



Ngao v Ngao (Civil Appeal 401 of 2017) [2023] KECA 123 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 123 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 401 OF 2017
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023

BETWEEN

ELIZABETH MUSILI NGAO APPELLANT

AND

AQWILILINA NDUNGE NGAO RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Family Division) (Muchelule, J.) dated 17th January 2017 in Succession Cause No. 500 of 2014)

JUDGMENT

1. Elizabeth Musili Ngao, the appellant, prefers this appeal against the Judgment of Muchelule J. delivered on 17th January 2017 in Succession Cause No. 500 of 2014 confirming the grant relating to the matter of the Estate of the late Stephen Kabibia Ngao (deceased).
2. The background to this matter begins with the demise of the deceased intestate on 21st May 2000 subsequent to which the parties herein both applied for grant of letters of administration intestate, being the widows of the deceased. A grant was issued on 10th July 2004.
3. The respondent then filed an application for confirmation of grant indicating that the deceased had left the appellant as a dependent and Isaac Ngau Ngao, Emmanuel Mwai Ngao and Saul Nzioka as the children; and sought equal distribution of the deceased's estate between her and the appellant.
4. The appellant filed a replying affidavit in protest on the grounds that the confirmation as sought was done without consulting her; and that the respondent had allocated herself the entire estate of the deceased and left her and her children out.
5. The appellant also filed an affidavit on a proposed mode of distribution in accordance with section 40 of the *Law of Succession Act*, and that the properties be registered in their joint names to be held in trust for the children, and for them to have a life interest. She also proposed that the pension be shared at 12.5% for each widow, and the children as: Saul Nzioka Ngao- 20%, Isaac Ngau Ngao-30%, Emmanuel



Mwai Ngai-25%; and that one of the deceased's properties be made available for the children to reside in instead of residential premises.

6. In her supporting affidavit the respondent explained that she got married to the deceased in 1971, who that at the time was living in a City Council house and that the only land he had was inherited; that they had jointly bought parcels no. 940, 941, 942, 1710, 1730, plot No. 26 at Makindu, and the Buru Buru House which was their matrimonial property; a motor vehicle KQN 780; and that she personally bought the houses at Umoja and Kahawa, and that, therefore, she was entitled to the entire estate apart from Dandora and Soweto Plots, the Nacico and Nahoso shares, and the pension which she asked to be equally shared.
7. The appellant then swore another affidavit dated 17th October 2008 stating that after the death of the deceased the parties jointly sold the motor vehicle and Dandora plot and shared the livestock.
8. The appellant maintained that the fact of the deceased having two families was open and within the knowledge of the respondent; that she had settled on Plot 940 a Makindu and that that she also worked and contributed to the acquisition of the property in the estate; and that all the property belonged to the deceased and therefore the same was available for distribution.
9. Vide a judgment dated 17th January 2017, the trial court having carefully considered the parties' pleadings, testimony, and evidence on record, was of the view that although the respondent claimed that the deceased had not taken another wife, her own pleadings demonstrated an acknowledgment of the other family. The learned Judge also pointed out that it was just and fair that the contribution of a spouse be taken into account when distributing the estate.
10. The trial court held that the deceased had two widows and had 3 children with the appellant. The trial court also noted that it was not clear when the deceased married the appellant, but from the birth certificates it deduced that the deceased married the appellant in the late 1980's.
11. The court upon analyzing all the evidence before it came to the conclusion that all of the deceased's property was bought before the appellant was married to the deceased. The court also found that it was not disputed that, after the death of the deceased the appellant and the respondent sold the motor vehicle and the Dandora plot and equally shared the proceeds as well as the livestock.
12. The court proceeded to find that the appellant and her children were entitled to benefit from the estate of the deceased less what the respondent would claim as her contribution, and that the respondent would be equally entitled to benefit from that portion of the deceased's estate.
13. The court also found that the Buru Buru House was the respondent's matrimonial house, and that the deceased contributed to the properties as did the respondent.
14. The court's final orders were that Buru Buru Block 76/572 and Kahawa West EE8 would go to the respondent absolutely, the respondent would also get 500 acres of the Makindu Plot and that the appellant and her 3 children would get 400 acres to be shared equally among them. The respondent would also get 40 acres of the land in Makindu and the appellant would equally share 40 acres of the remaining land with her 3 children. On the Nguu property the respondent got 5 acres and the appellant would share the remaining 5 acres with her children. The appellant also got the Soweto Plot and the plot at Makindu town to be shared equally amongst her and her 3 children. The court also held that the 3 children and the appellant would equally share the piece of land in Nunguni village and that both parties would equally share the shares in Nacico and Nahoco and that all the 5 beneficiaries would equally share the Local Government pension.



15. The court held that any unshared property would be shared equally between the appellant and the respondent, and proceeded to confirm the grant jointly to the appellant and respondent.
16. This outcome did not sit well with the appellant who prays that the appeal be allowed; that the judgment dated 17th January 2017 be set aside; and that the estate of Stephen Kabibia Ngao be distributed equitably in accordance with the [*Law of Succession Act*](#).
17. The appellant argues that the deceased's estate falls for administration under the [*Law of Succession Act*](#), and that this was the law the trial court ought to have applied when distributing the estate. Instead, the trial Judge considered article 45(3) of [*the Constitution*](#) of Kenya.
18. The appellant argues that the 2010 Constitution came into force 10 years after the deceased's death, and that it could not be applied retrospectively. The appellant further argues that the said article is applicable as between spouses, and that the case before the trial court was not between spouses but concerned distribution of intestate estate in a polygamous family.
19. The appellant further argues that the mode of distribution by the trial court was against the provisions of section 40 of the [*Law of Succession Act*](#). According to her, the mode of distribution was unfair, unjust and inequitable because the trial court allocated the respondent over half of the estate leaving the appellant to share the remainder with her 3 children.
20. She submitted that the distribution was in contravention of Section 40 of the Act, and that it should have been done according to the number of children in each house, the appellant having 3 children. Accordingly, the distribution should have been done in 1:4 ratio. She prays that the appeal be allowed.
21. On the other hand, the respondent argues that the trial court was correct in finding that the respondent and the deceased had acquired properties long before the appellant came into the picture and that the respondent had a share in the acquired assets which ought to have been taken into account before the distribution.
22. It is the respondent's contention that the trial court, as is the norm, identified the assets of the deceased available for distribution; and that the appellant did not challenge the evidence on how the properties were acquired, but that the respondent was able to show how she contributed to the properties with the deceased.
23. The respondent further argues that contrary to the appellant's assertions, there was no conflict of law between the [*Matrimonial Properties Act*](#), [*the Constitution*](#) and the [*Law of Succession Act*](#) as applied by the trial court.
24. This being a first appeal and has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as required under rule 29(1) (a) of the [*Court of Appeal Rules*](#). This duty has been reiterated in [*Abok James Odera t/a A.J. Oders & Associates v John Patrick Machira t/a Machira & Company Advocates*](#) [2013] eKLR.
25. The main issue in this appeal is the mode of distribution of the deceased's estate to his two widows.
26. In a case of this nature where the deceased died intestate, was polygamous and survived by two widows and children the anchor on distribution is section 40 of the [*Law of Succession Act*](#).
27. This Court in *Rono v Rono* [2005] eKLR when faced with distribution of a polygamous estate ordered distribution, not on the principle of ratios, but on the equitable principles, taking into consideration all the relevant factors and legal provisions.



- 28. From the record before the Court, there is no evidence that the appellant contributed to the properties that constituted the deceased’s estate, but the respondent was able to show that the properties were indeed acquired during the subsistence of the marriage between the deceased and the respondent.
- 29. The deceased did not own all the properties absolutely to the exclusion of the respondent, her contribution being taken into account, meaning that not all the properties were up for distribution. The properties were jointly owned between the respondent and the deceased. Having carefully considered the trial court’s decision, we agree with the respondent that the trial court applied the appropriate law and principle in arriving at its decision.
- 30. The finding of the trial court that consideration (of whatever nature) by a spouse must be taken into consideration by the court in distribution, as this brings to the fore what property is available for distribution echoes the legal principles of equity, and the law regarding spousal contribution towards acquisition of property. The appellant cannot now claim that all the deceased’s property is to be equally divided when she cannot show her contribution to any of the properties and taking into account the fact that she got married to the deceased way later when the deceased and the respondent had already acquired several properties. The fact that all the properties were registered in the name of the deceased did not give his estate absolute ownership to the exclusion of the respondent [See [Mugo Muiru Investments Limited vs E W B & 2 others](#) [2017] eKLR where this Court recognized that the spouse had a beneficial interest in the property in question, although her name did not appear on its title].
- 31. The learned Judge duly considered the evidence, the constitutional provisions regarding the rights of parties in a marriage and exercised his discretion judiciously. We concur with the respondent’s submission that the property was held in the ratio of 50:50 as between the respondent and the deceased, and as such it was the 50% share belonging to the deceased that was available for distribution which the court handled correctly and no injustice was occasioned. (See Margaret Mwangi Okwengu decision).
- 32. In conclusion, we find that appeal lacks merit and there is no reason to disturb the trial court’s judgment. Accordingly the appeal is hereby dismissed with costs to the respondent

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

