Koome v Mukomuthamia (Civil Appeal 147 of 2019)
[2025] KECA 603 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 603 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 147 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

MARCH 7, 2025

BETWEEN

HENRY KOOME ..... APPELLANT

AND

ROSALIA JOHN MUKOMUTHAMIA ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Meru (Gikonyo J.) dated 13th February, 2019, in Succession Cause No. 293 of 2011)

JUDGMENT

1. This is a first appeal against the judgment of the High Court of Kenya at Meru (Gikonyo J.), which was delivered on 13th February, 2019, relating to the estate of Japhet M'tuamwari M'ikandi (deceased). The deceased died on 27th March, 1988. He died intestate. He was survived by two sons; Andrew Kirema and John Mururu (deceased). John Mururu, the appellant's father, had two wives; Grace Maringa and Rosalia John Mukomuthamia (respondent).

   The children of the first house comprised of:
   Henry Koome (appellant)Florence Ntinyari (deceased)Ruth Nkoroi

   The children of the second house comprised of:
   Rose NaitoreNicholas KirimiJames KinotiPatrick ThuraniraSimon Mutwiri

2. The deceased's estate comprised of land parcel number Nyaki/Mulathankari/61.

3. On 6th June, 2011, the appellant petitioned the High Court for a grant of letters of administration intestate. The respondent filed Objection to the making of the grant of representation to the appellant dated 27th June, 2011, on grounds that she was not consulted when the succession cause, with respect to the estate of the deceased, was lodged, and that the appellant had omitted crucial information, with a

view to disinheriting the rest of the dependants. The respondent's objection was struck out by a ruling of the court dated 19th July 2016, on account of the application being premature.

4. A grant of letters of administration intestate were issued jointly to the appellant and the respondent on 19th September, 2016.

   The court directed each administrator to file their respective proposed scheme of distribution. The appellant proposed that ¾ acre of the suit land be allocated to him, and that the balance of the suit land be shared equally between the appellant and Andrew Kirema M'Itwamwari, the deceased's sole surviving child. The respondent, on the other hand, proposed that the suit land be shared equally amongst all the dependants.

5. It was the appellant's case that the deceased was his grandfather, as his father (John Mururu) was the deceased's son. The appellant stated that his father separated from his mother, Grace Maringa, and got married to the respondent. He explained that he was young at the time, and that the deceased took him and his siblings in, and raised them as his own children. The appellant asserted the deceased owned two parcels of land; Nyaki/Mulathankari/61 and Nyaki/Giaki/164. That during his lifetime, the deceased gave the land parcel situated in Giaki to his father, where he settled with the respondent. The appellant and his siblings remained on the land in Mulathankari, where the deceased resided. The appellant averred that the deceased gifted him part of the land in Mulathankari, located on the left side of the Meru-Mikinduri road, and directed that the remaining piece of the land was to be shared equally between the appellant and his uncle, Andrew Kirema. It was the appellant's case that the respondent cannot claim that she had been disinherited, as she had already benefitted from the deceased's estate. He maintained that the respondent has never resided on the land in Mulathankari, as his father settled them on the land in Giaki.

6. Charles Kirimi M'Mutiga, the appellant's witness, testified that the deceased was his uncle. He stated that the deceased gave the land in Giaki to his first son, John Mururu, and caused the same to be registered in his name. The deceased's second son, Andrew Kirema, is resident in the United Kingdom. He stated that after the appellant's father remarried, the deceased took in the appellant and his siblings, Ruth and Florence, and raised them as his own children. He stated that Florence died and did not leave behind any children while Ruth got married and relocated to Isiolo. He asserted that the appellant remained on the land in Mulathankari. It was his evidence that in 1988, the deceased gave the appellant part of the land in Mulathankari, and directed that the remaining part where he had built his home be shared equally between the appellant and Andrew Kirema.

7. It was his further evidence that the appellant's father, John Mururu, was not given a share of the land in Mulathankari, as he had already been given the land in Giaki. It was his testimony that sometime in the year 2010, the family called for a meeting at the Chief's office to resolve a dispute with respect to the estate of the deceased. In attendance was one John M'Mwaitari, who was present when the deceased shared out his property, and had recorded what the deceased had said. M'Mwitari confirmed that the land in Mulathankari had been given to the appellant and Andrew Kirema.

8. Charity Kirimi M'Mutiga and Eliud Mbaya, the deceased's niece and nephew respectively, agreed with the thrust of the evidence adduced by Charles Kirimi. They testified that they were present at the family meeting which was held at the Chief's office in 2010, and that at the meeting, M'Mwaitari, stated that the deceased left the land in Mulathankari to the appellant and Andrew Kirima.

9. Andrew Kirima, the only surviving son of the deceased, supported the appellant's proposed mode of distribution. In his statement, Andrew Kirima stated that the deceased wished that his land in Giaki be inherited by his first son John Mururu. As John Mururu is now deceased, Andrew stated that the said land should remain with the respondent and her children. It was his assertion that the deceased wished

to give the appellant part of the land in Mulathankari which was across the road, since he regarded the appellant as his third son. He stated that the remaining piece of land in Mulathankari was to be shared between himself and the appellant. It was his contention that the deceased made provision for his first son Jon Mururu, and that the respondent was not entitled to inherit the land in Mulathankari. Andrew Kirima, further to his statement, swore an affidavit dated 26th July 2018, where he deponed the matters stated above in his statement.

10. The respondent, in rebuttal, swore in a further affidavit dated 23rd October 2018 that the land in Giaki belonged to her husband, which he acquired in 1967, and that he did not inherit the same from the deceased. She was of the view that the land in Mulathankari, which formed the estate of the deceased, ought to be distributed equally amongst his beneficiaries.

11. The application for confirmation of the grant, by agreement of the parties, was determined on the basis of pleadings, affidavits, documents filed in court and written submissions. Gikonyo J., in his judgment, directed that the deceased's estate, which comprised of Nyaki/Mulathankari/61, be distributed equally amongst the two sons of the deceased, Andrew Kirema and the estate of John Mururu, as well as the appellant (Henry Koome) and his sister, Ruth Nkoroi.

12. Aggrieved by this decision, the appellant filed the instant appeal where he faulted the learned trial Judge for misapplying the law, with regard to the property the deceased distributed during his lifetime, and failing to give proper interpretation to Sections 28 and 42 of the *Law of Succession Act*, thereby making a decision that was bad in law. The appellant was aggrieved that the decision of the learned Judge found that the estate of John Mururu was entitled to inherit from the estate of the deceased.

13. The appeal was canvassed by way of written submissions. The appellant was represented by the firm of Maitai Rimita & Co. Advocates. Counsel for the appellant submitted that the deceased, before his death, had indicated how he wished his estate to be shared out among his beneficiaries. Counsel urged that the deceased, in a family meeting held on 26th January 1988, stated that: the land in Giaki was to be inherited by the appellant's father John Mururu; the land in Mulathankari, which lay across the Meru-Mikinduri road was to be inherited by the appellant; the remaining land at Mulathankari where the deceased had built his home was to be shared between the deceased's second son, Andrew Kirema, and the appellant. It was learned counsel's submission that the deceased's wishes were written down in the family minute book on the same day that the meeting was held. Counsel urged that the deceased died within three months of making his oral will, and as such, the same was valid in accordance with the provisions of Section 9(1)(a) of the *Law of Succession Act*.

14. Learned counsel submitted that the respondent's claim that the land in Giaki was not the deceased's was misleading, as the parcel's green book clearly indicated that the deceased was the original registered owner of the said parcel of land. Learned counsel reiterated that the land in Giaki measures 18.7 acres, while the land in Mulathankari measured approximately 4.4 acres. The appellant urged that the respondent having been settled in Giaki was not entitled to inherit the land in Mulathankari.

15. Learned counsel for the respondent, Mr. Muriuki, on his part, submitted that Section 38 of the *Law of Succession Act* directs that where a deceased left no spouse, his net estate shall be divided equally among the deceased's surviving children. He was of the view that decision of the superior court to divide the deceased's estate, comprised of the land in Mulathankari, equally amongst all beneficiaries, was sound in law. It was his submission that the land in Giaki belonged to the estate of John Mururu, and did not form part of the deceased's estate. Learned counsel urged that, in the circumstances, the distribution was fair and equitable and invited us to dismiss the appeal with costs.

16. This being a first appeal, our duty was well stated in Selle and Another v. Associated Motor Boat Co. Ltd [1968] E.A. 123, where the court observed as follows:

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact, if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mhamed Sholan, (1955) E.A.C.A. 270)".

17. We have re-evaluated the evidence adduced before the trial court, considered the pleadings filed, the grounds of appeal and the submission made by the parties on this appeal. We have also considered the applicable law. The issues that emerged for determination by this Court are two; firstly, whether the deceased distributed his estate during his lifetime, and secondly, if the answer to the first issue is in the negative, what mode of distribution of the properties that comprise the estate of the deceased to the beneficiaries ought to be adopted by the court.

18. In regard to the first issue, the appellant and his witnesses adduced evidence to the effect that on 26th January 1988, the deceased called a family meeting in which he indicated his wish on how his estate was to be inherited by his dependants upon his death. According to the appellant, this wish was recorded in a family minute book on the same day that the deceased made his wish known. The respondent disputes this fact. It was evident that the said minute book was not signed by the deceased. The said minutes cannot therefore constitute the last written will of the deceased as it does not conform to the requirements of Section 11 of the *Law of Succession Act* that mandates that such will, to be valid must be signed by the testator and be witnessed by two competent witnesses.

19. It was the appellant's further case that the said minutes be considered as the oral will of the deceased in accordance with Section 9 of the *Law of Succession Act*. Section 9 of the said Act provides thus:

> (1) No oral will shall be valid unless-
>
> a. It is made before two or more competent witnesses; and
>
> b. The testator dies within a period of three months from the date of the making of the will;
>
> .....'

20. According to the appellant, since the deceased died within three months of making his wish known, then his directions as contained in the said minutes should be considered as the last oral will of the deceased. This assertion is disputed by the respondent. On our part, upon re-evaluation of the rival facts presented before the trial court, we are not persuaded by the argument advanced by the appellant that the contents of the said minutes constitute the oral will of the deceased for the following reasons: it is not clear from the said minutes who called the meeting; whether the deceased specifically indicated that he was calling the said meeting as he was apprehensive that he was going to die soon; why were some crucial members of the family excluded from the meeting? And finally, it was not possible that the deceased would exclude some members of his family from the inheritance matrix if the said minutes

are indeed authentic. We therefore hold that the deceased did not make any valid will, oral or otherwise that meets the legal threshold as provided under Section 9(1) of the *Law of Succession Act*.

21. As regards the second issue for determination, it was evident to us that the assertion by the appellant that the parcel of land at Giaki belonged to the deceased prior to its transfer to John Mururu, the late husband of the respondent is not supported by credible evidence. The trial court, correctly in our view, made the finding that the land at Giaki was purchased by the said John Mururu- deceased and did not belong to the deceased in these proceedings. That parcel of land is not part of the estate of the deceased and is, therefore, not available for distribution to the beneficiaries of the estate of the deceased.

22. In the circumstances therefore, the only property that belongs to the estate of the deceased is the parcel of land known as Nyaki/Mulathankari/61. This is the property that is available for distribution to the dependants of the deceased. We see no reason to depart from the distribution matrix adopted by the trial court which was in accordance with Section 38 of the *Law of Succession Act* that mandates the estate of a deceased, where there is no surviving spouse to be distributed equally among the surviving children and or the spouse and children of such entitled children if they are deceased. We were not persuaded by the assertion by the appellant to the effect that the deceased had designated part of this parcel of land as his. If that were the case, nothing would have prevented the deceased from transferring the said portion to the appellant during his lifetime.

23. In the premises therefore, it is clear from the aforegoing that this appeal is for dismissal. It is hereby dismissed but with no orders as to costs as this is a family dispute. The judgment of the trial court is affirmed.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF MARCH, 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.