Nairuti & 2 others v Stephen (Civil Appeal 128 of 2019)
[2024] KECA 1001 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 1001 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 128 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

APRIL 26, 2024

BETWEEN

GIDEON MWORIA NAIRUTI ..... 1ST APPELLANT

FLORENCE NAITORE ..... 2ND APPELLANT

EREN MUKOMUNENE ..... 3RD APPELLANT

AND

LYDIA KARIMI STEPHEN ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Meru (Ong'injo, J.) dated 11th October, 2018 in Succession Cause No. 684 of 2011)

JUDGMENT

1. This is a first appeal against the judgment of the High Court of Kenya at Meru (Ong'injo, J.), delivered on 11th October 2018, relating to the Estate of M'Nairuti M'Ibiiri alias Nairuti Ibiiri (deceased).

2. A brief background of the case is that the deceased died on 10th April 1969. He was 87 years old. He died intestate. He was survived by two widows and twelve children.

   The first house comprised of:

   1. Salome Ncence- Widow (Deceased)
   2. Stephen Kaaria Nairuti- Son (Deceased)
   3. Margaret Mathiu – Daughter (Deceased)
   4. Gideon Mworia Nairuti – Son
   5. Fredrick Kaminto Nairuti – Son

6. Joseph Kigunda Nairuti - Son

7. Eunice Kagwiria Nairuti – Daughter

8. Joseline Kanana Nairuti – Daughter

9. Jennifer Kajigi Nairuti – Daughter

10. Lydia Karimi Stephen – Grand daughter

The second house comprised of:

1. Eren Mukomunene – Widow

2. David Nteere – Son (Deceased)

3. Benson M. Mike Nairuti – Son

4. Florence Naitore – Daughter

5. Grace Kuri Gitari - Daughter

3. On 15th November 2011, the appellants petitioned the High Court for grant of letters of administration intestate. It was issued to them on 21st March 2012, and confirmed on 13th November 2012. The deceased's estate comprised of two parcels of land, L.R. No. Kiirua/Kiirua/120, measuring approximately 21.57 acres, and L.R. No. Ntima/Igoki/186, measuring approximately 5.4 acres. The two properties were distributed as follows:

   L.R. No. Kiirua/Kiirua/120:
   Eren Mukomunene – 3.5 acresBenson Mugambi Mike – 3 acresFlorence Naitore – 1 acreGrace Kuri Gitari – 1 acreGideon Mworia Nairuti – 3.25 acresMwenda Nairuti – 3.25 acresFredrick Kaminto Nairuti – 3.25 acresLydia Karimi Stephen – 3.5 acres (Holding in trust for herself and other children of Stephen Kaaria Nairuti)

   L.R. Ntima/Igoki/186:
   Nathaniel Kithinji Ikiugu – 1.78 haLydia Karimi Stephen – 0.44 ha (Holding in trust for herself and other children of Stephen Kaaria Nairuti)

4. On 8th May 2012, the respondent filed an application seeking to revoke or annul the confirmed grant of letters of administration issued to the appellants as well as the inhibition orders issued in respect of L.R. Ntima/Igoki/186. It was the respondent's contention that the said grant was obtained fraudulently and through concealment of material facts. The respondent deponed that she is the daughter to the late Stephen Kaari Nairuti, and a granddaughter to the deceased. She stated that the succession cause before the probate court was filed without her knowledge or the knowledge of any of the other children of the late Stephen Kaari Naruti. That on 24th November 2012, she received a call from a man who introduced himself as Nathaniel Kithinji Kiugu, informing her that he had purchased part of L.R. No. Ntima/Igoki/186. That she immediately went to the Meru High Court registry where she discovered that a grant had already been issued to the appellants, and confirmed, with respect to the deceased's estate. She denied signing any consent that is mandatory before the filing of the succession cause, and asserted that the featured signature in the application was a forgery. The respondent insisted that the appellants and other beneficiaries were allocated L.R. No. Kiirua/Kiirua/120, where they have all along resided, and that L.R. No. Ntima/Igoki/186 was to be allocated to her father, Stephen Kaaria Nairuti, where members of his family had settled. She deponed that the appellants sold part of L.R. No. Ntima/Igoki/186 to the said Nathaniel Kithinji without her knowledge, and allocated her a share of L.R. No. Kiirua/Kiirua/120, which was not supposed to be her father's share of the estate.

5. The application was opposed. The appellants filed a replying affidavit sworn by Gideon Mworia Nairuti, on 10th December 2012. The appellants deponed the respondent was listed as a beneficiary in the letter issued by the chief, and that she was consulted and informed when the succession cause was filed. They swore that the respondent did not lodge any objection within the period stipulated by law, before the grant issued to the appellants was confirmed. They stated that the respondent's sole goal was to derail the administration of the deceased's estate, and that she had not satisfied the criteria set by the law for revocation of a grant. The appellants averred that the deceased died intestate, and did not bequeath L.R. No. Ntima/Igoki/186 to the respondent's father as alleged. The appellants deponed that both parcels of land were shared equally amongst the deceased's children, and that they decided to sell their portions in L.R. No. Ntima/Igoki/186 to Nathaniel Ikiugu. He was therefore included in the distribution schedule as a purchaser. The appellants denied the assertion that they obtained the grant fraudulently, or through concealment of material facts.

6. The application was heard by way of viva voce evidence. After hearing the parties, Ong'injo, J., in a judgment delivered on 11th October 2018, determined that the sale of 1.78 ha of L.R. No. Ntima/Igoki/186 to Nathaniel Ikiugu amounted to intermeddling with the estate of the deceased. The court ordered that the name of Nathaniel Ikiugu be removed from the certificate of confirmation of grant, and that L.R. No. Ntima/Igoki/186 to be held in trust by the respondent, for all the children of the late Stephen Kaaria, to share equally. The learned Judge further ordered that the 3.25 ha of L.R. No. Kiirua/kiirua/120 originally distributed to the respondent was to be allocated to Eunice Kagwiria, Joseline Kanana and Jennifer Kajigi, who had been left out of the distribution matrix, in equal portions.

7. Aggrieved by this decision, the appellants filed the instant appeal where they faulted the learned Judge for distributing the whole of L.R. No. Ntima/Igoki/186, situated within Meru municipality and worth tens of millions, to the children of Stephen Kaaria Nairuti, while L.R. No. kiirua/Kiirua/120, situated in a rural area, was distributed to the other beneficiaries. The appellants were aggrieved that the learned Judge failed to apply the provisions of Section 35 of the *Law of Succession Act* in distributing the deceased's estate. They took issue with the finding of the learned Judge, that L.R. No. Ntima/Igoki/186 was bequeathed solely to Stephen Kaaria Nairuti, yet the deceased died intestate.

8. The appellants further faulted the learned Judge for allocating Stephen Kaaria's share on L.R. No. Kiirua/Kiirua/120 to the three daughters of the deceased, yet they had renounced their rights to inherit the deceased's estate. They were aggrieved that the decision of the learned Judge created inequality in the distribution of the estate of the deceased, and was against the law and evidence placed before the court. The appellants urged the Court to set aside the decision of the probate court, and order that distribution of the estate of the deceased be redone, excluding Eunice Kagwiria, Joseline Kanana and Jennifer Kajigi, who renounced their rights to inherit the same.

9. The appeal was canvassed by way of written submissions. The appellants were of the view that the distribution of the deceased's estate by the learned Judge was not equitable, and was unreasonable and discriminatory. They argued that Stephen Kaaria Nairuti, and by extension the respondent, was awarded L.R. No. Ntima/Igoki/186 measuring approximately 2.22 Ha (6 acres), while the rest of the deceased's children got

3. 25 acres each, of L.R. No. Kiirua/Kiirua/120. Counsel faulted the learned Judge for failing to adhere to the provisions of Section 35 of *Law of Succession Act*, with respect to the deceased's sole surviving spouse. They explained that the evidence adduced by the respondent was not sufficient to establish the fact that a gift inter vivos, in favour of the respondent's father, with respect to L.R. No. Ntima/Igoki/186 had been made by the deceased. It was their submission that Eunice Kagwiria, Joseline

Kanana and Jennifer Kajigi, had expressed their wish not to inherit from the estate of the deceased, and should therefore be excluded from the list of those who are to benefit.

10. On her part, while opposing the appeal, it was submitted on behalf of the respondent, that the respondent's father and his family settled on L.R. No. Ntima/Igoki/186, while the other beneficiaries and their families settled on L.R. Kiirua/Kiirua/120, in accordance with the wishes of the deceased, and that none of the beneficiaries had ever contested this arrangement, prior to filing of the succession cause. The respondent's case was that the deceased had already settled his family, in accordance with Section 42 of the *Law of Succession Act*. She submitted that the deceased was survived by two wives, and therefore Section 40, and not 35, of the *Law of Succession Act* was applicable. The respondent urged us to dismiss the appeal for lack of merit.

11. 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)".

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 probate court and determine whether the learned Judge erred in allowing the respondent's application dated 8th May 2012, and thereby amending the grant originally issued to the appellants.

13. Section 76 of the *Law of Succession Act* states as follows on revocation of grants:

> " A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -
>
> a. that the proceedings to obtain the grant were defective in substance;
>
> b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
>
> d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either -
>
> i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
>
> ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e. that the grant has become useless and inoperative through subsequent circumstances."

14. The respondent had a duty to prove any of the grounds set out in the above. This Court in Matei Julius Mulili *Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti) & 4 Others v Ndeti & Another (Civil Appeal 64 of 2019*) [2022] KECA 150 (KLR) cited with approval, the decision of the High Court in Albert Imbuga Kisigwa vs. Recho Kavai Kisigwa, Succession Cause No. 158 of 2000 where it was held as follows:

> "(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrongdoing for the court to invoke Section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

15. It was the respondents' case before the probate court that she was not included in the list of beneficiaries when the succession cause was lodged before the probate court, and neither was she informed of the hearing date when the application for confirmation of the grant was to be heard. The respondent accused the appellants of illegally selling part of L.R. No. Ntima/Igoki/186, before the grant issued to them was confirmed, which parcel was meant to be inherited by the dependants of her late father, Stephen Kaaria. The respondent called four witnesses who led evidence to the effect that the deceased and all the beneficiaries, other than the respondent's late father, Stephen Kaari, moved from L.R. No. Ntima/Igoki/186 and settled on L.R. No. Kiirua/Kiirua/210. They stated that Stephen Kaaria built a home on L.R. No. Ntima/Igoki/186, where he resided with his family, until his demise. It was adduced in evidence that the respondent's parents died and were buried in L.R. No. Ntima/Igoki/186. The respondent and her witnesses testified that the appellants settled and have resided on L.R. Kiirua/Kiirua/210, from the time the deceased was alive to date.

16. The appellants, on their part, admitted that they have settled with their families on L.R. Kiirua/Kiirua/210, since the 1960s. The appellants also admitted that L.R. No. Ntima/Igoki/186 is occupied by the Stephen Kaaria's children. They did not deny selling a portion of L.R. No. Ntima/Igoki/186, measuring 1.78 ha, to one Nathaniel Igiuku. The reason given was that they needed to raise money to file the succession cause. At first, the appellants claimed to have a written agreement for the sale of the said parcel, and the 3rd appellant even claimed to have signed the said agreement, but later changed tune and testified that the agreement was verbal. We agree with the finding of the learned trial Judge that the act of the appellants of selling a portion of L.R. No. Ntima/Igoki/186 to Nathaniel Igiuku amounted to intermeddling with the estate of the deceased. At the time of the purported sale, letters of administration of the deceased's estate had not even been issued to the appellants.

17. Section 45 (1) of the *Law of Succession Act* stipulates as follows:

> " Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."

18. From the foregoing, the appellants ought to have preserved the deceased's estate until the succession process was completed in court before purporting to sell a portion thereof to third parties. Their act of selling the deceased's property to a third party or a purchaser was unlawful, and against the provisions of the *Law of Succession Act*.

19. It is not disputed that the appellants, and the other children of the deceased, moved to Kiirua in the 1960s. They, together with their families, settled there without any protest, until the death of the deceased. The 1st appellant was categorical in his evidence before the probate court that the appellants reside in Kiirua and have never utilized or lived on the parcel of land at Igoki. After the death of the deceased, the appellants now wish to lay claim on the parcel at Igoki, where the respondent and her siblings have settled. This is presumably because the value of the land at Igoki has exponentially increased due to its proximity to Meru town. The appellants are estopped from laying claim to this land. OW2 and OW3 told the court that the 1st appellant, sometime in 2009, called the respondents and her siblings, and in their presence and in the presence of his brothers, Kaminto and Mwenda, and showed each of Stephen Kaaria's children their portion of L.R. No. Ntima/Igoki/186. This was clearly indicative of the fact that the deceased had settled Stephen Kaaria and his family on the said parcel of land, a fact which the appellants acknowledged before they changed their minds obviously motivated by greed.

20. The fact that the appellants later decided to sell a portion of L.R. No. Ntima/Igoki/186, where the respondents and her siblings have settled, as opposed to L.R. Kiirua/Kiirua/120, where the appellants have settled, and without the respondent's knowledge and in stealth, was in bad faith. The respondent found out that a succession cause had been filed because the purchaser was threatening to evict them from the parcel of land at Igoki. The appellants later purported to allocate a portion of the parcel at Kiirua to the respondent, knowing fully well that the respondent and her siblings were already settled at Igoki. The appellants knew that by selling the Igoki land, they would be displacing the respondent and her siblings from the land.

21. Section 42 of the *Law of Succession Act* provides thus:

    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.

22. We note from the record that the respondent did not consent to or sign consent to the proposal made by the appellants in their application for confirmation of the grant. It was evident that it is in the interests of justice, that L.R. No. Ntima/Igoki/186, on which the deceased settled the respondent's father and his family, be transmitted to them.

23. The appellants were further aggrieved that the learned Judge apportioned 3.25 acres of L.R. No. Kiirua/Kiirua/120, which had been apportioned to the respondent by virtue of the confirmed grant,

to Eunice Kagwiria, Joseline Kanana and Jennifer Kajigi. The three are daughters of the deceased. It was the appellant's contention that they were not interested in inheriting any share of the deceased's estate, and should therefore be left out of the distribution. The appellants did not place any evidence before the court to establish that the three daughters wished to be left out of the distribution matrix. If that is the case, the appellants should have no difficulty in procuring a deed of renunciation from the said daughters and file the same in court. The said daughters did not testify in court, and there is nothing on record to suggest that they have renounced their right to inherit from their father's estate. They reserve the right to deal with their share as they deem appropriate.

24. The appellants faulted the learned Judge for failing to apply the provisions of Section 35 of the *Law of Succession Act*. The said provision relates to a situation where a deceased died intestate, and was survived by one spouse and a child or children. In the instant case, the deceased was survived by two widows. Therefore, the said section is not applicable in this case. This ground of appeal must fail.

25. On re-evaluation of the evidence adduced before the probate court in light of the grounds of appeal and submission argued before us, we hold and find that the trial court reached the correct verdict. We cannot upset the same. The appeal lacks merit. We order that the same be and is hereby dismissed with costs to the respondent.

26. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR