Nkirote & 2 others v M'Arimba (Civil Appeal 165 of 2019)
[2024] KECA 1062 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 1062 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 165 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

APRIL 26, 2024

BETWEEN

JULIET NKIROTE ..... 1ST APPELLANT

ROBERT MBAE ..... 2ND APPELLANT

JAMES MATI ..... 3RD APPELLANT

AND

JOTHAM MUTHURI M'ARIMBA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Meru (Mabeya, J.) dated and delivered on 21st February, 2019 in H.C. Succ. Cause No. 10 of 2007)

JUDGMENT

1. Nahashon Arimba Ndiira, (the deceased), to whose estate the proceedings before the High Court related died on 16th March 1994. Jotham Muthuri M'Arimba, the deceased's son, petitioned the High Court sitting at Meru to be issued with a grant of letters of administration intestate so that he could administer the estate of the deceased and distribute the same to the beneficiaries. The said petitioner (the respondent in this appeal) listed the following as the beneficiaries of the estate of the deceased; Jotham Muthuri M'Arimba, Peristan M'Arimba, Muthamia M'arimba, James Mati and Mbae M'Arimba, all sons of the deceased. The only asset that was listed as belonging to the estate of the deceased was Land Refence No. L. Mikumbune/251 measuring 4.02 Hectares (9.92 acres).

2. The grant of letters of administration intestate was issued to the respondent on 10th March 2008. On 27th February 2009, the respondent filed an application before the High Court to have the said grant to be confirmed. In the affidavit in support of the summons for confirmation of grant, the respondent made proposals regarding how the sole property comprising the estate of the deceased should be distributed to the beneficiaries. This proposal was objected to by Agnes Kanjau M'Arimba,

the deceased's widow, Felisian Murungi M'Arimba, a son of the deceased and Alice Ncurubi, a daughter of the deceased. There was a disagreement among the beneficiaries regarding the mode of distribution to be adopted in distributing the property that comprise the estate of the deceased to the beneficiaries. The dispute regarding distribution was heard by the trial court by way of viva voce evidence.

3. After hearing the parties, and considering their rival proposals regarding how the estate of the deceased should be distributed to the beneficiaries, the High Court (A. Mabeya, J.) held thus:

> " 25. . The final issue is, how the estate is to be distributed. I have considered the proposals made by all the parties. The deceased was polygamous. The applicable provision, therefore, is Section 40 of the *Act.* The section requires that all the children of the deceased make a unit each with the surviving spouse forming a separate and independent unit.
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> 26. Having given the 2nd protestor 2 acres and the 1st petitioner 1.90 acres which was reduced by the road in 1984 t0 1.55 acres, the rest of the beneficiaries will share the rest of the estate (5.37 acres) equally.
>
> 26. Accordingly, the estate will be distributed as follows:-
>
> Nkuene/L. Mikumbune/251
>
> a. Jotham Muthuri M'Arimba - 1.55 acres
>
> b. Felisian Muringi M'Arimba - 2.1 acres
>
> c. Julia Muthoni Kithae - 0.537 acres
>
> d. Lucy Ruth Nkuene - 0.537 acres
>
> e. Elizabeth Igoki - 0.537 acres
>
> f. Alice Ncurubi - 0.537 acres
>
> g. Agnes Kajuju - 0.537 acres
>
> h. George Muthamia - 0.537 acres
>
> i. James Mati - 0.537 acres
>
> j. Albert Mbae M'Arimba - 0.537 acres
>
> k. Juliet Nkirote - 0.537 acres
>
> l. Damaris Kiende - 0.537 acres"

4. Juliet Nkirote, Robert Mbae and James Mati (appellants) were aggrieved by the decision. They have filed an appeal to this Court. In their memorandum of appeal they were aggrieved;:- that the trial court had erred in not taking into account the fact that the 1st protestor was entitled to the personal and household effects of the deceased absolutely and a life interest on the whole of the residue of the net intestate estate; that the trial court did not take into consideration the prior sub-division of the estate by the deceased and the gifting of the same inter vivos by the deceased to the beneficiaries; they faulted the trial court for not applying the clear provision of Section 35 (5) of the *Law of Succession Act* which would have resulted in the adoption of a different mode of distribution; they were aggrieved that some of the beneficiaries had been left out during the distribution matrix and finally that the distribution by the trial court was unequal and therefore, some of the beneficiaries had benefited more than the others.

5. In the premises therefore, the appellants urged the Court to allow the appeal, and make an order distributing the estate of the deceased equally to all the beneficiaries.

6. Prior to the hearing of the appeal, both the appellants and the respondent filed their written submissions in support of their respective cases. The appellants submitted that it was common ground that the deceased died intestate. They argued that it was therefore wrong for the trial court to take into consideration what was said to be the intentions of the deceased as regards what share each beneficiary was to inherit upon his demise. The appellants complained that the trial court had left out two of the beneficiaries in the distribution matrix. They submitted that all the beneficiaries of the deceased ought to have been included when the estate was being distributed. They were of the view that the applicable provision of the *Law of Succession Act* regarding the distribution of the estate of the deceased was Section 35(1) of the Act where the surviving spouse had precedence and not Section 40 of the Act where all the beneficiaries were treated equally. The appellants urged the court to apply Section 31 (1) of the *Law of Succession Act* in the distribution of the estate of the deceased to the beneficiaries.

7. On his part, the respondent, in opposing the appeal, submitted that the trial court had correctly assessed the evidence and the applicable law and arrived at the correct decision. He pointed out that Agnes Kanjau M'Arimba, the 3rd widow of the deceased was married when the children of the other two widows were of age and had already been settled where they are currently residing by the deceased. The appellants cannot, therefore, argue that Agnes Kanjau M'Arimba was entitled to a life interest on the residue of the estate of the deceased. The respondent submitted that the said Agnes Kanjau M'Arimba and her children were entitled to inherit the portion of land where the deceased build her a house and settled her on the suit parcel of the land and nothing more. The respondent urged the court to disallow the appeal, as in his view, the trial court had taken into consideration all the facts and the circumstances of the succession dispute and rendered the correct verdict.

8. This being a first appeal, it is the duty of this Court to reconsider and to re-evaluate the evidence that was adduced before the trial court in light of the grounds of appeal and the submissions made by the parties on this appeal and reach its own independent determination. In considering the appeal, the court is required to take into account that it did not have the opportunity of seeing or hearing the witnesses and will give due allowance in that regard. In *James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court held thus:

> " This is a first appeal. We are reminded of our primary role as the first appellate court namely, to re-evaluate, reassess 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."

9. In the present appeal, the main issues for determination are twofold:- whether the trial court erred in failing to include all the beneficiaries of the estate of the deceased in the distribution; and, secondly, whether the principle applied by the trial court in distributing the property that comprised the estate of the deceased to the beneficiaries was fair and just in the circumstances.

10. In respect of the first issue, it was clear to us that the trial court was dealing with a list of beneficiaries that had already been, more or less, agreed. Indeed, when the Agnes M'Arimba testified before court, it was her claim that she was entitled to more land and as she had contributed towards the acquisition of the same. She demanded to be given a 4 acre share out of the only parcel of land that comprised the estate of the deceased i.e. LR No. Nkuene/Mikumbune/252. At no time during the trial was the issue of specific bequest to the two beneficiaries raised. Indeed, in his considered judgment, the trial Judge observed that the parties to the proceedings had substantially made representations that the distribution of the

estate be in accordance to the houses that comprised the beneficiaries of the estate of the deceased, and secondly, how the said beneficiaries of the deceased had specifically been settled on the ground by the deceased. We, therefore hold that the issue as to whether or not the two beneficiaries ought to have been included in the list of those who were to benefit from the distribution was not an issue that was before the trial Judge for determination. It is an issue that is being raised for the first time on this appeal. As an appellate court, we cannot consider this issue as it was not an issue that had been placed for determination before the trial Judge.

11. As was held by this Court in *Kenya Hotels Ltd v Oriental Commercial Bank Ltd* [2018] eKLR:

> " Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that the appellate court does not, in disguise, metamorphose into a trial court and make first instance determinations without the benefit of the input of the court from which the appeal arises..."

12. Our re-evaluation of the evidence that was adduced before the trial court clearly shows that it was common ground that the two beneficiaries who are now claiming, on appeal, that they were not included in the distribution matrix, will benefit from the share which their mother would inherit after her life interest expired. That ground of appeal lacks merit and is hereby disallowed.

13. As regards the second issue for determination, whether the distribution between the various beneficiaries was fair, we have re-analyzed the basis upon which the trial Judge distributed the only property that comprised the estate of the deceased. The trial Judge observed that the deceased had settled some members of his family during his lifetime. This is what he held:

> " 20. After showing the said sons their respective portions; they took possession thereof and developed the same. They have been in occupation thereof to date. None of the children of the deceased nor the 1st protestor questioned the arrangements for 12 years (1989 – 1999) when the deceased was alive if it was the daughters, they remained happily married wherever they were and the other sons continue(d) to occupy where he had shown them. It is clear that the intention of the deceased was to settle the sons of the 1st two houses for good."

14. The learned trial Judge then held that he was satisfied that the deceased had given the children of the first two houses their respective inheritance as gift inter vivos during his lifetime. The trial Judge was not persuaded that the appellants had adduced sufficient or any evidence to enable him upset this arrangement that had long ago been made by the deceased.

15. On our part, we agree with the learned trial Judge that the basis upon which the deceased settled the sons from the first two houses constituted gift inter vivos which became complete once the said sons settled on the land and started developing and residing on the same. It was also apparent to us that the deceased applied the principle of equity and not equality when he distributed the land to the children of the first two houses. The said children accepted what their deceased father gifted them. In the circumstances, the trial Judge did not err when he adopted the mode of distribution that was already in place on the ground and had been accepted by the members of the first two houses.

16. As regards the children of the 3rd widow, the trial Judge more or less adopted Section 40 of the *Law of Succession Act* in distributing the remainder of the estate of the deceased. We cannot fault the trial Judge for adopting that mode of distribution.

17. We have said enough. The upshot of the above reasons is that the appeal lacks merit and is hereby dismissed. We make no orders as to costs as this was a family dispute. It is so ordered.

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