IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 50 OF 2016

BETWEEN

ESTHER WANJIRU GITHATU.....APPELLANT

AND

MARY WANJIRU GITHATU.....RESPONDENT

(Appeal from the judgment of the high Court of Kenya at Eldoret (Kimondo, J.) dated 1st March, 2016

in

SUCCESSION CAUSE NO. 244 OF 2002)

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JUDGMENT OF THE COURT

[1] This appeal arises from a succession dispute concerning the estate of the late **Ephantus Githatu Waithaka** (hereinafter referred to as deceased), who died on the 9th of April, 2002. A dispute concerning the status of the appellant, Esther Wanjiru Kiarie (also referred to as Githatu), was resolved by a judgment of the High Court which was upheld by the Court of Appeal, in which it was declared that she was a widow of the deceased by virtue of long cohabitation and presumption of marriage. It is not disputed that the deceased's first widow, **Mary Wanjiru Githatu** (Mary) had seven children while Esther had three children.

[2] Following the judgment of the Court of Appeal, the High Court issued a grant of letters of administration intestate, for the estate of the deceased to Esther and Mary jointly. Before the grant was confirmed, Mary filed an Originating Summons under **Rule 41** of the **Probate and Administration Rules,** and **Order 36 Rule 1 & 12** of the **Civil Procedure Rules,** in which she claimed that she was entitled to immovable properties acquired by the deceased, between 1968 when she got married to the deceased and 1984, and that Esther having started cohabiting with the deceased in 1986, she had no interest in those properties. Mary sought to have the court determine, *inter alia*, whether she was entitled to all these properties, and the income, before the deceased's other properties are brought to hotchpotch for distribution, on confirmation of the letters of administration.

[3] The properties that were alleged to have been acquired by the deceased between 1968 and 1984 which Mary lay claim to were:

(i) Eldoret Municipality Block 5/249 acquired in 1968;

(ii) Title No. Loc 20/Mirira/1219 acquired in 1970;

(iii) LR. 37/244/19 Nairobi West acquired in 1972;

(iv) Plot Illalla/223 acquired in 1982;

(v) Eldoret Municipality/21/365 Kipyiamit acquired in 1982;

(vi) Plot Illalla/195 acquired in 1984.

[4] The properties that were allegedly acquired after 1984 were:

(i) Eldoret Municipality Block 5/502;

(ii) A lorry registration No. KAA 348D;

(iii) Saloon car KAH 887;

(iv) Lorry KAC 804H.

[5] On her part, Esther, by a Chamber Summons brought under **Rule 59** of the **Probate and Administration Rules,** sought to have the court determine the properties in the estate of the deceased available for distribution, the identity of all beneficiaries, their respective shares and liabilities if any. In her affidavit sworn in support of the application, Esther contended that all the properties acquired by the deceased including the ones acquired between 1968 and 1984 formed part of the deceased's estate. She maintained that Mary did not make any direct or indirect contribution to the acquisition of the properties, and therefore the properties should be shared out equally.

[6] The Originating Summons and the applications were heard together by the High Court by way of oral evidence. Mary testified that she was married to the deceased in 1968, while Esther was married in 1986. She relied in her witness statements that she had filed in court in which she had stated that the properties acquired by the deceased from 1968 to 1984, were acquired through their joint effort and that they were operating a butchery business which Mary managed. In addition, Mary took up commercial farming and was therefore contributing financially, to the acquisition of the business. In support of her evidence, Mary called John Waweru Makenya (Makenya) and Stephen Irungu Asaph (Asaph), Makenya testified that he was a family friend to Mary and her husband from 1974. He confirmed Mary's evidence that she was involved in the business and acquisition of the properties. Asaph a brother to the deceased maintained that the deceased had only one wife, who was Mary, and that she was involved in the businesses with her husband.

[7] On her part, Esther maintained that all the properties were acquired by the deceased, and therefore ought to be distributed equally between the widows and their children. She maintained that Mary's claim to the properties had no legal basis. She testified that the deceased's wish were for the properties to be kept for the children.

[8] In his judgment, the learned judge found that following the earlier judgment of the High Court, that was upheld by the court of Appeal, the beneficiaries of the deceased's estate were: Mary, Esther and their children. In regard to the issue concerning Mary's entitlement, the learned judge found that Mary made non-financial contribution to the acquisition of all the immovable properties that were acquired by the deceased prior to 1984, and that there was a resulting trust that arose in her favour. He therefore found that Mary was entitled to half the properties acquired by the deceased prior to 1984, and that it was only half of those properties and the properties acquired after 1984, that constituted part of the deceased's free estate which should be distributed among the beneficiaries in accordance with the Law of Succession Act. He ordered that the properties be valued by a Registered Valuer and the properties to be divided in accordance with the number of children in each house.

[9] It is that judgment that provoked the current appeal which is predicated on the grounds that the learned judge erred in law and fact in holding that the respondent was entitled to half the share of the estate, and in addition, to an equal share of the remainder; and that there was a resulting trust between the respondent and the deceased.

[10] During the hearing of the appeal, Esther was represented by **Mr. Elijah Momanyi,** while Mary was represented by **Ms Mary Kinyanjui,** who held brief for **Mr. Kigano.** Both parties had filed written submissions that were orally highlighted.

[11] The appellant submitted that of the properties claimed by Mary, Illalla 195 and 223 were non-existent as was Eldoret Block 21/365; that Uasin Gishu Illulla 195 and Uasin Gishu Illulla 223 were both acquired by the deceased in 1989; and that Eldoret Municipality Block 20 (Kapyemit) 365 was acquired by the deceased in 1993, and the properties therefore formed part of the estates of the deceased.

[12] In regard to the issue of trust, it was submitted that there was no presumption of a trust in Mary's favour; that no cogent evidence was adduced by Mary in proof of the existence of the resulting trust; that Mary was unable to quantify the income generated from the business or her contribution to the acquisition of the property; that no records from the business allegedly managed by Mary, or any income tax returns were availed; that the issue of the alleged trust, ought to have been raised during the lifetime of the deceased; and that any claim under the Married Women Properties Act, ought to have been similarly raised during the deceased's lifetime.

[13] In addition, it was submitted that the High Court ignored cogent and clear evidence that showed that only two properties (Mirira 1219 and Plot at Nairobi West), were acquired by the deceased prior to 1984, and all other properties were acquired after 1984; that the judgment declaring a trust to have arisen in Mary's favour, in regard to property acquired after 1984, was in error; and that there was no intention to create a trust in favour of Mary nor did Mary adduce any evidence to prove her contribution.

[14] In regard to the Constitution it was submitted that the learned judge totally misapprehended the intent of **Article 45(3)** of the **Constitution,** which simply means that none of the spouses is inferior or superior to the other, and not that they will acquire equal amount of the properties or that whatever has been acquired by one of the spouses is the property of, and equally belongs to the other spouse; that the learned judge failed to apply section 40 of the Law of Succession Act, which is the only applicable law dealing with the distribution of the deceased person's estate; and customary law cannot override the statutory provisions.

[15] It was argued that the decision of the High Court has caused injustice particularly to the dependents in the second house headed by Esther, as the first house has received more including what was acquired after 1984, and that what was left for distribution, was hardly enough some of the properties having been already sold. The appellant also took issue with the order of the High Court on the valuer to be used to value the properties, contending that the parties should have been allowed to agree on a list from which the court could choose from.

[16] For the respondent, it was submitted that the High Court rightly found that there existed a resulting trust in favour of Mary, in respect of

the properties acquired before the marriage of Esther; that although the properties were only registered in the name of the deceased, they belonged to the deceased and Mary, his then wife, in equal share; that a resulting trust arises to recognize equitable proprietary rights of someone who has contributed to the purchase price of property, with an intention that he/she takes some property rights in that property; and that the law presumes that a person who provides money acquired to purchase property intends to obtain interest in the property acquired.

[17] In addition, it was argued that the finding of the learned judge was based on the evidence presented to the court; that Mary adduced evidence that proved that she had made non-financial contribution to the acquisition of the properties; that there was no evidence adduced to controvert Mary's evidence; and that the court's conclusion was therefore sound.

[18] In regard to whether the respondent could bring the claim of trust after the death of the deceased, it was submitted that the learned judge was right in holding that the resulting trust in favour of the respondent is in the nature of "*cestui que trust* " that under the repealed Registered Land Act, one of the overriding interest was a trust which includes spousal interest; that a beneficiary of a trust possesses rights in *persona* and rights in *rem;* that a beneficiary can therefore bring a claim for his interests upon the trustee, at any time including after death of the trustee.

[19] It was submitted that in regard to the estate of the deceased, the net estate or residue estate available for distribution in accordance with section 40 of the Law of Succession Act, comprised of the deceased's half share in properties acquired upto 1984 and full share in all other properties acquired after 1986.

[20] In regard to the valuer, it was submitted that the directions given by the court was proper in light of the facts, circumstances, and length of the case in court; that the directions were consistent to **Article 159** of the **Constitution,** that mandates judicial authority, courts and tribunals to be guided by amongst other things, the principle that justice shall not be delayed; and that the overriding objective of the court is to facilitate the just, expeditious, proportionate and affordable resolution of the dispute before it. The Court was therefore urged to dismiss the appeal in its entirety.

[21] We have considered this appeal and the contending submissions of the parties. The fact that Mary and Esther are both widows of the deceased is no longer in issue the matter having been settled by the Court of Appeal majority judgment in Civil Appeal No. 20 of 2009. What this means is that the deceased was polygamous, and the deceased having died intestate, his estate should be administered in accordance with **Section 40** of the **Law of Succession Act**, which states as follows:

> ***"(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 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.***
>
> ***(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38."***

[22] Before the distribution of the deceased's estate can be done, the deceased's free property that is available for distribution, must be identified. This was the subject of both Mary's Originating Summons and Esther's Chamber Summons that were before the learned judge. It remains the subject of the appeal now before us albeit indirectly.

[23] The issue that has been argued before us and which is for determination, is whether, Mary made any contribution towards the purchase of properties by the deceased, prior to 1986, and if so, whether a resulting trust arose in favour of Mary in regard to those properties, such that her interests under the trust can be identified and excluded from the estate. Secondly, whether, the resulting trust can be enforced, in succession proceedings after the death of the deceased. Concurrently, with those issues, is the determination of the free property of the deceased available for distribution in accordance with section 40 of the Law of Succession Act, and whether the orders made by the learned judge in regard to the appointment of the valuer and the filing of a report were appropriate.

[24] During the hearing before the learned judge, evidence was adduced that the deceased and Mary started a butchery business which did very well, and that Mary was the one running the business. Although Esther disputed this, she came into the scene in 1986 long after the business was started. She had no evidence to controvert the evidence of Mary, Makenye and Asaph that Mary was actively involved in the management of the business and that the business did very well. In the circumstances we would agree with the trial judge that there was sufficient evidence to establish that Mary contributed to the acquisition of the properties that were acquired by the deceased up to 1984, through her active participation in the family business and farming. That being the position, it was proper that Mary's interest pursuant to her contribution, be identified and set aside before the net estate of the deceased is distributed. The mere fact that the properties are registered in the name of the deceased, without mention of Mary's interest does not change this position.

[25] We agree with sentiments expressed by the learned judge that:

> ***"Granted that evidence, it would lead to serious injustice to apply section 40 blindly in this case. The section does not completely tie the hands of the court. See Rono vs Rono & another [2005] 1 KLR 538, Rael Verukani Musi vs Racheal Indagaya Akola, Eldoret High Court P & A No. 5 of 2013, [2016] eKLR."***

[26] In addition, we have considered whether Mary's claim by way of a resulting trust, to half the properties registered in the deceased's name prior to 1984, ought to have been entertained in the Succession suit, or whether it should have been brought as a separate suit.

[27] Order 36 Rule 1 of the former **Civil Procedure Rules**, (now **Order 37 Rule 1** of the current Civil Procedure Rules), stated as follows:

> ***"1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any***

of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge, sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions –

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;

(b) the ascertainment of any class of creditors, devisee, legatees, heirs, or others;

*****.....***

(g) the determination of any question arising directly out of the administration of the estate or trust."

[28] This rule allows any party including an administrator or an heir or a beneficiary of a trust to bring an originating summons requiring determination of his/her rights. In this case, Mary was one of the administrators. She was also an heir to the estate of the deceased but she also claimed as a *cestui que trust* to be entitled to property registered in the name of the deceased. It was argued that Mary being an administrator of the estate could not bring a suit against the estate. We do not agree with this contention. As an administrator of the estate, Mary was vested with certain powers to be exercised for and on behalf of the estate. These powers do not however, take away her position as an individual capable of acting in her own rights. So, whereas in one instant she could act on behalf of the estate as an administrator in another situation she could act in her own behalf as a beneficiary or heir of the estate. In bringing the Originating Summons, under the former Order 36 Rule 1 & 2 of the Civil Procedure Rules, Mary was acting in her own personal capacity as an heir of the estate of the deceased and as a *cestui que trust* arising from the registration of the properties acquired by the deceased between 1968 and 1984.

[29] In **Twalib Hatayan & another vs Said Saggar Ahmed Alheidy & 5 others [2015] eKLR,** this Court sitting in Mombasa had this to say about a resulting trust:

"This leaves us with resulting trust; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee. (See Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally express intention (See Snell's Equity 29th Edn. Sweet & Maxwell p. 175), therefore unlike constructive trust where unknown intentions may be left unexplored, with resulting trusts, courts would readily look at the circumstances of the case and presume or infer the transferors intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another is immaterial (see Snell's Equity at p. 175) (supra)."

[30] Mary did not make any financial contribution and therefore no money changed hands. However, her indirect contribution through the management of the family business and the farming, brought in income and this enabled the business to grow, and the deceased to invest through purchase of properties. The non-monetary contribution was equivalent to a financial contribution towards the purchase of the matrimonial property acquired up to 1984. We would agree with the trial judge, that there was a resulting trust arising in favour of Mary, in regard to these properties. Mary having been an active participant in the acquisition of the properties, the apportionment of 50% interest adopted by the learned judge in accordance with the maxim equality is equity cannot be faulted.

[31] We come to the conclusion that in addition to properties acquired by the deceased from 1985 to his death, it is only half of the properties acquired by the deceased between 1968 and 1984 that is available for distribution. Thus, we are in agreement with the finding of the learned judge that only half of the immovable properties acquired by the deceased prior to 1984 and all the properties acquired by the deceased thereafter shall constitute the free estate of the deceased to be divided in accordance with the Law of Succession Act.

[32] The learned judge ordered valuation of all the immovable assets registered in the name of the deceased by a valuer agreed upon by the administrators within thirty days failing which the court was to appoint an independent valuer whose findings were to be final for purposes of distribution of the estate. The appellant was aggrieved by the order that was made by the trial judge regarding the appointment of an independent valuer. In our view, the order made by the learned judge was fair and just. It gives the parties an opportunity to agree on a valuer, and the Court to have the residual power of appointing the valuer should the parties fail to agree.

[33] The upshot of the above is that we uphold the judgment of the High Court and dismiss this appeal in its entirety as it has no merit. This being a family dispute each party shall bear their own costs.

DATED and delivered at Eldoret this 4th day of April, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR