



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 143 OF 2011

BETWEEN

JOHANNES MBUGUA MUCHUKU..... APPELLANT

AND

LOIS WANGUI MUCHUKU..... 1ST RESPONDENT

MARGARET NYAMATHWE KIBERA.....2ND RESPONDENT

JANE WANJIRU KURIA.....3RD RESPONDENT

LUCY NYAGUTHIE GATHURI.....4TH RESPONDENT

VIOLET WAMBUI MBUGUA.....5TH RESPONDENT

PAULINE NYAMBURA.....6TH RESPONDENT

WINNIE NJERI.....7TH RESPONDENT

(Being an appeal from an order of the High of Kenya at Nakuru Wendoh, J.) Dated 4th March, 2011

in

(H. C. Succession Cause No. 366 of 2003)

JUDGMENT OF THE COURT

The proceedings resulting in this appeal relate to the estate of **James Mbugua Muchuku (deceased)** formerly of **Matindiri** who passed on, on the 1st April, 2001. The appellant **Johannes Mbugua Muchuku** in his capacity as a son of the deceased set the ball rolling when he moved to Nakuru High Court and presented a petition for letters of administration intestate to the estate of the deceased, dated

the 28th August, 2003, supported by a supporting affidavit. In it the following were enumerated as beneficiaries in tandem with the list of beneficiaries contained in the chief's letters dated the 26th July, 2001.

- a. **Lois Wangui James widow.**
- b. **Lucy Nyaguthie Gathuri daughter.**
- c. **Pauline Nyambura daughter.**
- d. **Violent Wambui daughter.**
- e. **Johannes Mbugua Muchuku son.**
- f. **Margaret Nyamathwe Kibera daughter.**
- g. **Ngugi Muchuku Kagwe son.**
- h. **Jane Wanjiru Kuria daughter.**
- i. **Winnie Njeri daughter.**

While the following were enumerated as the assets forming the estate:

- a. **NYAMATINDIRI/344 measuring 1.20 Ha**
- b. **NYAMATINDIRI/335 measuring 2.00 Ha**
- c. **NYAMATINDIRI/345 measuring 0.30 Ha**
- d. **NYAMATINDIRI/336 measuring 1.80 Ha**
- e. **NYAMATINDIRI/337 measuring 5.65 Ha**
- f. **NYAMATINDIRI/338 measuring 5.65 Ha**
- g. **Account with Barclays Bank A/C No. 428654 (Ksh.190,000)**
- h. **17 heads of cattle and 27 sheep**

The debt of **Nathan K. Waithaka** to the tune of – Ksh. 30,000/- was the only liability noted against the estate.

Extracts of titles were exhibited as proof of both their existence and ownership of these by the deceased. “**No objection**” consents were filed only from **Ngugi Muchuku Kagwe; Loise Wangui James** and **Violent Wambui Mbugua**. There was no mention as to why “**no objection**” consents were not obtained from the rest of the enumerated beneficiaries. The cause was advertised vide gazettee Notice No. 8003 of 14th November 2002. No objections were raised against that notice paving the way for the presentation of an application for the issuance of the temporary grant of representation ultimately issued on the 8th December, 2003.

Armed with the above temporary grant, the appellant presented an application for its confirmation dated the 15th October 2004 supported by an affidavit. In it, at paragraph 6 thereof the appellant proposed to distribute the deceased's estate as hereunder:-

- a. **NYAMATINDIRI/344 measuring 1.20 Ha – VIOLENT WAMBUI (to be registered in her son’s name STEVEN MBUGUA MUCHUKU ID NO. 10881735.**
- b. **NYAMATINDIRI/335 measuring 2.00 Ha – JOHANNES MBUGUA MUCHUKU AND NGUGI MUCHUKU KAGWE.**
- c. **NYAMATINDIRI/345 measuring 0.30 Ha - JOHANNES MBUGUA MUCHUKU and NGUGI MUCHUKU KAGWE.**
- d. **NYAMATINDIRI/336 measuring 1.80 Ha JOHANNES MBUGUA MUCHUKU and NGUGI MUCHUKU KAGWE.**
- e. **NYAMATINDIRI/337 measuring 5.65 Ha - JOHANNES MBUGUA MUCHUKU.**
- f. **NYAMATINDIRI/338 measuring 5.65 Ha - NGUGI MUCHUKU KAGWE.**
- g. **Account with Barclays Bank A/C No. 428654 (Ksh.190,000) JOHANNES MBUGUA MUCHUKU and NGUGI MUCHUKU KAGWE (in trust for LOIS WANGUI).**

The above proposals formed the basis of the confirmed grant dated the 21st January, 2005 as here under:-

STEVEN MBUGUA MUCHUKU NYAMATINDIRI/344 - Whole

JOHANNES MBUGUA MUCHUKU NYAMATINDIRI/335 - Jointly

NGUGI MUCHUKU KAGWE

JOHANNES MBUGUA MUCHUKU NYAMATINDIRI/345 - Jointly

NGUGI MUCHUKU KAGWE

JOHANNES MBUGUA MUCHUKU NYAMATINDIRI/336 - Jointly

NGUGI MUCHUKU KAGWE

JOHANNES MBUGUA MUCHUKU NYAMATINDIRI/337 - Whole

NGUGI MUCHUKU KAGWE NYAMATINDIRI/338 - whole

Account with Barclays Bank A/C No. 428654 (Ksh.190,000) JOHANNES MBUGUA MUCHUKU and NGUGI MUCHUKU KAGWE (in trust for LOIS WANGUI).

LOIS WANGUI 17 heads of cattle and 30 sheep - whole share.

On the 26th January 2009 the respondents **Margaret Nyamathwe Kibera, Jane Wanjiru Kuria, Lucy Nyaguthie Gathuri, Violet Wambui Mbugua, Pauline Nyambura, Winnie Njeri** all of whom had been enumerated both in the affidavit in support of the petition and the letter from the area chief as daughters of the deceased presented a “**summons**” to court under **Sections 74 and 76(b)** and (c) Law of Succession Act Cap 160 Laws of Kenya and all other enabling provisions of the law. They substantively sought the following orders:

- (i) **The grant of letters of Administration issued on the 8th December 2003 and confirmed on the 21st January 2006 be and is hereby revoked.**
- (ii) **Alternatively, the grant of Letters of Administration and the confirmed grant issued on**

the abovementioned dates be altered or amended to describe the heirs/beneficiaries adequately.

The application was based on the grounds in its body and a supporting affidavit deposited by **Margaret Nyamathwe Kibera** on her own behalf and on behalf of the rest of the respondents. It was opposed by the appellant's replying affidavit deposited on the 24th day of June, 2006. The merit disposal of the above competing interests is what resulted in the impugned ruling of **R.V.P Wendoh J.** of 4th March 2011 in which the learned Judge faulted both the issuance of the temporary grant as well as its confirmation.

The appellant was aggrieved. He is now before us on a first appeal citing six grounds of appeal namely:

The learned Judge erred in law and in fact :-

- 1. in ruling that the estate of the late James Mbugua Muchuku be redistributed in accordance with section 35, 41 and 42 of Law of Succession Act Cap 160 as the subject matter is Agricultural land and livestock which fall under section 32 and 33 of the Act.**
- 2. in departing from the provisions of Section 82(4) of the old Constitution in her ruling and thereby rendering her very unconstitutional. (sic)**
- 3. in invoking sections 27(4)(5) of the new Constitution as the events that led to these proceedings and all the pleadings predate the new Constitution by almost a year and half.**
- 4. in ruling that the parcels of land gifted to the applicants before our father's death were advancements that had to be filled in a later distribution as my father believed that his estate was to be distributed according to Kikuyu Customary Law and therefore the gifts were final.**
- 5. in invoking International Laws against discrimination to support her ruling since International Laws are subservient to our Constitution and as long as section 82 of the old Constitution had not been amended then International Laws on discrimination could not be domesticated.**
- 6. in allowing the learned counsel for the applicants to prosecute the application although he had not filed a notice of change of Advocate as was required by Order 3 rule 5 of the old Civil Procedure Rules.**

The appellant who appeared in person urged all the six (6) grounds of appeal globally. In urging us to allow the appeal, the appellant argued that the assets subject of the succession proceedings all belonged to his deceased father who had every right under **section 82(4)** of the defunct Constitution of Kenya to deal with the property as he wished; in the exercise of that right the deceased shared his land to his sons as he had no intention of sharing his property to his daughters. The appellant went on further to urge that the learned Judge was in error when she invoked **Article 27(4)(5)** of the Kenya Constitution 2010 because it has no application to the issues in controversy as between them and also when she applied international conventions which are subservient to municipal law. Lastly, he argued that the proceedings from the application for revocation are flawed in so far as these were argued by an advocate who had not properly placed himself on the record for the respondents.

To buttress his arguments the appellant cited the case of **Julius Wainaina Mwathi versus Beth Mbene Mwathi & another [1996] eKLR** for the proposition that the distribution of an intestate estate of a deceased Kikuyu is governed by the Kikuyu customary law. Also cited is a non-binding case of **Robert Kisiara Dikir versus The Officer Commanding Kenyan General Service Unit (GSU) Post & 3 Others [2010] eKLR** for the proposition that litigation commenced under the defunct Constitution of Kenya has to be determined under the said defunct Constitution and not under the current Kenya Constitution 2010.

In response to the appellant's submissions **Mr. Murimi** learned counsel appearing for all the respondents

urged us to dismiss the appeal as unmeritorious. It is **Mr. Murimi's** view that **sections 32 and 33** of the law of succession do not apply to the issues in controversy herein as **Nyandarua** where the deceased's assets were situated is not one of the gazetted districts where customary law was to apply to the inheritance of both agricultural land and livestock; that the learned Judge fell in no error as she properly appreciated both the facts and the law applicable and arrived at the correct conclusions on the matter; that no will was exhibited to show that the deceased had any intention to have his estate distributed according to Kikuyu customary law, let alone to disinherit both his widow and daughters and that the fact of the respondents having received gifts *inter vivos* was not per se a disqualification for them to get a share of the residue of the deceased's intestate estate.

Turning to the provisions of law he urged that **Article 27** of the current Constitution of Kenya 2010, was properly invoked by the learned Judge as all she did was to recognize and enforce the respondents inheritance rights as already crystalized under the Law of Succession Act; the mention of International Law conventions by the learned Judge was inconsequential as the record is clear that the learned Judge relied on the Law of Succession Act provisions to determine the issues in controversy before her. Lastly, he submitted that **Section 82** of the defunct Kenya Constitution has no application to the issues in controversy in this appeal.

Turning to the case law cited by the appellant we were urged to distinguish these from the circumstances prevailing in this appeal as the **Robert Kisiara Dikir** case (supra) strictly dealt with purely constitutional rights, while that of **Mwathi versus Mwathi** (supra) was first of all bad in law as the Law of Succession Act (L.S.A.) talks of children and does not discriminate against girls whether married or unmarried. Second it applied to estates of deceased persons who died before the coming into force of the L.S.A.

To buttress his arguments **Mr. Murimi** cited the case of **Peter Karumbi Keingati and 4 others versus Ann Nyokabi Nguthi and 4 others [2015] eKLR**; In the estate of **Lerionka Ole Ntutu** deceased; **Samson Kiogora Rukunga versus Zipporah Gaiti Rukunga [2011] eKLR** and **Rono versus Rono [2008] 1 KLR (G&F) 803** all for the propositions that customary law has no primacy over both the written law (the L.S.A.) and the Constitution with regard to inheritance of children of a deceased person.

This is a first appeal. Our mandate is as set out in **rule 29(1)** of the Rules of the Court namely, to reappraise the record before us and arrive at our own conclusions on the matter. In doing so we have to bear in mind the caution in **Sumaria & another versus Allied Industries Limited [2007] 2 eKLR** among numerous others in which the court was categorical that although we are obligated to re-consider the evidence, re-evaluate it and make our own conclusions thereon, nonetheless as a first appellate court we should be slow to interfere with the findings of facts by the trial court unless;

- a. it was based on no evidence or
- b. it was based on a misapprehension of the evidence or
- c. the Judge has shown demonstrably to have acted on wrong principles in reaching the finding he did.

We bear the above principles in mind as we embark on the exercise of reappraising re-evaluating and re-analyzing the record before us. In our view, the following facts are not in dispute, that is:-

- (i) all the properties subject of the succession proceedings belonged to the deceased's intestate estate.
- (ii) all the respondents were daughters of the deceased having been enumerated as such by both the chief and the appellant's affidavit in support of the petition for grant of representation to the deceased intestate estate.
- (iii) the respondents received no share of the deceased's estate enumerated in the petition, all of which with the exception of cattle and sheep which were distributed to the widow, went to the appellant and another brother all of whom are sons of the deceased.

(iv) the deceased died intestate leaving no will excluding daughters from getting a share of his intestate estate.

(v) The appellant's affidavit in support of the application for the confirmation of grant is silent as to why the respondents were excluded from getting a share of their father's estate.

The respondents argued in support of their application that they were the daughters of the deceased and ought to have consented both to the application for the grant as well as its confirmation; the consent purportedly obtained from their mother **Loise Wangui Mbugua** was fraudulent as she was illiterate and most likely she may not have known what she was thumb printing; the respondents as daughters of the deceased should not have been denied their share of their father's estate on grounds of gender.

The appellant's response to the respondents' assertions is contained in paragraphs 5,6,7,8,9 and 10 of his replying affidavit in opposition to the application for revocation and or rectification which we find prudent to reproduce hereunder:

1. ...

2. ...

3. ...

4. ...

5. **That in further reply to paragraph 3 of the supporting affidavit, the respondent states that under Kikuyu Customary Law the application for grant was properly made owing to the fact that before our father died, he had made proper distribution of this estate to all the applicants and the residue of the estate which was land and livestock automatically devolved to his sons with sufficient provision for the mother for the rest of her life.**

6. **That in reply to paragraph 5 of the supporting affidavit, there was nothing to rectify as our father, prior to his death had subdivided his land, formally known as PLOT NO 45 Matindiri into 11 parcels and distributed as follows to the applicants:-**

a. **Violent Wambui Mbugua – Nya/mat 339 1.6 Ha.**

b. **Margaret Nyamathwe Kibera – Nya/mat 342 0.60 Ha.**

c. **Jane Wanjiku Kuria - Nya/mat 340 0.60 Ha.**

d. **Winnie Njeru Mbugua – Nya/mat 341 0.60 Ha.**

e. **Lucy Nyaguthie Gathuri – Nya/mat 343 0.60 Ha.**

f. **Pauline Nyambura Mbugua (Title not issued) 1.20 Ha. Annexed hereto are the true original copies of the title deeds issued to the applicants together with the mutation form dated 13/3/1998 (Marked JMM1)**

g. **That the applicants have no further claim to the residue of the estate, which in any case ceased to be when the estate was distributed five years ago.**

8. **That the applicants half –hearted moves in this matter beginning with an application that was withdrawn, to the application dated 27/2/2006 which had been pending for close to three years are proof that the applicants are on a fishing trip.**

9. **That the orders sought cannot be enforceable as they have been overtaken by events.**

10. That in reply to paragraph six of the supporting affidavit, the applicants were not beneficiaries of the residue of our father's estate, since plot Nos. Nya/Matindiri 337 Nya/Matindiri 338 of 5.65 Ha each had been gifted to Johannes Mbugua Muchuku and Ngugi Muchuku Kagwe respectively, while plot No. Nya/Matindiri 335 and Nya/Matindiri 336 and Nya/Matindiri 345 which our father left intestate automatically devolved to the applicant and our brother Ngugi Muchuku Kagwe in accordance with Kikuyu Customary Law.

In weighing and analyzing the above competing interests the learned Judge

reasoned thus:-

“The deceased died while domiciled in Kenya. Succession to his immovable and moveable property is therefore governed by the Law of Succession Act Cap. 160 Law of Kenya by virtue of Section 4 thereof. Since the deceased had one surviving spouse and children, the same will be governed by section 35 of the Act. It provides

‘S.35(1)..(4)

Subject to the provisions of sections 41 and 42 and subject to any appointment of award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.’

Under the above provisions, there is no discrimination of a deceased's children based on sex. They are equal before the law and the estate is to be distributed in accordance with section 35, 41 and 42 of the Act. In the instant case, all the children of the deceased should have agreed on the distribution of the estate and this should be subject to any gifts or advancement that the deceased had made during his life time if any. The respondent had no right to administer the estate single handedly with the consent of only two of the beneficiaries. The respondent's argument that the applicants are married women has no place in our law today and the decision relied upon of Julius Wainaina Mwathi (supra) that Kikuyu Customary Law should apply because the deceased was a Kikuyu, has long been overtaken by events. This is because Cap 160 requires that all children be treated equally and the Constitution which is the highest law of the land outlaws any law that is discriminatory of itself or in its effect. In *Rono vs Rono* [2005] 1KLR 536, the Court of Appeal invoked the International Instruments to which Kenya has subscribed and which prohibit discrimination on grounds of sex. The court also observed that the possibility that the daughters in a family may be married would only be one of the factors that may be considered in distribution but it is not a determining factor. The court held:

- 1. The application of African customary law is governed by section 3(2) of the Judicature Act (Cap 8). The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect.*
- 2. Even though Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated, current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law, even in the absence of implementing legislation.*
- 3. Kenya has subscribed to international laws which make provisions against the discrimination of persons on the grounds of sex, including the Universal Declaration of Human Rights; the Covenant on Economic, Social and Cultural Rights; the Covenant on Civil and Political Rights and the African Charter of Human and People's Rights. It has also ratified the Convention on the Elimination of All Forms of Discrimination against women.*

4. ...

5. ...

6. *The discretion of the court in distributing the estate of a deceased person under section 27 of the Law of Succession Act must be exercised judicially or on sound legal and factual basis. The possibility that the daughters in a family may be married would be one factor that may be considered and not a determining factor. In this case, there was no firm factual basis for finding that the daughter of the deceased would be married’.*

Article 27 (4) and (5) of the Constitution outlaws discrimination on account of gender. The applicants have a right to the deceased’s estate and even if they are married, it is upon them to decide whether or not they want a part of their father’s estate. I find and hold that the respondent acted in contravention of clear statutory provisions by excluding his sisters.’

The learned Judge then concluded thus:

“From the foregoing, it is evident that the grant of letters of administration issued to the respondent were confirmed irregularly because the respondent did not disclose all the beneficiaries. The grant is hereby revoked to allow for all beneficiaries to be involved. Lastly, though there was no application for joinder of another administrator, I think it is only fair that another administrator be appointed by the applicants to act as a co-administrator with the respondent to protect their interests. The petitioner will bear costs of this application.”

The deceased herein having passed on after the commencement of the L.S.A on 1st July, 1981, the learned Judge was in order when she ruled that both the administration as well as the distribution of his intestate fell under the provisions of **section 2(1) and (2)** of the said Act. These provide

“2.(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

Our reading of paragraphs 5,6,7,8,9 and 10 of the appellants replying affidavit is that gifts *inter vivos* per se locked out the respondents from getting a share of the residue of the deceased’s estate. The contrary is the position and the learned Judge rightly overruled him on this assertion. **Section 42** of the Act which was reviewed by the learned Judge provides clearly that gifts *inter vivos* are not a bar to getting a share of the residue of the intestate estate of a deceased person but that these should be taken into consideration at the time of distribution Section 42 provides:

“42 where

(a) an intestate has, during the 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 net intestate estate finally accruing to the child, grandchild or house”

The learned Judge’s view of the application of this provision to the issues in controversy before her was

in line with the view taken by the court in the case of **Samuel Maina Mwangi & 2 others versus Muthoni Kagiri [2013] eKLR** thus:

“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 and 35 that property shall be taken into account in determining the share of the net estate finally accruing to the child, grandchild or house.

Therefore, the trial court was correct in holding that the parcels of land that were given to the appellants would be taken into account in distribution of the deceased's estate”.

We fully adopt the above reasoning as the correct interpretation and application of **Section 42** of the L.S.A. As already mentioned above it was correctly construed and applied by the learned Judge.

In view of what we have stated above we find no merit in this appeal. The same is dismissed. Being a family issue we find it prudent to order that each party bears their own costs.

Dated and Delivered at Nakuru this 14th day of July, 2016.

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR