Marete v Marete & 3 others (Civil Appeal E014 of 2023)
[2024] KECA 371 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 371 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL E014 OF 2023

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

MARCH 22, 2024

BETWEEN

PRISCILLA NKIROTE MARETE ..... APPELLANT

AND

GLADYS KINAITORE MARETE ..... 1ST RESPONDENT

JANET MWARANIA MARETE ..... 2ND RESPONDENT

SALOME KANARIO MUTHURI ..... 3RD RESPONDENT

ESTHER MAKENA M'MARETE ..... 4TH RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Meru (Cherere, J.) dated 27th October, 2022 in Succession Case No. 11 of 2018)

JUDGMENT

1. This is an appeal against the ruling of the High Court of Kenya at Meru (Cherere, J.), delivered on 27th October, 2022, relating to the estate of Julius Marete Ibutu (deceased), whereby the Court declared the deceased's will invalid, on account of it being discriminatory.

2. A brief background of the case is that the deceased died on 20th April, 2018. At the time of his death, he was aged 82 years. He died testate. He was survived by two wives. The first house comprised of the 1st respondent (first widow) and four children, including the 2nd to 4th respondents. The second house was made up of the appellant (second widow) and six children. Other beneficiaries included a daughter in law, a son in law and eight grandchildren. On 20th June, 2018, the appellant petitioned the High Court for a grant of probate, in her capacity as the first appointed executor, with respect to the estate of the deceased. The appellant stated that the deceased left a written Will dated 10th November, 2015.

3. Before the certificate of confirmation of grant could issue, the respondents, vide summons dated 21st December, 2018, made an application before the superior court, under Sections 26 and 27 of the *Law of Succession Act*, seeking orders for reasonable provision of the respondents, as beneficiaries and dependants of the deceased, with respect to the estate of the deceased. The application was supported by affidavits sworn by the four respondents respectively, on the same date. The 1st respondent's case was that she met and got married to the deceased during the pre-independence era, under Meru Customary marriage rites. She deposed that their union was blessed with four children: the 2nd, 3rd, and 4th respondents; and Charles Marete, who is deceased. She explained that she was the first wife of the deceased, and that through their joint efforts, the deceased was able to acquire properties comprising a substantial part of his estate. She contended that the deceased's Will discriminated against her and her children, as it was skewed in favour of the second house, and that it completely disinherited her. The respondents challenged the validity of the Will, terming it as a forgery.

4. The appellant filed a replying affidavit dated 7th February 2019, in opposition to the application. The appellant deposed that she was married to the deceased for fifty-seven (57) years, prior to his death, and that when they got married, the deceased and the 1st respondent were separated. The appellant stated that the 1st respondent and the deceased were never in communication after the separation, and that she was not involved in the deceased's burial arrangements. The appellant asserted that she made direct contributions to the wealth amassed by the deceased in their 57 years of marriage. The appellant urged that the Will was valid, and that the deceased cited reasons therein, as to why he distributed his estate in accordance to the Will. She contended that parcel number Ruiru/Tutua/420 was bequeathed to the 1st respondent's children and grandchildren. She further stated that parcel number Nyaki/Kithoka/3468 was given to the 4th respondent, together with her husband and children. The appellant stated that the 1st respondent had been provided for by being given the life interest in parcel number Ruiru/Rwarera/519, where she has been living, and where her matrimonial home is situate.

5. The dispute was heard by way of viva voce evidence. After hearing the parties, Cherere, J., in her judgment delivered on 27th October, 2022, determined that the respondents were legitimate dependants of the deceased as per the provisions of Section 29 of the *Law of Succession Act*. The learned Judge found that the deceased's Will was a nullity, as it disinherited and discriminated against the respondents. The learned Judge ordered that the estate of the deceased be administered and distributed as intestate estate, in accordance with Section 40 of the *Law of Succession Act*, save for one acre of Parcel No. Nyaki/Giaki/3993, bequeathed to a buyer named Kariuki Kware.

6. It is this decision of the learned Judge that provoked the instant appeal. The appellant proffered six grounds of appeal. In a nutshell, the appellant faulted the learned Judge for declaring the deceased's Will a nullity, and for declaring that it was discriminatory, against the evidence on record. The appellant urged that discrimination is not among the grounds provided for under the *Law of Succession Act*, upon which a Court can invalidate a Will. The appellant was aggrieved that the learned Judge failed to consider that the deceased gave cogent reasons in his Will as to why he distributed his estate in the manner that he did. The appellant faulted the learned Judge for failing to take into consideration the provisions of Section 26 of the *Law of Succession Act* which provides for reasonable provision for dependants, and further, for failing to consider that the 1st respondent's matrimonial home was bequeathed to her children. She urged us to allow the appeal, and order that the estate of the deceased be distributed in accordance with the deceased's last Will.

7. The appeal was canvassed by way of written submissions. Counsel for the appellant, Ms. Kiome, maintained that the 1st respondent and the deceased ceased to be husband and wife a long time ago, and that they had lived separate lives. She submitted that the appellant and her children helped the deceased

amass most of the wealth they have during their 57 years of marriage. She urged that the will was not discriminatory, as parcel number Ruiru/Rwarera/519, which hosts the 1st respondent's matrimonial home was willed wholly to her children and grandchildren, as the 1st respondent is blind, and lives with her children who take care of her. Ms. Kiome was of the view that the 1st respondent ought to be granted life interest in the said property. The appellant's counsel further argued that contrary to the learned Judge's finding, the 3rd respondent was provided for in the Will. She submitted that Mary Mukiri was deceased, and that no claim was made on behalf of her estate for reasonable provision from the deceased's estate. Counsel submitted that the deceased's Will was valid, and that it was registered at the Land Registry in Nairobi.

8. Ms. Kiome contended that the deceased indicated in his Will, the reasons why he willed his property the way he did, and further, that he took into consideration the beneficiaries who had been provided for during his lifetime, including the 1st respondent's deceased son, Charles Kigorwe. She was of the view that the Court is empowered by the *Law of Succession Act* to make reasonable provision for aggrieved dependants, without necessarily nullifying the deceased's last written Will. She argued that the respondents did not establish that the deceased was incapacitated, at the time of making the Will, or that the Will was not properly executed, to warrant its nullification by the superior court. She reiterated that discrimination was a not a valid ground under the *Law of Succession Act* to warrant nullification of a Will. Ms. Kiome invited us to allow the appeal as prayed in their memorandum of appeal.

9. On the other hand, Counsel for the Respondents, Mr. Kariuki, in opposing the appeal, submitted that the deceased did not have a proper recollection of his property, as he directed that his body be buried at L. R. No. Itima/Igoki/708, which did not form part of his estate, and further, that the 1st and 3rd respondents were left out of the will. Mr. Kariuki submitted that testamentary freedom is not absolute, and is subject to Section 26 of the *Law of Succession Act*, which allows the Court to make reasonable provisions for dependants not provided for, with respect to the estate of the deceased. He explained that the mode of distribution of the deceased's estate, according to the Will, discriminated against the respondents, and favoured the 2nd house, which violated the provisions of Section 28 of the *Law of Succession Act*. Counsel submitted that the decision by the High Court was based on evidence on record, and he urged us to uphold the same.

10. This being a first appeal, our duty was well stated in *Abok James Odera T/A A.J. Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

11. Likewise, in *Selle and Another v. Associated Motor Boat Co. Ltd* [1968] E.A. 123, 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)."

12. Guided by the foregoing principles, the record of appeal as well as submissions by parties to the appeal, we are called upon to re-evaluate the evidence tendered before the superior court and determine whether the learned Judge erred in nullifying the deceased's last written Will dated 10th November, 2015.

13. It is important to note that the law recognizes a testator's freedom and power to distribute his property as he or she deems fit. Section 5 of the *Law of Succession Act* grants any adult of sound mind power to dispose any or all of his or her free property by will. A court of law is only allowed to interfere with the said testamentary freedom, if a testator fails to make reasonable provision for his or her dependants in accordance with the *Law of Succession Act*.

14. Section 26 of the *Law of Succession Act* provides as follows:

> " Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

15. This Court in *Erastus Maina Gikunu & Another vs Godfrey Gichuhi Gikunu & Another* [2016] eKLR observed as follows:

> " ...it is important to say here that, although there is this freedom, Section 26 of the Act enjoins the testator to make reasonable provision for his dependants. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance."

16. This limitation of a testator's testamentary freedom was also discussed by this Court in *Kamene Ndolo v George Matata Ndolo* [1996] eKLR. The Court had this to say:

> " This Court must, however, recognize and accept the position that under the provisions of Section 5 of the Act every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her lifetime. The responsibility to the dependants is expressly recognized by Section 26 of the Act..."

17. From the foregoing, where testamentary freedom has not been exercised responsibly, the Court has power to step in and interfere with the said freedom, by making reasonable provision for any disinherited beneficiaries, upon application by such dependant.

18. It is our considered view that the respondents have not placed sufficient material before the court to prove that the impugned will is a forgery. However, it is our opinion that the impugned Will cannot stand the test of reasonableness of provision for beneficiaries as provided by the law since it did not provide for all the dependants equitably. By equity we do not mean equality, rather, whether each dependant was sufficiently provided for taking into consideration the size of the estate of the deceased and the number of beneficiaries to be provided for. The first widow was totally disinherited and was not provided for in the impugned Will. There is no justifiable reason why the respondents, who are the beneficiaries from the first house were denied inheritance, and that some of them got so little as compared to the beneficiaries from the second house. Its trite law that Section 26 of the *Law of Succession Act* places limitations on the testamentary freedom given by Section 5, so that in the event a testator disinherits his wife or children who were dependant on him during his lifetime, the Court will then interfere with this freedom to dispose of his property by making reasonable provision for the disinherited beneficiaries.

19. We find that although the deceased had the freedom to dispose of his estate as he pleased, he was not entitled to leave out his first wife without any reasonable provision. The position in law is that failure to provide for a beneficiary in a Will does not vitiate the same. Section 28 of *Law of Succession Act* directs that the Court, in making reasonable provision for a dependant under Section 26 of the Act, shall have regard to:

    a. the nature and amount of the deceased's property;

    b. any past, present or future capital or income from any source of the dependant;

    c. the existing and future means and needs of the dependant;

    d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;

    e. the conduct of the dependant in relation to the deceased;

    f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will; and

    g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.

20. In the circumstances, even if the impugned Will is valid, the mode of distribution is so skewed so as to render the beneficiaries of the first house literally disinherited. The impugned Will failed to meet the guidelines set out under Section 28, leaving some beneficiaries wholly disinherited. Since all of the deceased's free property was distributed in the impugned Will, it is our view that the only way that the Court can make reasonable provision for all the dependants of the deceased, including the respondents, is to invalidate the last written Will of the deceased and distribute the properties that comprised the estate of the deceased under the intestacy laws of the *Law of Succession Act*.

21. We find no material in this appeal to warrant our interference with the decision of the learned Judge. The decision of the trial Judge is upheld. The appeal is devoid of merit. We accordingly dismiss it, with no orders as to costs, given that the parties to the appeal are family members.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF MARCH, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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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__