IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, MURGOR & KANTAI, JJ.A)

CIVIL APPEAL NO. 239 OF 2016

BETWEEN

GRACE WANJIRU NJURU.....APPELLANT

AND

LOICE NJERI NJURU.....RESPONDENT

(Being an appeal from the Ruling of the High Court (Meoli, J.) *dated 23rd June 2016* in Succession Cause No. 40 of 2014)

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JUDGMENT OF THE COURT

In this appeal, ***the appellant, Grace Wanjiru Njuru*** is aggrieved by the ruling of the High Court which upheld a protest by ***the respondent, Loice Njeru Njuru*** in which it was claimed that Josephine Muthoni Njuru, her late mother and widow of John Njuru Gakuu *(deceased)* was left out from the list of beneficiaries, and for the deceased's estate to be shared equally between the houses of Josephine Muthoni Njuru (deceased), the 1st house and the appellant's family (the 2nd house).

On 18th May, 2011, a grant of letters of administration in respect of the estate of the deceased was issued to the appellant. In the application for grant of letters of administration, the deceased's survivors were specified as;

Grace Wanjiru Njuru – Widow

Loise Njeri – Daughter/Married

Stephen Njuru – Grandson

Martha Muthoni - Granddaughter

Daniel Mwaura Njuru – Son

Jeremiah Wanjau Njuru – Son

Samuel Ndungu Njuru – Son

Irene Wanjiru - Daughter/Married

Lilian Wangu - Daughter/Married

Margaret Wanjiku - Daughter/Married

Martha Ngina – Daughter/ Married

Serah Nungari – Daughter/Married

Tabitha Muthii – Daughter/Married

Racheal Njeri – Daughter/Married

Irene Wanjiru – Daughter/Married

The deceased's properties as set out below were also specified.

Before the grant was confirmed, various affidavits of protest were filed by *inter alia* the respondent, one of the deceased's daughters, and Stephen Njuru, the deceased's grandson of the 1st house, who sought to have the assets of the deceased, distributed equally between the deceased's two houses.

A further application was filed by Samuel Ndungu Njuru on his own behalf and on behalf of his siblings, Daniel Mwaura Njuru and Jeremiah Wanjau Njuru to restrain the respondent from wasting or farming tea or collecting the tea production proceeds in respect of the properties known as Ndarugu/Gakoe/1619 and 1620. Various other parties filed affidavits, but not all the deponents testified before the trial court.

After considering the affidavits and witness testimonies, the learned judge found that the identities of the lawful beneficiaries of the estate was not in dispute. The judge also concluded that the deceased was polygamous, having had two wives namely, the respondent, the late Josephine Muthoni Njuru, who had two children, the respondent and Irene Njuru who was deceased, but was survived by two children namely Stephen Njuru and Martha Muthoni, and the appellant who had eleven children with the deceased.

In determining the dispute, the learned judge considered two issues; i) the scope of the estate of the deceased; and ii) the distribution of the deceased's estate. In respect of the scope of the deceased's estate, the learned judge concluded that by the time of his demise, the deceased's estate was made up as follows;

1. Longonot/Kijabe/Block 3/824

2. Longonot/Kijabe/Block 3/644

3. Longonot/Kijabe/Block 3/613

4. Longonot/Kijabe/Block 3/1012

5. Kiambogo/Elemantaita/544

6. Naivasha Kabati/457

7. Ndarugu/Gakoe/1619

8. Ndarugu/ Gakoe/1620

?On the distribution of the estate, the learned judge having taken into account the beneficiaries of the estate, and the proposals for distribution of the appellant and the respondent, determined that;

The 1st house should retain the following properties: -

A. Ndarugu/Gakoe/1619 with the whole share to Loice Njeri Njuru

B. Ndarugu/ Gakoe/1620 to be equally shared between Irene Wanjiru's children, Stephen Njuru and Martha Njuru C. Plot Naivasha/Kabati/457 to be shared equally between Loice Njeri Njuru, Stephen Njuru and Martha Njuru

And the 2nd house would share the remaining properties as follows:-

1. Longonot/Kijabe/Block 3/644 to be shared by the deceased's daughters as follows;

- **Rachael Njeri**
- **Tabitha Muthii**
- **Lilian Wangu**
- **Margaret Wanjiku**
- **Martha Ngina**

- **Serah Nungari**

2. Longonot/Kijabe/Block 3/824 with the whole share going to the appellant

3. Longonot/Kijabe/Block 3/613 with a whole share to Jeremiah Wanjau Njuru

4. Longonot/Kijabe/Block 3/1012 with the whole share to Daniel Mwaura Njuru

5. Kiambogo/Elementaita/544 with the whole share to Samuel Ndungu Njuru

The judge finally ordered that the grant be confirmed in the names of the appellant and the respondent.

The appellant was aggrieved by the High Court's decision and filed this appeal on grounds that the learned judge wrongly awarded properties to the respondent which she had not claimed; that the learned judge misapprehended the evidence and failed to take into account the causation of evidence, and by so doing wrongly awarded prime land with tea plantations and a commercial plot at Naivasha Town to the respondent and grandchildren thereby leaving the appellant and her children with semi-arid plots situated in the Longonot area; that the learned judge shifted the burden of proof to the appellant despite being cognisant of the history and background to the dispute, and distributed the deceased's properties unequally among the beneficiaries, and finally, that the learned judge went against the wishes of the deceased who had indicated how his estate should be distributed.

In the submissions, ***Mrs. Morande*** learned counsel for the appellant holding brief for Mr. Chepkwony relied on the memorandum and record of appeal and submitted that the essence of the appeal was that no valuation was undertaken on the properties of the estate, and therefore the properties were inequitably distributed amongst the beneficiaries. Though served, there was no appearance for the respondent.

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

> **"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** *(Abdul Hameed Saif v. Ali Mohammed Sholan,.* ***(1955), 22 E.A.C.A. 270)."***

Guided by the above principles, we have considered the grounds and record of appeal, and the brief submissions of counsel for the appellant, and from what we can discern, the issues for consideration are whether in distributing the deceased's estate, the learned judge evaluated the evidence and arrived at the correct methodology for distribution of the estate properties; whether the deceased's properties were equitably distributed amongst the beneficiaries and whether the learned judge ought to have taken into account the deceased's wishes.

Idistributing the deceased's estate, the learned judge discerned that there was no dispute as to who the beneficiaries of the estate were, or the properties to be included in the estate. The judge observed regarding distribution, that the only point of disagreement concerned *"…the sharing of the land at Kiambu and the Naivasha plot."* To arrive at a determination, the learned judge took into consideration that;

> **"Evidence on both sides indicates that the 1st wife and her children including the Protestor exclusively lived and worked the land at Kiambu, while the Petitioner and her children lived in Longonot. The bulk of the Petitioner's evidence was that the deceased distributed his property before death and particularly that the Kiambu land was split between the two houses.**

The court went on to observe that;

> **"It is true that the Gakoe parcels of land have tea bushes but the mode of distribution proposed by the Petitioner is faulty for two reasons. Firstly, she had made no provision for the listed daughters of the deceased, also lawful beneficiaries of the estate of the deceased, whether or not they have appeared herein. Secondly, it is not equitable as the 2nd family proposes to take more than the lion's share of the estate, ignoring the fact that the 1st wife lived and worked at the Gakoe property in her lifetime. Her body is buried there…**
>
> **Further… the protestor and Irene's daughter Martha Muthoni own a good number of tea plants at the Gakoe land."**

Whether the learned judge took into account the correct considerations requires that we interrogate the evidence that was before the court afresh. According to ***Samuel Ndungu Njuru (PW1***,) a son of the appellant, the deceased distributed his property to the 1st house because a dispute had arisen in the family; that Irene and the respondent were given properties, and that Irene's property was given to her children Stephen Njuru and Martha Muthoni; that Plots Nos. Ndaragua/Gakoe 1619 and 1620 were to remain with the 1st house to enable them pay off a loan, and thereafter, Plot No. Nderagua/Gakoe 1620 was to go to the appellant. It was his evidence that the Rift Valley properties were

also distributed to the two houses. Longonot/Kijabe Block 3/613, 644, 824, 1012 and Naivasha/Kabati 457 were to go to the 2nd house with Longonot/Kijabe Block 3/1012 to be given to Daniel Mwaura. He stated that 4 plots in Naivasha and Kinungi were given to the 1st house which the first family had sold. He did not have any details of these plots. The appellant supported this evidence.

It was the evidence of ***Esther Wanjiru Njuru (PW3),*** the deceased's sister, that the deceased had called his family together, and on that occasion had distributed his properties to his family. She testified that the land in the Rift Valley was to be inherited by his 2nd wife, and that the 1st wife was to inherit the Gakoe land, though he did not specify the acreage to be distributed to the beneficiaries. She claimed that the deceased had intended that the youngest son of the 2nd house inherit land in Gakoe, but she did not provide any details. The gist of the evidence of ***Josephat Kamau (PW4***), and ***Joseph Mwaura (PW5)***, both nephews of the deceased, was that the 2nd family was to get one of the plots in Gakoe.

On her part the respondent's proposal was that the 1st house retain the Ndarugu/Gakoe/1619 and 1620 and the Naivasha/Kabati 457, a property on which her sister had commenced a construction authorized by their father, and on which they had paid the rates over the years. The 2nd house would retain the properties in the Rift Valley. She reasoned that the Ndarugu/Gakoe/1619 and 1620 was where her mother was buried, and that they farmed tea on those properties. She further stated that the 2nd house were settled in the Rift Valley, where their father was buried. ***Stephen Njuru (RW2),*** supported the respondent's evidence. He added that over the years he had been paying the rates with respect to Naivasha/Kabati 457, and produced receipts as evidence of payment.

Based on the evidence that was before the court, was the deceased's property equitably distributed? It is not in dispute that the deceased was a polygamous man, with two families. One family comprised the 1st house of the late Josephine, the respondent's mother, comprising the respondent and her late sister Irene's two children Stephen and Martha Muthoni. The 2nd house comprised of the appellant, and her eleven children. The identities of the beneficiaries and the actual properties pertaining to the estate are not in dispute. It is also not in dispute that the deceased died without leaving a will to express how his properties were to be distributed amongst his two families.

As discerned by the learned judge, the appellant's grievances are centered on the distribution of Plots Nos. Ndarugu/Gakoe/1619 and 1620 and Naivasha/Kabati 457.

In her proposal for distribution of the estate, the respondent proposed that the Plots Nos. Ndarugu/Gakoe/1619 and 1620, where the 1st house farmed tea and where Josephine, her late mother was buried, as well as the Naivasha/Kabati 457 plot on which her sister Irene had commenced construction and for which they paid rates over the years, be retained by the 1st house, while the 2nd house would retain all the Rift Valley properties in which they had settled. The appellant's proposal was that the 2nd house retain all the Rift Valley properties including Naivasha/Kabati 457 and also Ndarugu/Gakoe/1620. She argued that since the 1st house had received 4 plots in the Rift Valley during the life of the deceased, which they had sold, they were not entitled to inherit property in the Rift Valley, but an equitable distribution of the deceased's property entitled the 2nd house to one of the Gakoe properties.

On the basis that the estate comprised of the two houses, the trial court rightly relied on ***section 40*** of the ***Law of Succession Act*** to ascertain the manner of distribution of his properties.

Section 40 (1) of the Act provides:

> **"Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residual of the net intestate 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."**

In discerning the purport and intent of ***section 40***, in the case of ***Elizabeth*** **Chepkoech Salat vs Josephine Chesang Salat *[2015] eKLR***, this Court expresseditself thus;

> **"Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated. Where a matter is contentious and the parties have not reached a consent judgment, the court is bound to apply the statutory provisions. More specifically, the court has no power to substitute the statutory principles for its own notion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house *or beneficiary or to decide which property should be disposed of to pay liabilities of the estate or to determine which properties should be retained by each house or several houses in trust."***

And in the case of **Scolastica Ndululu Suva vs Agnes Nthenya Suva [2019] eKLR** this Court again observed;

> **"…although section 40 of the Law of Succession Act provides a 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."**

When the manner of distribution of the deceased's estate is analysed, it is evident that the learned judge applied the above described methodology to the circumstances of the case, and having appreciated that by the time of the deceased's demise, the 1st house had settled on, and were farming tea on the two Gakoe plots, where the respondent's mother was buried, the court determined that the 1st house ought to retain the two Gakoe properties. The judge further observed that since the 1st house had, over the years paid the rates for the Naivasha/Kabati 457 property, it should also remain with the 1st house. On the other hand, the 2nd house would retain the rest of the Rift Valley properties where they had settled, and where the deceased was buried.

On the argument that the 2nd house was entitled to land parcel Ndarugu/Gakoe/1620 because the 1st house had received 4 plots in the Rift Valley from the deceased during his life which they had sold, the learned judge concluded that the appellant *"…was unable to prove by hard evidence that the 1st house had during the lifetime of the deceased benefited from the plots at Mirera, Naivasha, Hillstop Kinungi or Longonot. Nor was there any evidence that one of the sons of the petitioner's house was allocated the parcel Ndarugu/Gakoe/1620 in the lifetime of the deceased…"* Further, no evidence pointed to the Naivasha/Kabati 457 having been assigned to the 2nd house.

We too have considered the evidence that was before the trial court, and can find nothing to show that the 1st house was allocated plots in the Rift Valley during the deceased's lifetime, thereby rendering it a matter of necessity to give land parcel Ndarugu/Gakoe/1620 to the 2nd house, which would leave only land parcel Ndarugu/Gakoe/1619 to the 1st house. In effect, what the 2nd house was inferring was that the 2nd house would have all the Rift Valley properties, Naivasha/Kabati/457, and Ndarugu/Gakoe/1620, and therefore have, as the learned judge put it, *"…more than the lion's share of the estate…"*

We are satisfied that, not only did the learned judge consider that, by the time of his demise, the deceased had already settled the two houses on different portions of his land, the court also took into account the statutory requirement that all beneficiaries, including the appellant's daughters, who had been left out of the appellant's proposal, as also being entitled to a portion of the estate. And as to whether Navasha/Kibati 457 should have been granted to the 1st or the 2nd house, the weight of the evidence would tilt in favour of its being distributed to the 1st house by reason of the ongoing struction by Irene as authorized by the deceased, and their continued payments of the land rates.

That said, the appellant's main complaint is that the Rift Valley properties, relative to the Ndaragua/Gakoe plots, were lesser in value and therefore the distribution was inequitable. We have gone through the record, and find that this was not a matter for determination before the trial court. But this notwithstanding, there is nothing in the evidence that would indicate that the properties were valued, or that the parties called for a valuation of the properties. The only mention in terms of value is to be found in the respondent's testimony where she stated that the Ndarugu/Gakoe properties comprised 3 acres, while the Rift Valley properties comprised of a total of 24 acres with a value of about Kshs. 18 million.

Since the appellant did not demonstrate in any way that the Ndarugu/Gakoe properties were more valuable than the Rift Valley properties, it was not proved that they were of a lesser value than the Ndarugu/Gakoe properties. Without such evidence, we are satisfied that in the exercise of her discretion to distribute the estate in the manner that she did, the trial judge took into account relevant factors and, we can find no fault in the mode of distribution which we consider having regard to the facts of the case to be fair and equitable. As such, we have no reason to interfere with that decision.

As concerns the final issue of whether the trial court considered the deceased's wishes, ***section 34*** of the Act stipulates that;

> **"A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."**

And in the absence of a valid will, the court is required to apply the law as it relates to an intestate estate.

As stated above, the deceased who was polygamous did not leave a will, and as such, the learned judge was required to distribute the deceased's estate in accordance with the provisions of the law in respect of a polygamous intestate estate. But that is not to say that the learned judge disregarded the deceased's wishes. It is clear that in distributing the deceased's estate due regard was taken of the deceased's preexisting settlement of his two families, that being, the 1st house on the Ndaragua/Gakoe and Naivasha/Kabati plots and the 2nd house on the Rift Valley properties.

As enunciated by this Court in the case of **Margaret Wanja Elija vs Peter *Ngari Elijah Kimani* [2013] eKLR;**

> **"There is nothing in the Law of Succession Act cap 160 Laws of Kenya which authorizes a court of law to disregard a deceased person's wishes on how his estate is to be distributed especially where the same is within the parameters permitted by the said Succession Act, and it is also fair to the satisfaction of the court and all or a majority of the beneficiaries of the deceased's estate with the exception of the appellant."**1

We agree. It is evident that, whilst complying with the provisions of the Law of Succession Act to ensure that the distribution was equitable and fair, with all beneficiaries being duly catered for, the learned judge also took into account the deceased's wishes and shared his estate according to the manner in which he had settled his family.

In sum, the appeal is without merit and is dismissed. As the matter relates to a family dispute, we order each party to bear its own costs.

It is so ordered.

Dated and delivered at Nairobi this 5*th* *day of June, 2020.*

W. KARANJA

…….……..

JUDGE OF APPEAL

A. K. MURGOR

……..

JUDGE OF APPEAL

S. ole KANTAI

……..

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR