



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJA)

CIVIL APPEAL NO. 188 OF 2007

BETWEEN

KAMAU MUGWIMA.....APPELLANT

VERSUS

NG'ANG'A NJOROGE.....1ST RESPONDENT

NGUGI NJOROGE.....2ND RESPONDENT

KARIUKI NJOROGE.....3RD RESPONDENT

NJENGA NJOROGE.....4TH RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (M. Koome, J.) dated 21st January, 2005 in H.C. Succession Cause No. 263 of 1992)

JUDGMENT OF THE COURT

This is an appeal from the Judgment of Koome, J. (as she then was), dated the 21st day of January, 2005.

The appeal relates to the estate of **Njoroge Kamau Gichore**, (deceased). The **appellant, Kamau Mugwimi**, took out letters of administration intestate of the deceased's estate in his capacity as his son. A temporary grant of representation was issued to him on 22nd day of May, 1993, and confirmed on 21st day of February, 1994. The estate comprised only one asset, namely Kiamba/Kihara/717. The beneficiaries of the deceased as enumerated in the confirmed grant were the appellant and **Ngugi Njoroge**, (deceased), **Kariuki Njoroge**, **Ng'ang'a Njoroge** and **Njenga Njoroge**, who are the respondents in this appeal. The asset was to be distributed as follows:-

- (1) *Kamau Mugwima - 2.675 acres*
- (2) *Dependants of Ngugi Njoroge (deceased) -0.60625 acres*
- (3) *Kariuki Njoroge - 0.60625 acres*
- (4) *Ng'ang'a Njoroge - 0.60625*
- (5) *Njenga Njoroge - 0.60625.*

After the confirmation of the grant, the appellant filed summons dated the 3rd day of September 1997, seeking rectification of the grant and variation of the shares of the beneficiaries on the grounds that the asset was five (5) acres; that he had been allowed to alienate 0.25 (1/4) thereof to defray costs; that after the alienation the remainder ought to have been shared to the two households of the deceased in accordance with Kikuyu customary law; and that accordingly the asset should be distributed as follows:

- (1) *Kamau Mugwima - 2.625 acres.*

(2) Dependents' of Ngugi Njoroge deceased - 0.59375 acres.

(3) Kariuki Njoroge - 0.59375 acres.

(4) Ng'ang'a Njoroge - 0.59375-acres

(5) Njenga Njoroge - 0.59375 acres.

Njenga Njoroge, the 4th respondent filed an affidavit in protest on behalf of himself and the other respondents. Although the respondents conceded that the deceased was married twice, they maintained that he did not have two households because he married **Njeri Njoroge**, their mother, only after the death of **Wanjiku Njoroge**, the appellant's mother. They added that the appellant grew up with them in one house and therefore there was no basis for distributing the asset to two houses, which did not exist.

They accordingly urged the court to distribute the asset equally amongst all the beneficiaries of the deceased.

The summons was heard by Koome, J. who rendered herself as follows in the ruling which is the subject of this appeal:-

“In the circumstances I find that the petitioner was brought up with the objectors since his mother died in the infancy and the objector's mother was married not in the life time of the 1st wife, so the deceased was not having two concurrent houses but one house at a time. It is mete and just that the deceased's estate should be shared equally among the five sons who grew up together. I am in this regard encouraged by the provision of Section 3 of the Judicature Act. Although the deceased died in 1963 and the law applicable is the Kikuyu customary law, I am of the humble view that the circumstances of this case would warrant the distribution of the deceased's estate equally among the beneficiaries since there was no concurrent household but one household at a time. The second wife came in to replace the deceased 1st wife and brought up the child. This interpretation is guided by the provisions of section 3(2) of the Judicature Act which read:

‘The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in Civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.’

In the circumstances I hereby order the deceased's parcel of land known as KIAMBAA/KIHARA/717 less 0.025 (1/4) acres that was meant to defray the costs herein should be shared equally among:

Kamau Mugwima

Ngugi Njoroge (heirs)

Kariuki Njoroge

Nganga Njoroge

Njenga Njoroge”

The appellant was aggrieved and filed this appeal, premised on nine grounds of appeal, which he subsequently condensed into four (4) in his written submissions dated 26th April 2017. He contends that the learned Judge erred in law and in fact by:-

(1) revoking the grant while the application before her was for rectification of the grant;

(2) failing to consider his age which would have established that in 1956 he was beyond breast feeding age alleged by the respondents;

(3) failing ignoring the documentary evidence of the clan elders which showed that the deceased had two houses rather than one; and

(4) applying tenets of statutory marriages to a Kikuyu customary law marriage.

With the consent of the parties, the appeal was heard through written submissions and limited oral submissions. On the appointed date for highlighting the submissions, only the appellant's learned counsel, **King'oo Wanjau (Mrs.)**, appeared in Court. Neither the respondents nor their advocate turned up in court, although the latter was duly served with the hearing notice. The respondents also did not file their written submissions. On his part, the appellant elected to rely on his written submissions as filed.

The gist of the appellant's appeal is that the trial Judge erred by revoking the grant and distributing the net estate equally between the beneficiaries of the deceased. The distribution, he contended, was based on the Judge's misapprehension that the deceased had only one rather than two houses, and that the second wife brought up the appellant after his mother died while he was still a child.

He further contended that the learned judge ought to have warned the parties in accordance with **rule 44(5)** of the **Probate and Administration Rules** that she was considering revoking the grant so as to give them an opportunity to call for evidence for or against revocation. Having failed to do so, the appellant submitted, he was prejudiced because he limited his arguments before the learned judge to rectification rather than revocation of the grant. It was the appellant's contention that the learned judge erred by ignoring the decision of elders who were conversant with both the deceased's family and Kikuyu customary law to the effect that the estate of the deceased should be divided according to his two houses. In his view, the learned judge further erred by treating the deceased's as having been in a monogamous marriage. For those reasons the appellant urged us to allow the appeal, set aside the orders of the trial Judge and substitute therefor, an order allowing his application for rectification of grant.

This being a first appeal, our duty is to re-evaluate, re-assess and re-analyze the evidence on record and to determine whether the learned judge's conclusions are supported by the evidence. In **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212** this Court stated that:

“in a first appeal from the High Court, the Court of Appeal should re-consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in the evidence”

We have carefully considered the evidence, the ruling of the learned judge, and the appellant's submissions. From the record it is common ground that the deceased married twice during his lifetime. The mother of the appellant was the first wife. When she passed on the deceased married the respondents' mother. It is also common ground that the appellant and the respondents are the only beneficiaries of the deceased and the persons entitled to inherit the net estate of the deceased.

The record indicates that after the appellant applied for rectification of the grant the respondents applied for revocation of the grant. However, the latter application was withdrawn by consent of the parties, paving the way for the hearing and determination of the appellant's application for the rectification of the grant. That is the application that was before the learned judge.

In their affidavit of protest, which the appellant did not oppose through a replying affidavit, the respondents opposed the distribution of the estate among two houses as proposed by the appellant and proposed instead distribution of the estate equally among all the five sons of the deceased, contending that the deceased had only one house. Having carefully analyzed the manner in which the application was heard and the evidence on record, we are satisfied that the parties properly placed before the learned judge for determination the question whether the estate of the deceased should be distributed equally among two houses as sought by the appellant or among the five sons as urged by the respondents. All the parties were fully aware of the issues they had placed before the learned judge for determination and were afforded the opportunity to address them. It was the appellant who opted not to respond to the respondents' affidavit of protest challenging distribution of the estate between two houses and praying instead for equal distribution among the beneficiaries. We do not see how the learned judge can be blamed in the circumstances. In the same vein, we are satisfied that Rule 44(5) of the Probate and Administration Rules is not relevant in the circumstances of this appeal.

As far as we can see from the record, the alleged evidence relating to decisions of clan elders was not presented to the learned judge. But even if it was, she was not bound to agree with it, granted that all the parties agreed that the deceased married the second wife after the death of the first wife and that all his five sons were brought up together in one house.

For the foregoing reasons, we find no merit in this appeal. It is accordingly dismissed. Being a family dispute, and the respondents having failed to appear to defend the appeal, we direct each party do bear their own costs.

Dated and delivered at Nairobi this 28th day of September, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

Deputy Registrar