Ndorobwa & 3 others v Marango & another (Civil Appeal 33 of 2018)
[2022] KECA 1040 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KECA 1040 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 33 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 23, 2022

BETWEEN

SIUNDU NDOROBWA ..... 1ST APPLICANT

SIUNDU NDOROBWA ..... 2ND APPLICANT

AND

STEPHEN MARANGO ..... 1ST APPELLANT

STEPHEN MARANGO ..... 2ND APPELLANT

AND

MICHAEL WANJALA MARANGO ..... 1ST RESPONDENT

MICHAEL WANJALA MARANGO ..... 2ND RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (Ali Aroni J.) dated 1st February, 2018 in Probate & Administration Cause No. 403 of 2010 formerly High Court Civil Appeal No. 72 of 1995)

JUDGMENT

Judgment of Mumbi Ngugi JA

1. The appellants and the respondent are siblings, sons of Marango Wenina, the registered proprietor of land parcel number Bungoma/Kibisi/339 who died intestate in 1975. The deceased was survived by four sons, one Khaemba Marango, the appellants, the respondent, and several daughters, but the record of the High Court indicates that the daughters had no interest in the estate of the deceased.

2. It is common ground that the respondent and the deceased lived together on the suit property until the demise of the deceased. Sometime after the death of the deceased, the respondent petitioned for letters

of administration intestate, which were granted by the Principal Magistrate's Court in Bungoma in Succession Cause No 47 of 1993. I observe that the record on this matter, which has been in the court system for well-nigh 30 years, is not very clear. However, it appears that the appellants, dissatisfied with the decision of the Principal Magistrate in Bungoma, filed High Court Civil Appeal No 72 of 1995. By a consent dated September 19, 1999, the appellant's appeal in the matter was allowed, the letters of administration issued to the respondent were revoked, and fresh letters of administration were issued to the appellants and the respondent. The matter was thereafter assigned Succession Cause No 403 of 2010. Since the parties were unable to agree on the distribution of the estate, directions were given that it should be heard by way of oral evidence.

3. The matter was ultimately heard by the Ali Aroni J (as she then was) sitting in Bungoma. In her decision dated February 1, 2018, the learned trial judge found in favour of the respondent, holding that the respondent was entitled to the suit property as the appellants each had 15 acres of land which the deceased had registered in their names, but had not registered any land in the name of the respondent as he was under age at the time the land was registered.

4. Dissatisfied with the decision, the appellants filed the present appeal in which they raise nine grounds of appeal in the memorandum of appeal dated March 26, 2018. The appellants contend in these grounds that the High Court erred in law and fact when: it overlooked their uncontroverted evidence; failed to consider their documents and exhibits; failed to consider that the appellants and the respondent were all heirs of the estate; overlooked their submissions while relying on those of the respondent; failed to consider that the suit property was the only asset of the estate of the deceased and that they all had equal rights to a share of the estate; failed to consider the distribution of the estate as determined by their clan members believed the evidence of the respondent while the appellants had worked and bought their respective shares out of their sweat.

5. The issues identified for determination by the High Court were whether the deceased died intestate, what property he left behind, and who was to inherit the said property. It found that indeed he had died interstate, and that he had only one property registered in his name. The High Court accepted the respondent's version of events- that the appellants were not entitled to the two acres each that they claimed out of the suit land, Bungoma/Kibisi/339, which was registered in the name of the deceased and in which the respondent and the deceased had been residing at the time of the deceased's death.

6. According to the appellants, the deceased had died intestate, leaving only one asset, the suit property, measuring 15 acres. In 1985, their clan had shared the said property among the deceased's four sons, with the appellants and Khaemba Marango each to receive 2 acres while the respondent was to receive 9 acres. They contended that the appellants and Khaemba Marango had bought land elsewhere where they were staying. Upon realizing that the respondent had no land of his own, they had agreed to give him a larger portion of the deceased's land.

7. The respondent's case was that the deceased had acquired 4 shares in Kibisi Settlement Scheme, each measuring approximately 15 acres. The deceased had caused three of the shares to be registered in the names of his sons. Khaemba Marango was registered as the proprietor of Bungoma/Kibisi/329, Siundu Ndorobwa as proprietor of Bungoma/Kibisi/183 while Stephen Marango was registered as proprietor of Bungoma/Kibisi/166. The deceased had registered Bungoma/Kibisi/339 in his names to hold in trust for the respondent since, at the time of registration of the land parcels, the respondent was about 15 or 16 years of age. It was his case further that he had cleared the loan on the suit property with the Settlement Fund Trustees and had applied for grant of letters of administration to the deceased's estate without involving his brothers since the land belonged to him.

8. At the hearing of the appeal, Mr Stephen Marango, the 2nd appellant who also indicated that he was appearing on behalf of the 1st appellant, informed this court that the appellants would rely on their submissions dated August 22, 2019. In these submissions, the appellants fault the High Court for failing to note that at the time of allocation of land at the settlement scheme, they were working and were in a position to obtain the shares in the settlement scheme without any support from the deceased. They maintain that the two land parcels registered in their names were obtained from their sweat.

9. The appellants contend further that the High Court, having accepted that they are heirs of the deceased, should have distributed the suit land among them in accordance with the wishes of the clan. The High Court had erred in overlooking the mandate of the clan since the deceased died without having written a will.

10. The respondent did not appear at the hearing of the appeal, either in person or through counsel, nor did he file submissions in response.

11. The main issue for determination in the present appeal is whether the High Court erred in reaching the conclusion that the suit property was intended for the respondent and that the appellants were not entitled to a share of it as they claimed.

12. As a first appellate court, we are required to re-evaluate the evidence before the trial court and reach our own conclusion-see *Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123*.

13. Each of the parties to this appeal testified before the trial court. The evidence that emerged was that the deceased had acquired 4 shares, each measuring approximately 15 acres. Three of these shares had been registered in the name of the three sons of the deceased: Bungoma/Kibisi/329 in the name of Khaemba Marango, Bungoma/Kibisi/183 in the name of Siundu Ndorobwa while Bungoma/Kibisi/166 was registered in the names of Stephen Marango. The fourth share was registered in the name of the deceased. The 1st appellant conceded at the hearing that the suit property was registered in their father's name on behalf of the respondent. He maintained, however, that they had accepted 2 acres out of the suit property as it was their father's land. He further conceded that if he received two acres out of the suit land, he would have a total of 17 acres, which he stated was his luck.

14. On his part, the 2nd appellant testified that the suit property belonged to the deceased. Upon his demise, the property should have been divided to all of the sons of the deceased. He conceded that he and the appellant did not live with the deceased on the suit property, but maintained that in accordance with the decision of the clan, he and the 1st appellant were entitled to 2 acres out of the suit property. He could not, however, explain why the deceased had not subdivided the land in his lifetime, and he conceded that the respondent had sold part of the suit property to pay off a loan. He also admitted that they got their land by virtue of their father.

15. The argument before the High Court by the appellants, which they have advanced before us also, is that they are entitled to 2 acres each from the suit land as they bought the land parcels registered in their names- Bungoma/Kibisi/329, Bungoma/Kibisi/183 and Bungoma/Kibisi/166 respectively- but are willing to leave 9 acres of the suit property- Bungoma/Kibisi/339-to the respondent. The respondent argued, a position that the High Court found more credible, that the deceased registered the land in his name, but in trust for the respondent, who was then a minor.

16. I have considered the judgment of the trial court, the appellants' submissions, and the respective positions of the parties before the trial court. I am persuaded that the High Court properly addressed its mind to the issue before it and reached the correct conclusion. The three older sons of the deceased each had a parcel of land measuring 15 acres registered in his name. The deceased lived with the respondent,

his youngest son, on the suit property. The respondent was a minor at the time the four parcels of land were registered. The trial court, which heard and saw the parties testify, accepted the version of the respondent as more credible.

17. Section 42 of the *Law of Succession Act* provides that previous benefits to a beneficiary should be taken into account in distribution of a deceased's estate. It states 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 of this act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

18. This is what, in my view, occurred in the present case, and the trial court was correct in its finding that the deceased had distributed land to the appellants inter vivos, leaving the parcel registered in his name to the respondent. The deceased had acquired four properties from the Settlement Fund Trustees. He was the squatter on the land, and as conceded by the appellants, the government was settling squatters.

19. The evidence before the trial court was that each of the three older sons had been given Kshs 101 by the deceased to pay for the land parcels, namely Bungoma/Kibisi/329, Bungoma/Kibisi/183, Bungoma/Kibisi/166 and Bungoma/Kibisi/339, each measuring 15 acres. While the appellants contend that they obtained the land parcels through their own sweat, they did not adduce any evidence to counter the respondent's contention that all the land parcels had been obtained by the deceased, and that the suit property was not registered in his name as he was then a minor.

20. In *Johannes Mbugua Muchuku v Lois Wangui Muchuku & 6 others [2016] eKLR* this court held that

> " Section 42 of the act which was reviewed by the learned judge provides clearly that gifts inter vivos are not a bar to getting a share of the residue of the intestate estate of a deceased person but that these should be taken into consideration at the time of distribution".

21. The appellants claim that they are entitled to two acres from the suit property as they are sons of the deceased. They contend that such a distribution would accord with a decision reached by their clan in 1985. They did not, however, call any of the clan members to testify to the fact that such a meeting had been held and a decision reached. Even if there had been such a meeting and decision, as the trial court rightly found, it would not have been binding on the court. Having already received 15 acres each from the deceased in his lifetime, it would have been unfair for them to receive an additional 2 acres, at the expense of the respondent, who was entitled to an equal share with them as a son of the deceased.

22. I therefore find that this appeal has no merit, and I would dismiss it in its entirety.

23. As this is a family matter and noting that the respondent did not appear at the hearing of the appeal, I would direct that each party bears its own costs.

Judgment of Kiage, JA

1. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, JA I entirely agree with it and have nothing useful to add.

As Tuiyott, JA also agrees, it is so ordered.

Judgment of Tuiyott, JA

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR