Kaburu & another v Njeru (Civil Appeal 24 of 2020)
[2024] KECA 1391 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1391 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 24 OF 2020

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 11, 2024

BETWEEN

FRANCIS JOHNSON KABURU ..... 1ST APPELLANT

BONIFACE MUTEMBEI ..... 2ND APPELLANT

AND

FREDRICK NKONGE NJERU ..... RESPONDENT

(Being an Appeal from the ruling of the High Court of Kenya at Chuka (R.K Limo, J.) dated 10th December 2018 in Succession Cause No. 30 of 2015)

JUDGMENT

1. The deceased M'Birichi Maeti died on 23rd June 2011. During his life, the deceased had two houses; the house of Acenord Mukwanjeru Njeru and the house of Damaris Ithiru. In all he had seventeen (17) children. The appellants Francis Johnson Kaburu (1st appellant) and Boniface Mutembei (2nd appellant) were some of the children in the house of Damaris Ithiru (2nd house). The respondent Fredrick Nkonge Nderu was one of the children in the house of Acenord Mukwanjeru Njeru (1st house).

2. There is no dispute that land parcels L.R. Nos. Muthambi/ Chamunga/652 and Muthambi/ Chamunga/653 were some of the properties that the deceased left in his name. On 7th November 2011 the deceased went before an advocate Ireri Charles Mugo (PW 1) in Chuka who drew his Will which was witnessed by Anslas Kaburia Kanampiu (PW 2) and Zaberiu M'Rikanya M'Nkuma. In the Will, the deceased shared Muthambi/Chamunga/652 so that the appellants, the respondent, Genesio Nyaga Njeru, Silvester Muthoni Njeru, Patrick Mbae Njeru, Nicholas Micheni Njeru, Inocensia Mukwanyaga Njeru, Salesio Marangu Karuri Njeru, Scholastica Kaari Njeru, Jesinta Salai Njeru and Salome Riungu Njeru (all being the children of the deceased) each got 1.47 acres. The deceased's other children, Thamarisi Ithiri Njeru, Japhet Gitonga Njeru, Silvia Kagendo Njeru, Purity Kanini Njeru,

Irene Mukwaiti Njeru and Lawrence Kinyua Njeru were to each get 1.65 acres, except for Thamarisi Ithiru Njeru who was to get 2 acres, from Mathambi/Chamunga/653. The deceased and his wife Acenord Mukwanjeru Njeru were to get 2 acres from the parcel.

3. The Will distributed the other properties to the family.

4. Before the High Court in Succession Cause No. 30 of 2015 at Chuka, the 1st appellant petitioned for the grant of letters of administration intestate in respect of the deceased's estate. On 6th October 2015 he was appointed the administrator of the estate. This was followed by two objections, one being by the respondent whose case was that the deceased had died testate following the above Will. Another issue that arose in the succession cause was contained in the affidavits of protest sworn on 8th July 2011 by the 1st and 2nd appellants. The 1st appellant swore that, among other things, the Will was a forgery; that the deceased had died intestate. According to the 2nd appellant, and there were proceedings to show this, in Land Disputes Tribunal at Muthambi in Case No 13 of 2010 he and his brothers from the 2nd house had sued the deceased who had shared Muthambi/Chamunga/652 and 653 to the children of the 1st house and had left them out. The Tribunal heard them and heard the deceased, and determined that the appellants and their brothers would each get 2 acres from the parcels. It was the 2nd appellant's case that given the determination by the Tribunal, which had been adopted by the Principal Magistrate's Court at Chuka in LDT No. 47 of 2010, the Will could not take effect to reduce or take away their entitlement.

5. On 11th July 2016 the High Court directed that the protests by the appellants would be heard by viva voce evidence. The parties were asked to exchange affidavits on the issue. On 15th March 2017 the court asked that the issue of the validity of the Will be determined by viva voce evidence on 12th June 2017. Indeed, hearing commenced on 12th June 2017 where PW 1 testified. On 9th July 2018, PW 2, the respondent, PW 4 Salome Gaaji Riungu and PW 5 Lawrence Kinyua Njeru testified, all in support of the Will. For the defence, the 1st appellant testified and closed his case. The respective counsel were allowed to file their written submissions. The ruling that was delivered on 10th December 2018 by R.K. Limo, J. is what is the subject of the present appeal. The appellants were aggrieved by the decision and filed this appeal.

6. In the ruling, the learned Judge accepted the evidence of PW 1, PW 2, PW 3, PW 4 and PW 5 and found that the deceased had indeed made the written Will which he had executed and the same had been witnessed. The allegations that the deceased's signature had been forged or that the deceased was unwell at the time were discounted. The learned Judge then went on to discuss the issue raised by the 2nd appellant, regarding the effect of the Land Disputes Tribunal decision as confirmed and the shares that the appellants and their brothers had been awarded. The Court stated as follows:-

> " That cited award is a nullity in law ab initio and there is no basis for this court to be told that the property known as LR Muthambi/Chamunga/652 and 653 can only be distributed in this cause in accordance with an illegal finding of a body that was bereft of jurisdiction to make such findings. The protest of Mbirichi Boniface Justine Mutembei is therefore untenable in law and cannot be sustained."
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> It was ordered that the executor of the Will, George Nkonge Njeru should apply to have the grant confirmed on the basis of the Will.

7. The appellant's grounds of appeal were as follows:-

> " 1) That the honourable trial Judge erred in fact and law by declaring the Will dated 7th January 2011 as valid, misdirected himself in failing to consider the 1st appellant's protest regarding the validity of the Will and the mode of distribution of the deceased's estate.

2. That the learned honourable Judge erred in law and fact by ruling on an application/protest by the 2nd appellant without granting him a right to be heard on the same and or to prosecute the same.

3. That the learned honourable Judge erred in law and fact by ruling on an application/protest by the 2nd appellant after denying him a right to be heard on the same and or to prosecute the same.

4. That the honourable trial Judge erred in fact and law by misdirecting himself in invalidating the orders of the Lands Dispute Tribunal in Lands Dispute Tribunal Muthambi Division Cause No. 13 of 2010 Chuka that was later adopted as an order of Court in CMC at Chuka in Lands Dispute Tribunal No. 47 of 2010 on 22nd September 2010.

5. That the honourable trial Judge erred in law and fact by ignoring the appellant's prayers for orders for authentication of the will.

6. That the honourable trial judge erred in fact and law by misdirecting himself in finding that the Lands Dispute Tribunal as it then was lacked jurisdiction to distribute property during someone's lifetime and at point of death while the same was a dispute between the deceased and the appellants and not distribution of his estate upon death.

7. That the learned trial Judge erred in law and fact in finding that the properties that were previously awarded by the Lands Dispute Tribunal to the appellants formed part of the estate of the deceased at the time of the alleged time of making a will.

8. That the honourable trial Judge erred in fact and law by misdirecting himself in disregarding the inconsistencies and suspicious circumstances that were raised by the protestors during trial surrounding the alleged will and its validity while the same were numerous and substantial.

9. That the honourable trial Judge wholly erred in law and fact in arriving at his said decision."

8. One of the grounds in the appeal, and which the appellants counsel addressed in the written submissions, was that the 2nd appellant had not been heard on his affidavit of protest and yet the learned Judge had gone ahead to determine that the Land Disputes Tribunal had no jurisdiction to hear or determine the appellant's quest for land from their father (the deceased) while he was alive. It was the submission by the respondent's counsel that the appellants were represented by the learned counsel Mr. Kimathi in the High Court, and that the counsel called only one witness, the 1st appellant, and then decided to close his case; that counsel were allowed to file written submissions; and the learned Judge had considered the oral evidence and the written submissions in reaching his decision.

9. This is a first appeal. We are commanded to reconsider and reevaluate the evidence that was tendered before the trial court and draw our own conclusions thereon, while bearing in mind that we did not have the benefit of seeing and hearing the witnesses. (See Selle & Another -vs- Associated Motor Boar Co. Ltd & Others [1968]EA 123).

10. The record shows that on 20th September 2011 L. Kimathi & Co. Advocates was appointed to act for the 1st appellant in the High Court matter. The protest by the 1st appellant was drawn by the firm

of advocates. However, the protest by the 2nd appellant was drawn by the appellant in person. In the proceedings before the learned R.K. Limo, J. Mr. Kimathi appeared for the 1st appellant and Mr. Kaaria appeared for the respondent. The 2nd appellant did not attend the proceedings at any stage before the Judge, and Mr. Kimathi was not appearing for him. It follows that when Mr. Kimathi called the 1st appellant to testify, following which he closed the case, this had nothing to do with the 2nd appellant whose affidavit of protest was on record. The record does not show that the 2nd appellant was in court at any stage of the proceedings.

11. When, therefore, the learned Judge discussed the issues that the 2nd appellant had raised in his affidavit of protest and proceeded to make a determination thereon, when the 2nd appellant had not been invited to participate in the proceedings and to tender evidence on the protest, this was a fundamental breach of his right to be heard. Under Article 50 of *the Constitution*, the 2nd appellant had the right to have his protest heard. He had the right to testify on his protest, and to call witnesses. He was not afforded this right and therefore his complaint in the appeal was legitimate and valid.

12. We reiterate that what the court, following the direction on 15th March 2017, sought to determine was the question whether or not the Will of the deceased was valid. The interplay between the Will and the decision by the Land Disputes Tribunal, as confirmed by the subordinate court, was not up for determination. Even if it was, the owner of the question was the 2nd appellant who did not participate in the proceedings.

13. Secondly, despite the merits of the ruling, the 2nd appellant, by filing a protest in the petition, was a party to the proceedings. He was entitled to be present, to cross-examine the evidence of the witnesses, to testify and to call witnesses, if he so desired. He was not afforded the opportunity.

14. Our determination is that the proceedings before the learned Judge were null and void on the basis that the 2nd appellant, who was a party, was not invited to participate to present his case in the petition and to call evidence on his protest. These are the reasons why we allow the appeal, set aside the ruling dated 10th December 2018, and any consequential orders, and direct that this succession cause be re-heard by a Judge with the requisite jurisdiction, other than R.K. Limo, J.

15. Each party shall bear own costs of the appeal.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF OCTOBER 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