Munyole v Munyole (Civil Appeal 21 of 2017)
[2022] KECA 373 (KLR) (18 February 2022) (Judgment)

Neutral citation: [2022] KECA 373 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 21 OF 2017

K M'INOTI, M NGUGI & PO KIAGE, JJA

FEBRUARY 18, 2022

BETWEEN

GRACE NAMAROME MUNYOLE ..... APPELLANT

AND

WILLIAM WANJALA MUNYOLE ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (Ali-Aroni J) dated 20th January, 2017 in Bungoma P&A Cause No. 86 of 2000)

JUDGMENT

1. The appellant is aggrieved by the manner of distribution of the estate of Justus Munyole Nakitare (deceased) between the two houses of the deceased directed in the decision of Ali-Aroni J dated 20th January 2017. She has accordingly filed the present appeal in which she asks the Court to direct that the estate should be distributed as she had proposed before the High Court, with each house retaining the property it had occupied prior to the decision of the court.

2. The dispute relating to the estate of the deceased is somewhat convoluted, and the Record of Appeal is not very helpful. The proceedings before the trial court, which go back some twenty-two years to 2000 when the succession cause appears to have been filed in the High Court, have been omitted. The appellant did file a Supplementary Record of Appeal dated 17th September 2021 which unfortunately does not incorporate the proceedings, comprising only a decree, an attendance list at a clan meeting, minutes of the meeting and proceedings of the Land Disputes Tribunal to which the appellant had referred the matter in 1996. We accordingly summarise hereunder what can be gleaned from the Record of Appeal and the judgment of the trial court as the facts forming the background to the present appeal.

3. The deceased died intestate on 6thJune 1983 at Sikulu village, Chwele, in Bungoma. The deceased was polygamous, his first wife being Susan Munyole while the appellant was the second wife. The deceased had 20 children, with his dependants from each house being the following:

1st House

1. Susan Nekesa Munyole – Widow
2. William Wanjala Munyole - Son
3. James Lubekho Munyole – Son
4. Charles Lubekho Munyole – Son
5. Wycliffe Sawenja Munyole – Son
6. Aggrey Wanyonyi Munyole – Son
7. Stephen Wakhungu Munyole – Son
8. Kennedy Sitati Munyole – Son
9. Alex Masika Munyole – Son
10. Priscilla Nasimiyu Wafula – Daughter
11. Jane Nafula Odipo – Daughter
12. Dorcas Nelima Barasa – Daughter
13. Mary Naliaka Wekesa – Daughter

2nd House

1. Grace Namarome Munyole – Widow
2. Edward Mathani Munyole – Son
3. Stanley Kibichori Munyole – Son
4. Juliet Nangila Khisa – Daughter
5. Alice Musundi Munyole – Daughter
6. Juliet Nafula Munyole – Daughter
7. Ruth Matecho Munyole – Daughter

4. It appears that four sons of the deceased, namely Wycliffe Munyole, Hannington W. Munyole, Alex M. Munyole and Edward M. Munyole are also deceased. Also deceased was one daughter, Rebecca N. Munyole. A fifth son, Stephen Munyole, was lost, apparently since 2009. One grandson of the deceased, Godwin Walela Munyole, was also indicated as a dependant from the first house.

5. The estate of the deceased comprised two properties, Bokoli/Chwele/892 measuring 10.46 hectares which was occupied by the first house and Bokoli/Chwele/1065 measuring 12.33 hectares occupied by the 2nd house.

6. A decade or so after the death of the deceased, the respondent, William Wanjala Munyole, his eldest son from the first house, petitioned the Senior Resident's Magistrate's Court in Bungoma P & A Cause Number 5 of 1994 for letters of administration intestate. He named his brothers from both houses and a grandson as the beneficiaries of the estate, leaving out the widows and daughters of the deceased. A grant was issued to the respondent on 3rd November, 1994.

7. On her part, the appellant lodged a caution against the title to Bokoli/Chwele/1065. The appellant also filed Case No. 6 of 1996 with the Land Disputes Tribunal claiming the said land, and the Land Disputes Tribunal found in her favour. The award was subsequently adopted as an order of the court in Misc. Application No. 130 of 1996. The respondent's appeal against the decision of the Land Disputes Tribunal was unsuccessful, the Kakamega Appeals Committee affirming the award in favour of the appellant on 23rd September 2000. On the basis of the award in her favour, the appellant proceeded to have herself registered as the owner of Bokoli/Chwele/1065 and obtained a title on 18th June, 1999.

8. The respondent thereafter filed an application for confirmation of the grant issued to him dated 16th June, 2000 seeking equal distribution of the estate of the deceased among the sons and a grandson of the deceased. The application was struck out on 5th October 2001 for failure to comply with various provisions of the Law of Succession Act and the Probate and Administration Rules. The respondent was directed by the court to file a fresh application. The respondent then filed a fresh application for confirmation of grant on 23rd September 2002. In this application, the respondent named the sons, daughters, the two widows and a grandson of the deceased as beneficiaries of the estate.

9. The Record of Appeal indicates that on 12th February 2009, the High Court issued an order cancelling the registration of the appellant as the registered owner of land parcel number Bokoli Chwele/1065 to facilitate distribution of the estate of the deceased.

10. The appellant then filed an objection to the confirmation of grant and the proposed distribution contained in the application for confirmation of grant filed by the respondent dated 23rd September 2002. In the affidavit of protest sworn on 2nd July 2014, the appellant averred that the two houses of the deceased had been residing on different parcels since 1963. Her family had resided on Bokoli/Chwele/1065 while the family of the first house resided on Bokoli/Chwele/892. It was her contention that this represented the wishes of the deceased and should not be interfered with. The two houses should continue occupying the parcels that they had been occupying and there should be no redistribution of the estate.

11. In its decision, the court identified the issue for determination as being whether the court should sustain the arrangement of the widows and their children on the respective parcels of land, and what law was applicable in the matter. The court found that the applicable law was section 40 of the *Law of Succession Act*, the deceased having died intestate and left two widows and children. None of the children of the deceased had renounced their interest in the estate. However, the court accepted the averment by the respondent that the 1st widow was aged 90 years and was not interested in the estate. The court also noted that with the exception of one unmarried daughter from the second house, none of the other daughters of the deceased had evinced an interest in the estate, despite the protracted dispute over its distribution.

12. The trial court considered the argument of the appellant that the deceased had given her land parcel number Bokoli/Chwele/1065 but found that no evidence had been placed before it to show that the deceased had made a gift inter vivos to the appellant. Accordingly, the court held that the most equitable way of dealing with the estate of the deceased was to distribute the two properties to the heirs as a whole, but as far as possible maintaining the heirs where they were currently located. It accordingly distributed the estate as follows:

    1st House

    1. William Wanjala Munyole- Bokoli/Chwele/892- 5 acres

    2. James L. Munyole- Bokoli/Chwele/892- 2.8 acres

3. Aggrey W. Munyole- Bokoli/Chwele/892- 4.8 acres
4. Patrick N. Munyole- Bokoli/Chwele/892- 4.8 acres
5. Estate of Alex M. Munyole- Bokoli/Chwele/892- 4.72 acres
6. Estate of Wycliffe Munyole- Bokoli/Chwele/1065- 4.72 acres
7. Stephen W. Munyole- Bokoli/Chwele/1065- 4.72 acres
8. Kennedy S. Munyole-Bokoli/Chwele/892- 4.8 acres

2nd House

1. Grace Namarome Munyole- Bokoli/Chwele/1065- 2 acres
2. Estate of Hannington Munyole- Bokoli/Chwele/1065 4.72 acres
3. Estate of Edward Munyole- Bokoli/Chwele/1065 4.72 acres
4. Stanley Munyole- Bokoli/Chwele/1065 4.8 acres
5. Juliet A. Munyole- Bokoli/Chwele/1065 2 acres

13. The appellant was aggrieved by the decision of the trial court. She filed a Notice of Appeal dated 31st January, 2017 and a Memorandum of Appeal dated 23rd February, 2017 in which she raised thirteen grounds of appeal. In summary, these are that the trial court erred in law and fact in: failing to find that the dispute was about the two families of the deceased in the respective houses; failing to find that the respondent had obtained the grant of letters of administration intestate in the estate of the deceased without the consent of the 2nd house; and failing to find that the deceased had separated his two houses in 1963 after there was a serious altercation in which the 1st house forced the 2nd house out of land parcel No. Bokoli/Chwele/892 where both families were staying as a result of which the deceased bought Land parcel No. Bokoli/Chwele/1065 specifically for the 2nd house's occupation and settlement.

14. The appellant further faults the decision of the trial court for failing to find that the 1st house did not involve the 2nd house in the initial stages of the succession process; that it failed to find that the 2nd house only learned of the succession of the estate of the deceased at the confirmation stage when they were listed as beneficiaries; erred in failing to find that the wishes of the deceased were to see the two families stay in separate parcels of land for the sake of peace and stability due to the hostility of the 1st house against the 2nd house; erred in failing to find and take into account that the appellant had initially obtained title for the land bought for the 2nd house by the deceased after a long standing dispute arbitrated and resolved by the Land Disputes Tribunal; failed to find that the respondent and his house did not allow her house to have an administrator in the estate of the deceased; erred in failing to find that the respondent, as the elder son in the 1st house, together with his brothers, unlawfully sold part of their land before distribution to the beneficiaries and it was not therefore possible for him to purport to apply for equal shares of the estate of the deceased.

15. The appellant also challenges the decision of the trial court for failing to find that the respondent's aim was to grab and sell the land belonging to the 2nd house in order to make money for his own selfish interests; for failing to find that the two houses of the deceased have never stayed together as they were separated by the deceased in 1963 due to the hostility of the 1st house and mixing the land in sharing the estate of the deceased would not help them unite; that the court erred in not taking into account the resolution of the clan elders which the appellant had provided to the court; and that the trial court erred in taking into account extraneous matters from the respondent and failing to take into account

the weighty issues that the appellant had raised. She therefore prayed that the decision of the trial court be set aside.

16. In her submissions dated 17th September 2021, the appellant essentially reiterates her arguments that she and her house should remain on the land parcel that they had been occupying since 1963 as this represents the wishes of the deceased. She also argues that her house was not involved in the process of obtaining grant of letters of administration intestate to the estate.

17. It is also her submission that the deceased wished that his two families should stay in different locations so that they could live in peace. This was why he had settled the appellant on Bokoli/Chwele/1065 located in Sichei sub location and had left his 1st wife to occupy land parcel number Bokoli/Chwele /892 located in Sikulu sub location, and that the two houses had lived in these separate parcels since 1963. According to the appellant, the deceased had settled his wives in separate parcels of land in different sub-locations due to the hostility between the two wives. In her view, therefore, the mode of distribution of the estate should be one that respects the wishes of the deceased.

18. The appellant further submits that since 38 years have elapsed following the death of the deceased, the doctrine of estoppel should be invoked to bar the respondent from interfering with the wishes of the deceased as he had been satisfied with the way the deceased had settled his two wives on separate properties for the sake of peace. The appellant relies on the decision *in Re Estate of the Late Shwanyang Ngilochoi(Deceased)(2021)eKLR* in support of this submission.

19. In his submissions in reply, the respondent notes that the appellant has not stated which of her grounds of appeal relate to matters of law and which of facts, and in his view, the 13 grounds of appeal are not valid as the trial court had done a thorough review of the history of the matter.

20. It is his submission further that the trial court distributed the estate of the deceased in accordance with the advice of the Balako clan to which the deceased belonged but the appellant wants to impose her view with respect to the distribution. He notes that contrary to the submissions and averments of the appellant, land parcel number Bokoli/Chwele/892 measures 10.46 Ha or 26.15 acres while Bokoli/Chwele/1065 measures 12.33 Ha or 30.82 acres. He asks the Court to dismiss the appellant's appeal and uphold the mode of distribution directed by the trial court.

21. We have considered the pleadings in the Record of Appeal and the judgment of the trial court as well as the appellant's grounds of appeal and the submissions of the parties. In our view, while the appellant has raised several grounds of appeal, these do not really detract from the main issue for consideration in this matter, which is how the estate of the deceased should be distributed, and whether the trial court erred in distributing it in the manner that it did. We say this noting that while the appellant had complained about not being involved at the inception of the succession proceedings, this is no longer a material consideration as the trial court had struck out the application for confirmation of grant and had directed that a fresh application be filed. This latter application included all the beneficiaries of the estate of the deceased, and the appellant had been able to participate fully in the proceedings before the High Court.

22. From the background facts that we have summarized above, there is no dispute that the deceased was polygamous and that he had two houses. There is also no dispute that he died intestate leaving two widows and twenty children, some of whom are now deceased. Accordingly, we are satisfied that the trial court properly concluded that the law applicable to the distribution of the estate of the deceased was the Law of Succession Act, section 40 of which provides that:

    (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 intestate 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.

23. The law thus requires that the estate of a person who was polygamous and who died intestate should be divided among his houses according to the number of children in each house. The purpose of this provision is to ensure that there is equity in distribution of the estate without any form of discrimination amongst the surviving wives and children of the deceased.

24. There is provision in the Act, however, for any gifts or settlements made by the deceased to any beneficiaries in his lifetime to be taken into consideration in the distribution of the estate. Section 42 of the Act provides that where:

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

25. In order for the court to conclude that a deceased person had made a gift inter vivos to a beneficiary, evidence must be led to this effect. We note that the trial court considered this question and came to the conclusion that no evidence had been placed before it to show that the deceased had intended that each house should occupy the parcel of land that it was occupying at the time of his death. The trial court observed as follows:

24. The objector in her case pursues the argument that her deceased husband had given her the land because he bought and settled her there.In *Dan Ouya Kodwar versus Samuel Otieno Odwar and another SUCC.NO. 142 of 2015* Mrima J stated inter alia;

> "There are only two types of gifts in law. There are those gifts between living persons (gift inter vivos) and those in contemplation of death (gift mortis causa)"
>
> *In Re Estate of the Late Gedion Manthi Nzioka* 2015 eKLR P.Nyamweya J also considered the subject. She held that Section 31 of the Law of Succession dealt with gift in contemplation of death. And in considering this type of gift the court is obligated to consider provisions of Section 31(a) & (f). The gift would only arise where the death of the donor was contemplated.

For gift inter vivos she stated

> " the requirements of the law are that the gift may be granted by deed, an instrument in writing, by way of a declaration of trust by the donor or by way of resulting trust or presumption of (sic). Gifts of land must be by way of transfer, or if the land is not registered it must be in writing or by declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid...."

26. The trial court concluded that the deceased had not distributed or gifted any of his two properties to any of the beneficiaries during his lifetime as no evidence had been placed before it to show that he had done so. Both of the deceased's properties were therefore available for distribution to all his beneficiaries in accordance with section 40 of the Law of Succession Act.

27. Having considered the affidavit evidence presented before the trial court, we find no basis to fault the conclusion that it arrived at. Aside from the appellant's averments that the deceased purchased Bokoli/Chwele/1065 and settled her house on it as there was hostility between her house and that of her co-wife, no evidence was tendered to show that this property was gifted to her and her house by the deceased in his lifetime. Both of the deceased's properties, therefore, were available for distribution between his beneficiaries from both houses in accordance with the provisions of section 40 of the Law of Succession Act. As was further observed by the trial court, this section requires equitable distribution of the property of a deceased person, taking into consideration the circumstances surrounding the case. The trial court reached this conclusion, rightly in our view, on the authority of this Court's decision in *Mary Rono v Jane Rono & another* [2005] eKLR.

28. The circumstances of this case are that the deceased had two houses, one with 8 beneficiaries interested in a share of the estate, and one with five. His estate comprised two properties, Bokoli/Chwele/892 measuring 26.15 acres and. Bokoli/Chwele /1065 measuring 30.82 acres. An equitable distribution of the estate of the deceased requires that both properties be shared between the beneficiaries of the deceased equitably, so that none of the beneficiaries is disadvantaged in the mode of distribution adopted. While we note that the distribution by the trial court resulted in the sons of the deceased receiving larger portions of the estate than the daughter of the deceased who was interested in the estate, we note that there was no complaint or appeal lodged by the said daughter. The only party dissatisfied with the distribution being the appellant, and having found that she had not placed any material before the trial court to enable it find that the deceased had intended that Bokoli/Chwele /1065 should devolve to her house, we find no basis for interfering with the decision of the trial court.

29. In the circumstances, we find no merit in this appeal. It is hereby dismissed but with no order as to costs.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF FEBRUARY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR