Ndirangu v Ndirangu (Civil Appeal 141 of 2019)
[2022] KECA 1296 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1296 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 141 OF 2019

W KARANJA, HM OKWENGU & KI LAIBUTA, JJA

DECEMBER 2, 2022

BETWEEN

ROBERT KAHIGA NDIRANGU ..... APPELLANT

AND

ELISHA KAHIGA NDIRANGU ..... RESPONDENT

(Being an appeal against the decision and order of the High Court of Kenya at Nyeri (Mshila, J.) delivered on 5th October, 2017 in Succession Cause No. 335 of 2008)

JUDGMENT

1. On October 5, 2017, the High Court at Nyeri (Mshila, J) delivered a judgment in a succession dispute relating to the estate of the late Elisha Ndirangu Kahiga alias Elisha Ndirangu (deceased), who had died on June 25, 2005. The deceased was said to have died testate and the dispute concerned the validity of the will and distribution of his estate.

2. The respondent, Elisha Kahiga Ndirangu alias Kahiga Ndirangu Muriungi, a son to the deceased had kicked the ball rolling by filing summons for confirmation of grant of probate dated March 27, 2010, with the will annexed, seeking to have the will of the deceased confirmed. The appellant, Robert Kahiga Ndirangu (Robert), also a son to the deceased, lodged a protest disputing the will.

3. The learned judge, having heard the application and the protest, found that the written will was valid and directed that the assets enumerated in the will be distributed in accordance with the mode proposed in the will, and that the assets not enumerated in the will, but identified as belonging to the deceased, be divided equally amongst all the deceased's children.

4. Robert, who was dissatisfied with the judgment of the High Court, lodged an appeal before this court contesting the decision of the learned judge on 7 grounds on which he faulted the learned judge for: finding that the written will was a valid will; proceeding to distribute property number Gituamba/ Muhotetu Block 2/357 twice; finding that the deceased owned 6 shares at Kedong Ranch listed in the

will contrary to the evidence adduced; failing to find that most of the deceased's properties had been sold, and that there was a need for an inventory of assets before distribution; and in failing to find that the will did not adequately provide for some of the beneficiaries while a few got the lion's share of the estate.

5. Robert filed submissions in support of the appeal. He argued that, although the deceased could not read or write in English, the will was written in English, but no certificate was produced to confirm that the will was read out to the deceased in a language that he understood. He questioned the deceased's failure to instruct an advocate to prepare the codicil. He maintained that the deceased died intestate, and that the will produced was invalid as the signature on the will did not belong to the deceased, nor was the will signed by an advocate from the firm of Ghadially & Co Advocates.

6. Robert challenged the distribution in the will contending that it was not equitable; and that no findings were made in regard to the codicil, which allocated the lion's share of the vast estate to other beneficiaries, leaving to Robert "a mere 10 acres". Robert maintained that the deceased would not have favoured some of his children and adopted the unequitable mode of distribution in the will. He blamed the court for failing to make any finding on the codicil which sought to give him 20 acres instead of the 10 acres that had been provided for in the will. He urged that, in the event the will is found to be valid, the confirmation be set aside to allow him to file an application for provision of dependants.

7. The respondent also filed written submissions opposing the appeal. He contended that the deceased was an Assistant Chief from 1954 -1975, and also a church elder; that he knew how to read and write, and that he was literate in English and Kikuyu; and that the trial court was satisfied that the deceased was literate. The respondent argued that Robert did not provide any evidence of forgery, and nor was there any evidence that the attesting witnesses were not competent, or that the deceased lacked capacity under section 5 of the *Law of Succession Act* to make the will.

8. In regard to the alleged inequitable distribution, the respondent argued that the Law of Succession does not provide that a testator must share the property equally amongst his children. He reiterated that the court was alive to the fact that there were properties left out of the will and treated the same as forming part of an intestate succession. He therefore prayed that the appeal be dismissed.

9. This is a first appeal and the mandate of this court in such an appeal is well laid out in many decisions of this court. (See *Peters v Sunday Post Limited* (1958) EA 424 and *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123). The mandate is for the court to reconsider the evidence that was adduced in the trial court, evaluate it and draw its own conclusions, bearing in mind that it did not see or hear the witnesses, and should make due allowance in that respect. In analyzing the evidence on record, the court cannot introduce or address extraneous matters that were not addressed by the trial court.

10. With the above obligation in mind, we have perused the record of appeal, as well as the contending submissions made by the parties and the authorities cited. In our view, the following issues arise for our determination. First, whether in upholding the validity of the will and dismissing the protest, the learned judge properly addressed and analyzed relevant issues. Secondly, whether the learned judge was right in upholding the distribution of the estate as provided for in the will and codicil, and in adopting intestate distribution for the properties not included in the will.

11. In regard to the first issue, the learned judge referred to the provisions of section 5 of the *Law of Succession Act* on capacity to make a will, noting that the only argument raised by Robert was that their late father was illiterate, an argument which the learned judge noted was defeated by the evidence that their late father was an assistant chief from 1954 - 1973, a church elder from 1949 and knew how to read and write in Kikuyu and English. The learned judge further noted that no evidence had been provided

to support the allegation that the will was a forgery, that no issue of mental incapacity was raised; and that the court was satisfied that the testator had capacity to make the will. Under section 5(3) & (4) of the *Law of Succession Act*, the testator was deemed to be of sound mind, and it was upon Robert to establish any mental incapacity. There was no evidence tendered in this regard, and the deceased must be deemed to have been of sound mind at the time he is alleged to have made the will.

12. Section 11 of the *Law of Succession Act* sets out the requirements for the validity of a written will 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."

13. We have examined the impugned will dated April 19, 1995 and are satisfied that it meets the requirement of section 11 of the *Law of Succession Act*. The will contains the name of the deceased, and directly below it, is his signature, which shows that the testator intended to give effect to the will. We further note that the signature on the impugned will is similar to that in the letter dated February 12, 2004 written by the deceased in Kikuyu Language, and addressed to Muhotetu Farmers' Company Ltd. The signature has been witnessed by two people, namely: Francis Kibui Wachira and Jane Wangui Gateru, who signed below the testator's allocated section.

14. In *John Wagura Ikiki & 7 others v Lee Gachigia Muthoga* [2019] eKLR, this court adopted the holding of Githinji J (as he then was) in *Karanja & anor v Karanja* (2002) 2 KLR 22 where the learned judge stated as follows:

> " Where the will is regular on the face of it with an attestation clause and signatures of attesting witnesses and the signature of the testator, there is a rebuttable presumption of due execution (*Omnia esse riteatta*)."

15. We are equally satisfied in this matter that the will of the deceased was regular on the face of it, and find no reason to deviate from the finding by the learned judge that the will was valid. The impugned will was signed and attested to, and there was no evidence that could dislodge the presumption that it was properly executed. We therefore uphold the finding of the learned judge that the will was properly executed and witnessed, and was therefore valid.

16. On the second issue, the appellant alleges that there was no equity in the distribution set out in the will. However, no evidence was adduced to show that any beneficiary was left out of the will, or not adequately provided for as to be rendered destitute. A court can only interfere with the wishes of a

deceased person expressed in his will with respect to distribution of his estate in exceptional situations, such as where the will fails to provide for a dependant of the deceased either totally or adequately. Subject to this caveat,there is no legal requirement for equitable distribution by a testator disposing of his property in a will, and a testator has the right to dispose his property in whatever way he desires. The distribution may be influenced by his rapport with the dependants, and this may result in some being favoured. Robert qualifies under section 29(a) as a dependant of the deceased, being his son. Nevertheless, we are not persuaded that he was not adequately provided for in the will and codicil so as to justify the court interfering with the distribution made by the deceased in his will and codicil.

17. This court in the case of *Sisilia Mwikali Kirwa v H C & another* [2015] eKLR stated that:

> " We agree with counsel for the respondents that considering that the deceased left behind a valid Will, her estate cannot therefore be administered or distributed, as an intestate estate in the manner the appellant would wish."

18. The position in this matter is rather different. Whereas the will distributed most of the deceased's properties, a few properties were not included in the will. This means that the deceased's estate is being administered as an intestate estate with will annexed. In the absence of an agreement by the beneficiaries, the only equitable way of distributing the properties that the deceased did not include in the will is to adopt the rules of intestacy. The learned judge cannot therefore be faulted for directing that the deceased's properties that were not included in the will be distributed in accordance with section 38 of the *Law of Succession Act*. This requires that the deceased's properties that were not included in the will be divided equally among the deceased's surviving children.

19. The upshot of the above is that this appeal fails in its entirety, and is accordingly dismissed. In light of the fact that this is a succession dispute affecting members of the same family, we order that each party shall bear their own costs.

Those shall be the orders of the court.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR