IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, WARSAME & SICHALE, JJA

CIVIL APPEAL NO. 146 OF 2018

BETWEEN

DR. SYMON WAIRAGU GITHAE .....APPELLANT

AND

ALBERT NJERU GITHAE .....RESPONDENT

(An appeal from the judgment of the high Court of Kenya at Nairobi (Aggrey Muchelule, J) dated 5th October, 2017 IN **SUCCESSION CAUSE NO. 1106 OF 2010**

JUDGMENT OF THE COURT

As is now common in our Courts, this is yet another old succession matter which has defied quick closure. The deceased **Cyrus Mbere Githinji** died on **25th April, 2009**. Subsequently, **Albert Njeru Githae** and **Simon Wairagu Githae** were appointed as joint administrators on **12th April, 2011.** However, in order to facilitate confirmation of the letters of administration, each filed his own proposed list of distribution, necessitating the cause to be heard and determined by **Muchelule, J.** In the penultimate paragraph of the judgment, **Muchelule, J** rendered himself as follows:

> ***"Under section 38 of the Act the estate should be divided equally among the children's deceased (sic). The share of Marjory Wanjiru Wabandi shall go to her children. In respect of Tetu/Kiriti/63 0.025 Ha shall be preserved as a common site. The remainder shall be shared equally among the children of the deceased. The same goes for Nanyuki/Marura/Block 2250, and the shares in Gathuthi Tea Factory, shares at Chinga Tea Factory, shares at Rehmtulla KTDA, shares at Wananchi Sacco Society and the money in Wananchi Sacco Society Ltd A/C No. 02-6531-00-01102"***

The appellant, **Dr. Symon Wairagu Githae** was dissatisfied with the said outcome. In a Memorandum of Appeal dated **22nd March, 2018**, the judgment of the trial court was faulted for failing:

> (i) To find that the oral will was valid;
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> (ii) To find that the respondent was not a beneficiary in the oral will;
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> (iii) The distribution was against the deceased's wishes.

On **13th May, 2019** the appeal came before us for plenary hearing. Learned counsel **M/s Guserwa** for the appellant highlighted the appellant's written submissions filed on **18th April, 2019** and authorities filed on **10th May, 2019**. It was the appellant's submissions that the deceased had made an oral will in which he excluded the respondent, in view of the bad blood between the deceased and the respondent. It was in view of this bad blood and the fact of exclusion in the oral will that the appellant put forth as reasons to disqualify the respondent from inheriting as a son of the deceased.

In his brief rejoinder, **Mr. Kimani**, learned counsel for the respondent contended that the oral will was not valid, the deceased having died 14 months after the date of the alleged oral will.

We have considered the record, the rival submissions made before us, the authorities cited and the law. In our view, this is a fairly straight forward matter.

According to the appellant, (he testified on **23rd September, 2014** and **2nd November, 2016**) their late father was predeceased by their mother; that the deceased had five (5) daughters (two (2) who had since died) and four (4) sons.

It was his testimony that during the deceased's life time, the respondent used the deceased's security to obtain a loan which he failed to repay; that the appellant and his other siblings repaid the loan; that their late father subsequently filed suit against the respondent and obtained judgment against him to the tune of Kshs 216,000; that the respondent did not contribute towards their father's treatment and the subsequent funeral expenses and neither did he attend his burial. It was his further testimony that in a meeting held on **9th February, 2008,** the deceased indicated how he wanted his property distributed. **Alice Ngima Githae**, a sister of the two testified in support of the appellant's position and explained that the deceased had excluded the respondent from his will on account of failing to pay a bank loan advanced to the respondent on the strength of a title belonging to the deceased. **Peter Githae Githinji,** a clan member also supported the appellant's position and that he was present on **9th February, 2008** when the deceased made known his wishes.

On his part, the respondent acknowledged that he had charged a family property; that he was sued by the deceased and further, that he had been charged with an offence of attempting to kill the deceased. He however denied the existence of a bad blood between him and the deceased. All the above facts are largely uncontested.

> We have considered the record, the rival submissions, authorities cited and the law. As this is a first appeal, the position of the law as regards a first appeal is as set out in ***Selle vs. Association of Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:
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> ***"I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.***
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> ***An appeal to this court from a trial by the High Court is by way of a re-trial 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.***
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> ***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 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 EACA 270".***

According to the appellant, the deceased made an oral will on **9th February, 2008** at the appellant's house in Karen. The deceased however died on **28th April, 2009,** this was more than a year since he made the alleged oral will. Section 9 of the Law of Succession Act provides:

> ***"S.9 (1) No oral will shall be valid unless:***
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> ***(a) It is made before two or more competent witnesses; and***
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> ***(b) The testator dies within a period of three months from the date of making the will: provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.***
>
> ***(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by section 18 and 19.***

In view of the above provisions, the alleged oral will is not valid. We therefore cannot fault the said judge when he came to the finding that the deceased died intestate.

Having died intestate, the provision of Section 38 of the Law of Succession Act are applicable. It provides:

> ***"S.38 where intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.***

Again, in view of Section 38 of the Act, we cannot fault the trial judge in coming to the finding that the deceased's estate was to be divided equally amongst his children, including the respondent. It is very sad if indeed it be true that the respondent at one time wanted to kill his father. However, the law does not make provision for the exclusion of deceased's children, bad blood notwithstanding unless, this is stated in a valid will which we have found did not exist.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with no order as to costs in view of the filial relations between the parties.

Dated and delivered at Nairobi this 11th day of October, 2019.

P. N. WAKI

JUDGE OF APPEAL

M. WARSAME

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR