Wanjiru & 4 others v Kimani & 3 others (Civil Appeal 36 of 2014)
[2021] KECA 362 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 362 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 36 OF 2014

W KARANJA, HA OMONDI & KI LAIBUTA, JJA

DECEMBER 3, 2021

BETWEEN

HARRIET WANJIRU ..... 1ST APPELLANT

ALICE NDUTA ..... 2ND APPELLANT

LUCY WANGUI ..... 3RD APPELLANT

FLORENCE WANJIKU ..... 4TH APPELLANT

IRENE NGINA ..... 5TH APPELLANT

AND

SIMON NJIHIA KIMANI ..... 1ST RESPONDENT

JOSEPH KAMAU KIMANI ..... 2ND RESPONDENT

DANIEL KANYINGI KIMANI ..... 3RD RESPONDENT

SAMUEL MUHUHU KIMANI ..... 4TH RESPONDENT

(Being an Appeal against the Ruling and Order of the High Court at Nairobi (Hon. Lady Justice Rawal) delivered on 16th February 2010) in Succession Cause No. 341 of 1998)

JUDGMENT

1. This appeal arises from the Ruling and Order of the High Court (Family Division) at Nairobi (Rawal, J.) delivered on 16th February 2010 in Succession Cause No. 341 of 1998 in the matter of the estate of Sospeter Kimani Waithaka (Deceased), who died on 5th May 1997. The impugned Ruling and Order was made in determination of the 1st Respondent's Summons for Revocation of Grant dated 31st October 2005. The Summons were taken out under Rules 49 and 73 of the *Probate and Administration Rules* pursuant to which the 1st respondent sought revocation of the Grant of Letters

of Administration Ad Colligenda Bona made on 10th March 1998 to the Public Trustee in the estate of the deceased.

2. Following the death of Sospeter Kimani Waithaka on 5th May 1997, the Public Trustee obtained, with the consent of the appellants, Limited Grant of Letters of Administration ad colligenda bona on 10th March 1998 in High Court Succession Cause 341 of 1998 pursuant to section 67(1) of the *Law of Succession Act* for the purposes of collecting and getting in and receiving the estate, and for doing such things as may be necessary for the preservation thereof until grant of further representation.

3. In the same year, the 1st and 4th Respondent's had, jointly with The deceased's 2nd wife (Hannah Wambui Kimani, who died during the pendency of the subject succession cause), also obtained Letters of Administration ad colligenda bona in Kiambu SPMC Succession Cause No 296 of 1998 in the matter of the estate of the deceased on 26th April 1999, also for the purposes of collecting and getting in and receiving the estate, and for doing such things as may be necessary for the preservation thereof until grant of further representation.

4. By an order of the court (Etyang, J) given on 27th July 1999 in High Court (Family Division) Succession Cause No. 341 of 1998, the learned Judge directed that Kiambu SPM Succession Cause No. 296 of 1998 be "called for and brought to [the] court," presumably for the purpose of final determination of all matters relating to the estate of the deceased.

5. The 1st respondent's Summons dated 31st October 2005 seeking revocation of the limited grant obtained by the Public Trustee in High Court Succession Cause 341 of 1998 were, according to the impugned Ruling, supported by his affidavit sworn on 6th October 2008. The grounds on which the Summons were taken out were that –

    (a) a Will of the deceased had since been discovered;

    (b) the deceased had appointed him the executor of his Will; and

    (c) therefore, the distribution of the deceased's estate should be undertaken in accordance with the wishes of the deceased.

6. It is noteworthy that the affidavit in support of the 1st respondent's Summons is not part of the record. Accordingly, we can only construe its contents from the learned Judge's observations in her impugned Ruling delivered on 16th February 2010. As observed by the learned Judge, the 1st respondent averred that he was informed by an elderly man that his father had executed a written will kept by a firm of advocates known as M/s. G. N. Wakahiu. It is on the basis of that alleged Will that he sought revocation of the Grant aforesaid.

7. By a Notice of Objection dated 2nd February 2006, the appellants opposed the Summons and objected to the Will. In her replying affidavit sworn on the same date for and on behalf of the 1st, 3rd, 4th and 5th appellants, the 2nd appellant (Alice Nduta) deposed that their deceased father did not leave any Will, and that the will purported to be his was "fake and false".

8. Having heard the parties, the learned Judge delivered her Ruling on 16th February 2016 whereby she revoked the Grant of Letters of Administration Ad Colligenda Bona to the estate of the deceased obtained by the Public Trustee as aforesaid. So much for the background leading up to this appeal.

9. It is not in contention that the deceased, who died on 5th May 1997, was polygamous. He was survived by two widows (who are now deceased) and 16 children. His first house comprised of –

    (a) Miriam Wairimu Kimani (his first wife), who died on 16th May 1997;

(b) five daughters (the appellants herein), namely –

(i) Lucy Wangui Kimani;

(ii) Harriet Wanjiru Kimani;

(iii) Alice Nduta Kimani;

(iv) Florence Wanjiku Kimani; and

(v) Irene Ngina Kimani.

10. The deceased's second house comprised of –

(a) his second wife, Hannah Wambui Kimani, who died on 24th June 2004 during the pendency of this cause;

(b) eleven children (who include the 4 respondents). They are-

(i) John Waithaka Kimani;

(ii) Alice Wangui Kimani;

(iii) Mary Wanja Kimani;

(iv). Samuel Muhoho Kimani;

(vi) Miriam Nduta Kimani;

(vi) Ruth Muthoni Kimani;

(vii) Jane Wanjiru Kimani;

(viii) Simon Njihia Kimani;

(ix) Joseph Kamau Kimani;

(x) Daniel Kanyingi Kimani; and

(xi) Caroline Mugure Kimani.

11. The Appellants, who are daughters of the deceased by his first wife represent the interests of the first house while the respondents (who are sons of the deceased by the second wife) represented the interests of the second house (if not their own interest), in the High Court and in this appeal.

12. When this appeal last came up for hearing before this Court on 21st January 2019, the Court was informed that the 1st and 2nd respondents (Simon Njihia Kimani and Joseph Kamau Kimani) have since died. In the absence of evidence of substitution or agreement on the way forward, the 3rd and 4th respondents remain the only respondents in the appeal.

13. What then are the matters in contention? It is clear from the record before us that a dispute arose between the Appellants and the Respondents over and concerning (a) the validity of the alleged Will; and (b) the mode of distribution of the estate of the deceased in the manner set out in the Certificate of Confirmation of Grant dated 16th February 2010 pursuant to the impugned Ruling of the same date. The impugned mode of distribution is as set out in the Table below:

Name	Description of Property	Share of Heirs
Lucy Wangui Kimani Harriet Wanjiru Kimani Alice Nduta Kimani Florence Wanjiku Kimani Irene Ngina Kimani	Githunguri/Gathangara/599 Githunguri/Gathangara/24 Githunguri/Gathangara/212 Githunguri/Gathangara/18 Githunguri/Gathangara/022 Githunguri/Gathangara/ T.238 Githunguri/Gathangara/ T.239	The Interested parties to have 1/10 share to be shared equally amongst themselves
John Waithaka Kimani Alice Wangui Kimani Judy Wanja Kimani Samuel Muhoho Kimani Miriam Nduta Kimani Ruth Muthoni Kimani Jane Wanjiru Kimani Simon Njihia Kimani Joseph Kamau Kimani Daniel Kanyingi Kimani Caroline Mugure Kimani	Githunguri/Gathangara/ T.164 Githunguri/Gathangara/18 Githunguri/Gathangara/T.52 Githunguri/Gathangara/T.23 Githunguri/Gathangara/T.74 Riruta Satelite Plot No. 061 K.C.B Shares with Public Trustee Arrears of rent out of	The remaining share 9/10 to be shared equally to the other family members

14. In their appeal, the appellants faults the findings of the learned Judge on, among other things –

    (a) the validity of the document purported to be the deceased's Will;

    (b) the mode of distribution of the deceased's estate as decreed by the High court on account of discrimination on the basis of gender and marital status; and

    (c) want of provision for dependency.

15. The appellants advanced 10 grounds of appeal set out in their Memorandum of Appeal dated 14th March 2014, and which we need not reproduce in full here. In summary, the appellants' case is that the learned Judge –

    (a) erred in law and in fact in failing to hold that the document purported to be the deceased's Will was invalid;

    (b) erred in relying on the provisions of the impugned Will;

(c) erred in failing to find that the deceased died intestate, and that his estate was subject to administration and distribution in accordance with the rules of intestate succession;

(d) erred in exercising her discretion to apportion 1/10 of the estate to the appellants on account of provision for dependency, and against the weight of their evidence in that regard; and

(e) erred in failing to determine all the issues in contention.

The appellants pray that the appeal be allowed with costs, and that the Ruling and Order delivered on 16th February 2010 be set aside.

16. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on the following issues of law and fact, and on which learned counsel for the appellants submitted. In our considered view, the issues falling to be determined may be summarized as follows:

(a) Did the deceased leave a valid Will, or did he die intestate?

(b) Whether the mode of distribution decreed by the High Court in accordance with the alleged Will was in itself lawful?

(c) what orders should this Court make in determination of the appeal?

(d) Who bears the costs of this appeal?

17. We have considered the findings of the High court, the submissions of counsel for the appellants, the numerous statutory provisions and authorities cited before us. This being a first appeal, it is also our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR* citing thecase of *Selle v Associated Motor Boat Co. [1968] EA p.123* where the Court held:

> " 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 demeanor of a witness is inconsistent with the evidence in the case generally."

18. With regard to the formal validity of the Will, an issue arose as to whether the document purported to be the deceased's Will, and on the basis of which the learned Judge decreed distribution of the deceased's estate, was valid. Section 11 of the *Law of Succession Act*, Revised 2012 (2010) sets out the requirements of a valid Will. It reads:

> " 11. Written wills
>
> 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."

19. When the High Court Succession Cause No. 341 of 1998 came for hearing on 11th March, 29th April, 2nd and 29th June, and 22nd July 2009, the appellants contended that the Will was invalid. The 2nd appellant, Alice Nduta Mburu, told the court that the deceased had made an oral will, and that the signature on the document purported to be the deceased's will was not his. According to her, the deceased's signature should have been affixed on every page to lend validity to the document. In her testimony, she stated that their father loved them as his daughters and could not have ignored them. The learned Judge observed that the appellants had not sought opinion of a handwriting expert on the authenticity of the deceased's signature appended on the Will despite the ample time and opportunity allowed by the court to do so. On the appellants' allegations of forgery, the learned Judge observed that the charge of forgery is a serious one and the standard of proof required of the allegation of forgery is higher than that required in ordinary civil cases (see *Elizabeth Kamene Ndolo v Matata Ndolo [1996] eKLR*.)

20. Having carefully examined the form of the impugned Will, we are satisfied that the same meets the requirements of section 11 of the Act. The same was executed by the deceased on 25th May 1995, about 2 years before his death. The Will was witnessed by Kuria Kimani, Joseph K. Kiarie and Kariuki Kinyanjui in the presence of G. N. Wakahiu, Advocate, by whom it was drawn.Subsequently, the deceased's Will stamped and registered on 28th June 1995. In our considered view, the fact that the existence of the Will became known to the 1st respondent 7 years after the deceased's demise does not of itself invalidate that testamentary instrument. That settles the first issue before us. The only substantive question that remains for us to answer is whether the contents of that will relating to the distribution of the deceased's estate erodes its legal validity.

21. The next question that begs answers is what the effect of discriminatory provisions in a Will would be. Can such provisions stand? No. It is not in contention that the deceased's Will excludes all his daughters, including the appellants, from distribution, on account of their gender or marriage. In her Ruling, the learned Judge observed that the deceased may have excluded his 1st wife on account of their estrangement, and the appellants on account of their gender or presumed marriage under Kikuyu customary law. The same applied to the 6 daughters in the 2nd house. Notwithstanding the glaring discriminatory mode of distribution, the learned Judge proceeded to uphold and enforce the Will.

22. Article 27(3) of the *Constitution* guarantees the right to equality and freedom from discrimination. It provides that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." Sub-article (4) read together with (5) prohibits discrimination on the basis of inter alia sex or marital status.

23. *In Rono v Rono & Another [2008] 1 KLR* (G & F) p.803, Waki, JA (as he then was) stated:

> " Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribers to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two International Human Rights Covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966). In 1984, it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women in short "CEDAW". Article 1 thereof defines discrimination against women as:
>
> 'Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.'"

24. In *Mwongera Mugambi Rinturi& another v Josphine Kaarika & 2 others [2015] eKLR*, this Court stated that:

> " This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What *Rono v Rono* (*Supra*) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010."

25. The constitutional right to equality and non-discrimination is inalienable. This Court does not contemplate a situation where the scales of justice would tip in favour of sons as though daughters were diminished in human worth in matters of inheritance, or in any other matter. Indeed, the constitutional right to equality and freedom from discrimination is the mainstay of our personal dignity, which this Court should strive to uphold. As observed by Asike-Makhandia, J. (as he then was) *in Re Estate of Solomon Ngatia Kariuki (deceased) [2008] eKLR*:

> " The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate ... Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family."

26. In so far as the learned Judge upheld the deceased's Will despite its discriminatory provisions, the impugned Ruling and Order in that regard, and the deceased's Will, cannot stand. The two go against the grain of the Constitution, statute law and the international human rights instruments binding on Kenya under and by virtue of Article 2(5) and (6) of the Constitution. It contents erode its legal validity, and our finding in this regard settles the second issue before us.

27. Finally, we are constrained to interfere with the learned Judge's discretionary award of 1/10th of the deceased's estate as provision for dependency in favour of the appellants. With due respect, that limb of her order does not identify the specific assets in the deceased's estate that were to be distributed to

the appellants constituting 10% of its value. How practical the enforcement of such an award would be remains to be seen. By so holding, we are mindful of the principle that section 40(1) of the Act does not take away the discretion of a court in determining an equitable and fair mode of distribution. This Court so held in *Scholastica Ndululu Suva v Agnes Nthenya Suva [2019] eKLR* where the learned Judges observed that:

> ".....although section 40 provides the general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate."

28. In view of the foregoing, there is no doubt in our mind that despite its formal validity, the deceased's Will is a nullity on account of its discriminatory provisions. Neither the Will nor the Ruling of the learned Judge can be considered as providing a legal framework for what section 40 of the Act contemplates as equitable or fair distribution. What then are the orders that this Court should make? we hereby order and direct that –

    (a) the appellants' appeal be and is hereby allowed;

    (b) the Ruling and Order of the High Court (Family Division) Succession Cause No. 341 of 1998 be and is hereby set aside;

    (c) the deceased's estate be administered and distributed as intestate estate in accordance with section 40 of the Act;

    (d) the parties bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021

W. KARANJA

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JUDGE OF APPEAL

H. A. OMONDI

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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