



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: NAMBUYE, GATEMBU & J. MOHAMED, J.J.A]**

**CIVIL APPEAL NO. 220 OF 2013**

**BETWEEN**

**WILLIAM MURERO.....APPELLANT**

**AND**

**ESTHER MALASO MURERO.....1<sup>ST</sup> RESPONDENT**

**MARY NASERIAN MURERO.....2<sup>ND</sup> RESPONDENT**

**DANIEL MURERO.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya*

*at Nairobi (Kimaru, J) dated 9<sup>th</sup> May, 2013)*

In

**HC. SUCC. CAUSE NO. 95 OF 2006)**

**JUDGMENT OF THE COURT**

This is an appeal arising from the orders made by the High Court (Kimaru, J) on 9<sup>th</sup> May, 2013 in Nairobi High Court Succession Cause No. 95 of 2006.

The background to the appeal is that the proceedings herein relate to the Estate of **John Tupenet Murero** (the deceased) who died domiciled in Kenya on the 11<sup>th</sup> June, 1992. The said deceased died intestate leaving behind two households. The first household is that of the first wife **Mrs. Sophia Wamaitha Murero, (Sophia)** whose children were enumerated in the Chief's letter and reproduced on the record as follows:

1. **William Ole Murero**
2. **Stephen Ole Murero**
3. **David Ole Murero**
4. **Dickson Ole Murero**
5. **Catherine Saloli Murero**
6. **Rhoda Murero**
7. **Jeniffer Murero**
8. **Slvia Murero**

9. **Lucy Murero.**

While the second household is that of the second wife, **Mrs Lois N. Murero (Lois)** whose children were also enumerated in the Chief's letter and also reproduced on the record as follows:

1. **Joseph Ole Murero**

2. **Daniel Murero**

3. **Ibrahim Ole Murero**

4. **Samuel Ole Murero**

5. **Susan Murero**

6. **Esther Murero**

7. **Hellen Murero**

8. **Mary Murero**

9. **Winnie Murero**

The grant of representation was taken out by **William Murero** and **Daniel Murero (William & Daniel)**. It was issued on 29<sup>th</sup> May, 2006. On 12<sup>th</sup> September, 2006, an application was made pursuant to the provisions of Section 71 (3) of the Law of Succession Act Cap 160 Laws of Kenya and Rule 40 (2) of the Probate and Administration Rules, seeking the Confirmation of the grant issued on 29<sup>th</sup> May, 2006 before the expiry of the prerequisite period of six (6) months after the issuance of the temporary grant. The properties forming the subject of the confirmation were given as follows:

(1) NAROK/CIS-MARA/LEMEK/189

(2) NAROK/CIS-MARA/190

Orders on confirmation were made on 13<sup>th</sup> September, 2006 and issued on the 15<sup>th</sup> September, 2006 vesting the two subject properties in the names of the administrators to hold in trust for the benefit of all the beneficiaries of the estate of the deceased.

On 31<sup>st</sup> July, 2012, the 1<sup>st</sup> and 2<sup>nd</sup> respondents **Esther Malaso Murero** and **Mary Naserian Murero (Esther & Mary)** filed summons for the rectification of grant dated 30<sup>th</sup> July, 2012, substantively seeking orders for the preservation of the properties forming the estate of the deceased and rectification of the grant confirmed on the 12<sup>th</sup> September, 2006 to specify the share entitlement of each beneficiary of the estate of the deceased. It was grounded on the grounds in its body and a supporting affidavit together with annexures thereto.

In summary, the respondents' contention was that the grant of representation to the estate of the deceased was issued and confirmed in the names of **William & Daniel**; that the grant does not disclose that the deceased had another share with his brother in land parcel number CIS-MARA/OLOPITO/4187 and 4188 and which at that point in time were registered in the name of the deceased's brother **Kalaile Ole Murero (Kalaile)** with one **Sophia** (the 1<sup>st</sup> widow of the deceased); that the said **Sophia** intended to dispose of the subdivided portion to third parties to the prejudice and great detriment of the beneficiaries of the estate of the deceased, hence the need for the preservation of the said properties.

It was further the respondents' contention that it will be in the best interest of justice to all the beneficiaries to the estate of the deceased if the specific share of each beneficiary were specified.

The summons for the rectification of grant was opposed by a replying affidavit deposed by **William** on 6<sup>th</sup> August, 2012. In summary, it was the deponent's assertion that the mode of confirmation of the grant vide which the joint administrators held the property forming the intestate estate of the deceased in trust for all the beneficiaries of the deceased's estate accorded with the deceased's wish to have the property held in trust and not to be subdivided or sold. The deponent conceded that the deceased held an equal share in land parcel formerly number CIS-MARA/OLOPITO/4 with his brother **Kalaile**; that the said share was excluded from the list of properties forming the intestate estate of the deceased because the deceased had given it out as a gift *inter vivos* to his first wife **Sophia**; that there was no threat of disposal of the said property to 3<sup>rd</sup> parties as then contended by the respondents.

The summons for rectification for grant came before the learned Judge on 9<sup>th</sup> May, 2013. All we have on the record is the indication of the coram, representation for the parties with **Mureithi**, indicated as appearing for the respondents, while **Miss Kabage** appeared for the appellant and list of the beneficiaries. What followed next was a list of properties forming the intestate estate of the deceased and the orders made by the court with regard to those properties, as follows:

“(i) LR NAROK/CIS-MARA/LEMEK/189 – 300 Acres

(ii) *LR NAROK-CIS-MARA/LEMEK/190 - 50 Acres*

(iii) *OLOPITO/4187 – 48 Acres in the names of Sophia Murero*

(iv) *LOROPIL FARM – 516 Acres*

(v) *NAROK Township Plot 44 Acres distributed equally between the two*

*(2) households”*

*“The properties that comprise the estate of the deceased shall be distributed as follows:*

*(1) Since all the beneficiaries are agreed that the properties be distributed equally between the two (2) households of the deceased, (All the other properties having been so distributed), the Olopito property which was registered in the name of Sophia Murero before the conclusion of this Succession Proceedings should also be distributed equally between the two widows of the deceased.*

*In that regard, the portions that have already been inherited by the children of Loise Murero shall be taken into account in equal distribution. The remainder of the portion shall be transferred to Loise Murero, the 2<sup>nd</sup> widow by Sophia Murero, the 1<sup>st</sup> widow.*

*The said subdivision and transfer shall be effected within ninety (90) days of today’s date or in default the aggrieved party shall be at liberty to apply to the court for appropriate orders. There shall be no order as to costs”.*

The appellant was aggrieved with the above order and filed this appeal citing nine (9) grounds of appeal. These may be paraphrased as follows: the learned Judge erred in law and in fact when he misdirected himself and failed to appreciate that:

(i) Land parcel number CIS-MARA/OLOPITO/4 no longer existed as at the time of the making of the order.

(ii) Land parcel number CIS-MARA/OLOPITO/4 was jointly owned by **Sophia Wamaitha Murero** and **Kalaile Ole Murero** and in the circumstances no order could be made affecting such ownership without the participation of the said **Kalaile Ole Murero**.

(iii) Land parcel number CIS-MARA/ OLOPITO/ 4 was a gift *intervivos* from the deceased to **Sophia Wamaitha Murero** and was rightfully excluded as not forming part of the said intestate estate of the deceased.

(iv) He was biased against the appellant.

(v) He took into consideration extraneous matters he ought not to have taken into consideration in arriving at the conclusion reached.

On account of the above complaints, the appellant sought orders that the Ruling and order of the Honourable Court delivered on 9th May, 2013 be and is hereby set aside, and in lieu thereof the court to issue an order dismissing the summons dated 30<sup>th</sup> July, 2012 with costs to the appellant. In the alternative, an order do issue remitting the matter to the High Court for re-trial of the Summons dated 30<sup>th</sup> July, 2012 before a different Judge and that costs of the appeal be awarded to the appellant.

The appeal was canvassed by way of oral submissions by learned counsel **Mr. J. Harrison Kinyanjui**, instructed by the firm of J. Harrison Kinyanjui & Co. Advocates for the appellant and through written submissions, adopted and orally highlighted by learned counsel **E.C. Kibet**, instructed by the firm of Mirugi Kariuki & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. There was no appearance for the 3<sup>rd</sup> respondent. The record is also silent as to whether he had been served for the hearing of the appeal, a position inadvertently overlooked by the court when it allowed the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents to prosecute the appeal assuming but mistakenly that **Mr. Kibet** was appearing for all the respondents.

Supporting the appeal, **Mr. Harrison Kinyanjui** faulted the trial Judge for failing to appreciate that there was no prayer for redistribution of the intestate estate of the deceased in the Summons for rectification of the grant; that since the grant had been confirmed by consent with the participation of the respondents, the same could not therefore be varied without applying the threshold for varying a consent order which threshold in counsel’s view the Judge neither addressed his mind to, nor applied to the facts before him before vitiating the consent order for the confirmation of the grant.

Counsel further faulted the Judge for the failure to appreciate that land parcel number **CIS-MARA/OLOPITO/4** no longer existed. Neither were the resulting subdivisions of the said land available for redistribution without the involvement of the joint owners namely, **Kalaile** who owned the suit parcel at the material time jointly with **Sophia**.

Counsel also faulted the Judge for expressing bias against the appellant who was disinherited in the process of redistribution of the intestate estate of the deceased and also for taking into consideration extraneous matters not deposed to by the parties in their respective supporting documents.

Opposing the appeal, **Mr. Kibet** submitted that the Judge cannot be faulted for holding that land parcel number **NAROK/CIS-MARA/OLOPITO/4187 & 4188**, formerly **NAROK/CIS-MARA/OLOPITO/4** was part of the deceased’s intestate estate

property as the same was transferred into the names of **Sophia** long after the death of the deceased and without following the procedure laid down in the Law of Succession Act; that the purported sanctioning of the said transaction by the elders stood vitiated as the same was not only illegal but also null and void as the elders neither being personal representatives to the intestate estate of the deceased nor executors of any purported oral will of the deceased had the mandate to sanction the said transfer in favour of **Sophia**.

Counsel further submitted that the appellant tendered no deed or any written testimonial to demonstrate that the deceased freely and willingly bequeathed the subject property to **Sophia**; that if indeed that was the wish of the deceased, then nothing prevented the deceased from transferring the said properties to **Sophia** during his lifetime. Counsel therefore urged us to impute fraud in the whole transaction and affirm the trial Judge's findings that the registration of the suit property in the names of Sophia notwithstanding, the same was available for redistribution; that no prejudice would be occasioned to **Kalaile** as the other joint holder as his share entitlement was distinct from the share of **Sophia**.

As to whether the Judge fell into error when he ordered rectification of the grant, **Mr. Kibet** submitted that in law, the only remedy available to an aggrieved party for any wrongly included or excluded property forming part of an estate of a deceased person is summons for rectification of grant and not revocation; that the summons for rectification dated 30<sup>th</sup> July, 2012 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents simply sought to have the grant issued to **William** and **Daniel** rectified to show all the properties forming the intestate estate of the deceased and the beneficiaries' mode of share entitlement.

On the exercise of judicial discretion, counsel relied on the case of **Moiso [2008] 1 KLR (G & F)** and submitted that an estate of a deceased person cannot be effectively distributed outside the Court as the Commissioner of Lands only acts on a Court Order to effect change or transfer of a deceased person's property from the deceased in favour of a beneficiary; reiterated that the elders had no mandate vesting title in **Sophia** as the authority to do so is vested in either a personal representative or an executor of a Will through a Court Order; that the trial Judge was properly seized of the summons for the rectification of grant in terms of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules; that the order on redistribution granted by the Judge accords with the prerequisites in Section 40 of the Act and should not be disturbed.

On alleged misdirection by the learned Judge, counsel relied on the case of **Paul Tono Pymto & Another versus Giles Tarpin Lyonnet [2014] eKLR** and submitted that the learned Judge neither misdirected himself nor misapprehended the facts and the law with regard to the title vested in **Sophia**; that the law obligated **Sophia** to prove through a court process that it was the intention of the deceased to bequeath her the subject property; that sanctioning the action of the elders in favour of **Sophia** would have amounted to the Court sanctioning an illegal and an impugned transaction and which would have amounted to a fraud being committed against the rest of the other beneficiaries of the intestate estate of the deceased.

Turning to the complaint that the Judge also took into account extraneous matters, counsel relied on the case of **Odd Jobs versus Mubia [1970] EA 476 and Dr. Leonard Kimeu Mwanthi versus Rukaria M'Twerandu M'Iriungi [2013] eKLR** and submitted that a Court of law has jurisdiction and can base its decision on an un-pleaded issue if it appears from the cause followed at the trial that the issue has been left to the Court for a decision. This was in support of the submission that parties filed opposing supporting documents but left the matter to the court to resolve the opposing issues.

Turning to the allegation of bias against the appellant, counsel relied on the case of **Kimani versus Kimani [1995 – 1998] 1 EA of 134** and urged us to dismiss the allegation of bias against the learned Judge for the appellants' failure to point out factors that go to demonstrate that the Judge was biased against the appellant. In counsel's view, all the Judge did was to redistribute the estate of the deceased equally between the widows and the beneficiaries.

This being a first appeal, our duty is as was aptly stated in the case of **Selle versus Associated Motor Boat Co. [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 vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”**

We have considered the record in light of the above mandate. The issues that fall for our determination are the same as those condensed above. The above position notwithstanding, we find it prudent to make a pronouncement as to whether the approach taken by the trial Judge in determining the summons for rectification of the then confirmed grant before him was the correct approach before delving into the merits of the condensed issues.

It is not disputed that what the trial Judge was confronted with at the trial were Summons for the rectification of a confirmed grant. It is the same confirmed grant that we have already alluded to earlier on in this Judgment that was confirmed in favour of **William** and **Daniel** to hold the two and only properties indicated in the application for the confirmation of grant as property forming the intestate estate of the deceased in trust for all the beneficiaries of the said deceased's intestate estate.

The prayers in the said Summons for rectification as already highlighted above sought first of all the preservation of the intestate estate property pending the determination of the said Summons and second a redistribution of the intestate estate property to indicate the specific shareholding of each beneficiary. Besides the two properties that had initially formed the subject of the confirmed grant; the Summons for rectification of grant introduced two other parcels of land namely, Land Parcel Number **NAROK/CIS-MARA/OLOPITO/4187 and 4188**. It was the contention of the applicants for the Summons for rectification of grant that the two parcels were resulting subdivisions of Land Parcel Number **NAROK/CIS-MARA/OLOPITO/4** formerly registered in the joint names of both the deceased and his brother **Kalaile**. The applicants were apprehensive that the change in the title holding from the deceased to one of his widows **Sophia** was highly prejudicial as

there was a threat of disposal of the said property to 3<sup>rd</sup> parties to the detriment of the beneficiaries who were equally entitled to a share in the said property.

In rebuttal to those assertions, the appellant filed a replying affidavit. His major contention was that it was the wish of the deceased that the properties forming the confirmed grant be held as such in trust for all the beneficiaries of the intestate estate of the deceased without any subdivisions. Second that Land parcels number **NAROK/CIS-MARA/OLOPITO/4187 & 4188** formerly Land Parcel Number **NAROK/CIS-MARA/OLOPITO/4** formerly jointly owned by the deceased and his brother **Kalaile** was a gift *inter vivos* from the deceased to his widow **Sophia**, a position confirmed by the elders with the participation of the respondents and was therefore not available for redistribution, contended the appellant.

We have also observed from the record that Daniel filed an affidavit which was struck out for failure to seek leave of court before introducing the same. Daniel is one of the co-administrators. The record is silent as to the nature of the contents of the said affidavit and its probative value to the proceedings considering that this was a succession matter which in our view called for caution on the part of the court taking such a drastic measure in an instance where inheritance rights are an issue. Counsel for the respondents also filed written submissions and authorities in support of the Summons for rectification of grant. The record is silent as to whether any directions were ever taken on the mode of procedure for the disposal of the said Summons for rectification of grant before the Judge proceeded to determine the same. The record is also silent as to the mode and the nature of the representations made by the parties before the Judge proceeded to make the impugned orders. It is also our observation that two other properties were introduced in the order and which had not been mentioned by the parties in their respective opposing depositions namely LOROPIT Farm – 576 acres and NAROK TOWNSHIP Plot 44 acres.

In light of the above observations, it is our view that proceeding on to determine the merits of the issues raised by the appellant in the condensed grounds of appeal will occasion a miscarriage of justice to both parties considering that this is a matter touching on individual rights of inheritance. We are therefore of the view that the supporting pleadings of both sides raised controversial issues which needed to be clarified through adduction of *viva voce* evidence and have these tested on cross-examination before drawing out any conclusions thereon especially the issue touching on the alleged wish against subdivision of the properties forming the confirmed grant; and the alleged gift *inter vivos* by the deceased to **Sophia** of his share in Land Parcel Number, **NAROK/CIS-MARA/OLOPITO/4148 & 4188** formerly, land parcel number **NAROK/CIS-MARA/OLOPITO/4**, which undoubtedly belonged to the deceased and had subsequently been transferred to **Sophia** outside the succession proceedings. The procedural or the regularity of the process by which the property changed hands from the deceased to **Sophia** needed not only to be supported by cogent evidence on oath but also for that evidence to be tested on cross-examination to determine its veracity.

Lastly, there is need for the other two properties included in the re-distribution with no backup supporting documentary evidence and which properties did not form part of the confirmed grant sought to be rectified to be properly and procedurally introduced into the proceedings and proven to be part of the intestate estate of the deceased before their distribution to the beneficiaries. There was also need for evidence to be adduced by the administrators to explain why these substantial properties had not been enumerated as forming part of the intestate estate in the first instance.

The upshot of the above reasoning is that we find merit in the appeal. It is accordingly partially allowed on the following terms: the orders of the trial Judge made on 9<sup>th</sup> May, 2013 be and are hereby set aside. We substitute hereto an order remitting the matter back to the High Court for expeditious hearing before another Judge other than **Kimaru, J.** Each party to bear their own costs.

**DATED & Delivered at Nairobi this 8<sup>th</sup> day of March, 2019.**

**R.N. NAMBUYE**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR