.

16. It was submitted that the learned Judge properly and correctly applied Section 40 of the *Law of Succession Act* which stipulates that where an instate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall in the first instance, be divided among the houses according to the number of children, but also adding any wife surviving him as an individual unit to the number of children.

17. It was submitted that the High Court was bound by Section 40 of the Succession Act and there was no basis for the trial court to deviate from the principle in that provision; that the Court is bound to apply the statutory provision and has no power to substitute the statutory principles for its own notion of what is an equitable or just decision and the court cannot speculate or make decisions based on unproven allegations.

18. We have considered the appeal and the rival arguments. There is no dispute that the deceased was polygamous with two wives; that he had 16 children, 10 from the 1st house and 6 from the 2nd house. The issue for determination is whether the learned Judge erred in his interpretation and application of

Section 40 of the *Law of Succession Act*. In other words, whether the learned Judge erred in the mode of distribution of the deceased's estate among the two houses.

19. The principle under Section 40 of the *Law of Succession Act* is that it requires equal distribution to all dependants, calculated by adding the children from each house along with their surviving mother and then dividing equally. Section 40 of the *Law of Succession Act* provides as follows:

> "(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 sections 35 to 38."

20. As this Court stated in Francis Mwangi Thiongo & 4 Others vs. Joseph Mwangi Thiongo, Civil Appeal No.8 of 2015, the intention of the legislature in enacting that Section was to lay down a two step-process of division of the personal and household effects together with the residue of the net intestate estate of a polygamous person by the number of houses in proportion to the number of children and each houses' portion as per the general rules of intestacy established under section 35 to 38 of the Act.

21. In Scholastica Ndululu Suva vs. Agnes Thenya Suva, Civil Appeal No. 49 of 2017, this Court cited with approval the earlier decision of the Court in Mary Ronoh vs. Jane Ronoh & Another [2005] eKLR and expressed that:

> "It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate."

22. More recently, the Court in Koech & Another vs. Chemutai & 2 Others (Civil Appeal 438 of 2019) [2022] KECA 1309 (KLR) stated that section 40 of the *Law of Succession Act* should be interpreted in a manner that promotes equality and non-discrimination, non-applicability of customary law repugnant to justice and morality, and the appropriate application of equitable principles. In the same vein, in Munyole v Munyole (Civil Appeal 21 of 2017) [2022] KECA 373 (KLR) the Court in reference to Section 40 of the *Law of Succession Act* stated that:

> The law thus requires that the estate of a person who was polygamous and who died intestate should be divided among his houses according to the number of children in each house. The purpose of this provision is to ensure that there is equity in distribution of the estate without any form of discrimination amongst the surviving wives and children of the deceased."

23. It is clear from the impugned judgment, that the learned Judge was alive to, and applied those legal principles in his interpretation and application of Section 40 of the *Law of Succession Act*. The appellants complained that the 1st house was favoured by the deceased and enjoyed privileges that the 2nd house was denied, during and after the death of the deceased, and that the learned judge should have treated this as advancements to the 1st house. Section 42 of the Act provides that:

Where—

a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

24. The Black's Law Dictionary, 10th edition defines "advancement" as a payment to an heir during one's lifetime as an advance share of one's estate, with the intention of reducing or extinguishing or diminishing the heirs claim to the estate under intestacy laws.

25. No evidence at all was presented that the deceased made gifts or advancements to the 1st house. The learned Judge was therefore correct in our view that Section 42 of the *Law of Succession Act* is inapplicable.

26. All in all, we have no basis for interfering with the exercise of discretion by the learned Judge and the mode of distribution of the deceased's estate by the learned Judge.

27. The appeal fails and is dismissed. This being a family matter, each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.