Ndungu v Makara (Civil Appeal 114 of 2017) [2023] KECA 1575 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1575 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 114 OF 2017

DK MUSINGA, K M'INOTI & J MOHAMMED, JJA

OCTOBER 27, 2023

BETWEEN

ANNAH MUTHONI NDUNGU .... APPELLANT

AND

ROSEMARY WAMBUI MAKARA .... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nyeri (Ngaah, J.) dated 30th January, 2017 in Succession Cause No. 328 of 1996)

JUDGMENT

Introduction

1. This is an appeal from the judgment and decree of the High Court at Nyeri (Ngaah, J.) delivered on 30th January 2017 in Succession Cause No. 328 of 1996. The dispute herein relates to the distribution of the estate of one John Makara Muriuki alias Makara Muriuki, (the deceased). The facts discernible from the pleadings filed before the High Court are that the deceased had in his lifetime married three wives and had three households. The deceased owned various parcels of land including Tetu/Unjiru/780, Tetu/Unjiru/781, Tetu/Unjiru/782, Tetu/Unjiru/783, Tetu/Unjiru/784, Tetu/Unjiru/785, Matanya Estate Plot No. 1755, Plot No. 12 Kagunduini. The deceased also owned shares in various companies.

2. The deceased died on 9th February 1987. On 25th November 1994, John Makara Muriuki filed High Court Succession Cause No. 421 of 1994 wherein he described himself as the only son of the deceased. The other survivors of the deceased named in the Petition were the deceased's widow Dorcas Wanjira and Rosemary Wambui Makara, a daughter of the deceased (the respondent herein).

3. On 8th March 1995, Charles Maina Mwangi, (who described himself as the son of the deceased), filed High Court Succession Cause No. 48 of 1995, Eustas Ndungu Mwangi, Hannah Wangari Makara (wife) and Mwangi Makara (son) were named as the deceased's survivors.

4. On 11th December 1996, Joseph Muriuki Makara petitioned for grant of letters of administration of the deceased's estate in his capacity as the deceased's son. In the affidavit in support of the petition, the petitioner named himself as the sole survivor of the deceased.

5. On 27th October 2005 the three petitions were consolidated upon which a grant was made in the names of Charles Maina Mwangi and Joseph Ndungu Makara. On 7th September 2006 a summons for confirmation of grant was made by the said administrators, with an affidavit sworn by Joseph Ndungu Makara in support of the application, which listed Jane Makara, Jane Wambui Muriuki, Moses Maina Makara, Mwangi Makara Mucheru, Annah Muthoni and Joseph Ndungu Makara as the children of the deceased.

6. John Maina Wambui, Eustus Ndungu Mwangi, Charles Maina Mwangi, Samuel Maina Muriuki and John Makara Ndungu were named as the deceased's dependants. A proposed mode of distribution of the estate of the deceased was also included.

7. On 7th November, 2006, the respondent swore and filed an affidavit protesting the confirmation of grant and the distribution of the estate as proposed by Joseph Ndungu Makara. She averred that she was a daughter of the deceased and that the deceased had three wives, that the second wife was her mother, and that Joseph Ndungu Makara was her brother, and that the two of them were the only children born in the second house. According to her, the deceased's properties, LR Tetu/Unjiru/782, LR Tete/Unjiru/785 and Plot No. 12 Kaguindini (Muitwo wa Higi) should go to her and her brother as members of the second house.

8. In response, Joseph Ndungu Makara filed an affidavit wherein he agreed that indeed his deceased father had three wives, and that Rosemary Wambui Makara was his sister. He deposed that Plot No. 12 Kaguindini (Muitwo wa Higi) which his sister, the respondent identified as belonging to the deceased was not the deceased's property.

9. Before hearing the protest and confirmation of grant, following the death of Joseph Ndungu Makara on 4th November 2007, a fresh grant was issued on 16th May 2008 in the names of Charles Maina Mwangi, Rosemary Wambui Makara and Annah Muthoni Ndungu (the appellant herein). On 5th June 2008, the appellant was substituted in place of Joseph Ndungu Makara in her capacity as his wife.

10. Two summonses seeking confirmation of grant of the deceased's estate were filed on 7th November 2008 by the respondent and on 18th November 2008, the appellant filed another summons which was later withdrawn, with directions from the court that the appellant was at liberty to file an affidavit of protest against the summons filed by the respondent.

11. In the summons dated 7th November 2008, the respondent swore that the deceased was survived by four children namely, Mwangi Makara, Rosemary Wambui Makara, (the respondent), Moses Maina and Mwangi Makara Mucheru and four dependants namely Annah Muthoni Ndungu, (the appellant) Charles Maina Mwangi, Eustus Ndungu Makara and Jane Wambui Muriuki.

12. The respondent proposed that the estate be shared as follows: LR. Tetu/Unjiru/782 and LR Tetu/Unjiru/785 to be shared equally between the respondent and the appellant; LR. Tetu/Unjiru/780 and LR Tetu/Unjiru/783 to be given to Charles Maina Mwangi; LR. Tetu/Unjiru/784 and LR. Tetu/Unjiru/781 to be distributed to Jane Wambui Muriuki; Plot No. 622 Suguroi to be shared equally between the respondent and the appellant; Kenya Breweries Shares to be given to Eustus Ndungu Mwangi; Nyeri plot owners company shares to be distributed to Mwangi Makara; Plot No 1755 Matanya and Tetu coffee membership No. 2011 to be distributed to Jane Wambui Muriuki and Plot No. 12 Kagunduini to be shared equally between the respondent and the appellant.

13. The appellant, who was the protestor, filed an affidavit of protest and opposed the distribution of the deceased's estate as proposed by the respondent. She, however, agreed with the respondent that the Kenya Breweries shares, the Nyeri Plot Owners Company and LR. Tetu/Unjiru/783 should be shared out and distributed as proposed by the respondent. In her own proposal, the appellant did not provide for any share of the estate to the respondent. She also introduced properties which, in her view, comprised the deceased's estate, but which were apparently omitted from the list of assets available for distribution as expressed in the respondent's affidavit in support of the summons for confirmation of grant. According to the appellant, apart from the assets whose distribution is not in dispute, the rest of the estate should be distributed as follows: LR. Tetu/Unjiru/784 to be distributed to Samuel Maina Muriuki and Jane Wambui Muriuki; Suguroi Plot No. 622 to be given to John Makara Ndungu and the appellant; LR. Tetu/Unjiru/786 to be given to Charles Maina Mwangi; LR. Tetu/Unjiru/782 & 785 to be given to the appellant; LR. Tetu/Unjiru/781 to be distributed to Samuel Maina Muriuki and Jane Wambui Muriuki. Other properties which the appellant identified as comprising the deceased's estate and which should also be distributed included: Othaya Mahiga/Chinga share number 1534 which the appellant proposed should be given to John Maina Makara; Shares in Cathedral Parish Co-op, Saving and Credit Society to be given John Maina Makara and Matanya shares to be given to Mwangi Makara alias Mucheru.

14. The cause was heard and determined by the High Court, (Ngaah, J.) who rendered himself as follows:

> " For the foregoing reasons, it is not in doubt and it is legitimate to conclude that the deceased died intestate and therefore the administration and distribution of his estate are subject to intestacy provisions of the Act. Be that as it may, this court has to resolve the dispute between parties, one way or the other, and I will proceed to do just that based on the evidence on record and on the applicable law to which I have made reference. Apart from the properties referred to as LR. Tetu/Unjiru/780 and LR. Tetu/Unjiru/783 which the parties are in agreement should be given to Charles Mwangi Maina representing the first house and the shares at Kenya Breweries Limited which should be transferred to Eustus Mwangi Ndungu, I order that the rest of the estate be shared equally between the second and the third houses; in the absence of any evidence regarding the status of the second wife, the applicant Rosemary Wambui Makara and the respondent Ann Muthoni Ndungu shall represent the second house and share equally the share of the estate allocated to that house. Similarly, in the absence of evidence regarding the deceased's third widow, the third house's share shall be transferred in the name of Moses Maina Makara who shall hold it in trust for himself and for the benefit of deceased's children in the third house. For avoidance of doubt the deceased's net intestate estate shall be transmitted as follows: -
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> 1. LR. Tetu/Unjiru/780
> 2. LR. Tetu/Unjiru/783 Shall be transferred in the names of Charles Mwangi Maina absolutely.
> 3. LR. TETU/UNJIRU/781 (measuring 0.108 ha)
> 4. LR. TETU/UNJIRU/782 (measuring 0.128 ha)
> 5. LR. TETU/UNJIRU/784 (measuring 0.44 ha)
> 6. LR. TETU/UNJIRU/785 (measuring 0.4 ha)
>
> Each of these properties shall be shared equally between Rosemary Wambui Makara and Ann Muthoni Ndungu on the one hand and Moses Maina Makara on the other hand.

Each of the shares due to Rosemary Wambui Makara and Ann Muthoni Ndungu shall be registered in their names as

15. The appellant was dissatisfied with the said outcome. In the memorandum of appeal, the judgment of the trial court was faulted on the grounds that: although the deceased died intestate, the learned Judge erred in dismissing the book that he had written distributing his estate among his beneficiaries; that when the beneficiaries of the estate mistakenly filed three (3) separate petitions in respect of the same estate, they were complying with the contents of the book as each petition included only the assets left to each house; that the learned Judge should not have dismissed the book off hand, in concluding that any land that did not have a title in the name of the deceased did not form part of the estate and yet some of the titles were being processed; in distributing some of the assets in the estate to some beneficiaries who had not asked for them; in introducing a new format of distributing the estate as opposed to the one the beneficiaries had already accepted, creating more conflicts than it intended to solve; and in ignoring the fact that the deceased for reasons given did not wish to provide the respondent with any land but instead gave land to her son.

Submissions by Counsel

16. The appeal came before us for plenary hearing. Learned counsel Mr. Kebuka for the appellant highlighted the appellant's submissions. He submitted that the deceased had expressed himself during his lifetime that his estate should not be administered as purely intestate.

17. It was submitted that the deceased was polygamous, having married three wives and sired several children, and that he owned several assets in Nyeri and Laikipia Counties in the form of land, plots, company shares and bank accounts. Further, that at face value, one would conclude that for a polygamous man who died intestate his estate should be distributed as per Section 40 of the *Law of Succession Act*. Counsel submitted that it was not in dispute that the deceased had expressed himself to his family in the manner he desired his estate to be shared among them after his demise, and had written in a book specifying which beneficiary was to inherit which asset, a book that was produced in its translated version in court.

18. It was further submitted that it was a mistake that the three petitions were filed in relation to the estate, but the petitioners had already accepted the contents in that book and were ready to take the assets that had been bequeathed to them, and that being laymen they should be forgiven for assuming that each house could file separate succession petitions. Reliance was placed in the High Court Case, Machakos Civil Appeal No 115 of 2019, *John Makau Nzolove v John Kithuka,David Nzolove &2 others*.

19. It was contended that the trial Judge ignored the existence of Plot No. 622 Suguroi, Nyeri Plot Owners Company Shares, Plot No. 1755 Matanya, Tetu Coffee Membership No. 3011, Plot No. 12 Kagunduini, Othaya Mahiga/Chinga shares number 1534 and Cathedral Parish Co-operative Savings & Credit yet the beneficiaries knew their existence that for instance the appellant produced receipts for payment of Plot No. 622 Suguroi but the trial Judge ignored them and so they will remain undistributed.

20. Finally, it was submitted that the dispute was between the appellant and the respondent in respect of only two assets being Tetu/Unjiru/782 and 785 and the trial Judge went out of his way to bring in parties who did not appear in court to make a claim. It was further submitted that the said two plots were to be distributed to the second house but the learned Judge brought in the third house and Moses Maina Makara who did not come to court to claim any part of the estate and he should therefore not have been given any part thereof.

21. Further, that the basis of distribution of the estate of the deceased should have been the book that the deceased left and that the court should only have allowed amendments to make it enforceable especially where the deceased allocated some assets to himself and yet he wanted his wishes to be implemented after his death.

22. In his brief rejoinder, Mr. Kiminda, learned counsel for the respondent contended in his written submissions that the appeal lacked merit. Counsel submitted that it was not in dispute that the deceased was polygamous and had three houses; that the appellant was married by a son of the second house and as such both the appellant and the respondent belong to the same house; and that the other two houses have no issue in the mode the estate was distributed by the trial court. Counsel further submitted that the properties in contention are Tetu/Unjiru/781,782,784 and 785; that the trial court made a finding that the appellant and the respondent share equally the properties and that there was no issue in contention as they are the only children of the second house.

23. Finally, on the contention that some assets of the estate were not distributed, it was submitted that the trial court found that sufficient material was not tendered in court to ascertain the existence of the particular assets and that the trial court therefore cannot be faulted.

    Further, that if the appellant found sufficient evidence to support the existence of a particular asset, she would simply make an application in court regarding the assets that had been discovered.

Determination

24. The duty of this Court as a first appellate court is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own independent conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See: *Selle & Another V. Associated Motor Boat Co. Ltd & Others* (1968) EA 123.

25. In our assessment, this is a straight forward appeal where only one issue stands out for our consideration in the matter to wit; whether the undated "book" authored by the deceased was a valid Will of the deceased.

26. As we have seen in the submissions of the respondent's counsel, there is an attack of the book which was produced in court by the appellant as containing the last wishes of the deceased on how his estate would be dealt with. According to the appellant, the deceased made his wishes known in accordance with a "book" which she produced in court on 18th March 2015. The deceased however died on 19th February 1987. This was twenty-eight (28) years since the deceased had made the alleged wishes.

27. A "Will" under Section 2 of the *Law of Succession Act* is defined as a legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death duly made and executed according to the provisions of Part II of the *Law of Succession Act*.

28. Regarding the contest on the validity of the will, Section 11 of the *Law of Succession Act* sets out a trio of requirements for the formal validity of written wills as follows:

    " No written will shall be valid unless—

    a. the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

    b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."[Emphasis supplied].

29. The respondent's submissions contained a frontal attack on the validity of the book said to be the deceased's last wishes. It was claimed that it lacked the statutory requirement of proper and valid will. The trial court noted that the book was questionable as "when the petition was lodged in court, no Will was filed alongside the petition or annexed to it; where it is alleged that a Will exists section 51(3) of the *Law of Succession Act* requires of petitioner to annex it to the petition."

30. The learned Judge in determining the issue of validity of the will was fully cognizant of Section 11 of the *Law of Succession Act* and observed as follows:

> " The document alleged to have encapsulated the deceased's wishes and which the petitioner sought to rely upon falls short of what in law amounts to a will; at very basic, it does not meet or comply with the formalities of a written will as prescribed under section 11 of the *Law of Succession Act*
>
> For the foregoing reasons, it is not in doubt and it is legitimate to conclude that the deceased died intestate and therefore the administration and distribution of his estate are subject to intestacy provisions of the Act."

31. In keeping with our mandate as a first appellate court, we have examined the impugned book. It is clear that the book was not in compliance with Section 11 of the Act, which provides that no written Will shall be valid unless the testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator; that the signature or mark of the testator, or the signature of the person signing for him is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will; and that the Will is attested by two or more competent witnesses each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator; or have received from the testator a personal acknowledgment of his signature or mark; or of the signature of that other person; and that all the witnesses must sign the Will in the presence of the testator.

32. Further, the argument against the book was that it was an after-thought as the same was not attached to the petition at the time of filing the petition in court. As it was noted by the court, the learned Judge cannot therefore be faulted for his findings on lack of validity of the book suggested by the appellant to be the deceased's Will. Clearly, the learned Judge found that the book did not qualify as a will and determined that the estate shall be distributed under intestacy laws. We find that in the circumstances, the learned Judge did not err. We therefore cannot fault the learned Judge when he came to the finding that the deceased died intestate.

33. Having died intestate, the provisions of Section 40 of the *Law of Succession Act* are applicable. It provides as follows:

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 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.

(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."

34. In view of the express provisions of that section, we cannot fault the learned trial Judge for finding that the deceased's estate was to be divided equally amongst his children, including those who had not raised any complaints. From the record, the deceased intended to leave the land to the respondent's son and not to the respondent. However, the law does not make provision for the exclusion of any of the deceased's children, unless this is stated in a valid will, which we have found did not exist.

35. The result is that the appeal fails in its entirety, and is accordingly dismissed. This being a family matter, the order that commends itself to us is that each party shall bear its own costs of the proceedings in the High Court and of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023

D. K. MUSINGA (P)

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JUDGE OF APPEAL

KATHURIMA M'INOTI

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JUDGE OF APPEAL

JAMILA MOHAMMED

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR