



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KOOME, JJA.)

CIVIL APPEAL NO. 292 OF 2016

BETWEEN

TRILCHAN SINGH JANDU.....APPELLANT

VERSUS

AMARJET SINGH JANDU.....1ST RESPONDENT

KAUR SINGH JANDU.....2ND RESPONDENT

(An appeal from the judgment and decreed of the High Court of Kenya at Nairobi, Milimani Law Courts, (Musyoka J.), delivered on the 7th day of April, 2016 in Succession Cause No. 2063 of 2011)

JUDGMENT OF THE COURT

[1] The dispute in the High Court that has snowballed into the present appeal relates to the estate of the late Kahmira Singh Jandu (deceased) who died on 8th September, 2011. The deceased was survived by two sons and one daughter namely; Trilochan Singh Jandu (appellant) Amarjeet Singh Jandu (1st respondent) and a daughter Amarjeet Kaur Chana (2nd respondent). On 21st September, 2011 the second son Amarjet Singh Jandu petitioned the High Court for a grant of probate of a written 'Will' made on 13th October, 2010 by the deceased which allegedly named him as the executor. The said 'Will' distributed the deceased estate being LR No. 209/2079 situated at Parklands Nairobi, 1/3 of LR No. 37/396 situated in Industrial Area, Nairobi and all the deceased property in Punjab, India to his second son, Amarjet. It provided that his only daughter Amarjeet Kaur Chana would receive rental income from one unit, comprising of the three flats in the Parklands property.

[2] The said 'Will' did not make any provision for the appellant as it was stated in the said testament that he was adequately provided for during the deceased's life time. In particular, it was stated that he had been given a property known as 28 Browning Way TW9 London, United Kingdom, \$100,000 and shares in Kolaba Enterprises that owned a prime property in Industrial Area known as LR No. 209/9273 (Enterprise Road property). The appellant objected to the petition, challenging the validity of the said 'Will' on the grounds that it was a forgery; it disinherited him as a son of the deceased; the petition was filed secretly without his involvement and if granted, the appellant's interests in his father's estate would be disregarded by the 1st respondent.

[3] Notwithstanding the contents of the 'Will', the learned trial Judge (Kimaru J.,) who was handling the matter at the time overlooked it, (perhaps in the interest of expediency) and gave directions that the only matter for trial was whether the appellant (who was the objector) was entitled to inherit from the deceased's other estate which seems to be the properties that were named in the 'Will'. All the parties were content with the said directions as they proceeded with the hearing in earnest before Musyoka J., without any further mention of the 'Will'. The appellant gave evidence in support of his claim which is well summarized in the impugned judgment. In other words, the appellant was disputing the allegation that he received his bequests in form of cash transfers and loans that he used to purchase a house in London. Regarding the shares in the company called Kolaba Enterprise Ltd which owns a prime property in Industrial Area, the appellant maintained that he started working with his father from 1976, and his brother, the 1st respondent joined them in 1977, but when the appellant relocated to settle in the UK, the deceased distributed the property among the three of them with the appellant getting the entire shares of Kolaba Enterprises Limited, the 1st respondent got the property on Sotik Road LR No. 37/396 which he had no quarrel with. The appellant denied that the deceased purchased for him a house in London, contending that he bought it through a mortgage financing with his wife way back in 1986. The appellant urged the estate of the deceased be shared equally among the three children of the deceased, although he was agreeable the entire share at the Sotik Road property can go to the 1st respondent as per the deceased's wishes which were expressed in an agreement but he wanted the Parklands property shared among the three children of the deceased equally.

[4] On the other hand, the 1st respondent, who was the petitioner, defended his petition by stating that the three properties that made up the estate of the deceased were acquired solely by their father. When the assets were acquired, he and the appellant were minors therefore they contributed nothing towards the said acquisition. Moreover, the appellant was not actively involved in the deceased's business as he spent a considerable amount of time abroad on further studies which he never completed and eventually migrated to the UK with his family. The deceased bought the appellant a residential house in London with proceeds from the family business and advanced him colossal sums of money over time which was adequate provision during the deceased lifetime. The 1st and 2nd respondents accused the appellant of being disrespectful to the deceased and generally being hostile and making unreasonable demands on the deceased and at one time subjecting the deceased to physical violence, they described the appellant as a bully who is difficult to work with.

[5] At one time, the deceased wanted to distribute his estate as per a draft agreement which fell through because the appellant refused to sign. Eventually, the appellant was given a business called Kolaba Enterprises Ltd which owns a prime property at Enterprise Road valued at Kshs 170 million while the 1st respondent was given Jandu Steel Works Ltd and the business premises on Sotik Road and the Parklands apartments that have a combined value of Kshs 165 million to be shared among the respondents. A share of income from one of the apartments in Parklands will go to their sister. The 1st respondent maintained that the appellant had benefited with a lion share of the deceased estate, and allocating him a share of the Sotik Road and Parklands properties would result to an injustice to him and his sister.

[6] Upon considering the evidence, the learned trial Judge found the appellant had benefited from a substantial allotment of assets *inter vivos* and there were no commensurate benefits to the respondents; it would be unfair and inequitable for the appellant to further benefit from the remaining assets of the deceased. Thus ordering the remaining assets be shared between the respondents. The appellant was aggrieved by the aforesaid conclusion hence the instant appeal which is predicated on some six grounds of appeal to wit:-

That the learned Judge erred in law and fact by:-

“a) Holding contrary to evidence on record that the appellant had benefited from substantial

inter vivos allotment of assets during the deceased lifetime to the exclusion of the respondents.

b) Failing to consider the contents of a mutual agreement drawn 10 years prior to the death of the deceased in which the deceased wanted to share his estate among his two sons.

c) Failing to consider the enhanced value of the Enterprise Road was as a result of the appellant injecting massive capital to improve the premises, whereas the 1st respondent received a running business with machinery and goodwill.

d) Erroneously concluding that the deceased bought a house for the appellant in the UK contrary to the evidence on record.

e) Dispossessing the appellant of flat and office space allocated to him during the lifetime of the deceased on LR No 209/2079 where he used to reside and denying him access to Temple.

f) Denying the appellant a share of their parents' estate against the weight of the evidence.”

The appellant sought prayers that the deceased's asset namely L.R No. 208/2079 be shared equally among the three children of the deceased and he be allowed equal access to the family home and the use of the Temple at the same premises.

[7] During the plenary hearing, Mr Mwangi Kigotho, learned counsel for the appellant relied on his written submissions and made some oral highlights. Counsel elaborated on the above grounds by submitting that there was no evidence on record to support a finding that the deceased transferred properties to the appellant as a gift *inter-vivos*. The evidence on record confirmed that the deceased and his two sons, appellant and 1st respondent incorporated a company by the name Jandu Steel works Ltd where the three worked as employees of the company. From the proceeds of this company, they purchased LR. No. 37/396 otherwise referred to as Sotik Road property and they constructed the apartments in Parklands.

[8] Counsel for the appellant further submitted that there was a mutual agreement in the year 2002, on how the deceased wanted to distribute his assets which the deceased duly executed as well as the 1st respondent on how the businesses acquired by the family was to be shared. That is how the shares in Kolaba Enterprises Ltd were transferred to the appellant and his wife. In line with the same agreement, the 1st respondent moved his business to Sotik Road property with all the machinery though he considered them obsolete. Thus, according to counsel, the learned Judge fell into error when he concluded that the appellant was allotted the property in Kolaba Enterprises as a gift *inter vivos* without also recognizing the 1st respondent received the property on Sotik Road. That is the reason why the appellant never pursued the Sotik Road property in deference to the said mutual agreement.

[9] Lastly, counsel for the appellant faulted the learned trial Judge for failing to factor in the value additions made towards the enhancement of the value of the Enterprise Road property by the appellant. The appellant had outlined the improvements he made on the property; on the other hand the 1st respondent neglected both the running concern in the Jandu Steel Works Ltd claiming the machines were obsolete and failed to maintain the property on Sotik Road and as a result it yielded a lower value. The fact that the properties were shared in 2002 was not considered by the learned Judge. Also there was no evidence to show the appellant had no income to purchase his own house in London, an allegation that it was bought with family finances was not supported by evidence as the appellant was able to demonstrate how he and his wife bought their home through a mortgage financing.

[10] This appeal was opposed by Ms Wanyoike learned counsel for the respondent. She too relied on her clients written submissions which she highlighted by clarifying that the written 'Will' of the deceased was not considered by the court in view of the provisions of Sections 26 and 27 of the Law of Succession which recognized the appellant as a beneficiary of the deceased who was not provided for in the deceased

'Will.' Counsel supported the judgment by the trial court which she submitted was based on solid evidence where it was proved the appellant benefited from substantial assets during the deceased's lifetime which was taken into account pursuant to the provisions of **Section 42** of the Act. The valuation of the three assets clearly shows the appellant had benefited with the lion share of the deceased's property even before factoring in the London home.

[11] As regards the 2002 family agreement, counsel for the appellant said this was inconsequential as the appellant refused to sign it as such there was no such agreement and the 1st respondent did not inherit Jandu Steel Works as a running business. Indeed, sometime in March, 1999 the 1st respondent had resigned from the said company due to interference and constant quarrels with the appellant and when the appellant refused to sign the family agreement the deceased wound up the company that ceased operations in 2002. According to the 1st respondent, even after the deceased transferred to him the Enterprise Road property, he continued to demand for a share of Parklands property but the deceased was categorical that unless he ceded 50% of the Enterprise Road property to the respondents he was not entitled to Parklands and this was confirmed by the evidence of Kartilal Shah Chandaria, a close friend of the deceased who gave evidence on behalf of the respondents. Also, the 2nd respondent testified that the deceased gave her a note written in his hand telling her that he had lent the appellant large sums of money; the hand written notes were produced in evidence.

[12] Lastly, counsel submitted that the appellant did not adduce any evidence in regard to the alleged improvement on the Enterprise Road Property; there was no evidence the 1st respondent received a running business in Jandu Steel Works Ltd. Also, the contention by the appellant that he used money from the rent in Enterprise Road to purchase the London house could not hold any water as the said property was transferred to him in 2008, while the documents he produced of ownership relating to the London property were dated between 1986 and 1989; all this went to prove the appellant was not a credible witness. The appellant also owns an office block within Enterprise Road property and his push for Parklands property is motivated by greed and a selfish desire to gain more from the deceased's estate which is characteristic of his bullish behaviour. Counsel urged us to dismiss the appeal with costs.

[13] This is a first appeal, that being so, we are alive to our duty on a first appeal as stated by *Sir Clement de Lestang VP* in **SELLE V.**

ASSOCIATED MOTOR BOAT COMPANY [1968] E.A. 123 at p. 126;

“... 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 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 witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the 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.”

The above was cited with approval by this Court's decision in **JIVANJI V. SANYO ELECTRICAL COMPANY LTD** [2003] KLR 425 at p. 431.

[14] Bearing the above principles in mind, we have considered the record of appeal, submissions filed and the rival arguments; we discern a single straightforward issue for our determination in this appeal; that is, whether the appellant was denied a share of his father's estate. Although the 1st appellant petitioned for a grant of probate of a written 'Will', this matter was determined under intestacy, that is Part V of the Law of Succession. It follows that nothing turns on the purported 'Will' of the deceased as all parties seem to have accepted the directions

given by court that they adduced oral evidence on the distribution of the deceased's estate, the 'Will' notwithstanding. As a consequence, the 'Will' was not propounded and it is of no relevance in this appeal. In this regard, as the deceased was survived only by the three children; the relevant section of the Law is Section 38 of the Law of Succession Act which provides;-

“Where an 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 be equally divided among the surviving children.”

[15]The deceased's net estate that fell for distribution as indicated in the affidavit in support of the petition is the following assets;-

1. Parcel of land with residential developments standing on plot No. LR. 209/2079 (Parklands property).
- 2.Parcel of land with Industrial developments standing on plot No. LR 37/396 Nairobi (Sotik Road).
- 3.Bank Account with Prime Bank Kenya Ltd.

Total estimated value was stated as Kshs 100 million.

The 1st respondent's proposal was that the deceased wishes as expressed in the said 'Will' be followed in that he gets all the above properties with exception to rental income from one of the flats in Parklands property that was to go to his sister, Kaur Chana, deceased's only daughter.

[16] This proposal was opposed by the appellant and upon considering the evidence, this is what the learned trial Judge posited in a pertinent paragraph of the impugned judgment;-

“From the material that is before me, I am satisfied that the objector was allotted what the parties describe variously as the Enterprise Road property or Kolaba Enterprises Ltd. The assets that remain unallotted are referred to as the Sotik Road property and the Parklands property. The issue is whether the objector should be entitled to a share in the remaining two or whether the two should exclusively be distributed between the petitioner and their sister

I have noted from the record that the objector owns a property in London. He asserts that he acquired it from his own sources, while the opposition says that it was acquired using family funds. It would appear that the objector did not really have any funds of his own which have facilitated such an acquisition. I am persuaded that he could only have acquired the property with the support of his father, the deceased. I have also noted from the valuations put on record by both sides that the value of the Enterprise Road asset is fairly substantial in comparison with the other two assets.

It would appear to me that the objector has benefitted from a substantial inter vivos allotment of assets, while the other two survivors did not equally so benefit. It would be unfair and inequitable for the objector to share the remaining assets equally with them. I am persuaded that the said assets ought to be shared by the two to the exclusion of the objector.

In view of the above, the orders that I feel compelled in the circumstances to make are as follows;-

- a) That the objection by the objector is hereby dismissed;
- b) That Amarjeet Singh Jandu is hereby appointed administrator of the estate of the deceased, and a grant of letters of administration intestate shall accordingly issue to him;

c) That the administrator shall move forthwith to apply for confirmation of the grant to distribute the remaining assets of the estate as between himself and Amarjeet Kaur Jandu and;

d) That each party shall bear their own costs.”

[17] The above orders were challenged on three main grounds, firstly, that the appellant was left out of the distribution of his father’s estate; secondly, that the court arrived at an erroneous finding that the deceased assisted the appellant to purchase his home in London and thirdly, the court failed to take into consideration the enormous improvements the appellant had done to his Enterprise Road property which has enhanced the value, while the 1st respondent did nothing to enhance the value of the Sotik Road property. In considering the above issues, we must bring to bear the provisions of Section 42 of the Law of Succession that provides;-

“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,

That property shall be taken into account in determining the share of the, net intestate estate finally accruing to the child, grandchild or house.”

It is obvious the learned trial Judge took into account the above provision of the law when he considered the effects of a mutual kind of arrangements whereby the appellant and 1st respondent each assumed total control and ownership of Enterprise Road property and Sotik Road properties respectively. The ownership of two properties are kind of settled, it would also appear the 2nd respondent was assisted to buy a residential house in London, as she seems to go with the proposal by the 1st respondent.

[18] What remains unclear and has given us some measure of anxiety is whether when these two properties were given to the appellant and 1st respondent respectively they were of equal value. The appellant contended that he added value on Enterprise Road property through renovations while the 1st respondent has not done anything to improve the value of the Sotik Road property. The respondents contended that the appellant was given a lion share of the deceased estate, being a house in London where the deceased contributed towards the purchase price and a loan advanced to him of \$100,000. The respondents made an averment of fact that the deceased gave the appellant money to purchase the London house and advanced him some personal loans. However, the loan advanced and money to purchase the London property were not documented nor did the respondents avail authentic money transfer documents. The burden lay on the respondents squarely to prove those facts. Looking at the evidence by the respondents and even their witness, one cannot say with certainty whether the deceased contributed to the purchase of the house in London or the amount of money that was loan advanced to the appellant. To us, this evidence did not prove on a balance of probability that the appellant was assisted to purchase the London property as gift *in te vivos*.

[19] On the other hand the appellant denied having received any money from the deceased and he challenged the documents that were produced by the respondents as lacking in authenticity. The appellant also strenuously stood by the fact that the house in London was bought jointly with his wife in 1986 through a mortgage financing. What went on was one party making allegations and counter allegations about what the deceased did or did not do. On our part, it is not possible to discern whether on a balance of probability the house in London was bought for the appellant by the deceased and whether he received colossal sums of money over time from the deceased as personal loans.

These were just mere statements of facts that were made, and as the appellant denied them and produced his own documents regarding the purchase of the house, those were mere allegations without more as the documents attached are not conclusive and they cannot form the basis for excluding the appellant from benefiting from a share of the deceased property at Parklands.

[20] Be that as it may, the deceased estate was not distributed according to the deceased 'Will', by which the deceased had expressed his wish on how his estate was to be distributed. In the event therefore, the law requires the deceased property be shared equally among the three beneficiaries and what is in contention as aforesaid is the Parklands property. The deceased's daughter admitted that the deceased assisted her to purchase a house in London; she was given rental income from one of the units in Parklands and she seems content with that as far as the proceedings in the High Court went. The Parklands property is where the deceased used to live, it seems it was the family home and the appellant claims to have a sentimental attachment to the same. The Enterprise Road property is obviously more valuable than the Sotik Road, but the dilemma we have with this kind of evidence is that we do not know exactly the amount of money the appellant put in to enhance its value. For that reason, we are of the view that for there to be a semblance of equity in the distribution of the deceased estate, all the beneficiaries should have a share of the Parklands property. Perhaps if the 1st respondent had invested money in renovating the Sotik Road property that would have enhanced its value as well.

[21] In order to achieve the principle of equal sharing among the deceased's children, it is imperative that the appellant should get a share of the Parkland Property or to borrow from Shakespearian language a "pound of flesh." In this regard, we interfere with the distribution orders made by the High Court by ordering the deceased estate be distributed as follows:

- a) The 1st respondent Amarjeet Singh Jandu is upheld as the administrator of the deceased's estate.
- b) Enterprise Road Property LR No 209/9372 to remain with appellant **TRILCHAN SINGH JANDU**.
- c) Sotik Road property LR NO 37/396 to remain with the 1st respondent Amarjeet Singh Jandhu.
- d) One apartment at Parklands Property LR NO. 209/2079 be transferred to the appellant **TRILCHAN SINGH JANDU** (for avoidance of doubt, the administrator shall determine which apartment).
- e) One apartment at Parklands property LR NO. 209/2079 should go to the deceased daughter Amarjeet Kaur Jandu (the apartment where 2nd respondent was collecting rent).
- f) The residual of Parklands property LR NO 209/ 2079 to be transferred to the 1st respondent Amarjeet Singh Jandhu as well as any other property of the deceased. (Considering the value of Sotik Road Property was less)

This being a family dispute we have no desire to set them against each other anymore. We order each party to bear their own costs of this appeal and the subsequent transfers of their respective shares of property.

Dated and delivered at Nairobi this 19th day of October, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR.