IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO 6 OF 2016

BETWEEN

GRACE CHEBET SISIMWO.....1ST APPELLANT

BEN STEPHEN SISIMWO.....2ND APPELLANT

LUKA SISIMWO.....3RD APPELLANT

SIMON MENGICH SISIMWO.....4TH APPELLANT

JAMES SISIMWO.....5TH APPELLANT

AND

EVERLYNE CHERUKUT SISIMWO.....1ST RESPONDENT

AMY CHEBOSIS SISIMWO.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (Mabeya, J) delivered on the 7th April 2014

in

High Court Succession Cause No 89 of 2002)

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JUDGMENT OF J. MOHAMMED JA

BACKGROUND

1. This appeal relates to the distribution of the estate of the late **Stephen Baron Sisimwo** (deceased) who died on 12th June 1998, leaving behind two widows and eighteen children. The estate of the deceased, comprised of several properties which were apportioned among the two houses of the deceased.

2. The first house of the deceased comprised his widow, **Grace Chebet Sisimwo** (the 1st appellant) and nine (9) adult children who all survived the deceased. The children are **David Sisimwo Stephen, Ben Stephen Sisimwo** (the 2nd appellant), **Luka Sisimwo** (the 3rd appellant), **Simon Mengich Sisimwo** (the 4th appellant), **James Psia Sisimwo** (the 5th appellant), **Margaret Chepkiza Sisimwo, Everlyne Cherukut Sisimwo** (the 1st respondent), A**my Chebosis Sisimwo** (the 2nd respondent) and **Virginia Chelimo Sisimwo.**

3. The second house of the deceased comprised his widow, **Agnes Nafula Sisimwo** and nine (9) adult children who all survived the deceased. The children are **Silas Sisimwo, Martin Sisimwo, Kennedy Sisimwo, Tonny Sisimwo, Phillip Ngeywa Sisimwo, Kisa Sisimwo, Violet Sisimwo and Chemilil Vera Sisimwo.**

4. The appellants were aggrieved by the distribution of the estate approved by the trial judge (Mabeya J) in the succession cause. The bone of contention is the distribution of Museng Farm Koitabos LR No 1948/10 comprising 98 acres and Museng Farm LR No 2058/7, measuring

130 acres both of which formed part of the deceased's estate. The appellants faulted the learned judge: in finding that none of the beneficiaries had been settled by the deceased on any of the properties during his lifetime; in holding that any developments carried out by the beneficiaries on the properties they had been occupying was subject to the final distribution of the estate; in determining that the respondents should get a share in Museng (Farm) LR No 2058/7 which had already been developed by the appellants, and in ordering a distribution that was not equitable. The appellants therefore urged that the appeal be allowed and that orders be made to the effect that the beneficiaries had properly been settled by the deceased during his lifetime; that the appellants had developed their portions in Museng (Farm) LR No 2058/7 extensively, and that the respondents be settled elsewhere where the property was yet to be developed.

SUBMISSIONS BY COUNSEL

5. During the hearing of this appeal, both parties were represented by counsel. Learned counsel, Mr Wayne Olonyi represented the appellants, while learned counsel Ms Wakoli, represented the 1st and 2nd respondents. The appellants submitted that the parcel of land known as Museng (Farm) LR No 2058/7, measuring 130 acres formed part of the deceased's estate; that the appellants had lived on Museng (Farm) LR No 2058/7 for most of their lives; that the learned Judge erred in failing to consider that the appellants had been settled by the deceased on Museng (Farm) LR No 2058/7; that the learned Judge allocated some beneficiaries properties which they had occupied, constructed and improved on; that the learned Judge therefore acted unfairly in distributing portions of Museng (Farm) LR No 2058/7 to the respondents when Museng (Farm) LR No 2058/7 had been occupied and developed by the appellants since 1965.

6. In addition, the appellants submitted that the respondents were married at some point in time, and had moved out of the deceased's properties and left the appellants who occupied utilized developed and improved Museng (Farm) LR No 2058/7; that it was unfair and unjust for the learned judge to allocate the respondents shares in Museng (Farm) LR No 2058/7; that although Museng Koitabos LR No 1948/10 was at the time of the judgment still the subject of litigation in **Kitale ELC Case No 111 of 2011**, the suit has since been determined and Museng LR No 1948/10 has reverted to the estate of the deceased; that the respondents should be allocated that property and the appellants allocated Museng (Farm) LR No 2058/7 which they have developed; that this would be in accordance with the allocation done by the deceased and would also be in the interest of not interfering with the occupation and utilization of the Museng (Farm) LR No 2058/7 occupied by the appellants, and further, that the appellants have built permanent houses on Museng (Farm) LR No 2058/7, cultivated the land, keep dairy farms and had planted trees on Museng (Farm) LR No 2058/7 that the deceased allocated to them; and that their families will be forced to move out of Museng (Farm) LR No 2058/7 should this appeal be dismissed.

7. In opposing the appeal, the respondents submitted that the trial judge did take into consideration the developments undertaken by individual beneficiaries and endeavored not to disrupt the lives of the other beneficiaries; that even if the appellants have built permanent houses on Museng (Farm) LR No 2058/7, it is not true that the appellants have settled on or developed the entire piece of land; that since each individual was allocated a share in the Museng (Farm) LR No 2058/7 the appellants would not suffer any prejudice if the original distribution stands; and that the appellants seek to disinherit the respondents through this appeal since the entire estate has already been distributed and beneficiaries have already taken possession of their respective shares in Museng (Farm) LR No 2058/7; that Museng Koitabos LR No 1948/10 where the appellants seek to relocate the respondents is not available for distribution as it was awarded by the court to **Silas Sile Sisimwo** and **David Sisimwo Stephen** in their personal capacity, having acquired the property by adverse possession; that the learned judge took into account the nature of the land, and the fact that the respondents were allocated less than half of what the sons of the deceased were allocated. For these reasons, the respondents submitted that the appeal is an abuse of the court process and urged the same be dismissed with costs.

DETERMINATION

8. This is a first appeal, it is therefore the duty of this Court imposed by law to evaluate afresh by way of a retrial, the evidence recorded before the trial court in order for it to reach its own independent conclusion. See **Selle v. Associated Motor Boat Co. Ltd (1968) EA 123) Selle and Another v. Associated Motor Boat Company Ltd and others, [1968] 1 EA 123 (CAZ**):

> ***"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 allow3ance 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 v. Ali Mohammed Sholan,.* ***(1955), 22 E.A.C.A. 270)."***

9. Being guided by the above principles, I have carefully perused the record of appeal, the rival written and oral submissions by the parties, the authorities cited and the law. The issue that falls for determination is *whether the mode of distribution of the estate of the deceased adopted by the learned Judge was fair and justifiable.*

10. As already stated, this appeal relates mainly to the distribution of two properties in the deceased' estate. That is Museng Koitabos LR No 1948/10 and Museng (Farm) LR No 2058/7. The former was the subject of Kitale Land Case No 111 of 2011 which was determined by Obaga, J. on 28th May, 2015, who held that Silas Sile Sisimwo and David Sisimwo Stephen had, in their personal capacities, acquired a portion comprised of 125 acres of the suit property by adverse possession, as they had been in quiet and uninterrupted occupation of the same for a period of over twelve years; Therefore as counsel for the respondent submitted, that property is not available for distribution.

11.Nevertheless, we note that in the impugned judgment, the learned judge (Mabeya, J.) ordered that in the distribution of the estate Museng Koitobos 1948/10 be taken into account as follows:

> ***"As regards Museng Farm (Koitabos) 1948/10*** *(the suit property)****, I have already held that there are strong indications that the property may ultimately revert to the estate. If and when that happens, considering the diligence with which Sila Sile Sisimwo***

has shown in protecting and attempting to recover the same and that he has already constructed a permanent home thereon, it is only fair that that be taken into consideration. If and when the property is recovered, the certificate of grant shall be amended accordingly to reflect that Silas Sile be entitled to a share thereon whilst the rest of the sons of the deceased shall share equally the balance with each getting 8 acres."

12.As an appellate court, "***this Court has power, upon hearing an appeal, to distribute the estate of the deceased should it differ with the manner in which the High Court distributed the estate."*** See ***M N M v D N M K & 13 others [2017] eKLR.***

13.The distribution of the estate with respect to the other properties that formed part of the estate of the deceased is not challenged, but the question is whether this Court should now review the distribution done by the trial judge in regard to Museng (Farm) LR No 2058/7 in order to take into account the fact that Silas Sile Sisimwo and David Sisimwo Stephen now have shares in Museng Koitobos 1948/10 following the judgment in the Kitale suit, and also take into account the appellant's contention that they should not be moved from their portions in Museng (Farm) LR No 2058/7 which they are in occupation of and have already developed.

14.In distributing this property, the learned judge distributed Museng (Farm LR No 2058/7 as follows:

Distribution of Museng Farm – 2058/7 (130 Acres) (the Museng Farm)

1) Grace Chebet Sisimwo – 10 acres – flat and arable.

2) Everlyne Cherukut Sisimwo – 15 acres – flat and arable.

3) Amy Chemosi Sisimwo – 15 acres – flat and arable.

4) Simon Mengich – 27 acres.

5) James Psia Sismiwo – 27 acres

6) Luka Sisimwo – 9 acres

7) Ben Stephen Sisimwo – 9 acres

15. In considering whether or not the deceased had settled his children during his lifetime, the trial judge stated:

"To my mind [section 42 of the Law of Succession Act] means that the law recognizes that during one's lifetime he/she may settle any of his/her properties upon any of his/her beneficiaries. Upon such a person's demise, it is a requirement that such a property settled should be taken into account when distributing the estate. This in my view means that, such a settled property or portion will not be subject to distribution but will be taken into account when undertaking distribution. That it will not be removed from the hands or possession upon whose beneficiary it was settled by the deceased."

16. The trial judge found that the 1st appellant, who was the deceased's first widow had been living on Museng (Farm) 2058/7 on a permanent basis; and that Agnes Wafula Sisimwo (the 2nd widow) was occupying another property of the deceased known as Cherongos Farm L.R. No. 2028/5 during the lifetime of the deceased but upon his demise she moved to Cherongos Farm LR. No. 2058/4. The learned judge found that: -

"Apart from the widows, there was no sufficient evidence before me to show or suggest that any of the other beneficiaries had been settled by the deceased in any of the properties during his lifetime.

17. The evidence that was led before the court bears out the fact that the 1st appellant was residing on Museng Farm. **David Sisimwo Stephen (David)** and **Silas Sile Sisimwo (Silas)** the administrators of the estate of the deceased both testified that Museng (Farm LR 2058/7 was occupied by the 1st appellant, (2 acres) and the 2nd, 3rd, 4th and 5th appellants in shares of 32 acres each. These are considerations that the trial Judge took into account when distributing the estate. However, the issue was not who was in occupation at the time of distribution, but whether the deceased had settled the appellants on the land before his death.

18. Section 40 of the Law of Succession Act guides the distribution of the estate where the intestate was polygamous. That section provides 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.

(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 sections 35 to 38.

19. The evidence that was adduced before the trial court was clear that the respondents had moved away from the suit property and were married. Nevertheless, it is now well settled that there can be no discrimination against the daughters of a deceased, and it matters not that they are married. This has been the case since the enactment of the Law of Succession Act and has been the subject of numerous pronouncements, both in this Court and in the lower courts. For instance in ***Grace Wachuka v Jackson Njuguna Gathungu & another [2014] eKLR*** this Court held that all the children of a deceased person are treated equally as beneficiaries, and that unless a married daughter voluntarily renounces her rights, she would be entitled to an equal share of her deceased parent's estate.

20. In **Mwongera Mugambi Runturi & Another V Josephine Kaarika & 2 others [2015] eKLR** this Court emphasizing that the Law of Succession Act does not countenance any discrimination against female children of a deceased person stated as follows:

> ***"With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was (once) the norm for a vast majority of Kenya's communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstances of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What Rono -V- Rono (2005) IEA 363 decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya 2010."***

21. In the earlier decision of **Mary Rono v Jane Rono & Another [2005] eKLR** this Court had set aside the distribution of the estate in which the deceased's daughters had been excluded. The Court ordered that the estate be shared out equally between the sons and daughters of the deceased and stated:

> ***"The Constitution which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect. …More importantly, Section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the 'houses' according to the number of children in each house…There is no discrimination of such children on account of their sex."*** *(Emphasis supplied).*

22. Section 42 of the Law of Succession Act provides as follows:

> ***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.***

23. During the hearing of the objection to the distribution, none of the appellants (other than the two widows) led evidence to the effect that the deceased settled them on any of his properties. In the absence of such evidence, it followed that the learned judge had the discretion to distribute the property in line with section 35 of the Law of Succession Act. In the distribution that led to this appeal, the learned judge opted to make a distribution that in his view was equitable. Thus, each of the widows was awarded 10 acres of flat arable land, each daughter was awarded 15 acres of flat arable land, while the rest of the estate, comprising in some parcels rocky as well as arable land, was divided amongst the sons of the deceased.

24. The respondents were awarded 15 acres each out of the entire parcel was flat and arable. The appellants, particularly **Simon Mengich, Luka Sisimwo** and **James Psia Sisimwo**, who previously occupied 32 acres each had their shares reduced to 27 acres, while Ben Stephen Sisimwo who was also occupying 32 acres had his shares reduced to 9 acres. However, **Ben Stephen Sisimwo** got other parcels of land, to wit, the whole of Elgon/Kaptama 285 measuring 12.3 acres, Chesito Market Plot No 8, as well as Tractor KLV 146 while **Luka Sisimwo** got motor vehicle KLR 370.

25. In the circumstances of this appeal, I find that the distribution reached by the learned judge was equitable in all respects. That being the case, there is nothing before the Court to warrant any interference with the distribution made by the trial court.

26. Accordingly I find no merit in this appeal and would dismiss it. This being a family matter, each party shall bear their own costs.

JUDGMENT OF H. OKWENGU, JA.

I have read the Judgment in draft of my sister Mohammed, JA in which the facts relating to this appeal have been fully set out. I am in agreement with her analysis and the orders she proposes to make. The dispute concerned the distribution of the estate of **Stephen Baron Sisimwo (deceased).** The Learned Judge of the High Court distributed the estate equitably and in accordance with section 35 of the Law of Succession Act. There is therefore no justification for this Court to interfere.

The appeal is therefore dismissed and each party ordered to pay their own costs. This Judgment has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules Githinji, JA having ceased to hold office by virtue of retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

J. MOHAMMED

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR