



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & MURGOR, J.J.A)

CIVIL APPEAL NO. 305 OF 2018

BETWEEN

JANE NYAMBURA NDUNGU.....APPELLANT

AND

BEATRICE WANGARI NDUNGU.....1ST RESPONDENT

TABITHA WAIRIMU NDUNGU.....2ND RESPONDENT

LUCY NYAMBURA NDUNGU.....3RD RESPONDENT

As Consolidated with

CIVIL APPEAL NO. 306 OF 2018

BETWEEN

TABITHA WAIRIMU NDUNGU.....APPELLANT

AND

BEATRICE WANGARI NDUNGU.....1ST RESPONDENT

JANE NYAMBURA NDUNGU.....2ND RESPONDENT

LUCY NYAMBURA NDUNGU.....3RD RESPONDENT

(An appeal from Judgment and Decree of the High Court of Kenya

at Nairobi (W. Musyoka, J.) dated 10th June, 2016

in

Succession Cause No. 1638 of 1993)

JUDGMENT OF THE COURT

1. A brief background of this appeal is that Simon Ndungu Kihonge (the deceased) died intestate on 24th July, 1993 and was survived by four (4) widows; Beatrice Wangari with whom he had no children; Jane Nyambura with whom he had six (6) children: Stephen Kihonge, Joseph Kung'u, Jecinta Njeri, Andrew Ng'ang'a,

Elizabeth Muthoni and Susan Njoki; Tabitha Wairimu with whom he had four (4) children: Edwin Waweru, Pauline Wambui, George Kihonge and Isaac Muthaka and; Lucy Nyambura with whom he had three (3) children: Michael Kihonge, Schola Njeri and Stella Wanjiku.

2. Upon his demise, his fourth wife, Lucy Nyambura, vide summons dated 27th September, 1999, moved the Court seeking confirmation of the grant made on 8th April, 1999 to the four (4) widows. The application was supported by her own affidavit of even date wherein she gave an inventory of the assets and liabilities of the deceased, the beneficiaries and mode of distribution.

3. Lucy averred that at all material times the deceased was survived by four

(4) wives and thirteen (13) children. She deponed that the estate included agricultural plots: Naivasha Mwachiringiri/Block 4/303, 304, 311, 312, 403, 2633, 2634 and 3298 and Nyandarua/ Ol'aragwai/ 550, 977 and 978; Commercial plots: Plot no. 97 Gilgil Town, Murungaru Commercial Plot, LR No. 1144/469 (Othaya Annex Hotel), Naivasha/Maraiguchu/ Block 1/921 and 6/114 and LR No. 1144/249 (Othaya Country Hotel) and; a tractor registration No. KHD 742 together with its trailer.

4. She averred that the estate ought to have been distributed in the manner proposed in the said affidavit. Further, that since the death of the deceased, she had been subjected to untold suffering and oppression in terms of finances hence heavily relying on the assistance of relatives and the first widow, Beatrice Wangari for her and her children's maintenance. She deponed that despite a consent order made on 25th November, 1993 in which the Court ordered, *inter alia*, that she runs and manages LR No. 1144/249 (Othaya Country Hotel), all the 7 lodging rooms on the western wing of the bar and also collects rent from one of the front shops rented to Messrs Heshima Hardware for her and her children's subsistence, she had been denied the same by the 2nd and 3rd widows' families.

5. Consequentially, that she was the only widow not drawing income from the estate's assets, despite her efforts to enforce the said consent order having since been evicted from LR No. 1144/249 (Othaya Country Hotel) by members of the second and third households.

6. In her proposed mode of distribution as appears in her application, Lucy allotted herself LR No. 1144/469 (Othaya Annex Hotel) for reasons that she had resided there with the deceased before his demise, that she managed the premises and businesses thereon, that it was the deceased's wish that she inherits the same jointly with the first wife, Beatrice. It was her contention that the Court ought to take into consideration that she was the youngest widow and that her children were minors who required substantial maintenance and support.

7. Beatrice responded to the application vide her affidavit sworn on 7th October, 1999 while Tabitha and Jane responded to the application vide their joint affidavit sworn on 13th October, 1999.

8. In her affidavit, Beatrice echoed Lucy's averments save for stating that Jane Nyambura was in control of LR No. 1144/469 (Othaya Annex Hotel) drawing a monthly income of over Kshs. 180,000/=, that Tabitha run the whole of LR No.1144/249 (Othaya Country Hotel) drawing a monthly income of over Kshs. 100,000/=, that since 1962 she had substantially contributed to the estate directly and indirectly and was entitled to a fair share and that all houses should retain the agricultural land which they occupied and lived on during the deceased's lifetime as the same were gifts *inter vivos*.

9. It was Tabitha and Jane's averment that the beneficiaries and the assets forming the estate were as listed by Jane including Plot No. 4 Elburgon, Naivasha Town Plot No. 75 and Njoro Plot No. 662. They opposed the proposed mode of distribution deposing that the monetary values of the assets ought to inform the mode of distribution. It was averred that the deceased had also expressed his wishes that one Jecinta Wanjiru, his niece, and one Peter Kariuki Ndung'u, his adopted son, be allocated Naivasha/ Maraiguchu/Block 1/921 and Naivasha/Mwachiringiri /Block 4/ 2633 and 4/2634 respectively.

10. They denied Lucy's allegations that she had been evicted from LR No. 1144/249 (Othaya Country Hotel) by members of the second and third households; it was deposed that she had moved out of the property on her own accord after realizing that the property had accrued utility and financial facility liabilities. Further, they denied the averments in relation to the alleged monthly income they drew from the commercial plots they each managed.

11. Vide a further affidavit sworn on 3rd June, 2010, Tabitha deposed that the beneficiaries did not agree with Lucy's proposed mode of distribution as set out in her application. Further, that on 23rd April, 2005 the beneficiaries reached a consensus and made a consent through the firm of Waigwa Ngunjiri & Co. Advocates on 29th April, 2005 expressing the beneficiaries' consensus on the mode of distribution of the estate. That the consent was formalized and executed by the necessary parties on 13th May, 2005. However, due to a misunderstanding between Jane and her advocates, the same was never filed in Court to be adopted as an order of the Court. Therefore, that Lucy is estopped from going against the terms of the 29th April, 2005 consent.

12. The trial court, W. Musyoka, J., heard and analysed the evidence before him, identifying that the bone of contention revolved around the distribution of the commercial properties specifically LR No. 1144/469 (Othaya Annex Hotel), Naivasha/Maraiguchu/Block 1/921, Naivasha/ Mwachiringiri/ Block 4/2633 and Naivasha/Mwachiringiri/ Block 4/2634.

13. Ultimately, the learned Judge entered judgement as follows:

“28. All the four sides appear to be angling for a stake in the commercial assets. This is plain from the various proposals placed on the table by the party(sic), that is the proposals made in the application, by the applicant and the respondents, as well as the alleged settlement

dated 29th April 2005 which was never adopted as an order of the court. In distributing the estate of the deceased I will be guided by section 40 of the Act, and by the factors that I have referred to in the foregoing paragraphs of this judgment.

29. Some of the parties proposed distribution to two individuals, who are neither spouses or children of the deceased on the basis that the deceased had informally adopted them or had expressed a wish to have them benefit. The two are Jecinta Wanjiru and Peter Kariuki Ndung’u. **Only the deceased could benefit persons outside his immediate family by making gifts to them in a will. There is no will in respect of the estate of the deceased herein. It is not incumbent on administrators or beneficiaries to benefit persons who are outside the immediate family. In any event, the said persons should have come forward to stake their claim to the estate through an application appropriately brought under section 26 of the Law of Succession Act. I do not find any legal basis upon which the court can take them into account in the distribution of the estate of the deceased.**

30. In the end I direct that the estate of the deceased be distributed as follows:

a) That the survivors of the first and fourth houses (Beatrice Wangari, Lucy Nyambura, Michael Kihonge, Schola Njeri and Stella Wanjiku) shall share Naivasha Mwachiringiri/Block 4/303, 304, 311 and 312, Plot No. 4 Elburgon, equally, with the tractor registration mark and number. KHD 742 going to Beatrice Wangari and Lucy Nyambura jointly;

b) That the survivors in the second house (Jane Nyambura, Stephen Kihonge, Joseph Kung’u, Jecinta Njeri, Andrew Ng’ang’a, Elizabeth Muthoni and Susan Njoki) shall share Nyandarua/ Ol’aragwai/550, 977 and 978, Naivasha Mwachiringiri/Block 4/3298, Njoro Plot No. 662, Plot at Murungaru shopping centre and Naivasha/ Maraiguchu/Block 1/921, equally;

c) That the survivors in the third house (Tabitha CWairimu, Edwin Waweru, Pauline Wambui, George Kihonge and Isaac Muthaka) shall share Naivasha/ Maraiguchu/Block6/114, Naivasha/ Mwachiringiri/

Block 4/ 2633 and 4/2634, Plot no. 97 Gilgil Town and Naivasha Town Plot No. 75 equally;

d) That LR No. 1144/249 and LR No. 1144/469 shall be shared equally among all the seventeen (17) survivors of the deceased, that is to say, Beatrice Wangari, Jane Nyambura, Stephen Kihonge, Joseph Kung’u, Jecinta Njeri, Andrew Ng’ang’a, Elizabeth Muthoni, Susan Njoki, Tabitha Wairimu, Edwin Waweru, Pauline Wambui, George Kihonge, Isaac Muthaka, Lucy Nyambura, Michael Kihonge, Schola Njeri and Stella Wanjiku;

e) That any other property that has not been distributed here above shall be sold and the proceeds of sale thereof shared equally amongst all the seventeen (17) survivors of the deceased;

f) That in the event of the survivors being unable to agree on the sharing and management of the premises standing on LR No. 1144/249 and LR No. 1144/469 the same shall be sold and the proceeds of sale thereof distributed equally between all the seventeen (17) survivors;

g) That the shares of the minor children in the fourth house shall be held by their mother, Lucy Nyambura, until all the said children attain the age of majority; and

h) That there shall be no order for costs.”

14. Aggrieved by the above, Jane Nyambura Ndung’u filed Nairobi Civil Appeal No. 305 of 2018 raising five (5) grounds of appeal being that the learned Judge erred: in fact and law in failing to adopt the consent dated 29th April, 2005 despite the fact that it was evidently freely entered into and acted upon by the four houses for 21 years with substantial developments on the properties thereon; in law and fact in making a decision based on assumptions despite oral evidence to the contrary thereby arriving at a wholly erroneous and inequitable distribution of the estate including matrimonial homes; in unilaterally determining the number of beneficiaries to the estate despite one having died during the pendency of the Succession Cause and the minors having attained the age of majority; in not making a final distribution but requiring contesting parties to achieve consensus after more than 20 years and failing to take into account the existing assets of the estate and their current values and; in leaving out legitimate dependants and including assets which were no longer in existence. In sum, she sought orders that the trial Court’s

decision be set aside and substitution of the same with the consent dated 25th April, 2005 or in the alternative that the matter be remitted for fresh hearing before the trial court.

15. Also aggrieved, Tabitha Wairimu Ndung'u filed Nairobi Civil Appeal No. 306 of 2018 similarly raising five (5) grounds of appeal being that the learned Judge erred: in holding that LR No. 1144/249 should be shared equally by the 17 beneficiaries against the weight of the evidence adduced; in totality ignoring the handwritten and typed consent of the parties dated 24th April, 2005 and 29th April, 2005 respectively thereby prejudicing the appellant who acted on the consent and developed her share; in deliberately omitting a legitimate dependant against the weight of the evidence adduced; in failing to take into account the developments made by the parties on the respective assets from the time of filing the confirmation of grant to the time of hearing thereby arriving at an unrealistic decision and; by distributing to the appellant Plot no. 97 Gilgil Town and Naivasha Town Plot No. 75 though the assets cannot be traced.

16. During the plenary hearing on 30th June, 2020, following a consent filed by learned counsel for the appellants, the appeals were consolidated and heard together as they arose from the same judgment of the High Court. Counsel further consented that the appeal be heard on the basis of the written submissions already on record without oral highlighting. The appeal was heard by way of video link in accordance to this Court's Covid-19 directions.

17. Urging the Court to allow the appeal, counsel for the appellant (Jane Nyambura Ndung'u) submitted faulting the learned Judge for heavily dwelling on the fact that the 29th April, 2005 consent arrived at by the family members was not adopted as an order of the Court so as to dismiss its applicability in the circumstances of this case. He argued that the 29th April, 2005 consent was willingly entered into and signed by all parties. Further, that it was absurd that the 3rd respondent would seek to enforce the 29th April, 2005 consent which she claimed to have unwillingly signed yet there was evidence showing that she had instructed her then advocates to draft a consent dated 13th May, 2005 in similar terms.

18. Citing **sections 107 and 109** of the Evidence Act, he contended that the 3rd respondent's allegations that she had been harassed by the 1st and 2nd respondent's families was not proved as no such evidence is on record.

19. He submitted that the 3rd respondent was estopped from going back on her conduct and denouncing her own signature on the 29th April, 2005 consent. In addition, that there was evidence on record showing that she even sought to enforce the said consent through her then advocates.

20. Counsel argued that the 3rd respondent falsely alleged that she did not benefit from the estate's income yet during trial she testified that she drew a sum of Kshs. 20,000 from the estate. Further, that the 3rd respondent lived with the 1st respondent while she rented out her residence and therefore, the learned Judge erred in failing to adopt the mode of distribution proposed by the parties in the 29th April, 2005 consent. He maintained that this was against the rules of equity; Equity looks to the intent or substance rather than the form.

21. He submitted that the learned Judge's judgment could not be enforced as it distributed Plot No. 97 Gilgil Town and Naivasha Town Plot No. 75 which were not in existence. Further, that the parties were already conducting themselves as per the 29th April, 2005 consent and it would be a great injustice to deprive the parties of properties that they had already occupied over a long period of time. Placing reliance on **Esther Wanjiru Kiarie v. Mary Wanjiru Githatu (2016) eKLR** and **sections 5 and 8(1)(a)** of the Matrimonial Property Act, 2013, he submitted that the 3rd respondent could not lay a claim on the matrimonial property that had been acquired by the deceased and his first three wives before she married the deceased.

22. Counsel submitted that the learned Judge erred in failing to include Peter Kariuki Ndung'u, who according to the deceased's wishes was to inherit Naivasha/Mwihiringiri /Block 4/ 2633 and 4/2634. He urged the Court to allow the appeal.

23. In support of the appeal, learned counsel for the 1st respondent submitted that the learned Judge erred in failing to take the 29th April, 2005 consent into consideration yet it expressed the parties' intentions.

Further, that the learned Judge's judgment imposed on the parties the distribution of non-existent assets and the inequitable distribution of matrimonial homes which was contrary to the parties' intentions as per the said consent hence prolonging discontentment among them.

24. Counsel faulted the learned Judge's decision that the 1st respondent was to share Naivasha Mwachiringiri/Block 4/303 and 304 with the 3rd respondent and her children despite uncontroverted evidence that the same constituted a matrimonial home which she had exclusively developed since 1963, before the existence of the 3rd respondent's marriage to the deceased. He maintained that this threatened the 1st respondent's source of livelihood from the said properties and ownership of the same. Citing, **Esther Wanjiru Kiarie v. Mary Wanjiru Githatu (supra) (Re Estate of Ephantus Githatu Waithaka (Deceased))** and **In the Matter of the Estate of Mwangi Giture (Deceased) (2004) eKLR** he argued that the court ought not to arbitrarily apply section 40 of the Law of Succession Act but must be guided by fairness and the law of equity. Further, that the learned Judge in bundling together the 1st respondent with the 3rd respondent and her children, blatantly disregarded the 1st respondent's entitlement in view of her lifelong contribution to the estate way before the other wives were married to

the deceased. (See: In **Re the Estate of the late George Cheriro Chepkosiom (2007) eKLR**).

25. Also supporting the appeal, Counsel for the 2nd respondent reiterated the appellant's and the 1st respondent's submissions save that the learned Judge erred by disregarding the evidence on record that the 2nd respondent had always occupied and operated LR No. 1144/249 (Othaya Country Hotel) and that the 3rd respondent voluntarily moved out of the said property on her own accord after realizing that the property had accrued utility and financial facility liabilities. He maintained that it was improper for the learned Judge to hold that LR No. 1144/249 (Othaya Country Hotel) be divided equally amongst the estate's beneficiaries.

26. Urging the Court to dismiss the appeal, counsel for the 3rd respondent submitted that the consent dated 25th April, 2005 was determined with finality vide the appellant's application dated 23rd October, 2013 in which she sought to have the consent adopted as an order of the Court; the Court declined to grant the same on grounds that there needed to be a consensus by the parties to adopt it as an order of the Court. He maintained that the resultant ruling was never challenged vide an appeal or review hence putting the matter to rest.

27. Counsel posited that the trial Court could not delve into the issue about the consent dated 25th April, 2005 as it was *res judicata*. (See: **Keren Buaron v. Sony Holdings Limited & Others, Civil Appeal No. 131 (2016) eKLR** and **North West Water Ltd v. Binnic & Partners (1990) 3 all E.R. 547**). He maintained that the only recourse available to the parties was an appeal or review of the ruling.

28. He argued that the appellant could therefore not purport to bring in the issue of adoption of the consent in the instant appeal as the same was not adopted as an order of the trial Court. He maintained that the trial Judge could not therefore be faulted for not abiding by its contents. Further, that the merits and demerits of the said consent did not fall for the determination of this Court.

29. Counsel for the 3rd respondent submitted that there was no evidence on record proving that Jecinta Wanjiru and Peter Kariuki Ndung'u, were *bona fide* beneficiaries of the estate. He contended that the burden for proving the existence and/or non-existence of an asset in an estate squarely lies on the party that alleges the same. Therefore, that the existence and/or non-existence of Plot no. 97 Gilgil Town and Naivasha Town Plot No. 75 ought to have been raised during trial. He maintained that it is the appellant and the 2nd respondent, in their joint affidavit, who introduced the said properties, Plot no. 4 Elburgon and Plot No. 662 Njoro thus, the trial Judge cannot be faulted for including them in his judgment.

30. Relying on **section 40** of the Law of succession and **Irene Mabuti Gitari v. Zacharia Njege Gitari (2017) eKLR** counsel contended that the learned Judge properly applied the law in accordance with **section 40** of the Law of succession in the distribution of the estate. He urged the Court to dismiss the appeal as it was incompetent and an abuse of the court process.

31. This is a first appeal; therefore, this Court has the duty to proceed by way of re-evaluating all the evidence on record before arriving at its own independent conclusion. This was aptly summed up in the case of **Selle v. Associates Motor Boat & Co. [1968] EA 123** where the predecessor of this Court stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif – vs-Ali Mohamed Sholan [1955], 22 E.A.C.A.270).”

32. Further, in the case of **Ramji Ratna And Company Limited v. Wood Products (Kenya Limited), Civil Appeal No. 117 of 2001** this Court stated that in a first appeal it will interfere with the decision of the trial Judge only where it is based on no evidence or on a misapprehension of the evidence or the Judge is shown obviously to have acted on wrong principles in reaching the findings he did.

33. Having considered the pleadings, the written submissions and the law, we discern the issues that fall for our determination as:

- a) *Whether Peter Kariuki Ndung'u and Jecinta Wanjiru were bona fide beneficiaries or dependants;*
- b) *Whether the learned Judge erred in disregarding the consent dated 29th April 2005.*
- c) *Whether the learned Judge erred in distributing the estate as he did.*

34. On the first issue, it is the appellant's and the 1st and 2nd respondents' contention that the learned Judge erred by leaving out Peter Kariuki Ndung'u and Jecinta Wanjiru who were also dependants of the deceased.

35. A dependant is defined under **section 29** of the Law of Succession Act as follows: -

“29. Meaning of dependant

For the purposes of this Part, "dependant" means –

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

36. Therefore, what was required of the appellant and the 1st and 2nd respondents was for them to adduce evidence to demonstrate that Peter and Jacinta were indeed dependants of the deceased in terms of section 29 of the Law of Succession Act. According to them, the deceased had expressed his wishes that Jacinta Wanjiru, his niece, and Peter Kariuki Ndung'u, his “adopted” son, be allocated Naivasha/Maraiguchu/Block1/921 and Naivasha/Mwicingiri/Block 4/2633 and 4/2634 respectively.

37. A careful perusal of the record however, shows that there is no evidence showing that the deceased had taken the two under his care as his dependants. Hence, the appellant and the 1st and 2nd respondents claim that it was the deceased’s wish that the two individuals inherit the said properties is neither here nor there as the deceased died intestate. Further, as noted by the learned Judge, the two individuals never filed any applications for dependency for consideration and determination by the court. Had they done so, the court would have had the opportunity to determine their entitlement, if any, to the deceased’s estate. In the circumstances of this case, the estate could only be distributed as per the provisions of the Law of Succession Act as correctly observed by the learned Judge. The learned Judge cannot therefore be faulted for finding as he did on that issue. That aspect of the appeal therefore fails.

38. On the second issue, on one hand, the appellant and the 1st and 2nd respondents faulted the learned Judge for failing to consider a consent dated 29th April, 2005 in which the parties had allegedly reached consensus on how to distribute the estate. Further, that the 3rd respondent was estopped from going back on the contract because she had previously consented to it and that her allegations of coercion were misleading to the Court. On the other hand, the 3rd respondent alleged that she was coerced into signing the said consent and was forced to oblige since she had lost control of LR No. 1144/249 (Othaya Country Hotel) after being evicted by members of the second and third households.

39. The Supreme Court in **Geoffrey M. Asanyo & 3 Others v. Attorney General Supreme Court Petition No. 7 of 2019** expressed itself thus:-

“[38] We turn now to the standing of the consent filed by the parties before the Appellate Court. The pertinent question is: When does a consent by the parties transmute into an Order of the Court? What is the role of the Court in the adoption of the consent?

[39] In this Court’s Order of 20th November 2018, we directed that the Appellate Court do adopt the consent of the parties.

[40] Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio. This Court having ruled that the Judgment of the Court of Appeal (dated 13th November 2015) was a nullity; and that Court having not formally adopted the consent by parties, was not yet functus officio.”

40. It is common ground that the consent dated 29th April, 2005 was never

adopted in Court. The learned Judge correctly observed as follows:-

“The said settlement was reduced into a typed consent, which was signed by the four widows and dated 29th April 2005. It was lodged at this registry in the cause on 10th August 2005. The same was never adopted as an order of the court. An application by the second widow dated 23rd October 2013 to have the same adopted as an order of the court was filed on 24th October 2013, but the court declined to grant it on the grounds that the adoption of the consent needed the concurrence of all the parties.”

There is no dispute also that at one point following the death of the deceased, the parties herein sat, discussed the change of circumstances they found themselves in and decided to chart the way forward in as far as the deceased’s properties were to be distributed. This is how they came up with the document dated 29th April, 2005.

41. This document was filed in court and for eight years, it remained in the court file without any party moving the court either for adoption or, to challenge it in any way until the 2nd widow moved to have it adopted, a prayer which was declined by the court for reasons that are on the record, but essentially that all the parties had to consent to its adoption. The question that begs an answer is what was happening on the

ground all this time. According to the appellant, 1st and 2nd respondents, parties started developing the properties distributed to them as per the said agreement, and the impugned judgment has therefore thrown them into a spin, hence this appeal.

42. Having reconsidered the record and the circumstances surrounding this matter, we wish to point out first and foremost, that succession matters, though deceptively straightforward in some cases, are not the easiest to determine. This is so particularly where a person dies intestate leaving behind many properties and many beneficiaries, and sometimes different houses as is the case here. It will always be difficult to distribute the properties “equally” and with scientific precision because different properties will have different sizes and different economic values. **Section 40** of the Law of Succession Act is not a magic pill which can be applied to resolve all issues pertaining to distribution of a deceased person’s estate. In as much as section 40 LSA talks of “Equal Shares” the distribution must also be equitable. Where the parties themselves are unable to agree on the mode of distribution, it is left to the court to do the distribution based purely on the documents presented to the court.

43. It is highly unlikely that the court would arrive at a mode of distribution that will be acceptable to all the beneficiaries. In this case, we are persuaded by the fact that following the death of the deceased, the principal parties sat, discussed the way forward and arrived at some kind of agreement which they reduced into writing, appended their signatures and filed in court. We appreciate the fact that the third respondent appears to have withdrawn her consent and subsequently denounced the agreement, hence the trial court’s reluctance to endorse or adopt the same. We have keenly pondered on this issue and come to the conclusion that there is no guarantee that any other mode of distribution dictated by this court will be better, or more equitable than that presented in that document.

44. As far as the second issue is concerned, we cannot say that the learned Judge erred in failing to adopt the said agreement as the same was not binding on the parties, it having not been adopted as a consent by the court. The learned Judge nonetheless had the discretion to consider the content thereof or to disregard it altogether. We have considered the content of the said document *vis a vis* the mode of distribution adopted by the learned Judge and note that except for the commercial properties, the rest of the distribution largely reflects the will of the parties as at the time they signed the said document.

45. In our considered view, considering the facts surrounding this matter, the document accords a good reference point on a just and equitable mode of distribution of the deceased’s estate, it having been acted on by the parties for over 20 years. We would also wish to express our view (*obiter*) that where a person dies intestate having settled spouses and other beneficiaries on specific properties, bearing in mind the circumstances of each case, the court should try as much as possible to preserve that *status quo* by endorsing a mode of distribution that is least disruptive. The learned Judge also took this view when at paragraph 24 of the judgment he stated as follows:-

“Of course, in distribution, the court has to be alive to other factors, such as where the matrimonial homes are located, who occupies and utilises what property, and the deceased persons’ preferences”.

46. This consideration along with the contents of the disputed “agreement” and the different modes of distribution proposed by the parties in their affidavits guided the learned Judge in arriving at the mode of distribution contained in the impugned judgment. We also appreciate the fact that the learned Judge had the advantage of seeing and hearing the parties as they testified during the *viva voce* hearing of the applications before the court and he was therefore in a position to assess their general demeanor and arrive at an informed decision. We have reconsidered the issue of distribution and find that other than the distribution of the two commercial properties, there is no reason for us to interfere in the distribution of the rest of the properties. We shall advert to this issue later.

47. On the third issue, the appellant and the 1st and 2nd respondents challenged the learned Judge’s decision on grounds that in granting orders for distribution of the estate, the learned Judge erred by: distributing Plot No. 97 Gilgil Town and Naivasha Town Plot No. 75 which were not in existence; bundling together the 1st respondent with the 3rd respondent and her children hence blatantly disregarding her own person notwithstanding her lifelong contribution to the estate way before the other wives were married to the deceased; failing to take into consideration that one of the beneficiaries had passed on during the succession proceedings and that the beneficiaries who were minors as at the time of instituting the succession cause had since attained majority age as at the time of judgment.

48. On the issue of the distribution of non-existent assets, it is the duty of the applicants seeking grant for letters of administration to give a full inventory of the assets and liabilities of the estate. The Court works with the schedule of property presented to it and if the parties include in the schedule non-existent properties, the learned Judge cannot be faulted for distributing the same. **Section 51** of the Law of Succession Act provides as follows:-

“51. Application for grant

(1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to —

...

(h) a full inventory of all the assets and liabilities of the deceased; ...”

Further, in the appellant's and 2nd respondent's joint affidavit sworn on 13th October, 1999 in response to the 3rd respondent's application for confirmation of grant, they averred that the said properties be included in the list of properties in the estate of the deceased. The learned Judge had no way of establishing whether the listed properties existed or not and he cannot, therefore, be faulted for relying on the contents of the affidavits. That ground of appeal therefore fails.

49. On the issue that the learned Judge failed to consider that one of the beneficiaries had passed on, a cursory reading of the proceedings reveals that this issue was never brought to the attention of the Court. Therefore, the learned Judge cannot be faulted for not considering the same. Moreover, the share of any beneficiaries who may have died during the pendency of the suit would pass on to his /her beneficiaries in accordance to the Law of Succession Act.

50. On the issue that the beneficiaries who were minors as at the time of the institution of the suit had now come of age having attained the age of majority as at the time the judgement was delivered, this does not in itself invalidate their right to their share of the estate. That would only mean that their mother would now transfer the properties to them directly instead of holding the properties in trust for them. We see no problem with that.

51. We now revert to the mode of distribution. We uphold the mode of distribution made by the learned Judge, save for the distribution of the two commercial properties, namely, LR NO.1144/469 and LR NO. 1144/249. We appreciate the fact that all the houses are angling for a stake in the two commercial properties. In redistributing these properties, we are guided by the contents of the parties' affidavits on the proposed modes of distribution.

52. i) LR NO. 1144/469: From the record before us, we note that the 4th widow, Lucy Nyambura Ndun'gu used to live on plot No.1144/469 with the deceased and for all intents and purposes part of the property was her matrimonial home. She had been given 47% of that property as per the disputed consent but she was unable to pay off the 2nd widow as proposed in the document. She has since been thrown out of the property. The second house had been given 53% and from the evidence Jane Nyambura carries out business on that property. She is said to be in control of the larger part of the building. The 1st widow, Beatrice Wangari has also some businesses on the property. In an attempt to keep these businesses going in the least disruptive manner, and after considering the interests of all these parties, we set aside that aspect of the impugned judgment pertaining to distribution of the above properties. We order that the property be shared between the houses (not all the survivors as follows:-

i) Beatrice Wangari Ndun'gu 20%; Jane Nyambura Ndun'gu 40%, and Lucy Nyambura Ndu'ngu 40%.

ii) LR.NO. 1144 /249: Tabitha Nyambura has been operating the businesses on the property alone after allegedly kicking out the 4th widow who is said to have refused to share the liabilities emanating from the property. Tabitha availed to the court evidence that she paid loans on that property, pays land rates on the same and electricity bills. We, therefore, deem it fit and just to order that Beatrice Wangari (1st house) gets 20% of LR NO.1114/269 and Tabitha remains with 80%. In arriving at these percentages we have also considered the value of the two properties. If parties fail to agree on this mode of distribution, we order that fresh valuation of the properties be carried out within 90 days from the date of this judgment and the properties be sold and the proceeds thereof be shared by the 4 houses in accordance to the above percentages.

iii) Ultimately, the appeal succeeds only to the above extent. We order that a certificate of confirmation of the Grant be issued in accordance with the above schedule. On the question of costs, as this is a family matter, the order that commends itself to us is that each party bears its own costs of this appeal and before the High Court.

Delivered and dated at Nairobi this 5th day of February, 2021.

W. OUKO, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR