



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 124 OF 2012

BETWEEN

ELIZABETH NJAMBI KIMEMIAAPPELLANT

VERSUS

FLORENCE NGINA BANGA.....RESPONDENT

*(An Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (L. Kimaru, J.)
delivered on 30th July, 2011*

in

Succession Cause No. 538 of 2007

JUDGMENT OF THE COURT

INTRODUCTION:

1. This is a first appeal against the decision of the High Court in succession cause No. 538 of 2007.
2. **Peter Kimemia Karuu**, (the Deceased) died intestate on 21st May, 2003 leaving five children, **Elizabeth Njambi Kimemia**, the appellant herein, **Milkah Njeri Njenga**, **Rachel Wanjiru Maina**, **Emma Wambui Wahome** and **John Banga Kimemia**. At the time of his death, the Deceased owned a parcel of land described as Loc. 3/Mukangu/283 (the suit property) with a house erected thereon, which was the sole asset comprising the estate of the deceased (the Estate).
3. On 8th March, 2007, the Appellant, a daughter of the Deceased filed a Petition for Grant of Letters of Administration Intestate in respect of the Estate of the Deceased. In the Petition, four beneficiaries were listed, namely, **Elizabeth Njambi Kimemia**, **Milkah Njeri Njenga**, **Rachel Wanjiru Maina**, and **Emma Wambui Wahome**. On 28th May, 2007, the Appellant was issued with a Grant of Letters of Administration Intestate and proceeded to file Summons for Confirmation of Grant.
4. Before the application for confirmation of the Grant could be heard and determined, the Respondent herein, **Florence Ngina Banga**, the widow of the son of the Deceased, **John Banga Kimemia**, filed an Affidavit of Protest to the Confirmation of Grant on 18th November, 2008. In her said Affidavit, the Respondent claimed that she was the wife of **John Banga Kimemia**, the last born son of the Deceased;

that before the Deceased died, he had sub-divided the suit property into three parcels of land namely, Loc. 3/Mukangu/903 (measuring 3.0 Acres) in favour of the Appellant, **Elizabeth Njambi Kimemia**, Loc. 3/Mukangu/904 (measuring 2.1 Acres) in favour of **Milka Njeri Njenga** and Loc. 3/Mukangu/905 (measuring 3.5 Acres) in favour of **John Banga Kimemia** and which portion of land the Respondent was to inherit as **John Banga Kimemia** had died on 7th July, 2004; the Respondent attached an Application for Consent of Land Control Board to sub-divide, a letter of consent for subdivision and a Mutation Form in support of her claim; that the deceased's wish was that the suit property be subdivided and the only beneficiaries would be the two unmarried daughters of the Deceased, namely, the Appellant, **Elizabeth Njambi Kimemia**, **Milka Njeri Njenga** and the Respondent as the other two sisters, **Rachel Wanjiru Maina** and **Emma Wambui Wahome** were married and were therefore not entitled to benefit from Estate of the Deceased. The Respondent filed a further affidavit dated 3rd January, 2009 and averred that she and her late husband, **John Banga Kimemia** moved into the Deceased's house before the demise of the Deceased and that she had been living in the house ever since, even after the demise of her husband, **John Banga Kimemia** on 7th July, 2004.

5. In response, the Appellant averred that all beneficiaries were entitled to equal shares of the Deceased's Estate and that there was no Will left by the Deceased as he died intestate; that there could have been no sub division effected on the suit property as the suit property was encumbered by a charge of Kshs. 3,600/- in favour of the Government of Kenya.

6. The learned Judge identified two main issues for determination as:

"a) whether the two married daughters of the Deceased should be considered as beneficiaries of the Estate of the Deceased and;

b) the mode of distribution to be adopted by the Court while distributing the Estate."

7. On the first issue, the Court relied on Section 29 of the Law of Succession Act and stated:

"The Objector's assertion that the two married daughters of the deceased, being Rachel Wanjiru Maina and Emma Wambui Wahome, should not be considered as dependants of the deceased has no basis in law. This Court therefore finds that the two married daughters of the deceased are dependants for the purposes of these succession proceedings."

8. On the issue of the mode of distribution of the Estate, the Court relied on Section 28 of the Act in determining the acreage that each beneficiary should inherit and distributed the Estate as follows:

i) "Florence Ngina Banga shall inherit 2.5 acres. This parcel of land shall include the house where the objector is currently residing i.e. the objector shall inherit the house of the deceased.

ii) Elizabeth Njambi Kimemia shall inherit 2.5 acres

iii) Milka Njeri Njenga shall inherit 2.5 acres

iv) Rachel Wanjiru Maina shall inherit 0.75 acres

v) Emma Wambui Wahome shall inherit 0.75 acres."

9. Aggrieved by that decision, the Appellant preferred this appeal premised on 9 grounds of appeal:

"(i)

That the learned judge erred both in law and in fact by agreeing that both married and unmarried are equal before the eyes of the law but proceeded to allocate the last two beneficiaries smaller share;

(ii) That the learned judge erred both in law and fact by contradicting himself- the respondent gave evidence that she entered the home after the demise of deceased in 2003 but the judge ruled that she had been there for 16 years;

(iii) That the learned trial judge erred both in law and in fact in not appreciating that the appellant allowed the respondent and the husband to get to the house as it had better facilities and the brother was sick.

(iv) That the learned trial judge erred both in law and in fact by failing to appreciate that the appellant had contributed in putting up the house and allocating it to the respondent who had not contributed anything.

(v) That the learned judge erred both in law and in fact in making the finding against the weight of the evidence.

(vi) That as regards the house, the learned judge misdirected himself in finding that the Objector had lived in that house for sixteen (16) years, yet it is evident by the Objector that she started living in the house shortly after the demise of the deceased.

(vii) That the learned trial judge erred both in law and in fact in not considering the wishes of the deceased though there was evidence to that effect, which was not rebutted by the objector.

(viii) That the learned trial judge erred both in law and in fact in failing to consider the contradicting evidence of the objector (which she gave under oath) that she has been living in the subject house since she got married in 1993 then later testified that she got into the house a month after the death of Mzee Kimemia, which is legally, a serious omission

(ix) That the learned trial judge erred both in law and in fact in finding that the deceased's house was to be occupied by one person (objector) while it was the family understanding that the said house ought to be a ceremonial one."

The appellant sought the following orders:

"1) That the appeal be allowed,

2) That the judgment and decree of the High Court be set aside and substituted with an order distributing the Estate equally and leaving out the Deceased's house."

SUBMISSIONS

10. The appeal was disposed of by way of written submissions with brief oral highlighting. When the matter came up for oral highlighting of the written submissions, there was no appearance by or for the Appellant. Learned Counsel, Mr. Kimani appeared for the respondent and informed the Court that he was relying on his written submissions in support of his case.

11. Although the appellant did not appear in Court, she had filed written submissions.

The appellant's submissions were to the effect that the learned Judge failed to properly address his mind to the salient condition of Section 28 of the Law of Succession Act and that there was no material placed before the Court indicating that some beneficiaries should receive larger shares than the rest and that the Respondent as the Objector in the High Court did not advance any reason why she was entitled to a larger share; that since the Respondent did not contribute to the construction of the Deceased's house, she should not be entitled to benefit from it. The appellant urged the Court to allow the appeal.

12. Counsel for the respondent submitted that none of the married daughters of the deceased filed any documents proposing the mode of distribution favourable to them and that the documents produced by the

respondent indicated how the deceased intended to have the property sub-divided and distributed; that the respondent had lived on the suit property for 16 years and she had nowhere else to go and that the Court of Appeal had in many authorities held that the Court cannot substitute its own findings for that of a trial Court. Counsel urged the Court to dismiss the appeal.

DETERMINATION

13. We have considered the pleadings, the written submissions and the law.

This is a first appeal and as such, the Court is enjoined by law to proceed by way of re-appraising all the evidence on record before arriving at its own independent conclusion. This was aptly summed up in the case of ***Selle vs. Associates Motor Boat & Co. [1968] EA 123*** where the predecessor of this

Court stated as follows:

“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 demeanour 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).”

Further, in the case of **RAMJI RATNA AND COMPANY LIMITED V WOOD PRODUCTS (KENYA LIMITED)** Civil Appeal Number 117 of 2001 this Court further stated that in a first appeal it will interfere with the decision of the trial judge only where it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the findings he did.

14. The main issues for consideration are whether the learned Judge erred in failing to apportion the Deceased’s Estate equally among the beneficiaries and whether the Respondent was entitled to any share of the Deceased’s Estate as a beneficiary. It was not in contention that the Respondent was the widow of the Deceased’s son, **John Banga Kimemia**, who died in 2004.

15. In determining the issue of apportionment of the Estate between the beneficiaries, the learned Judge relied on Section 29 of the Law of Succession Act which provides as follows:

For the purposes of this Part, “dependant” means-

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to this death;

(b) Such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

16. In distribution of the Estate of the deceased, the learned Judge, took into account the fact that two daughters of the deceased, namely, **Elizabeth Njambi Kimemia and Milka Njeri Njenga** were unmarried and had prior to his death, been allowed by the deceased to reside on the suit property. The learned Judge also considered the fact that two of the daughters of the deceased, namely, **Rachel**

Wanjiru Maina and Emma Wambui Wahome were married. Accordingly, and taking into account pertinent factors relating to this matter, the learned Judge apportioned a larger portion of the Estate to the unmarried daughters of the Deceased and a smaller portion of the Estate to the married daughters of the Deceased, namely, **Rachel Wanjiru Maina and Emma Wambui Wahome**.

17. The learned Judge, correctly in our view considered various factors in distributing the Estate of the Deceased as he did.

As held in the case of **RONO VS RONO (2005) 1 EA 263**, notwithstanding the provisions of Section 40 of the Act, the court has discretion to take into account fairness in determining the distribution to dependants. Omolo, J.A expressed this point as follows:

“...I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act (Chapter 160) of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such a deceased person must inherit equal portions of the estate where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act.”

Later in the same Judgment, his Lordship added:

“...Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and with whom no school fees and things like that were to be provided, such equality would work an injustice and for my part I am satisfied that the Act does not provide for that kind of equality.”

18. On the question whether the respondent was entitled to any share of the deceased’s estate as a beneficiary, the learned Judge relied on Section 28 of the Law of Succession Act which provides for the circumstances to be taken into account by the Court in making an order:

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-

- (a) the nature and amount of the deceased’s property;*
- (b) any past, present or future capital or income from any source of the defendant;*
- (c) the existing and future means and needs of the dependant;*
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;*
- (e) the conduct of the dependant in relation to the deceased;*
- (f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;*
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant.”*

19. The learned Judge considered that the Respondent had been living in the house of the Deceased for 16 years and held that the Respondent shall inherit 2.5 acres including the house of the Deceased.

20. We are guided by the case of **JOHN GATIBA BURUNA & ANOTHER VS JACKSON RIOBA**

BURUNA CA No. 89 OF 2003 where this Court stated:

“While the Court of Appeal has jurisdiction to review the evidence in order to determine whether the conclusion reached by the superior court should stand, nevertheless, the court cannot properly substitute its own finding or unless the findings are shown to be plainly wrong. Indeed it is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses.”

21. In the circumstances of this case, we are satisfied that the learned Judge considered all the relevant issues and we do not find any misdirection by the learned Judge or any basis for disagreeing with or disregarding his findings.

22. The upshot is that on the facts of this appeal, the conclusion and order of the learned Judge cannot be faulted. This appeal has no merit and is accordingly dismissed. In view of the fact that this is a family dispute, we direct that each party bears its own costs.

23. This Judgment has been signed pursuant to Rule 32 of this Court’s Rules as the Hon. Mr Justice G.B.M. Kariuki, SC had retired by the time of delivery of the judgment.

Dated and delivered at Nairobi this 19th day of January, 2018.

ALNASHIR VISRAM

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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