IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO, (P), GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 223 OF 2019

BETWEEN

(IN THE MATTER OF THE ESTATE OF ELIUD WANYAMA SARATUKI (DECEASED)

JOHN MUCHASI WANYAMA.....1ST APPELLANT

CAROLYNE KITUYI WANYAMA.....2ND APPELLANT

AND

CHRISTINE SIKHOYA WANYAMA.....1ST RESPONDENT

GEORGE NANDOKHA WANYAMA.....2ND RESPONDENT

(Being an appeal from the Judgment of the High Court at Bungoma, (S.N. Riechi, J.) dated 15th May, 2019

in

H.C Succ. Cause No. 19 of 2008)

****

JUDGMENT OF THE COURT

This appeal relates to the distribution of the estate of the late Eliud Wanyama Saratuki (the deceased) who died on 3rd July, 2007 leaving behind four (4) widows and a record forty-two (42) children. Like most disputes over probate in polygamous unions, there will always be some challenges with the distribution of the estate, especially where there are many beneficiaries, as this case demonstrates.

The first house of the deceased comprised his widow, Yakobet Wanyama and her 12 children; the widow, Robai Wanyama, in the second house had 10 children; the third one, Jane Wanyama had 8 children whilst the forth widow, Florence Wanyama was blessed with 12 children.

The estate of the deceased is said to have comprised the following assets;

i. Land Parcel No. **North Malakisi /North Wamono/620** being 35.0822 acres of agricultural land with a 6 bedroomed house.

ii. Land Parcel No. **North Malakisi /North Wamono/632** being 12½ acres;

iii. Plot No. 377 Bungoma Town,

iv. Plot No. 8 Mayekwe Market,

v. Plot No. 7 Chebukube Market and

vi. rental collections approximately Kshs.1,200,000 in an account in Diamond Trust Bank.

In distributing these assets, the High Court, *(Riechi, J.)* awarded each house (widow) equal share of each of the above properties for themselves and in trust for their children, save for Land Parcel No. **North Malakisi/North Womono/620,** from which some 2 acres sold to Christopher Kasuti was to be excluded.

This distribution has been challenged before us by the appellants who argue that the Judge ignored the evidence showing that Yokabet Wanyama (the 1st widow), John Songolo (her son) and Samuel Ngeti had intermeddled with the estate during the pendency of the cause; that the three illegally disposed of 2½ acres of **North Malakisi /North Wamono/632;** that the learned Judge disregarded the fact that a portion of **North Malakisi /North Wamono/632** measuring 3 acres had similarly been illegally possessed by Samuel Ngeti who, without authority from the administrators, sold 2½ acres to ACK Namatotoa Primary School; that the learned Judge failed to hold that Plot No. 8 Mayekwe Market had also been illegally sold during the pendency of the succession proceedings; that the learned Judge failed to apply the principles of equity when he equally distributed the estate among the houses, whereas there was intermeddling and unjust enrichment by some members of the family through the sale of part of the estate; that the learned Judge erred by distributing Land Parcel No. **North Malakisi /North Wamono/620** and Plot No. **Bungoma Town/377** which had already been transferred by the deceased to some members of his family in his lifetime and therefore did not form part of the estate; and finally, that he failed to consider the application dated 2nd May, 2019 regarding their request for school fees from the income in the joint account.

The appellants insist that the deceased had left a valid written will, which the trial court nullified without a formal hearing or consent of all the beneficiaries; and that the appellants filed an affidavit of protest against the nullification of the said will which was never considered by the trial court. They further contended that in that will, the deceased had distributed all his properties to the beneficiaries; and that there was no objection to the will as all the widows were in agreement with it. They maintained that although the parties met, they did not agree on the mode of distribution of the estate or even on the nullification of the will; that in the absence of a consent of the beneficiaries, the nullification was of no effect; and that in any case, the estate had already been distributed by the deceased in accordance with his wishes.

Over and above these complaints, the appellants also faulted the Judge for failing to acknowledge that **North Malakisi/North Wamono/632** had already been granted to the 1st and 3rd houses by the deceased during his lifetime as demonstrated by the proceedings in succession cause No. 140 of 1999, which proceedings were still pending; and that the acts of intermeddling listed by the appellants against some family members warranted the court's intervention before distributing the estate.

The general distribution of the estate, the appellants argued, did not achieve fairness given the professional qualifications and standing of the children in each house; that, while some houses had many graduate children who were employed and earning reasonable salaries, others, like the 4th house, all the children except one were in school.

The respondents opposed the appeal maintaining their absolute satisfaction with the decision of the trial court. They submitted that the decision of the trial court was not a solitary one, but rather one based on the mutual consent of all the parties, including the appellants.

They argued that both the consent and the decision to share the estate equally were informed by the exclusion or discriminative manner in which *bona fide* beneficiaries were treated in the deceased's last will; that the court was permitted by the Law of Succession Act, to order for reasonable provisions for such dependants; that **section 40** of the Act particularizes the formula for distribution of the net estates of a deceased person who was married to more than one wife; that by consent of all parties, the trial court annulled the last will of the deceased on the 6th of March, 2018 and finally delivered judgment to the effect that the entire estate of the deceased be distributed equally among the 4 widows for subsequent redistribution to all the beneficiaries in each house; and that **section 21** of the Act prohibits any revival of part or whole of a revoked will other than by re-execution of it or by a subsequent will or codicil.

In response to the claims of intermeddling, the respondents submitted that parcel of land No. **North Malakisi/ North Wamono/632** measuring 35 acres registered under the deceased's father's name, the late Wachiye Ngeywa Nandokha was pending distribution in Succession Cause No. 140 of 1999, in which five sons of the late Wachiye Ngeywa Nandokha, including the deceased are seeking, through an administrator to share the same equally (7 Acres each); that even as this was pending, John Songolo, a son to the 1st widow illegally sold to ACK St. Andrews Church some 1.297 Acres from this parcel; that the trial court, being alive to this transaction, reviewed the proceedings in Succession Cause No. 140 of 1999, revoked the illegitimate transaction and restored the whole share of 12.5 acres as ancestral inheritance available to the deceased in this matter to be divided equally to all the 4 widows as reflected in the judgment; that the alleged sale of Plot No. 8 Mayekwe Market is based on hearsay as there is no record of any transaction involving this parcel; and that indeed, there were copies of recent receipts to show payment of rent to the estate.

In response to the claims that the court below adopted an unfair mode of distribution of the estate, the respondents submitted that on the 2nd February, 2006, the deceased, through a written will, redistributed all his estates to all his widows and sons but left out all except 2 daughters from the last house; that as a result, on the 6th March, 2018, based on applications made by the beneficiaries who were inadequately provided for or those completely excluded from the will, the High Court, by consent of all parties, including the Executor of the said will, issued

orders annulling the last will of the deceased, to allow for equitable distribution of the estates to all his heirs; that with the revocation of the will, the allocation to the 4th widow of **Plot No. 377 Bungoma Town** was similarly vacated and the property reverted to the estate for redistribution as, in any case, the 4th widow merely held it as a trustee for the other beneficiaries; and finally, that the secretive and exclusive transfer of the **Plot No. 377 Bungoma Town** that forms 85% of all estates of the deceased and agricultural land North **Malakisi/North Wamono/620** to two out of 46 beneficiaries, was executed without the consent of the first and third widows contrary to **section 12** of the Matrimonial Property Act.

Lastly, on the claims that the trial court failed to consider the appellant's application dated 2nd May, 2019 for school fees from the income in the Joint Account, it was submitted that the High Court dismissed the application on account of proven falsification of documents; that the appellants deliberately failed to disclose to the High Court that the first three beneficiaries on the list of children requiring fees were already on the Higher Education Loans Board scholarship and that their school fees had already been catered for; that the fourth beneficiary on the list was found by the High Court to be an employed mature adult married with two wives; and that from the school fees receipts filed from various academic institutions, the High Court found that most of the school fees had already been paid for by a lender, Sharon Anyango Owino and therefore the application was only meant to defraud other widows of their entitlement in the share of the money in the Joint Account. For these reasons, we were urged to dismiss the appeal.

This is a first appeal; it is therefore the duty of this Court imposed by law, and elucidated in numerous decisions of the Court, to evaluate afresh by way of a retrial, the evidence recorded before the trial court in order for it to reach its own independent conclusion. See: **Selle vs. Associated Motor Boat Co. Ltd** (1968) EA 123.

Being guided by the above principles, we have carefully perused the record of appeal, the submissions by the parties, the authorities cited and the law, and are of the view that the single, broad issue that falls for determination, is whether the mode of distribution of the estate adopted by the learned Judge was fair, equitable and justifiable. We answer this question in the manner it has been framed in the memorandum of appeal as distinct grounds.

We start with the last ground, which, in our view, presents no serious challenge. The appellants are complaining that the Judge failed to consider the application dated 2nd May, 2019 in which it had been requested to approve the withdrawal of funds from the joint account for purposes of paying school fees to some of the deceased's children. For their part, the respondents have argued that the application was in fact dismissed by the court below for the reason that the appellants had conspired to swindle the estate by presenting a fraudulent list of names of children. We ourselves have not seen the decision on the application alluded to by the respondents. For this reason, all we shall say is that, in view of ultimate overall decision that we have reached in this judgment, the failure, if there was any, by the Judge to consider the application in question, is not fatal.

Secondly, we have seen on record a consent recorded on 11th February, 2019, just about 3 months before the application in question, in which parties agreed that the sum of Kshs. 853,631 be withdrawn and paid to various schools of some of the children. In May, 2019 when the impugned decision was made only Kshs.1,200,000 was said to be in the bank account, which amount the learned Judge ordered to be shared between the four houses. That distribution should be sufficient to determine the application if the same was not determined in a separate ruling. The last ground, for those reasons, has no merit and we reject it.

Turning to the crux of this appeal, the learned Judge, in the impugned decision, distributed all the five properties and money in a bank account as proposed by the parties represented by the respondents. He said in final determination that;

> **"All the estate will be distributed among the 4 widows equally for their own benefit and hold the same in trust of their respective children".**

He went on to specify the mode of distribution and portions of the five properties for each house. He also directed that the rental collections amounting at the time to approximately Kshs.1,200,000 in a bank account be shared equally in the sum of Kshs. 300,000 each amongst the 4 widows.

The first complaint by the appellants is that in distributing North **Malakisi/North Wamono/632,** the learned Judge did not take into consideration the fact that the 1st widow and her son had intermeddled with that property by transferring it to a third party. Throughout the proceedings, it was common factor, acknowledged even by the appellants that this property measuring 35 acres belonged to the deceased's father, the late Wachiye Ngeywa Nandokha; that his five sons, including the deceased, through their respective representatives were in court in Kakamega High Court Succession Cause No. 140 of 1999 seeking to share it among themselves. The status of the Cause at this point in time is not clear but before the learned Judge, it was disclosed that the Cause in Kakamega High Court was pending determination.

In view of this disclosure, the learned Judge therefore had no jurisdiction to distribute an estate of another deceased person, and particularly when the Cause for such distribution was pending before a court of coordinate jurisdiction. The question whether the 1st widow and her son had intermeddled with part of it, falls in the hands of the Judge in that cause. Consequently, we set aside the premature distribution of **North Malakisi/ North Wamono/632**.

The next ground is that **Plot No. 8 Mayekwe Market,** had been illegally sold during the pendency of the cause and therefore was not available for distribution. Our simple answer to this grievance is that no such evidence was presented to the learned Judge. Before us, at least the respondents demonstrated, through the last receipt for rent payment, that the property is still within the estate. That ground has no substance and must therefore fail.

Next, we have been invited to say that the learned Judge did not correctly apply the principles of equity by distributing the estate equally among the households against the weight of evidence to the contrary. We understand the appellants to be saying two things in this ground; that after the 1st house had sold part of **North Malakisi/ North Wamono/632** to a 3rd party, it was unconscionable for them to benefit in equal measure with the rest of the houses.

Secondly, that the Judge failed to consider the uniqueness of each house by the wholesome equal distribution, going against the expressed intention and wishes of the deceased. We have already disposed of the question of ownership of **North Malakisi/North Wamono/632** in the preceding paragraphs and find no purpose for considering this ground, which we too reject.

The second limb, which perhaps is the last substantive ground attacks the distribution of two properties which the court ordered to be shared between the 4 houses equally, namely **Plot No. 377 Bungoma Town** on which is developed 3 shops and 4 rental houses as well as parcel of land **No. North Malakisi/ North Wamono/620** measuring approximately 35 acres.

Starting with the former **(Plot No. 377),** the appellants insisted that it was transferred by the deceased to the 2nd and 4th widows; and that a portion had also been transferred to Christopher Kasuti, a purchaser.

The respondents, for their part, have submitted that, though in the year 1993, the deceased had, through an oral will, distributed both properties as well as **Plot No. 7 Chepkube Market** to only the 2nd and 4th widows to the exclusion of 46 beneficiaries to his estate, upon the realization of the injustice, on 10th January, 2003, through a written will, he revoked the previous oral will and redistributed all his properties afresh. We observe that between January 2003 and 2nd February, 2006, the deceased had written and subsequently revoked 4 wills, each time writing fresh ones in their place. In the last will of 2nd February, 2006, the deceased redistributed all his assets to all his widows and sons but left out all, except 2 of the daughters from the last house.

The respondents have submitted that, on the basis of this background, and due to the fact that some beneficiaries were omitted in the deceased's last will, an application was presented before the High Court by those excluded for the annulment of the will. That application was allowed (Ali-Aroni, J.) by consent of the parties, including the appellants, who, among other members of the family, were by consent also appointed administrators of the estate.

Following these developments, parties were directed to file proposals for distribution. All, except the appellants and those they represent, agreed in unison that the assets, including cash in the bank be shared as explained earlier, equally between the 4 houses. Each of the widows, save for the 4th widow repeated this desire in their oral testimony before the court. The 4th widow, for her part, asked that the distribution be **"as per the will…each widow to be given its (sic) share and the widows will distribute to the children"**. It is her insistence on the distribution being done in accordance with the will that separates her from the rest, though she adds that each widow would distribute their respective shares to their children, perhaps after distribution in accordance with the will.

In view this history, the appellants, according to the respondents, are misguided in insisting that the contents of the revoked will be applied in the distribution of the estate.

Parcel No. **PLOT NO. 377 BUNGOMA TOWN** was acquired by the deceased many years in 1959/1960 before he married any of the last 3 widows. Fast forward, according to a copy of certificate of official search dated 7th September, 2008, the 4th widow is shown as its sole registered proprietor. Tracing the basis of that ownership back to the Transfer of Lease dated November, 2000, it is obvious that the deceased was transferring this property from himself to himself and the 4th widow, jointly. We cannot find any explanation how, at the time of registration, it ended up with the 4th widow alone. We only suspect that it was after the death of the deceased and on the basis of the first will made orally by the deceased, in which it is said that he bequeathed the 2nd and 4th widows with this and another property. In the final written will of 2006, which revoked the previous one, and which is now of no effect as we explain below, the deceased transmitted this property to the last 5 children of the 4th house.

About that will, we must clarify that by **section 26** of the Law of Succession Act, if the disposition of the deceased's estate effected by his will is not such as to make reasonable provision for a dependant, then that dependent may apply, and the court, if satisfied that no provision or insufficient provision was made in the will, may, having regard to the matters set out in Section 28 of that Act, order that such reasonable provision as it thinks fit be made for that dependant out of the deceased's net estate.

> **"In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit".** See **section 27**.

This process, in our view, does not amount to revocation or annulment of the will, as seems to be the suggestion, though it may amount to its modification, in the course of providing for a deprived dependant. There is a specific procedure under sections 17 to 20 of the Act for the revocation of a will. A will may be revoked or altered by its maker so long as he is competent to do so. A will or any part thereof can be revoked by another will declaring the testator's intention to revoke it, or by the burning, tearing obliteration, interlineation or otherwise destroying it with the intention of revoking it by the testator, or by some other person at his direction.

We have already said that where a deceased by his will does not make reasonable provision for a dependant, then the court, if satisfied that no provision at all or insufficient provision was made to a dependant may, having regard to the circumstances enumerated under Section 28, order that such reasonable provision be made for that dependant. A dependant is defined by **section 29** of the Act to include **"the wife or wives, or former wife or wives, and the children of a deceased whether or not maintained by the deceased immediately prior to his**

death". The effect of what happened on 6th March, 2018 when Ali-Aroni, J, by consent of the parties annulled the will, was that the estate was to be distributed as if the deceased had died intestate. Whether that process and its outcome was correct is not the subject of this appeal. That decision was made, in the first place, by consent of the parties, as we have stated, but more importantly, it was never challenged by way of a review or an appeal. It cannot be a question for us now. The parties are bound by it.

With the will annulled, the learned Judge properly directed himself on the applicable law, being the provisions of **section 40** of the Law of Succession Act on the distribution of the estate of a polygamous intestate. He also correctly noted that both appellants had filed their proposal for their benefit and the benefit of the beneficiaries they represented; the widows and their children. This step by the appellants amounted to a protest under **section 40** of the Law of Succession Act, which was heard by the Judge in accordance with **section 41**and judgment rendered.

After considering the evidence, the learned Judge purportedly upon reliance on **section 40** aforesaid expressed this view;

> **"I have taken into account the pleadings and submissions before me by all the widows and some beneficiaries that the estate be divided equally among the 4 widows to hold it in trust for themselves and for the benefit of their children. For equity to be achieved it is my finding that the mode of distribution does commend itself to the circumstance of this cause".**

It is a correct statement of the law to say that according to **section 40**, where the marriage is polygamous and the deceased died intestate, then his 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".**

This provision has been subjected to judicial interpretation in a number of instances. In **Mary Ronoh vs. Jane Ronoh & Another**, [2005] eKLR, for example, this Court firmly reiterated the position that, in distributing the estate under that section, the judge has a discretion to take into account or consider the number of children in each house; and that the section does not set down any firm rule that, in the distribution of the estate, there must be equality between houses. The Court explained that;

> "**If Parliament had intended that there must be equality between houses, they would have been no need to provide in the section that the number of children in each house be taken into account.**
>
> **Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality."** *(per Omolo, JA).*

Evidence having been led before the trial court that in the 4th house there were children who needed, not only maintenance, but also school fees; that the deceased had, from his resources, educated all the adult "children" in the other houses, with most of them being graduates of reputable universities and were employed earning reasonable income, it was in error for him to lump together and treat all the houses as equal. At the time of the hearing, the 1st house had a total of 7 graduates, employed and on a salary; the 2nd house had 1 graduate; the 3rd house had 7 graduates who were employed and earning a good living from their employment, while the 4th house had 1 graduate with the rest of the children in that house being students who needed school fees and upkeep.

Although the number of children in each house is almost equal, we have no doubt that the equity and fairness envisaged under **section 40** requires a distinction to be drawn between houses, based on their unique circumstances. By making a blanket order to distribute the estate in the manner he did, the learned Judge misapplied the law and failed to be guided by previous decisions. We shall return shortly with our conclusion on this question.

Next is parcel of land **No. North Malakisi/ North Wamono/620** measuring approximately 35 acres. It is not in dispute that from this property, 2 acres were surrendered to Christopher Kasuti, a buyer. In the appeal, the appellants have asked us to find error in the judgment for directing that the property be shared equally, when in fact the deceased in his life time had gifted it to the 2nd and 4th widows, apart from the portion which was sold to Christopher Kasuti.

Again, we reiterate that the basis of this ground is flawed. The will upon which it is premised was then and is today and then unavailable as the foundation for distribution. This ground fails and is dismissed.

In our ultimate conclusion, therefore, we stress that **North Malakisi/ North Wamono/**632, being a subject of another succession cause, was unavailable for distribution.

Similarly, having found that there was an error in the application of **section 40** in respect of the entire estate, we are minded to interfere with

the equal distribution of the estate by setting aside the decision and substitute it with an order distributing half of **Plot No. 377 Bungoma Town** to the 4th house while the other half will be shared equally by the 1st, 2nd and 3rd houses on account of what we have said regarding the distinction between children in need of upkeep and those who are adults. That is the only aspect of the judgment that deserves to be disturbed.

This appeal, to that extent, succeeds. We make no orders as to costs.

Dated and delivered at Nairobi this 29th day of January, 2021.

W. OUKO, (P)

……

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

……

JUDGE OF APPEAL

A.K. MURGOR

……

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR