Kamau v Njogu (Civil Appeal E008 of 2020) [2023] KECA 432 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 432 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E008 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

APRIL 14, 2023

BETWEEN

VIRGINIA WANGARI KAMAU ..... APPELLANT

AND

JANE MUTHONI NJOGU ..... RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya at Malindi (Nyakundi, J.) dated 15th October 2019 in High Court Succession Cause No. 57 of 2015)

JUDGMENT

1. In a judgment delivered on October 15, 2019 in Succession Cause no 57 of 2015 in the matter of the estate of John Macharia Ngethe, deceased, who died on June 28, 2009, the High Court at Malindi (R. Nyakundi, J.) ordered: that the grant of letters of administration in respect of the estate of the deceased be issued in the names of the Virginia Wangari Kamau and Jane Muthoni Njogu, the appellant and the respondent respectively, as co- administrators of the estate; that the initial grant of letters of administration in Succession Cause no 4 of 2014 before the Principal Magistrate's Court at Lamu be revoked; and that the distribution of the estate be in conformity with section 40(1) of the *Law of Succession* Act.

2. The appellant, Virginia Wangari Kamau, is particularly aggrieved by the order for distribution of the estate in conformity with Section 40(1) of the *Law of Succession* Act. In her memorandum of appeal, she has complained that the Judge exercised his discretion wrongly in ordering distribution of the estate in accordance with Section 40(1); that he failed to take into account relevant facts that dictated a departure from the general provisions of that provision; and that he exercised his discretion wrongly by ordering distribution that is unfair and inequitable in the circumstance of the case.

3. The record shows that in 2014, the appellant, alongside her son Peter Mburu Kamau, petitioned the Magistrate's Court at Lamu in Succession Cause no 4 of 2014 for letters of administration in respect of the estate of the deceased, who died on June 28, 2009 at Hindi sub-location, Lamu. The survivors

of the deceased were indicated in that petition as the appellant, as the wife of the deceased; Peter Mburu Kamau, as adult son; Patrick Kamau Macharia, son aged 16 years; FNM, son aged 13 years; ANM, daughter aged 9 years; and SGM, son aged 6 years. The inventory of assets comprised solely of a property known as Lamu/Hindi Magogoni 1/327 (the property).

4. As the appellant's said petition was pending before the Magistrate's Court at Lamu in the said Succession Cause no 4 of 2014, the respondent, by a petition dated 5th May 2015, applied to the High Court at Malindi for a grant of letters of administration in respect of the deceased in Succession Cause no 57 of 2015. Both the respondent and the appellant were named as joint petitioners in that petition although the appellant maintained that she was not privy to that petition and that any signature in that petition purporting to be hers was forged.

5. It was averred in the High Court petition that the deceased died on June 28, 2009 and was survived by the respondent, as the first widow of the deceased; her children with the deceased, namely, Ann Nyambura Macharia, adult daughter; Francis Ng'ethe Macharia, adult son; Julius Njogu Macharia, minor son; and Gladys Waruguru Macharia, minor daughter; the appellant as the second widow of the deceased and her children Patrick Kamau Macharia, son; FNM, son minor; ANM, daughter minor; and SGM, son, minor. It was pleaded that the property was the only asset of the deceased.

6. By her application dated October 23, 2015 filed in Succession Cause no 57 of 2015, the appellant sought an order for the striking out of that petition. In the alternative, she prayed for an order that a grant of letters of administration of the estate of the deceased be issued to her exclusively. In her affidavit in support of that application, the appellant deposed that she filed Succession Cause no 4 of 2014 before the Magistrate's Court at Lamu in respect of the estate of the deceased; that in the process of pursuing the grant of letters of administration in that cause, her advocates were informed of the pendency of High Court Succession Cause no 57 of 2015 in which she was purportedly a petitioner alongside the respondent; that on learning that she had been joined in that petition without her knowledge she reported the matter to the Malindi Police Station.

7. On December 3, 2015, an order was recorded before the High Court calling for the file in Succession Cause no 4 of 2014 to be forwarded to the High Court. On the same day, it was also ordered that a grant of letters of administration in respect of the estate of the deceased be issued to both the appellant and the respondent; and that the appellant should file an application for confirmation of grant and that the respondent would be at liberty to file her reply to that application.

8. On February 23, 2016, the appellant presented an application before the High Court for confirmation of grant on the basis that the deceased had by written will bequeathed the property to her and that, "the mandatory six months period [had] already elapsed since" the grant was issued on December 3, 2015 and "no objection has been lodged".

9. The respondent in a replying affidavit in response denied that the deceased had bequeathed the property to the appellant. She asserted that she filed Succession Cause no 57 of 2015 with the full knowledge of her co-wife, the appellant, and made full disclosure of the beneficiaries of the estate, but the appellant declined to sign the petition; that by the time she filed Succession Cause no 57 of 2015, she was unaware of Succession Cause no 4 of 2014 filed by the appellant before the Magistrate's Court at Lamu where she concealed some of the dependants and beneficiaries of the deceased, including the respondent and her children, with the object of fraudulently denying them their share of the estate. The respondent prayed for the dismissal of the appellant's application dated February 23, 2016 and prayed for confirmation of the grant in favour of both the appellant and the respondent as administrators of the estate of their deceased husband.

10. Thereafter the appellant filed a lengthy further affidavit stating that she married the deceased in 1998; that throughout her marriage with deceased, the respondent "was never in the scene" until after the death of the deceased; that in the course of her marriage with the deceased, they approached the Settlement Fund Trustees Scheme for an advance to enable them obtain a title deed over the property; that the title was issued to the deceased on August 28, 2006 and a charge in favour of Settlement Fund Trustees created; that in order to redeem the property from the charge, the deceased and herself embarked on intense farming and applied the proceeds to defray the loan but entrusted the repayment to the deceased; and that when all that was going on, the respondent was not in the picture.

11. She deposed further that the respondent was in a "short lived marriage with the deceased" from which she walked out and re- married; that the deceased disclosed to her that he had two children with the deceased, namely ANM and FNM and that the respondent's other children do not belong to the deceased; that on February 28, 2012, the father of the deceased, one Francis Ng'ethe Gakuru convened a meeting and "purported to divide the land into two halves, giving half to the [respondent] and her household and half to" the appellant and her household; that the appellant was aggrieved bearing in mind "all the toil the deceased and [the appellant] have put into the land without any input from the [respondent] and her household"; that the suggestion to have the land divided equally between the two houses is "too unfair" as she had "sacrificed a lot" of her energy and participated in the acquisition of the property while the respondent "was only installed on the land" by the father of the deceased after the death of the deceased.

12. In a reply to the appellant's further affidavit, the respondent deposed that upon her marriage to the deceased, they were living at the deceased's parents rural home in Kiambu but the deceased would occasionally travel to Lamu; that in Kiambu, they had a nice farm which the deceased sold as he had found alternative land in Lamu; that in 2002, the deceased asked her to move to Lamu only to find that he was living with the appellant; that they lived together with the appellant and in 2003, the respondent travelled to Murang'a with her children to stay with her parents but returned to Lamu in 2008 where she continued to live with the appellant under the same roof with the deceased until his death in 2009.

13. The respondent deposed that when the deceased got ill, she was forced to move out leaving the children, as the appellant purported to be in charge of the house as the deceased was indisposed; that on the death of the deceased, the respondent was announced and recognized as the deceased's first wife at the funeral; that it is not correct as claimed by the appellant that she was brought to the land by the deceased's father; that she was all along married to the deceased and asserted that all her children she bore with the deceased, and annexed birth certificates; that the intention of the deceased prior to his death was for the land to be divided equally between the appellant and the respondent.

14. On March 22, 2016 the trial court directed that the hearing of the matter should proceed by way of oral evidence with the appellant as the plaintiff and the respondent as the defendant. On January 21, 2019, the Court, whilst noting that "there appears not to be any dispute about the relationship of the deceased and the parties" directed the parties to file further affidavits and thereafter a hearing would follow.

15. In her testimony, the appellant adopted her affidavit in support of the application she had filed to strike out the petition as well as her further affidavit; she stated that she was married to the deceased in 1998 in accordance with Kikuyu customs; that by that time the deceased was single and there was dowry negotiations and payment; that they cohabited on the property; that the respondent was a wife of the deceased but they separated; that in 2002, she welcomed the respondent and her children at the home on the property but the respondent left; that the deceased recognized two of the respondent's children.

Under cross examination, the appellant asserted that the respondent was not a wife to the deceased but is a mother to his children and that the deceased did not recognize the respondent as a legal wife.

16. In her testimony, the respondent adopted the affidavits she had filed. She stated that she married the deceased in 1988 in accordance with Kikuyu customary law and they were blessed with four children in 1988, 1992, 1995 and 2001; that the appellant is her co-wife; that the deceased left him in Kikuyu where they were living and moved to Lamu where he bought land but used to visit her and in the process the last two children were born; that she later lived with the appellant in the same house but left to seek treatment when she fell sick; that her proposal was for the property to be divided equally between the two houses. Under cross examination, she stated that she went to Lamu in 2002 with her children and stayed with the appellant in the same house with all the children; that she became sick in 2003 and left the children with the deceased; that her last two children were born in Murang'a but subsequently obtained birth certificates in Lamu; and that the title to the property was issued in 2006.

17. Ahmed Mohamed Lausie, a Senior Assistant Chief of Hindi Location, Lamu, testified that he knew the deceased as his subject; that the deceased had two wives, namely the respondent and the appellant and they all lived on the farm in the same home; that the deceased had referred a dispute involving the appellant and the respondent to the District Officer when one spouse did not want the other recognized as wife and wanted her to vacate the home. Under cross examination, the witness stated that he knew the deceased in 2001 and visited him and maintained that the appellant and the respondent lived together.

18. In his judgment, the learned trial judge identified three issues for determination. The first being whether the appellant's petition before the Magistrate's Court should be revoked. Secondly, whether two of the respondent's children, namely Gladys Waruguru and Julius Njogu, should be omitted from inheriting any share of the estate. Thirdly, whether the deceased solemnized a monogamous or polygamous marriage.

19. With respect to the question whether the appellant's petition before the Magistrate's Court should be revoked, the learned judge found that Succession Cause no 4 of 2014 was tainted with legality (sic), misrepresentation and non-disclosure of material facts as to the correct dependants of the deceased. The Judge declared that "any such purported grant of administration applied for and if issued in Succession Cause no 4 of 2014 to be fatally defective and must be struck out as of right".

20. As to whether two of the respondent's children, namely Gladys Waruguru and Julius Njogu, should be omitted from inheriting any share of the estate, the Judge found as a fact that "the children were undoubtedly issues of the union".

21. On whether the deceased solemnized a monogamous or polygamous marriage, the Judge expressed that the appellant "was economical with the truth because her interest and focus" is on the property; that the dispute is more on how the property left behind by the deceased is to be shared out between the appellant and the respondent and their respective children. In that regard, the Judge stated that "there is absence of essentials of what constitutes Kikuyu Customary marriage on both sides" but invoking the doctrine of presumption of marriage expressed that the appellant and the respondent "categorically qualify under the presumption of marriage are entitled to inherit the estate of the deceased"; that the system of marriage by presumption permits polygamy and that the deceased was a polygamist.

22. The Judge expressed that even if, as submitted by the appellant's counsel, the respondent had not contributed towards the purchase or development of the property, she was entitled as of right as widow to inherit the deceased. Citing Section 29(1) of the *Law of Succession* Act, the judge held that the property should be shared equally between the two houses and that each child is entitled to equal share

of the estate. In the end the Judge decreed that "the distribution of the estate be in conformity with Section 40(1) of the *Law of Succession* Act".

23. As already stated, the main complaint by the appellant as set out in her memorandum of appeal is that the Judge exercised his discretion wrongly by failing to take into account relevant facts that dictated a departure from the general provisions of Section 40 (1) of the *Law of Succession* Act and by ordering distribution that is unfair and inequitable in the circumstances of the case.

24. Urging the appeal before us, Mr. Muriithi, learned counsel for the appellant relied entirely on his written submissions. It was submitted that the trial Judge did not properly and exhaustively evaluate the evidence. To illustrate, counsel urged that the premise on which the Judge concluded that the appellant was economical with the truth was faulty; that contrary to the finding by the Judge that the appellant had disavowed being the petitioner in Succession Cause no 4 of 2014, the appellant had in fact owned the same; that contrary to the statement by the Judge that the appellant seemed to have no knowledge of the respondent having been married to the deceased, the appellant's evidence was that the respondent was in a short lived marriage with the deceased.

25. It was submitted that had the Judge properly and exhaustively evaluated the evidence, he would have found that there was evidence that the appellant, unlike the respondent, had assisted in the acquisition and development of the property and there was therefore a basis for departing from the rule of distribution as set out in Section 40(1) of the *Law of Succession* Act. In support, the decision of this Court in *Esther Wanjiru Githatu v Mary Wanjiru Githatu* [2019] eKLR and the decision of the High Court in the case of In *re the Estate of the Late George Cheriro Chepkosiam (Deceased)* [2017] eKLR, were cited for the proposition that the Court can identify and set aside the share of a wife who contributed in the acquisition of property before the other wife came into the scene; and the decision of this Court in *Scolastica Ndululu Suve v Agnes Nthenya Suva* [2019] eKLR for the argument that where one wife solely contributes to the acquisition of property before the arrival of the other wife, it would be unjust and unfair to distribute the property equally between the houses.

26. Lastly, it was submitted for the appellant that the Court erred in imposing Julius Njogu and Gladys Waruguru, the last two children of the respondent, as beneficiaries of the estate and in so doing ordered distribution of the estate to strangers. It was urged that there was a basis for the trial court to uphold the contention by the appellant that the two were not sired by the deceased on the basis that their birth certificates were processed after the death of the deceased, and that while the respondent stated that the two were born in Murang'a, the birth certificates indicated the place of birth as Lamu; and that those inconsistencies were sufficient "to pique incredulity".

27. Learned counsel for the respondent Miss. Marubu also relied entirely on the respondent's written submissions. She submitted that the contention by the appellant that she is entitled to a separate share of the property on grounds that she was involved in its acquisition and development is baseless and not supported by the evidence; that on the contrary, it is the respondent's half share of the property that should be set aside for her, and the remaining half share of the property be distributed in accordance with Section 40 of the *Law of Succession* Act.

28. It was submitted that the fact that the title to the property was issued in 2006 does not mean that is when it was acquired; that in fact, it was acquired before 2006 and prior to the deceased marrying the appellant. It was urged that the respondent established in her evidence that she was living in the deceased's parents' home with the deceased in Kikuyu when the deceased went to Lamu to purchase the land; that the appellant was not in the picture at the time; that if consideration is to be given to the contributions made in the acquisition or development of the property, it is the respondent who

contributed; and that the property was acquired using the proceeds of sale of their land in Kikuyu at a time when the appellant, as the second wife, "was nowhere."

29. Counsel submitted that the respondent owns half the property even though it was registered in the name of the deceased in trust; that as joint owner, the respondent's half share should be set apart for her before the other half is distributed amongst the beneficiaries under Section 40 of the Law of Succession Act. In support, counsel referred to the decision of the High Court in In *re Estate of Johnson Njogu Gichohi (Deceased)*[2018] eKLR for the proposition that where property is jointly owned, upon the death of one tenant, it passes to the surviving tenant by survivorship.

30. We have considered the appeal, the evidence and the submissions by counsel. The only issue for our consideration is whether the learned Judge wrongly exercised the court's judicial discretion in ordering the distribution of the estate of the deceased, comprising solely of the one property in accordance with Section 40(1) of the *Law of Succession* Act.

31. The circumstances in which we can interfere with the exercise of judicial discretion by a judge are circumscribed. As the Court stated in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

32. As already stated, one of the reasons the appellant has faulted the decision of the learned Judge is on account of the Judge having expressed reservations on the credibility of the appellant, when the Judge stated:

> " I was of the view that the [appellant] was economical with the truth because her interest and focus is preferably on the nature of the property of the deceased they have to share equally or as the court may decide."

33. The appellant urged that there was no basis for the Court to conclude that the appellant was being economical with the truth. In that regard, we bear in mind that the trial judge was better placed than we are to assess the credibility of the witnesses who appeared before him. As observed in *Joseph Kariuki Ndungu & another v Republic* [2010] eKLR:

> " ...the trial judge is best equipped to assess the credibility of the witnesses and that it is a principle of law that an appellate court should not interfere with those findings by the trial court which are based on the credibility of the witnesses unless no reasonable tribunal could have made such findings or it is shown that there existed errors of law."

34. The appellant readily accepted that the deceased was in what counsel referred to as a "short lived marriage" with the respondent and that the deceased and the respondent had children together. In her testimony, the appellant stated:

> " The [respondent] was a wife to the deceased but they separated. They were blessed with two children, AN and FM. The [respondent] co- wife came in 2002. I welcomed the [respondent] and the children at the home. There are two children who have been included to inherit while they are not children of the deceased. They are, 1. Julius Njogu 2. Gladys Waruguru.
>
> The deceased had recognized FN and N."

35. However, in her earlier bid to be appointed as the sole administrator of the estate of the deceased in her petition before the Magistrate's Court in Succession Cause no 4 of 2014, the appellant had made no mention of the respondent or her children. The learned Judge had a basis therefore for concluding that the appellant was economical with the truth and lacked candour in failing to disclose material facts "as to the correct dependants of the deceased." We have no basis for faulting the Judge's finding in that regard.

36. As to the complaint that the trial Judge failed to take into account the appellant's contribution in the acquisition of the property and thereby wrongly applied Section 40(1) of the *Law of Succession* Act, quite apart from the fact that the appellant's credibility was justifiably impeached, there was no credible evidence of her contribution towards the acquisition of the property. In her further affidavit sworn on 4th April 2019, the appellant deposed that she married the deceased sometime in the year 1998 and moved to live with him on the subject property. She deposed further that when she married the deceased in 1998, he was "squatting on the subject land" and that together they approached the Settlement Fund Trustees for a loan which they defrayed through her farm produce sales.

37. The respondent's testimony on the other hand was that the deceased married her in 1988 and their first three children born in 1988, 1992 and 1995 respectively before the appellant was in the picture. She testified that she was initially living with the deceased in his parent's home in Kikuyu before the deceased moved to Lamu where he purchased the property. When the testimony by the respondent is considered alongside that of the appellant that when she married the deceased in the year 1998 she moved to live with him on the subject property, it emerges that the deceased had already acquired the property when the appellant got to the scene despite her endeavor to embellish her claim by asserting that the deceased was "squatting on the subject property" when she married the deceased in 1998. There was no cogent evidence presented by the appellant of her contribution towards the acquisition of the property by the deceased.

38. The respondent in opposing the appeal prayed that her half share of the property ought to be distinguished from the estate and the other half to be distributed in accordance with Section 40 of the *Law of Succession* Act. Apart from the fact that the respondent did not cross appeal, there is equally no cogent evidence of her contribution towards the acquisition of the property. All there is, are unsupported claims by both parties in that regard in addition to claims that they have contributed to the development of the property.

39. We do not find merit in the claim by the appellant that the two younger children of the respondent should be excluded from the estate on account of their birth certificates having been obtained after the death of the deceased and on account of the statementtherein that they were born in Lamu whilst the respondent stated they were born in Murang'a. That, in itself, is insufficient to conclude that they are not the children of the deceased.

40. All in all, we find no basis for interfering with the decision of the learned trial Judge. The appeal fails and is dismissed. We uphold the decision of the trial court that the distribution of the estate be in conformity with Section 40(1) of the *Laws of Succession* Act. Considering the relationship between the parties, we order that each party will bear its own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar