IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 227 OF 2014

BETWEEN

EDWIN KARIUKI NGOTHO.....1ST APPELLANT

PETER KARUGA NGOTHO.....2ND APPELLANT

ALICE MURUGI NGOTHO.....3RD APPELLANT

MARY WACEKE NGOTHO.....4TH APPELLANT

SOPHIA WANJIRU MUNENE.....5TH APPELLANT

AND

MICHAEL KOIRUGO NGOTHO.....1ST RESPONDENT

FRANCIS KANJABI NGOTHO.....2ND RESPONDENT

LAWRENCE NJEGA NGOTHO.....3RD RESPONDENT

(Being an appeal against from the Ruling and Orders of the High

Court of Kenya at Nairobi (Kimaru, J.) dated 26th March, 2014

in

P & A Cause No. 941 of 2012)

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JUDGMENT OF THE COURT

1. The appellants, ***Edwin Kariuki Ngotho, Peter Karuga Ngotho, Alice Murugi Ngotho, Mary Waceke Ngotho*** and ***Sophia Wanjiku Munene***, and the respondents, ***Michael Koirugo Ngotho, Francis Kanjabi Ngotho*** and ***Lawrence Njenga Ngotho*** are all children and beneficiaries of the estate of ***Teresia Wangui Ngotho***, *(hereinafter referred to as the deceased)*. In this appeal, the appellants have challenged the ruling and order of the High Court, ***(L. Kimaru, J.)***, made on 26th March, 2014, by which ruling and order the

learned Judge determined that the value of ***LR No. Dagoretti/Riruta/4658***, *(hereinafter "the suit property"),* was Kshs. 21 Million. The learned Judge further granted the daughters of the deceased liberty to purchase the suit property which option they were to exercise within 90 days of his order. In default, the property was to be sold in the open market for not less than Kshs. 21 Million. This is the order which provoked this appeal.

2. However, the order was a consequence of another order made by the learned Judge on 3rd September, 2013, pursuant to a challenge made to a grant of representation confirmed on 23rd July, 2013. The order of 3rd September, 2013, revoked the grant of representation confirmed on 23rd July, 2013. After revoking the said certificate of confirmation of grant, the learned Judge ordered as follows:

> ***"A new certificate of confirmation of grant shall be issued with the distribution in terms of the former certificate for grant save that Parcel No. Dagoretti/Riruta/4658 and Dagoretti/Riruta/T. 236 shall be distributed as follows:***
>
> *i.* ***L. R. No. Dagoretti/Riruta/T. 236 shall be inherited by Alice Murugi Ngotho, Mary Waceke Ngotho and Sophia Wanjiku Munene.***
>
> *ii.* ***L.R. No. Dagoretti/Riruta/4658 shall be inherited by all the eight (8) beneficiaries of the deceased in equal portions. To obviate any dispute, the said parcel of land shall be valued, by two valuers each appointed by the contesting parties, after which the daughter[s] shall be given the first option to buy out the brothers. If they shall fail to exercise the option, any of the brothers shall be at liberty to apply to the court to buy out the shares of the other beneficiaries".***

3. This order did not appear to elicit any complaint from any of the beneficiaries until the suit property was valued and the learned Judge made the impugned order of 26th March, 2014. In their memorandum of appeal, the appellants raise several issues but the submissions made on behalf of the appellants only raise two (2) issues namely:

> *1.* ***That the sons of the deceased should not have been granted a share of the suit property as they had previously benefited from the estate.***
>
> *2.* ***That the value of the suit property of Kshs. 21 Million should not have been accepted by the learned Judge and that the suit property should not have been ordered to be sold and proceeds shared equally by the beneficiaries.***

Those are, in our view, the substantive issues raised by the appellants and which we shall endeavour to resolve.

BACKGROUND

4. The deceased was the mother of all the beneficiaries. She died intestate on 15th October, 2009. She was survived by the eight (8) beneficiaries. There was no dispute that two (2) of the beneficiaries, ***Michael Ngotho*** and ***Peter Ngotho*** were appointed administrators of the deceased's estate. ***Peter Ngotho*** is one of the appellants and ***Michael Ngotho*** is one of the respondents. There is also no dispute that prior to her demise, the deceased had sub-divided ***L. R. No. Dagoretti/Riruta/3133*** creating six parcels namely ***L.R. Nos. Dagoretti/Riruta.4658 - 4663***. She had then transferred five of the parcels to her five sons and retained the suit property. She also retained ***L.R. No. Dagoretti/Riruta/T 236***.

5. It was also common ground that at the time of her demise the deceased's free property compromised the above parcels together with the following assets:

> *1.* ***Funds with Barclays Bank.***
>
> *2.* ***Plot Nos. 227 and 341 (L.R. No. 9361 - Gilgil Farm) Dagoretti Nyakinyua F.C.S. Ltd).***

6. The first application for confirmation of grant was dated 21st June, 2013, and was made by ***Peter Karuga Ngotho***, the 2nd appellant. He deponed in his affidavit in support of the application, *inter alia*, that the beneficiaries had agreed to distribute the assets of the estate as follows:

> ***"A. DAGORETTI/RIRUTA/4658 and DAGORETTI/RIRUTA/T. 236 to be given to ALICE MURUGI NGOTHO, MARY WACEKE NGOTHO AND SOPHIA WANJIRU MUNENE jointly in equal shares.***
>
> *B.* ***The money in Barclays Bank of Kenya, Haile Selassie Avenue Branch to be shared equally among all the beneficiaries.***
>
> *C.* ***Funds in Co-operative Bank, Kawangware Branch, Account No.*** [particulars withheld] ***to be shared equally among all the beneficiaries after deducting the costs incidental to the administration of the estate prior to confirmation.***
>
> *D.* ***Plot No. 227 and 341 (L.R. No. 9361/5-Gilgil Farm), Dagoretti Nyakinyua F.C.S. Ltd. to be disposed off and the proceeds shared equally among all the beneficiaries".***

7. Although the mode of distribution was claimed to have been by consent, the consent annexed to the supporting affidavit was not signed by the respondents. In the application for revocation of the said grant ***Michael Kairungo Ngotho*** deponed that the respondents were neither consulted nor did they consent to the application by his co-administrator. They however, only disputed the distribution of the suit property which, in their view, was to be shared equally among all the eight (8) beneficiaries.

8. The learned Judge of the High Court agreed with the respondents and revoked the certificate of confirmation issued on 23rd July, 2013, pursuant to the application by the said ***Peter Karuga Ngotho***.

9. It is against that background that the appellants have raised the twin issues already identified above. The only property in dispute is the suit property and the twin issues raised are whether the same should be shared equally among all the beneficiaries and whether the order to have the suit property sold at not less than 21 Million should stand.

THE APPEAL AND SUBMISSIONS

10. On their part, the appellants contend through learned counsel, ***Mr. Mbuthia Kinyanjui***, that the respondents' claim to the suit property is unmerited as they benefited from the deceased during her lifetime and that it was the wish of the deceased that the suit property be the share of her daughters. In their view, the order of the learned Judge denied the daughters their rights over the suit property. It was also the appellant's submission that the deceased had intimated before she died that the suit property remains in the family and the order that it be sold went against the said wishes. That order, according to the appellants, was disrespectful and would attract *"curses"* as on the suit land is their grandmothers' grave. It was the appellants' further contention that the order would render the 4th appellant, ***Mary Waceke,*** homeless as she resides on the suit land.

It was further submitted on behalf of the appellants that the learned Judge erred in accepting the valuation of Kshs. 21 Million for the suit property. In their view, the valuation was manifestly excessive. According to them, the suit property would reasonably be valued at between Kshs. 8 Million and Kshs. 10 Million.

11. On behalf of the respondents, the first respondent contended that all the beneficiaries, including the daughters of the deceased, were provided for by the deceased, during her life time and that it was only just that the suit property be shared among all the beneficiaries equally. The respondents further contended that the deceased had not, during her life time, intimated that the suit property be given to her daughters and that the appellants had, in that regard, forged a will purporting to have been made by the deceased.

With regard to the order to sell the suit property, the respondents submitted that the order cannot be faulted as the daughters were given an option to purchase the suit property. It was the respondents' further submission that there are no graves on the suit property as alleged by the appellants and the issue of *"curses",* does not arise. In any event, according to the respondents, if their (appellants) valuer's valuation had been accepted by the court, the appellants would not be complaining as they have not challenged the order confirming the grant.

DETERMINATION

12. We have considered the appeal and the submissions made to us in the light of the two issues identified above. In addressing these issues, we are mindful of our duty consistent with the principles pronounced by this Court in many decisions including ***Selle & Another -v- Associated Motor Boat Company Ltd. & Others, [1968] EA 123 and Williamson Diamond Limited -v- Brown [1970] EA 1,*** to review and re-evaluate the evidence and draw our own conclusions. Furthermore, the distribution of an intestate estate by the court under the ***Law of Succession Act*** entails a degree of exercise of discretion by the Court. This Court does not interfere with the exercise of such discretion unless satisfied that the lower court misdirected itself on some point and as a result arrived at a wrong decision or unless it is manifest from the record as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result, injustice has occurred. [See

Mbogo and Another -v- Shah [1968] E.A. 93*]*.

13. As already mentioned, the appellants would like us to interfere with the ruling and order of the High Court in two respects. First, they wish to have the order that the suit property be shared equally among all the beneficiaries reversed and in substitution therefor, an order be made giving the suit property to the three daughters of the deceased. Secondly, the appellants would like us to interfere with the order of the High Court to sell the property at not less than Kshs. 21 Million and if the order is maintained the respondents be excluded from sharing the proceeds thereof.

14. We begin with the question of whether the suit property should be shared equally among all the beneficiaries. It cannot be gainsaid that the respondents and their brothers; the 1st and 2nd appellants were each given portions of the former ***L.R. No. Dagoretti/Riruta/3133***. That title was sub-divided by the deceased creating ***L.R. Nos. Dagoretti/Riruta/4658, 4659, 4660, 4661, 4662*** and ***4663***. The five brothers: the 1st and 2nd appellants and the respondents were given ***L.R. Nos. Dagoretti/Riruta/4959 to 4663***. None of the daughters got a share of the former ***L.R. No. Dagorreti/Riruta/3133***. We find no evidence that the respondents benefited from the deceased during her life time save the transfer of the aforesaid parcels to them by the deceased.

15. With respect to the following assets of the estate of the deceased all the beneficiaries were happy with the order that the same be shared among them equally: Funds with ***Barclays Bank - Haile Selassie Avenue Branch***, and ***Co-***

operative Bank A/C No. 01109453486; proceeds of the sale of ***Plot Nos. 277*** and ***341. (L.R. No. 9361/5 - Gilgil Farm)***.

16. All the beneficiaries were also happy with the order that ***L.R. No. Dagoretti/Riruta/T. 236*** be given to the daughters; ***Alice Murugi Ngotho, Mary Waceke Ngotho*** and ***Sophia Wanjiru Munene*** to be shared by them equally.

Unfortunately, there were no valuation reports for the parcels of land transferred to the sons of the deceased during her life time nor have we traced any valuation report for ***L.R. No. Dagoretti/Riruta/T. 236*** which was given to the daughters after the demise of the deceased.

17. The learned Judge was, no doubt, fully alive to the fact that the sons of the deceased had received portions of land from the deceased during her life time and that the daughters were to get ***L.R. No. Dagoretti/Riruta/T. 236*** exclusively. In any event, if the deceased intended to give her daughters the suit

land, we find no reason why she did not do so when she transferred various portions to her sons. Her decision to keep the suit property in her name, in our view, is inconsistent with the wish to give it to any of the beneficiaries.

Even if the result of the order of the learned Judge to let all the beneficiaries share the suit property equally would lead to some beneficiaries getting more than others, that, *per se*, would not, influence the learned Judge to agree with the appellants. The Law of Succession does not require that the estate of a deceased be divided equally in mathematical terms.

18. We, therefore, find and uphold the finding by the learned Judge of the High Court that the suit property was free for distribution to all the beneficiaries of the deceased.

19. We turn now to the issue as to whether the learned Judge of the High Court was right to order a sale of the suit property and at a minimum of Kshs. 21 Million. The appellants, as we have observed, contended that during her life time, the deceased had intimated to her children that she did not wish that the suit land be sold but rather wished that the same be retained within the family on her demise which, according to the appellants, was also the wish of her predecessor in title whose grave is on the suit property. Disposing of the property as ordered, according to the appellants, would amount to disrespect and would unleash a possible wave of curses upon the beneficiaries. The appellants also argued that the 4th appellant, ***Mary Waceke***, resides on the suit property and the sale would have the undesirable effect of leaving her homeless.

20. With regard to the valuation accepted by the learned Judge of Kshs. 21 Million, the appellants contended that the same was grossly exaggerated. In their view, the more realistic value was that made by ***M/s Wamae Mureithi & Company Associates*** of Kshs. 7.5 Million which could be increased by between Kshs. 0.5 Million and Kshs. 2.5 Million. With regard to the first issue as to whether the learned Judge should have ordered a sale of the suit property, in our view, having found that all the beneficiaries were equally entitled to a share of the suit property, that order for sale of the same was inevitable. We say so, because of the parties' stand points on who should inherit the suit property. Given the apparent acrimony between the appellants and the respondents, the order to sell the suit property was, in our view, reasonable. The learned Judge did not accept the argument that the deceased expressed any wish to have the suit property left with her daughters or that the property remains in the family. In our view, the presence of the grave of the grandmother of the beneficiaries on the suit property would not affect ownership of the suit property. In fact, the presence of any grave on the suit property was denied by the respondents in their replying submissions. It is significant that the appellants did not rebut the respondents' submissions in that regard. It is illustrative that the appellants were silent on where the grave of the deceased is. Our assumption is that the deceased's grave is not on the suit land as if it was, the appellants would not have failed to say so. In the premises, our conclusion is that the order for the sale of the suit property would not be defeated because of the presence of any grave on the suit property.

21. We also observe that the learned Judge did not make the order for sale open ended. He gave the daughters of the deceased the option to purchase their brothers' shares in the suit property within a specified period. He went further in his attempt to keep the property within the family when he ordered that if the daughters failed to exercise their option, any of the brothers would be at liberty to apply to the court to buy out the shares of the other beneficiaries.

22. With regard to the argument that the 4th appellant would be rendered homeless if the suit property is sold, we think the appellants are overstretching the meaning of homeless. We say so, because the 4th appellant with her sisters, the 3rd and 5th appellants were exclusively given ***L.R. No. Dagoretti/Riruta/T. 236*** in the order confirming the grant of representation.

23. The upshot of the foregoing is that, we consider that the learned Judge cannot be faulted for ordering the sale of the suit property.

24. The next issue is whether the learned Judge erred in determining that the suit property be sold at not less than Kshs. 21 Million. The appellant argued that the valuation accepted by the learned Judge was

exaggerated and that the more reasonable valuation was between Kshs. 8 Million and Kshs. 10 Million. The respondents disagreed. In their view, the suit property now has a higher value than Kshs. 21 Million with the passage of time.

25. The learned Judge did not pluck the figure of Kshs. 21 Million from the air. He got it from one of the valuation reports he had ordered before he made his final order. The learned Judge was satisfied that the valuation of Kshs. 21 Million for the suit property represented the correct market value of the suit property at the time of his order. Should we fault the learned Judge merely because the appellants think the same is exaggerated? We do not think so, for the following reasons. Firstly, because the power to interfere with the order of the learned Judge as an appellate court is circumscribed. We cannot merely, supplant our figure because we think the figure accepted by the learned Judge was exaggerated. The learned Judge had before him two professional valuation reports and he chose to accept one of them. He was perfectly entitled to do so. He was exercising a judicial discretion and as we have observed, we cannot interfere with that exercise unless satisfied that the learned Judge misdirected himself on some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was plainly wrong in the exercise of the discretion and that as a result, there has been misjustice, (***Mbogo and Another -v- Shah*** (supra).

26. The learned Judge in this case undertook a delicate exercise of balancing the competing interests and claims of all the beneficiaries and took into account factors he deemed relevant for his order. He was entitled to do so. We discern no misdirection, no improper exercise of discretion nor do we find his order plainly wrong. On the contrary, we find that his order meets the ends of justice and we cannot interfere.

27. In the end , we are satisfied that this appeal has no merit and it is accordingly dismissed.

28. In keeping with the order of the High Court on costs, we order that each party shall bear their own costs of the appeal.

It is so ordered.

Dated and delivered at Nairobi this 10th day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.