Kilonzo v Kilonzo & another (Civil Appeal E351 of 2021)
[2024] KECA 354 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 354 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E351 OF 2021

P NYAMWEYA, PM GACHOKA & SG KAIRU, JJA

APRIL 12, 2024

BETWEEN

PHOEBE MBENEKA KILONZO ..... APPELLANT

AND

PRISCILLA MUMBUA KILONZO ..... 1ST RESPONDENT

BERNARD MUTETI MUNGATA ..... 2ND RESPONDENT

(An appeal from the ruling and orders of the High Court of Kenya at Machakos (G. V. Odunga, J.) delivered on 7th November 2019 in Succession Cause No. 261 of 2007)

JUDGMENT

1. In his lifetime, Morris Kilonzo Musyimi (now deceased) had two wives: Phoebe Mbeneka Kilonzo the 1st wife, and Priscilla Mumbua Kilonzo, the 2nd wife. The marriage to Phoebe Mbeneka Kilonzo, the appellant herein, had not been formalized but on 25th September 2018, the trial court held that she was a wife under the doctrine of presumption of marriage. The deceased kept the two families far apart; one was settled in Machakos and the other in Makueni. Upon his demise, the appellant, and the 1st respondent, have been engaged in legal combat on the distribution of the assets of the estate. The 2nd respondent has been dragged into the fight for purchasing a parcel of land from the 1st respondent when she was the sole administrator of the estate before the grant was rectified to include the appellant as a co-administrator.

2. By way of background and to put this appeal in context, we shall give a summary of the facts as discerned from the record. As stated, the estate of the deceased consists of two families. The 1st respondent was the 1st wife and had no children. The appellant was the 2nd wife and was blessed with 11 children, though 3 had died as at the time of the distribution of the estate.

3. On 26th September 2009, following the demise of the deceased, the 1st respondent obtained a grant of letters of administration and was named the sole administrator and beneficiary of the deceased's estate. On 9th March 2010, the appellant applied for revocation of the grant. On 25th October 2012, a consent was recorded to rectify the grant issued 26th September 2009 by including the name of the appellant as a co-administrator and the parties agreed to file a formal application for confirmation of the grant.

4. The record shows that the trial court had given parties time to attempt an amicable settlement appurtenant to the distribution of the estate but the talks bore no fruits. Accordingly, the parties agreed to dispose of the application for confirmation of grant by way of written submissions. Upon considering the submissions and the rival affidavits, the trial Judge (Odunga, J.) (as he then was) held as follows:

> " 21. In this case, the 1st administrator avers that three of the properties mentioned are not available for distribution. This is due to the fact that three of them have been sold. Two of the properties were sold by the deceased himself though their transfer was yet to be effected. The third property was sold by the 1st administrator before the grant was revoked. That the third property was sold and transferred to the interested party is supported by the documentary evidence herein. I agree that without the said sale being reversed by a court of competent jurisdiction, this court cannot, in these proceedings proceed as if the said property belongs to the estate of the deceased. As regards the property sold by the deceased, there does not seem to be any serious challenge to that contention.
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> 22. I have considered the averments by the 1st administrator as regards the reasons behind her contention that the deceased allocated to her two of the properties in question. In my view, based on the reasoning of the Court of Appeal in Douglas Njuguna Muigai vs. John Bosco Maina Kariuki & Another, it would be unjust to treat the 1st administrator in the same way as one would treat any of the children of the 2nd administrator. In arriving at my decision, I have considered the plots at Kativani and Masimba as part of the estate of the deceased since the 2nd administrator did not adduce any evidence to the contrary.
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> 23. It is therefore my view that the estate of the deceased ought to be distributed in the manner proposed by the 1st administrator. In the premises, the summons for Confirmation of Grant dated 6th March 2017 succeeds and is allowed as prayed."

5. Aggrieved by the ruling, the appellant filed a notice of appeal and memorandum of appeal dated 15th November 2019 and 14th June 2021 respectively. The appellant has raised a whopping 16 grounds. We have taken the liberty to summarize them as follows: that the learned Judge did not distribute the estate in line with section 40 of the *Law of Succession Act*; that the distribution was done in a manner that was unjust, inequitable and unfair; that the children of the appellant were not considered as units; that the plots in Kativani and Masimba were not part of the estate of the deceased; that the Judge erred in holding that he could not determine the legality of the sale of land parcel number Machakos/Kiandani/2783 to the 2nd respondent; and that the appellant's evidence was not taken into account in the ruling.

6. The parties filed written submissions that were orally highlighted at the hearing. The appellant's submissions and case digest dated 19th June 2023 and the supplementary submissions dated 3rd July 2023 reiterated the grounds of appeal. We need not rehash them but we shall refer when necessary.

7. The 1st respondent's written submissions and case digest are dated 14th June 2023. The 2nd respondent's written submissions and case digest are also dated 14th June 2023. Similarly, we shall not rehash the submissions but will refer to them where necessary.

8. We have carefully considered the record of appeal, the submissions and the authorities cited. In our view, two issues fall for determination:

   i. Whether the learned Judge distributed the estate in accordance with section 40 of the *Law of Succession*? Put differently, was the distribution fair, just and equitable?

   ii. Whether the learned Judge erred in disregarding the parcels of land sold to 3rd parties including the 2nd respondent and in treating the plots in Kativani and Masimba, owned by the appellant, as part of the estate.

9. On the first issue, the starting point is section 40 of the Law of Succession which has been the subject of discussion in many judgments of this Court. The said section provides as follows:

> " Where intestate was polygamous
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> 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.
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> 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."

10. In the celebrated case of *Mary Rono vs. Jane Rono & another*

[2005] eKLR, Justice Waki expressed himself as follows:

> " While I do not doubt the discretion donated by the Act in matters where dependants seek a fair distribution of the deceased's net estate I think the discretion, like all discretions exercised by courts, must be made judicially or to put it another way, on sound legal and factual basis. The possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the court's discretion. It is not a determining factor."
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> Justice Omolo was more emphatic on the application of section 40 of the Succession Act, and he stated as follows:
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> > "My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

> Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality."

11. In our view, parties need to understand that the distribution of an estate is not a mathematical exercise. A court of law dealing with the distribution of an estate has the discretion to ensure fair distribution is done, but the discretion has to be exercised judiciously based on sound legal and factual basis. In addition, the circumstances of each case have to be considered taking into account inter alia, the number of houses; the number of children in each house; the circumstances of each beneficiary; and any gift that may have been given to a beneficiary during the lifetime of deceased but always bearing in mind that the factors to be considered cannot be exhaustive. Of paramount consideration in the exercise of discretion in distribution is to ensure justice is done so that there is no blind application of section 40 of the *Law of Succession Act*.

12. Turning to the appeal before us, it is common ground that the late Kilonzo has been survived by two wives. The 1st respondent, the 1st wife lived with the deceased in Machakos and had no children. The appellant, whom the court recognized as a wife by presumption of marriage, lived in Makueni and was blessed with 11 children, though 3 had passed on at the time of distribution. Their deceased husband may have kept them away from each other but the law of succession knows no distance. In the absence of a will or consent, the court was called upon to distribute the estate of the deceased in accordance with the *Law of Succession Act*, taking into account the factors that we have highlighted.

13. When the parties appeared before the trial court, each wife proposed a different mode of distribution. The 1st respondent acknowledged that the deceased was survived by 10 dependents. It was her evidence by way of affidavit that the deceased owned Machakos /Kiandani / 2783, Machakos / Kaliluni / 1754, Machakos / Kiandani/ 2601, Nzaui/ Kikumini/ 17, Nzaui / Kikumini/692, a plot at Kativani and a plot at Masimba. According to her, she was entitled to the parcel of land namely Machakos/Kaliluni/1754 whilst the appellant was entitled to land parcel Nzaui / Kikumini/17, Nzaui / Kikumini/692 plot in Kativani and plot at Masimba. It was her further submission that plot No. Machakos /Kiandani/2783 and Machakos / Kiandani/2601 had been sold in the lifetime of the deceased and should therefore be transferred to Elizabeth Kanini Mulumbi and Shadrack Musyoka respectively. In respect of plot no. Machakos/ Kiandani / 2784, she submitted that it had already been sold and transferred to the 2nd respondent and was therefore not available for distribution.

14. The 1st respondent averred that the deceased in his lifetime allocated her land parcel number Machakos/ Kiandani/2783 and Machakos/Kaliluni/1754 because that is where she lived. She stated that she was collecting rent from the buildings on the said properties to support herself given her old age. She urged the court to take into account that she had no children to support her and thus needed the two properties to support herself. She further stated that the appellant was put in control of most of the properties as she had children and therefore it was not true that the distribution was unfair as alleged by the appellant.

15. On her part, the appellant was opposed to the mode of distribution proposed by the 1st respondent. She in particular stated that the sale to the 2nd respondent was irregular and ought to have been cancelled by the court. It was also her assertion that the plots in Kativani and Masimba were registered in her

name and thus not part of the estate. It was her submission that the 1st respondent had been given more acreage than she deserved.

16. We have carefully considered the submissions by the parties on the mode of distribution. The main contention by the appellant is that the learned Judge erred by failing to take into account the children in each house and the number of units in each house. As already stated, under section 40 of the *Law of Succession Act*, a Judge distributing an estate has a duty to ensure justice is done. We agree with the appellant that under section 40 of the *Law of Succession Act*, the number of houses and the children in each house has to be considered. However, circumstances may arise where the court may depart from this general rule by taking into account the age of the beneficiaries or the prevailing circumstances.

17. In this appeal, we note that the Judge was dealing with a case in which the evidence that some properties had been disposed of in the lifetime of the deceased was not seriously challenged. It is also not in dispute that the 1st respondent was childless and resultantly depended on the rent collected from the parcels of land that she was in occupation to support her livelihood. It is clear that the appellant is pushing for a mathematical distribution of the estate without taking the question of justice into account. She did not challenge the evidence that the 1st respondent, though childless, survived on the rent that she was collecting from the properties. It is also evident that the appellant was adequately provided for in the distribution. Taking into account all the circumstances of this case, we are not persuaded that the trial Judge exercised his discretionary wrongly. There is nothing on record to show that he took into account improper factors or failed to take into account relevant factors. In the premises, we find that all the grounds related to the manner of distribution have no merit and we resultantly dismiss the same.

18. On the second issue concerning the properties that had been sold to 3rd parties, we note that the learned Judge considered this issue and held that they did not form part of the estate. We note that the appellant alleged that the said properties were sold in contravention of the consent that was recorded in court on 24th October 2012. If that be so, one wonders why the appellant did not move the trial court for contempt or move the court to cancel the agreements for sale. It is important to point out that the parties opted to proceed by way of written submissions and affidavits. We have carefully read the record and it is our finding that the learned Judge was right when he held that two of the properties were sold during the lifetime of the deceased. Furthermore, the property to the 2nd respondent was sold by the 1st respondent when she was sole administrator. It is significant that the grant of letters of administration of the estate of the deceased issued to the 1st respondent were never cancelled but were rectified to include the appellant. If the appellant wanted any transaction that the 1st respondent had undertaken prior to that date be revoked, nothing would have been easier than for the consent to say so. Taking into account the evidence that the parties had placed before the court, it is our finding that there is nothing to show that the Judge exercised his discretion wrongly. Accordingly, this ground of appeal also fails.

19. On the last issue, whether the two plots in Kativani and Masimba formed part of the estate, we agree with the 1st respondent that the appellant did not controvert the fact that the two plots belonged to the estate. If the plots did not form part of the estate, nothing was easier than for the appellant to demonstrate how she acquired the plots. We agree with the holding of the learned Judge that the two plots ought to have been taken into account in the distribution.

20. The appellant's main argument is that the clan elders had in a resolution dated 7th April 1998, held that the two plots were not part of the estate. With respect to the appellant, that resolution, without any further evidence, amounts to nothing and has little evidential or probative value. We have also looked at the purported documents of ownership being the transfer letters and in our view, those letters did not

displace the evidence that the two plots formed part of the estate. Indeed, we note that the appellant, in her affidavit sworn on 2nd June 2017, in support of her mode of distribution, states as follows:

> " ...the plot at Kativani and Masimba do not form part of the deceased estate as the same are registered in my names and as such should not be included amongst the deceased properties. This was recognized by a resolution by clan elders on distribution of the estate..."

21. It is therefore clear that the appellant does not make any attempt to show how she acquired them and as already held, the attempt to rely on the resolution by the clan elders is nothing more than clutching on straws.

22. Having considered all the facts, the law and the ruling by the learned Judge, it is clear to us that this appeal has no merit and all the grounds of appeal fail. Accordingly, we dismiss the appeal but this being a family dispute and to promote peace between the two families, we order that each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2024.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR