IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO 61 OF 2015

BETWEEN

DAVID MARITIM ROTUK.....1ST APPELLANT

PETRONILA CHEPKURGAT KEBENEI.....2ND APPELLANT

AND

JEPSONGOK CHERUIYOT.....1ST RESPONDENT

KIRWA TARUS.....2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret (Kimondo, J) dated 22nd January, 2015

in

H.C. Succ. Cause No. 754 of 2008)

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JUDGMENT OF THE COURT

BACKGROUND

1. The dispute between, ***David Maritim Rotut*** and ***Petronila Chepkurgat Kebenei*** (the appellants) and ***Jepsongok Cheruiyot*** and ***Kirwa Tarus*** (the respondents) arises out of the estate of ***Tuptubor Arap Chirchir*** (deceased) who died intestate on 21st January 1983.

2. The deceased had three wives, two of whom predeceased the deceased namely, ***Jepkemboi Bot Cherus*** and ***Sigei Tabrandich. Jepsonogk Cheruiyot*** is the only surviving widow of the deceased.

3. ***Jepkemboi Bot Cherus*** (Jepkemboi) had 8 children 4 of whom are deceased (***Kiptum, Thomas Kibenei, Chemalit*** and ***Kikwai***). ***Cherus Bitok*** is the first surviving son of the deceased. Another son, ***Thomas Kebenei*** (deceased) is survived by his widow, ***Petronila Kebenei*** (the 2nd appellant herein). Another surviving son is ***David Rotuk*** (the 1st appellant herein). ***Jepkemboi*** is also survived by two daughters, ***Priscilla Chelimo*** and ***Mary Sang***.

4. ***Sigei Tabrandich*** had 2 children, ***Cheruto Tebunei*** and ***Kirwa Tarus*** (the 2nd respondent herein).

5. ***Jepsongok Cheruiyot*** the only surviving widow of the deceased (the 1st respondent herein) has one daughter, ***Nora Chepkorir*** who was married.

6. The primary issue for determination revolves around the mode distribution of a parcel of land known as Nandi/Ndalat/260 (the suit property) measuring 90 acres or thereabouts. The respondents applied to the Principal Magistrate's Court in Kapsabet for a grant of letters of administration to the estate of the deceased which was issued on 13th October 2008 and subsequently confirmed on 4th November 2008. The suit property was subdivided into two portions: ***Cherus Bitok*** (Cherus) a son of the deceased and who co-owned the suit property with the deceased was given 45 acres, while the respondents were given the remaining portion of 45 acres. The appellants objected to that mode of distribution and filed a summons for its revocation.

7. Pursuant to a consent recorded in the High Court on 17th March 2009, the parties entered into a consent that: ***the grant of letters of administration and confirmation thereof issued at Kapsabet Principal Magistrates' Court in Succession Cause No 35 of 2008 be revoked, that a fresh grant of letters of administration be issued to all the parties herein, and that any title issued subject to the subdivision be surrendered for safe custody***."

8. To determine the mode of distribution of the suit property, the parties elected to give *viva voce* evidence. The 1st appellant testified on behalf of the objectors and proposed that the suit property be divided into five portions, with Cherus getting 30 acres, Thomas Kebenei (now deceased) getting 15 acres, the 1st appellant, 15 acres and the respondents getting 15 acres each. The 1st appellant claimed that all the beneficiaries had been living on their designated portions of the suit property for a period of over 30 years, had built houses and allowed their children to live on the suit property. He denied that he and his brother, Cherus had at any point in time received gifts *inter vivos* from the deceased, and claimed that any property that they owned they had acquired out of their own efforts.

9. The 1st respondent testified that the deceased had during his lifetime distributed some of his property: that he had given 45 acres of the suit property to Cherus; that he had also given Thomas Kebenei (now deceased) a parcel of land measuring 24 acres in Sugoi, while the 1st appellant was given 30 acres of land in Kormaet. The 1st respondent claimed that the deceased did not distribute the remainder of the suit property, and proposed that the property be distributed between the three households in equal shares.

10. The 2nd respondent on his part proposed that 45 acres of the property should be given to Cherus Bitok who is the son of the first wife, and that the remaining 45 acres should be distributed between the other two houses.

11. After the pleadings, the written submissions as well as the evidence tendered, the learned judge agreed with the objectors that the grant made by the Kapsabet Magistrate's Court was tainted by non-disclosure and fraud. The learned judge held that the grant was therefore null and void, and any subdivision that had been done pursuant to the confirmed grant was also invalid. As a result, the learned judge ordered that the land revert to the original title.

12. The learned judge considered that as at 4th February 1959, the deceased and Cherus were jointly registered as the proprietors of the suit property. Based on this fact, the court was of the view that Cherus was entitled to half the portion of the suit property even though he had been occupying only 30 acres. Noting that there was no contest on how much land Cherus was entitled to in respect of the suit property, the court ordered that he be apportioned a further 15 acres of the property, in addition to what he was occupying to entitle him to his rightful share of half of the suit property. The court also accepted the evidence that the 1st appellant and the deceased husband of the 2nd appellant had been given gifts of land during the lifetime of the deceased and that this was a fact that ought to have been taken into consideration during distribution. The final distribution made by the learned judge was therefore as follows:

> ***"Cherus Arap Bitok shall get 45 acres… Norah Chepkorir and the widow Jepsongok Cheruiyot shall get 15 acres. I have considered that David Rotuk and Thomas Kebenei had been given other land by the deceased at Sugoi and Kormaet measuring 24 acres and 30 acres respectively. But since they had occupied portions of Nandi/Ndalat/260, and in line with sections 27 and 28 of the Act, they will share 15 acres, which is to say 7.5 acres each. The shares I have given the two are not unreasonable considering their other sizeable gifts of land inter-vivos. The remaining 15 acres shall go to Kirwa Tarus."***

13. Following this judgment, a certificate confirming this grant was issued on 9th February 2015. The appellants were dissatisfied and appealed against the entire decision listing four grounds of appeal. They denied that they had benefited from gifts *inter vivos* during the lifetime of the deceased and maintained that the court proceeded on a wrong premise and arrived at an unfair decision; and that the decision as a whole was unjust and untenable as the distribution of the property was inequitable. The appellants therefore sought to have the decision of the High Court set aside; the estate of the deceased distributed fairly and equitably; that costs of the appeal borne by the respondents.

SUBMISSIONS BY COUNSEL

14. At the hearing of the appeal, both parties were represented by counsels. Learned counsel Mr. Elijah Momanyi represented the appellants while learned counsel Mr. Songok represented the respondents. In support of these grounds of appeal, the appellants filed written submissions in which they contended that there was no basis upon which the court could have found that the 1st appellant and his deceased brother, Thomas Kebenei had been the recipients of any gifts from their father, and that the evidence showed that the 1st appellant had been working as a teacher and later on as a farmer. The appellants faulted the trial court's reliance on the 1st respondent's testimony that the deceased had gifted the respondents the Sugoi and Kormaet land since the 1st respondent had no evidence to prove that the deceased had indeed purchased those properties. The appellants argued that by accepting the evidence of the gifts *inter vivos*, the court had irregularly shifted the burden of proof to the appellants, yet it was the respondents who had raised these assertions and therefore had the onus to prove the assertions.

15. The appellants further submitted that the mode of distribution that they had proposed was fair, and that the trial court ought to have adopted it; that the parties are peacefully settled on the property as per the mode of distribution that they had proposed and there was therefore no justification to disturb the informal agreements that had been reached by the parties. For these reasons, the appellants urged this Court to allow the appeal and distribute the estate of the deceased as proposed by the appellants, with each of the parties taking 15 acres while Cherus takes 30 acres.

16. Mr. Songok opposed the appeal and submitted that the High Court did not make an erroneous judgment; that he relies entirely on the evidence that was adduced at the hearing; and that the appellants have not demonstrated that the decision of the learned judge was erroneous. Counsel urged us to dismiss the appeal with costs.

DETERMINATION

17. This is the first appeal. Our duty is as stated in the case of ***Selle – vs- 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 witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

18. In support of the application for revocation of the grant that was issued by the magistrate's court, the 1st appellant annexed a copy of the green card to the suit property. The green card showed that the suit property, measuring 91 acres, was first registered on 4th February 1959 in the name of the deceased and Cherus in equal shares. As a result, only the share that belonged to the deceased is the free property that may form the subject of distribution. The half share of the suit property belonging to Cherus does not comprise free property within the meaning of section 3 of the Law of Succession Act which defines free property as ***""free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."***

19. From the record, before the deceased passed on, he allocated 30 acres of the suit property to Cherus, his eldest son from the first house. Cherus had lived on his portion of the suit property for over 30 years.

20. The appellants in their submission suggested that Cherus was satisfied with the lesser portion of 30 acres and that as a result this court should maintain this as his share in order to avoid upsetting the peace in the family and share the remaining portion equally between the three houses.

21. Distribution under intestacy is provided for under section 40 of the Law of Succession Act, which provides in part that:

> ***40. Where intestate was polygamous***
>
> ***(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.***

22. In this appeal, the three houses left behind by the deceased are all represented, although it appears that several children of the deceased made no claims on the estate. The 1st respondent in her testimony stated that she claimed a share of the property for herself and on behalf of her daughter, Norah Chepkorir while the appellants stated they purposed that the suit property be shared equally, in portions of 30.3 acres each, between the three houses. We have already stated that the free portion of the suit property amounts to 45 acres.

23. As we consider what mode of distribution of the suit property is equitable, we shall consider the issue of whether or not the appellants had been given gifts of land by the deceased during his lifetime. This is in compliance with section 42 of the Law of Succession Act which provides that:

> ***42. Previous benefits to be brought into account Where—***
>
> ***(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***
>
> ***(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.***

24. Evidence of the gifts *inter vivos* was given by the 1st respondent in her testimony where she stated that the deceased had bought the 1st appellant property measuring 30 acres in Kormaet area using 12 cows, and that the deceased had bought the 2nd appellant's deceased husband, Thomas Kebenei a property measuring 24 acres in Sugoi using 100 cows. While the 1st respondent did not have any documentary evidence in support of her claims, her evidence was not controverted by the appellants, and neither did the appellants shed light on how they had acquired this property. In submissions before this Court, the appellants merely stated that they had bought the property using their own resources. Our view after analyzing this evidence is that the 1st respondent's evidence was more believable; she stated how and where the property gifted to David Rotuk and Thomas Kebenei were purchased. If this was not the true version of events, and the appellant's bought this property out of their own funds, then the evidential burden rightly shifted to them to state how and when they purchased the property. These were facts within the special knowledge of those appellants and as section 112 of the Evidence Act provides, ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."*** The appellants failed to discharge this burden and for this reason, we find no fault with the learned Judge's finding that the property in Sugoi and Kormaet were gifts given by the deceased during his lifetime to Thomas Kebenei and the 1st appellant herein.

25. In the circumstances, of this case, we find that the trial court did not err in holding that the parcels of land that were given to the appellants as gifts *inter vivos* would be taken into account in the distribution of the deceased's estate in compliance with section 42 of the Law of Succession Act **(**see: **Johannes Mbugua Muchuku V. Loise Wangui Muchuku & 6 others [2016] eKLR.)**

26. The upshot of the foregoing is that we are satisfied that the learned Judge properly considered and analyzed the evidence and applied the law appropriately. We see no reason to interfere with the findings of the High Court. Accordingly, we uphold the judgment and dismiss this appeal. This being a family succession dispute we find it prudent to order that each party bears their own costs.

It is so ordered.

Dated and Delivered at Eldoret this 17th day of October, 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