Mburire v Mbaka (Civil Appeal 66 of 2020)
[2024] KECA 1388 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1388 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 66 OF 2020

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 11, 2024

BETWEEN

JOHN MUTEGI MBURIRE ..... APPELLANT

AND

JOYCE MBINYU MBAKA ..... RESPONDENT

JUDGMENT

1. This is a first appeal. Our mandate is to reconsider the questions of fact and law that arose before the High Court and to affirm or reverse the findings, while bearing in mind that it was that court that had the advantage of seeing and hearing the witnesses. (See Selle & another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123.

2. The deceased M'Thirika Mburire hailed from Kabuboni in Chuka, and had two houses. The house of the late Martha Ciankui had the following children: -

    a. the late Janet Ciambuti Mugo (daughter);

    b. the late Teresa Ciakanyakine Mugo (daughter);

    c. Joyce Mbinyu Mbaka (daughter) the respondent);

    d. Juliesta Ciakathia Nyaga (daughter); and

    e. the late Mary Ciagitari (daughter).

    The house of the late Jane Ciangai had the following children: -

    a. Ephantus Nyaga (son);

    b. John Mutegi Mburire (son) (the appellant);

    c. the late Peter Mbuba (son);

d. the late Lloyd Gitari Mburire (son);

e. Hellen Ciambaka (daughter);

f. Lucy Ciakuthi Rugendo (daughter); and

g. Loise Murugi (daughter).

3. The estate left by the deceased comprised land parcels Nos. Karingani/Ndagani/1251, Magumoni/Mwonge/536 and Karingani/Githarene/539, and heads of cattle.

4. Following the death of the deceased, the respondent petitioned the High Court at Chuka and on 4th January 2016 obtained a grant of letters of administration. This was on the basis that the deceased had died intestate. Vide summons dated 21st August 2016, the respondent sought to have the grant confirmed. She proposed how the parcels of land should be shared. She basically sought that parcels of 536 and 539 be shared so that each child benefits equally, while 1251 would go to Lucy Ciakuthi Rugendo. 1251 measured one acre, 536 measured 5.26 acres while 539 measured 3.50 acres.

5. The appellant filed a protest dated 19th September 2016. According to him, the deceased had left an oral Will in which he had indicated how he wanted his estate to be shared out upon his death. He wanted the grant confirmed on the basis of that oral Will. He swore that the oral Will commanded that 536 be shared equally between him and Ephantus Nyaga Mburire, 539 to go to the beneficiaries of the late Peter Mbuba Mburire and that 1251 to be registered in the name of the respondent in trust of all the daughters of the deceased. The respondent denied that the deceased left any Will, oral or otherwise. Her case was that she was the one who was taking care of the deceased during his last days; that he was sickly and not in a mental state to do any Will regarding his children and properties. Lastly, that the intention of the appellant was basically to disinherit the deceased's daughters.

6. The High Court (R.K. Limo, J.) received oral evidence from the respondent, the appellant and witnesses, and came to the conclusion that the deceased had not left any oral Will; that he had died intestate. The Court determined that the estate of the deceased would be shared equally among the children of the deceased, in accordance with section 38 of the *Law of Succession Act* (Cap. 160). It was noted that such distribution would mean that each child would be entitled to about 0.97 acres. But that, considering how each child had settled and was developing the parcels of land, and in effort to be as fair as was possible, the estate would be shared as follows:-

A: Parcel 539

i. Lenity Muthoni Mbuba to hold 0.975 acres for the benefit and in trust for Robert Mugendi Mbuba, James Mwenda Mbuba, Phonela Murugi Mbuba, Jane Kathure Mbuba and Eddy Karani Mbuba;

ii. Hellen Ciambuka – 0.975 acres;

iii. Loise Murugi – 0.975 acres;

iv. Juliesta Ciakatha Nyaga – 0.5 acres.

B: Parcel 536

i. John Mutegi Mburire – 0.975 acres;

ii. Joyce Mbinyu Mbaka – 0.975 acres;

iii. Ephantus Nyaga Mburire – 0.975 acres;

iv. Janet Ciambuti Mugo – 0.975 acres;

v. Dorris Karimi – 0.975 acres to hold it for her benefit and in trust for Jane Gathoni and Anne Mwende;

vi. Lucy Ciakuthi Rugendo – 0.37 acres.

C: Parcel 1251

i. Juliesta Ciakatha Nyaga – 0.47 acres;

ii. Lucy Ciakuthi Rugendo – 0.6 acres.

7. The appellant was aggrieved by the decision and came before this Court on appeal. His main grievance was the finding that the deceased had not left an oral Will. According to him, and as contained in the memorandum of appeal, the trial court ought to have accepted his version and that of his witnesses and therefore distributed the deceased's estate in accordance with his affidavit of protest which reflected the said oral Will.

8. The parties were absent during the hearing of the appeal, but the appellant had filed his written submissions in accordance with the directions that had been given during case management. The respondent had not. The appellant's submissions had been filed on his behalf by Waklaw Advocates. In them, the complaint by the appellant was that, despite his having called witnesses who had produced credible evidence, the learned Judge had erringly failed to accept that the deceased had left an oral Will on the basis of which the estate should have been distributed.

9. We have reconsidered all the material that was placed before the trial court, the impugned judgment, the grounds of appeal and the submissions.

10. In Beth Wambui & Another -vs- Gathoni Gikonyo & 3 Others [1968]eKLR, this is what Gachuhi, J.A. observed:-

> " There is nothing to prevent a person from making an oral Will disposing of his property. In Cotran's Book (Kenya 2) at page 15, it is stated:-
>
> 'A person may make a Will in his old age or on his death bed. He calls a meeting of all his close relatives from his mbari, other muhiriga relatives, and close friends and declares orally how his property is to be distributed item by item, and also declares who shall be his Muramati. No other formalities are required, but his Will is invalid unless the above witnesses (the number is not specified) are present.'"

11. In Re Rufus Ngethe Munyu (Deceased) Public Trustee -vs- Wambui [1977] KLR 137, the deceased had given instructions of the disposal of his properties to his wives and children and those instructions were written on a piece of paper by the person recording them. It was held that the writing disposing of the property was an oral Will as the deceased died after a few days.

12. In the instant matter, there was a dispute before the trial court on whether the deceased had died on 16th December 1995, according to the applicant, or on 24th December 1995, according to the respondent. The learned Judge, after considering the evidence, found that the deceased's probable date of death was on 24th December 1995. Nothing really turned on the issue of the date of death, as was observed by the court.

13. The evidence by the appellant was that the deceased had on 28th September 1995 called a meeting at his home that was attended by the respondent's mother before she died, PW 2 Ephantus Nyaga (the

appellant's brother) and neighbours, who included Fredrick Njoka Mbuba (PW 3) and Mutegi Kanga (PW 4). In the meeting, they said, he indicated that parcel 536 would be shared equally between the appellant and his brother (PW 2), parcel 539 was to go to the family of the appellant's brother, Peter Mbuba Mburire, and that parcel 1251 was to be held by the respondent for all the deceased's daughters. The respondent testified that she was unaware of this meeting, and that, in any case, the deceased was then too sick to call the meeting or indicate how he wanted his estate to be disposed; and that the deceased did not by then have the mind to make the Will. She called Dorris Karimi (DW 2) who was the widow of the appellant's late brother Lloyd Gitari. She had two children with Lloyd Gitari. Her case was that she had been excluded by the said Will, and that following the death of the deceased the appellant had demolished her house and chased her from the home. He also evicted the respondent from the parcel she was occupying.

14. According to the respondent, her late mother (Martha Ciankui) did not attend the meeting where it was said the deceased had made the said oral Will.

15. The appellant's further evidence was that on 24th December 1995, which he stated was one day after the burial of the deceased, there was a family meeting in which the oral Will was discussed and the cattle left by the deceased shared; and that the meeting was reduced to minutes which he produced in evidence.

16. The learned Judge considered the whole evidence. He found that the said oral Will was not one of the items discussed in the said family meeting of 24th December 1995 as shown by the produced minutes. It was observed that the appellant and his brothers were the primary beneficiaries of the said oral Will. Thirdly, that the respondent, and the girls as a whole, had only superficially been provided for. Fourth, Lloyd Gitari's family (which had DW 2 and two children) had not been provided for even when there was no evidence that the deceased had any dispute with the family. Lastly, that the appellant had embarked on the process of evicting and dislocating the respondent and DW 2 immediately the deceased had died. The court wondered why he was doing this when he had an oral Will that was favouring him. In total, the court disbelieved the appellant and his witnesses on the question that the deceased had left an oral Will. We have reconsidered the evidence and come to the conclusion that the learned Judge reached the correct determination.

17. That meant, as was rightfully found by the learned Judge, that the estate of the deceased was to be shared according to the provisions of section 38 of the *Law of Succession Act*. All that the learned Judge was to bear in mind, which he did, in sharing the estate was that the law did not discriminate between boy children and girl children; it did not matter whether the girls were married; and the distribution was to be equal, equitable and fair, taking into account how and where each child had settled so that there was minimum dislocation or disruption.

18. We have looked at how the estate of the deceased was distributed in the judgment. The distribution was reasonable and fair, given the facts of the case. We shall not interfere with it.

19. The result is that the appeal lacks merits. It is dismissed.

20. Since this was a family dispute, 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