



IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, NAMBUYE & KIAGE, J.J.A)

CIVIL APPEAL NO. 39 OF 2015

BETWEEN

ELIUD CHIRA MURIITHI.....ST APPELLANT

NANCY WAMBUI MURATHI.....^{2ND} APPELLANT

ELIZABETH WANJIKU NGARI.....^{3RD} APPELLANT

VERSUS

KINYUA MURIITHI NGARI.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kerugoya (Limo, J.) dated on 20th February, 2015)

IN

SUCC. CAUSE NO. 553 OF 2013)

JUDGMENT OF THE COURT

This appeal is against the judgment and decree of the High Court at Kerugoya (**R.K. Limo, J.**) by which he ordered that the respondent **Kinyua Muriithi Ngari** (Kinyua) do receive a half while the three appellants were to share the other half of the **2.5 hectare INOI/THAITA/468** being the only property of the estate of **MURIITHI NGARI** (deceased) who was the father of them all. He died on 22nd November 1976.

The learned Judge based that skewed distribution of the estate on the fact that the deceased having died before the coming into force of the **Law of Succession Act in 1981**, the applicable law for the distribution and disposition of his intestate estate was the **Gikuyu Customary Law**. He found and held that the deceased was polygamous at the time of his death and that the respondent was sole child of the first house while the appellants were of the second house, and he divided the estate equally between the two houses.

The appellants who are acting in person, were aggrieved by that finding. They duly filed a notice of appeal and record of appeal. In the memorandum of appeal they complain that the learned Judge erred

by;

i. Deciding against the weight of evidence.

ii. Applying Gikuyu Custom to distribute the estate between two alleged houses irrespective of the number of dependants in each which was repugnant to morality and justice and contrary to Article 27 of the Constitution.

iii. Failing to find and uphold evidence that each child had been shown what portion of the deceased's property to occupy.

At the hearing of the appeal **Nancy Wambui** spoke on behalf of all the appellants and stated that the learned Judge should have applied the New Constitution and distributed the property equally between all of the deceased's dependants especially because each were already occupying portions that the deceased had shown to them during his lifetime. She asserted that the deceased's four sons were all brought up together by their mother **ALICE**, as children of one household notwithstanding that the respondent was the child of the first wife of the deceased, **SARAH**, who died before Alice was married. The respondent was 3 years old when his own mother died and he was brought up as a child of the appellants' mother so that the Judge was wrong to hold that there were two houses when it was only one. She concluded that the judgment was unfair as the respondent would have to unjustly appropriate part of the appellants' respective pieces of land in order to get what the Judge awarded him.

For the respondent, learned counsel **Mr. Kahiga** defended the learned Judge's conclusion that there was no evidence that the deceased wanted all the parties to share the land equally. He, however, conceded that the respondent did not file a further affidavit to controvert the averments in the 1st appellant's Affidavit of protest sworn on 11th May 2011 in which he deposed, inter alia;

“8. THAT upon the demise of Alice Wangithi in 1941 our mother took the petitioner herein [the respondent] in (sic) her wings and brought him up as her son until her death.

9. THAT our late father had allocated each of us portions to cultivate.

10. THAT all along we have been brought up by our father as children of the same mother.”

Counsel insisted that the deceased was a polygamist and that having died **five years** before the Law of Succession Act came into effect, his succession was governed by Gikuyu Customary Law which decreed that distribution be on the basis of houses irrespective of the number of children. He asserted that **“this may seem unfair today but it is the law”** and that the Constitution did not do away with the customs of the people of Kenya and defended Gikuyu customs on the point against the accusation that they were repugnant to justice and morality. He urged us to dismiss the appeal.

In reply to those submissions, the appellants insisted that the two wives of the deceased never lived as such at the same time, the first having died before the appellants' mother was married. They urged us to apply the Constitution which came to equalize all dependants.

This being a first appeal, our mandate is to re-appraise and re-evaluate the evidence that was before the Judge of first instance and draw our own independent inferences and conclusions as set out in **Rule 29(1) (a)** of the **Court of Appeals Rules** and recognized in many decisions of this Court.

In performing that duty, this Court would not normally interfere with a finding of fact of the trial court unless, as held in **SUMARIA & ANOTHER –VS- ALLIED INDUSTRIES LTD** [2007] 2 KLR 1;

“(a) It was based on no evidence or

(b) It was based on a misapprehension of the evidence or

(c) The Judge was shown demonstrably to have acted on wrong principle(s) in reaching the finding he did”

See also **EPHANTUS MWANGI & ANOTHER –VS- DUNCAN MWANGI WAMBUGU** [1982-88] 1 KLR 278.

The deference that this Court pays to the findings of the trial Judge flow from an appreciation that he, unlike we, had the advantage of seeing and hearing the witnesses as they testified and is therefore better placed to gauge their credibility. See **PETERS –VS- SUNDAY POST LTD** [1958] EA 424 and **SELLE –VS- ASSOCIATES MOTOR BOAT CO. LTD** [1968] EA 123.

We think, however, that this Court would be less reticent to interfere in cases such as the one before us, where the High Court did not take evidence by way of live testimony but relied on affidavits sworn by the parties. In such a case, this Court stands in the same situation, being no less advantaged than the court below, and therefore freer to arrive at its own conclusions.

Having considered the evidence and the record, we find as did the learned Judge, that the deceased having died in 1976, the law governing the distribution of his intestate estate was Gikuyu Customary Law. The Judge was therefore right to apply the principle recorded in Prof. Cotran’s Restatement of African Law, Vol.2 on Succession, which is that inheritance under Gikuyu customary Law is patrilineal, based on distribution of a man’s property amongst his wife’s houses, though the eldest may get a slightly larger share .

We are also satisfied that he was correct in relying on the cases of **PHILIS MICHERE MUCEMBI –VS- WAMAI MUCHEMBI** [2010] e KLR and **in RE the matter of the Estate of KIRUTHO KIIRU**(deceased) [2007] e KLR where it was observed that Gikuyu customs of succession have no element of repugnancy or immorality in them. The estate shall be divided between the two houses in equal shares.

Where we think, respectfully, that the learned judge fell into error is in his finding that the deceased had two houses. The evidence appears quite clear that the respondent was taken in by the appellants’ natural mother who brought him up as her own child alongside the appellants. The deceased home for the entire period from 1941 when the respondent’s mother died while he was a three (3) year toddler, until the deceased’s own demise in 1976 was a one-wife homestead. All the children were brought up by that one mother. There was therefore one house and not two. The 1st appellant’s affidavit setting out those facts was not challenged by the respondent as we have already observed.

It is testimony to that state of things that the deceased, again from the appellants’ unchallenged testimony, showed each of his children which part of the land to occupy and till. The said portions appear to have been equally or equitably shared out by the deceased and there is no complaint that any child was favoured or disfavoured. If anything, only a giving effect of the learned Judge’s judgment would bring about inequity and inequality.

As the evidence on record points to all the children of the deceased as belonging to one household who were already shown which portions of the deceased’s land to occupy, we find that the learned Judge’s holding that there be a distribution that gives the respondent 50% of the whole, with the three appellants sharing the remaining half, is wrong in fact, in law and in principle. We therefore must interfere.

This appeal succeeds and is allowed. The judgment and decree of the High Court is set aside. It is substituted with orders that the land known as **INOI/THAITA/468** measuring **2.6 hectares (approximately 6.17 Acres)** shall be shared between; KINYUA MURIITHI NGARI, ELIUD CHIRA MURIITHI, ELIZABETH WANJIKU NGARI and NANCY WAMBUI MURATHI in equal shares.

Although this is a family matter between siblings, it is the respondent apparently driven by greed who precipitated this dispute thereby putting the appellants into unnecessary expense. We order the respondent to pay the costs of the appellants in this court and the court below.

Dated and delivered at Nyeri this 17th day of February, 2016.

E. M. GITHINJI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR