



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, MURGOR & KANTAI, J.J.A.)

CIVIL APPEAL NO. 92 OF 2011

BETWEEN

CHRISTINE GATHONI KARANJA.....APPELLANT

AND

SAMUEL KARIUKI MUNGAI

Alias SAMMY KARIUKI MUNGAI.....1ST RESPONDENT

LUCAS MUHIA MUNGAI.....2ND RESPONDENT

BERNARD NJUGUNA MUNGAI.....3RD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at

Nairobi (Onyancha, J.) dated 25th June 2007

in

H.C.S.C. No. 5 of 1998)

JUDGEMENT OF THE COURT

In this appeal, the appellant is dissatisfied with the decision of the High Court which relied on the panel of elder's distribution of the estate of the late *Mungai Njuguna alias Ignatius Mungai Njuguna (the deceased)* who died on 11th May 1996, without deference to the Law of Succession Act, and without appreciating that *Christine Gathoni Karanja, the appellant (Christine)* did not participate in the meeting to distribute the estate.

The background of the dispute is that *Samuel Kariuki Mungai alias Sammy Kariuki Mungai (Samuel)* was issued with a Grant of Letters of Administration of the deceased's estate on 14th July 2004. The application for grant had specified that the beneficiaries of the estate were Bernard Njuguna, Lukas Mwhia Mungai, Sammy Kariuki Mungai, Christine G. Karanja Mungai, Jane Waithira Mungai & Ephantus Maina Mungai.

The properties of the deceased's estate were specified as;

1. L.R. No. Ndithini/Machakos 8/32 – 18 acres,
2. Shop No. 48 Masinga Market,
3. L.R. No. Masinga/Machakos/1102 – 1.5 acres,
4. L.R. No. Masinga/Machakos/1312 – 19.7 acres.

Upon issuance of the grant, Bernard Njuguna Mungai a son of the deceased and Christine, the deceased's daughter in law filed objections to the confirmation of grant. In her objection Christine contended that, she was protesting against confirmation of letters of administration granted to Samuel for reasons that the proposed distribution of the deceased's estate was inequitable, discriminatory and unfair. It was asserted that the administrators and Bernard Njuguna Mungai and Lukas Muhia Mungai had illegally transferred some of the properties without due consultation; that portions of land parcel known as Masinga/Machakos District/1081 and Masinga/Machakos District/1312 had been sold and occupied by the purported purchasers; that land parcels known as LOC4/Gakarara/216, Ndithini/Machakos District 8/82, and Masinga/Machakos District /1102, which are still available should be distributed equally, taking into account the disposal of properties by some of the beneficiaries; that Masinga Market Shop Plot 48 belonged to her husband and was not available for distribution.

In determining whether the grant of letters of administration ought to be confirmed, the learned judge took into account minutes of a meeting to agree on the manner of distribution of the estate, which meeting was held at Masinga Market and was presided over by a panel of elders and attended by all the dependants, except Christine. The court stated that;

“Taking the submissions before me by the parties into account and considering and independently evaluating what the panel took into account and reasons for such course, I have come to the conclusion that the best course of this court is to strictly take into account what the panel took into account.”

In so doing, the court found that the grant of letters of administration was properly issued, and that no proper grounds were advanced for annulling or revoking it.

The appellant was aggrieved by the decision of the court and appealed to this Court. In the grounds of appeal the appellant complained that the learned judge erred in confirming the grant by relying entirely on the minutes of the panel of elders who had based their conclusions on customary law as opposed to the provisions of the Law of Succession Act; that the learned judge failed to take into account that the proposed distribution of the estate of the deceased by the panel of elders was inequitable, discriminatory, unfair and in contravention of the Law of Succession Act and in failing to appreciate that the appellant was not invited to the meeting of the panel of elders.

Learned counsel for the appellant, **Mrs. J. Thongori**, submitted that the learned judge misdirected himself in relying entirely on the minutes of the elder's meeting which were unsigned, and in failing to appreciate that the appellant was not present at the meeting as she had not been invited. Counsel asserted that the distribution was unequal, as the judge did not take into consideration that most of the properties had been disposed of, and instead distributed the properties to the beneficiaries; that in addition, the learned judge did not deduct the properties disposed of from the entitlement of the responsible beneficiaries.

On the Maragwa plot, it was submitted that distribution was unequal as it was not clan land, and that an extra acre was given to Samuel, on the premise that he had cleared the hospital bill for the deceased's wife, Elizabeth Muthoni Mungai (also deceased). Counsel adverted that the amount paid was not commensurate with the value of the land parcel given to Samuel, so that Samuel received more acreage than the other beneficiaries.

As concerns shop No. 48 at Masinga market, it was submitted that it did not belong to the estate, as the appellant's late husband had purchased it from the deceased. Counsel finally argued that in accepting the distribution in the manner that it did, the court failed to apply the principles of fairness and justice to the distribution of the estate as required by the Law of Succession Act, which had occasioned grave injustice to the appellant.

Though served with the hearing notice for that days' hearing, neither the 1st nor 3rd respondents nor their counsel appeared. With respect to the 2nd respondent, the court was informed that he had died three years earlier, and that the appeal against him had abated, since he had not been substituted.

We have considered the pleadings, and the parties' submissions and are of the view that the issues that fall for consideration are whether the learned judge was wrong to rely on the minutes of the elders' meeting held on 19th and 20th November 2004 to determine the manner of distribution of the deceased's estate among the beneficiaries. The appellant's other complaint was that she was not present at the distribution meeting of 19th and 20th November 2004 as she was not notified of the same, and that though she was entitled to contribute to the discussions, since she did not participate, and her views and opinions were not heard, she was denied her rights contrary to law.

In determining the issues, our mandate on a first appeal is set out in **rule 29 (1)** of this Court's Rules namely, to re-appraise the evidence and to draw inferences of fact. We remain guided by the principles enunciated in ***Selle vs Associated Motor Boat Company Ltd [1968] EA 123*** that requires that we be slow to interfere with the decision unless we are satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifestly clear from the case as a whole that the judge was overtly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

Beginning with the complaint that the appellant was not invited to attend the meeting to distribute the estate of the deceased, when the record is considered, it is true that the appellant did not attend the meeting. According to the minutes of the impugned meeting, it was noted that all the beneficiaries except Christine attended. The minutes stated;

“Joseph Njuguna Mwangi chaired the meeting assisted by Ernest Mburu Mungai, Zacharia Mbugua Kinyanjui was secretary to the panel. All the beneficiaries attended the meeting except one Christine Gathoni Karanja who had not been invited.”

In the judgment, the learned judge also observed that; *“...the panel discussed the estate of the deceased and how best it should be distributed in the presence of all the dependents except one— Christine Karanja Mungai, whose interest was taken care of and protected.”*

It is trite that no person should be subjected to a decision to which they have not been made a party. In the ***Board of Education vs Rice***

[1911] AC 179 in Lord Loreburn, LC stated;

“a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is ‘a duty lying upon everyone who decides anything.’”

And in ***Mbaki & Others vs Macharia & another*** [2005] 2 EA 206, this Court emphatically expressed itself on the right to be heard thus;

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

In the instant case, it is not disputed that by virtue of having been the wife of the late Silas Karanja Mungai, a son of the deceased, Christine was included as a beneficiary of the deceased’s estate. Yet, she was not invited to attend the elder’s meeting that distributed the deceased’s properties, and neither did she attend. And unlike all the other beneficiaries who participated in the meeting, it is not also controverted that Christine did not have an opportunity to present her views to the elders, or to be heard. As a result the decision making body, the panel of elders, distributed the deceased’s estate without Christine’s participation.

And in deciding that the court would rely on the panel’s decision regarding the distribution of the estate on the basis that Christine’s “interest was taken care of”, the learned judge failed to appreciate that the appellant’s right to be heard was violated. In our view, the learned judge failed to observe the basic tenets of the rules of fair hearing, and for this reason we are constrained to interfere with that decision.

At this juncture we need say no more on the complaints regarding distribution of the estate as a determination of the issues goes to the merit of Christine’s application objecting to summons for confirmation of the grant of the Letters of Administration.

Accordingly, we find that the appeal is merited, since the learned judge relied on the decision that failed to adhere to the rules of natural justice. The ruling and order of the High Court of 27th June 2007 is hereby set aside. We order that the Summons for Confirmation be referred back to the High Court for determination. The appellant shall have the costs of the appeal.

Dated and delivered at Nairobi this 8th day of March, 2019.

D. K. MUSINGA

.....

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

DEPUTY REGISTRAR