IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA]

CIVIL APPEAL NO. 49 OF 2017

BETWEEN

SCOLASTICA NDULULU SUVA ……APPELLANT

AND

AGNES NTHENYA SUVA ……..… RESPONDENT

*(Being and appeal from the judgment of the High Court of Kenya at Nairobi (**Aggrey Mchelule, J**) dated 14th May, 2016*

in

SUCCESSESSION CAUSE NO. 110 OF 2007)

JUDGMENT OF THE COURT

[1] This appeal arises from a succession dispute concerning the estate of the late **Justus Munyori Suva** (deceased) who died on 23rd October 2002. Letters of administration were issued to the deceased's widows **Scolastica Ndululu Suva** (appellant), and **Agnes Nthenya Suva** (respondent), on 18th June, 2007. The parties were however unable to agree on the mode of distribution of the estate.

[2] The respondent had filed summons for confirmation of grant, proposing the distribution of proceeds from compensation paid by the National Land Commission in regard to properties known as **L.R. NO. Kathekani/706,** and **Kathekani/730** (herein **the two properties),** that were registered in the name of the deceased, and which had been compulsorily acquired for the construction of the Standard Gauge Railway (SGR). The respondent proposed that the two properties be distributed in the ratio 50% in her favour and 50% in favour of all the other beneficiaries made up of the appellant, her five children and the respondent's five children. The respondent justified the proposed distribution on the ground that the two properties had been purchased by her and the deceased before he married the appellant, and that the she (respondent) had made substantial financial contribution towards the purchase of the two properties.

[3] The appellant filed a protest, objecting to the mode of distribution proposed by the respondent. She disputed the respondent's contention that she had contributed to the purchase of the two properties, and maintained that the two properties were acquired by the deceased before his marriage to the respondent.

She urged that the deceased having been polygamous, the distribution of his estate should be done in accordance with Section 40 of the Law of Succession Act. She also noted that in her proposed distribution the respondent had excluded the interested Party **Mark Maweu Suva**, who is the deceased's son by his first marriage. The appellant proposed that the distribution should be done equally amongst all the 13 beneficiaries including the interested party.

[4] Following the hearing of the summons for confirmation of the grant, the learned Judge of the High Court found that the respondent had indeed contributed financially towards the acquisition of the two properties, and that it would be unfair to make her share the proceeds of compensation from the National Land Commission equally with the other widow. The learned Judge therefore directed that the balance of the proceeds which then stood at 11,908,595 be shared in the ration of 40% to the respondent and 60% to be shared equally between the remaining 12 beneficiaries of the estate.

[5] The appellant is aggrieved by that judgment and has lodged a memorandum of appeal raising five grounds. In brief, the appellant faults the trial judge for deviating from the provisions of section 40 of the Law of Succession Act regarding distribution of polygamous intestate

estate, and concluding that the respondent was entitled to a bigger share of the deceased's estate; finding that the respondent contributed to the purchase of the two properties the subject of the application before him, when there was no evidence adduced by the respondent to substantiate her claim; and applying the principles of matrimonial property law to the dispute before him when the matter was not a matrimonial property dispute but a succession dispute.

[6] The appellant filed written submissions that were duly highlighted by his counsel Mr **Julius Juma**. The appellant submitted that the trial judge should have applied Section 40 of the Law of succession Act that requires the estate of a polygamous person who dies intestate to be divided among the houses according to the number of children in each house but adding any wives surviving him as an additional unit. Accordingly, the estate should have been divided between 13 equal units composed of the two widows each with 5 children and the interested party.

[7] The appellant contended that the distribution should have been in the ratio of 1:6:6 in accordance with the numbers of the children and widow in each house. In support of this proposition the appellant cited this Court's decision in **Francis Mwangi Thiongo & 4 others v. Joseph Mwangi Thiongo [2015] eKLR**; and the judgment of Omolo JA in **Mary Ronoh v. Jane Ronoh & Another, [2005] eKLR**, arguing that the trial judge had the discretion to take into account the number of children in each house.

[8] The appellant faulted the finding of the trial judge in regard to the allegation that the respondent contributed financially towards the purchase of the two properties. She maintained that there was no justification for the respondent getting more than other beneficiaries as the two properties belonged to the deceased and were part of the deceased's estate; that the distribution adopted by the trial judge was not fair nor proper as in addition to the respondent getting 40%, each of her six children got 5%; that this meant that the respondent and her children received 65% of the deceased's residual estate while the appellant and her 5 children received only 30 percent; that this was very unfair considering that the appellant's children were much younger; and that the trial judge ignored the evidence adduced by the deceased's brother that the deceased bought the two properties single handedly.

[9] The respondent also filed written submissions which were highlighted by her counsel **Mrs. Alice King'oo**. In summary, the respondent submitted that she married the deceased under the African Christian Marriage and Divorce Act, and this marriage remained until the death of the deceased; that although the appellant's marriage to the deceased under **Akamba Customary Law** during the subsistence of the deceased's monogamous marriage to the respondent, was questionable, she was not disputing the appellant's marriage; that the trial judge rightly found that she (respondent) was entitled to a bigger share because she contributed to the purchase of the two properties; and that she was employed as a teacher and was able to contribute financially to the purchase of the two properties;

[10] The respondent pointed out that the estate of the deceased comprised of whatever share or portion of the property that the deceased himself owned by virtue of contribution during the marriage. Relying on **Kivuitu v. Kivuitu [1991] KLR 248,** the respondent argued that the invocation of the Married Women Property Act was proper; that the current Matrimonial Property Act recognizes the contribution made by spouses directly or indirectly, and therefore the learned judge was right in awarding the respondent 40% of the property before dividing the rest to the beneficiaries. The respondent therefore urged the Court to dismiss the appeal.

[11] In accordance with the duty expected of us as a first appellate Court, we have carefully considered this appeal and re-evaluated the evidence in light of the submissions made before us. The facts are not substantially in dispute.

[12] The deceased died intestate and therefore the administration of his estate is governed by the provisions of the Law of Succession Act. In his lifetime, the deceased had three (3) wives. The 1st wife who was mother to the interested party Mark Suva walked out of the marriage and is not party to these proceedings. The 2nd wife was the respondent whom the deceased first married under the Kamba Customary law in September, 1971 and then wedded in church under the African Marriage and Divorce Act in 1975. There are five issues of this marriage. The 3rd wife is the appellant whom the deceased married under the Kamba Customary Law in 1983 and with whom he had five (5) children. An attempt was made to question the validity of the appellant's marriage to the deceased during the subsistence of his monogamous marriage to the respondent. However, **section 3(5)** of the **Law of Succession Act** is clear that the appellant is nevertheless a wife for the purposes of **sections 29 & 40** of the **Law of Succession Act**. Thus, the deceased beneficiaries are therefore, the appellant and her five (5) children, the respondent and her five (5) children and the interested party all totaling to thirteen (13) beneficiaries.

[13] It is also not disputed that the two (2) properties were registered in the deceased's name and listed as part of his estate. What is disputed is whether the respondent contributed financially towards the purchase of the two (2) properties and, if so, whether it was proper for the trial court to take this into account in the distribution of the estate. Of consideration, is also the discretion of the court in the distribution of the estate in light of the provisions of **section 40(1)** of the **Law of Succession Act.**

[14] Section 40(1) of the Law of Succession Act provides for distribution of the estate of a polygamous deceased's person as follows:

> ***"40(1) where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate 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."***

[15] In **Mary Rono vs Jane Rono & another** (supra), Waki JA in the leading judgment, accepted the proposition that the Court had

the discretion in ensuring a fair distribution of the deceased's estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows:

> ***"My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children***

in each house. If Parliament had intended that they 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."

[16] In **Douglas Njuguna Muigai & vs John Bosco Maina Kariuki & another** (supra) this Court noted the absurdity of a blind application of section 40(1) of the Law of Succession Act as follows:

"Back to section 40(1) of the Law of Succession Act, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased's estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co-wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and, in our view, that failure to recognize her contribution is tantamount to discrimination."

[17] It is therefore evident, that, 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.

[18] In regard to the question whether the respondent contributed towards the purchase of the two (2) properties, the trial judge had this to say:

"The protester testified that she was married to the deceased in the year 1983 and found the applicant already married to the deceased. She further stated that she found the two properties in issue herein had already been acquired, though she was not sure of the exact year of the acquisition. It was her testimony that at the time of her marriage to the deceased she found him living together with the applicant on the same land. It is thus safe to hold that the protester never contributed to the purchase of the two properties herein. It also emerged that the applicant herein was gainfully employed as a teacher in the year 1973 and retired in the year 2005. It was admitted by the protester and her witness Johnson Musyimi Suva that the applicant was working as a teacher when the deceased bought the parcels, she signed one of the agreements as the purchaser. I accept her evidence that she contributed financially towards the acquisition of the two parcels; Kathekani/76 and Kathekani/730. In the circumstances, it would be unfair to share the proceeds half - half between the two (2) widows of the deceased, or to find that each beneficiary should get equal proceeds of the share"

[19] On our own evaluation of the evidence, we are entirely in agreement with the conclusion that the trial judge arrived at that the respondent contributed financially to the acquisition of the two prperties. We are alive to the fact that what was before the learned judge was a succession cause and not a matrimonial dispute.

However, the succession cause was anchored on the matrimonial circumstances of the deceased. The fact that the deceased acquired the two (2) properties during the subsistence of his marriage to the respondent, before the appellant came into the scene, and the fact that the respondent was employed, clearly, supported her allegation that she contributed to the acquisition of the two (2) properties. It would not therefore be fair nor just to treat the appellant and the respondent equally in the distribution of the estate.

[20] The following excerpt of the judgment reflects the distribution adopted by the trial Court as follows:

"All the 13 beneficiaries (including the applicant and the protester) entered into a consent on 10/2/2015 and shared Kshs11,000,000/= equally. The balance from the proceeds of the parcels at Kshs11,908,595/=.(sic). In the circumstances of the case, I ask (sic) that 40% of the Kshs11,908,595/= shall go to the applicant Agnes Nthenya. It works to Kshs.4,763,438/=. The protester Scholastica Ndululu Suva, Mark Maweu Suva, Felix Munyoki Suva, Barnaba Iwia Suva, Clement Moki Suva, Jonathan Kaloki Suva, Methussella Kivila Suva, Isaac Ngolano Suva, Roy Silas Suva, Metes Mwonge Suva, Abednego Andrew Munyoki and Sarah Muyoki Suva shall equally share the balance of Kshs7,145, 157/=. Each will get Kshs.595,429/75. Lastly the proceeds of the treasury Bills Nos A0009717 and A0009718 shall be equally shared among all the 13 Beneficiaries."

[21] From the above it is apparent that apart from the amount of Kshs11,908,595/= of which the respondent received 40 percent, the

rest of the proceeds were shared out equally. An arithmetical calculation reveals that the respondent actually got only about 25 percent of the total sum whilst the rest was shared out equally amongst the remaining 12 beneficiaries. In the circumstances the appellant's contention that the distribution was unfair has no substance.

[22] Accordingly, we find no substance in this appeal and do therefore dismiss it. As the appeal involves a family dispute the order that commends itself to us on the issue of costs is that each party shall bear their own costs in this appeal.

Those shall be the orders of this Court.

DATED and delivered at Nairobi this 25th day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

……...……..

JUDGE OF APPEAL

J. MOHAMMED

……...……..

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.