



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 230 OF 2014

BETWEEN

EDWARD KAMAU MBOCHI APPELLANT

AND

LUCY NJERI MBOCHI RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Nairobi, (W. Karanja, J.) dated 27th June, 2013

in

HC. SUCC CAUSE NO. 1845 OF 1999)

JUDGMENT OF THE COURT

1. The appellant, Edward Kamau Mbochi, has in this appeal challenged the ruling of the High Court (W. Karanja, J (as she then was)) delivered on 27th June 2013 in which the court distributed the estate of Henry Mbochi, deceased. In that ruling, the court invoked Section 40 of the Law of Succession Act and ordered that the property known as title number Kabete/Lower Kabete/140, being the only asset of the estate of the deceased, *“be subdivided among all the children of the deceased in equal shares with any surviving spouse getting an equal share as she is recognized as a single unit.”*

2. The appellant complains that in making that order, the court overlooked an earlier order given by the same court on 29th June 2009 that had directed a different mode of distribution between the two houses of the deceased.

Background

3. The deceased, Henry Mbochi, was in his lifetime in a polygamous union. With his first wife, Hannah Wambui Mbochi, they were blessed with 5 children. With his second wife Lucy Njeri Mbochi, the respondent, they were blessed with three children. He died on 13th March 1994. There was some contest over the administration of his estate. During the pendency of the succession cause in the High court, the first wife of the deceased, Hannah Wambui Mbochi died. On 8th May 2007 the High Court ordered, by consent, that Hannah Wambui Mbochi be substituted by her son Edward Kamau Mbochi, the appellant;

that a new grant of letters of administration of the estate of the deceased be issued to Lucy Njeri Mbochi, the respondent, jointly with Edward Kamau Mbochi, the appellant; and that once a new grant is issued, the appellant and the respondent should “*move the court for confirmation of that new grant.*”

4. Thereafter attempts were made by the parties, with the assistance of their advocates, elders and the court to amicably resolve the question of the mode of distribution. On 11th February 2009, Rawal, J (as she then was) ordered in the presence of the advocates for the parties that, “*land be surveyed by the Government land surveyor Kiambu as per the current occupation of the parties*” and adjourned the matter to await that report.

5. On 13th May 2009, the record shows that an order was made in terms that, “*the survey report is filed. The counsel to consult their clients. In the event of agreement, the parties to file further affidavits if needed and witness affidavits.*” The judge scheduled the matter for mention on 29th June 2009 with direction that “*the counsel be at liberty to file consent if arrived prior to that date.*”

6. On 29th June 2009, the Judge in the presence of counsel for the appellant and in the absence of counsel for the respondent, endorsed an order in this terms;

“As there is no apparent objection of the survey, the summons for confirmation be filed within 14 days by either party The confirmation be prepared as per the survey report.”

7. Summons for confirmation of grant dated 18th November 2009 was then filed. The parties then appeared before W. Karanja, J on 20th September 2011 when counsel for the appellant informed the court that

“one of the parties has contested the surveyor’s report as the (sic) wants a larger portion” and proposed the matter proceeds “by way of filing written submission.”

Counsel for the respondent agreed stating that, “*we have reached a dead end as we have been trying to reach a settlement. We can file the written submissions.*”

8. The court directed that the submissions be filed within 15 days. After several mentions, the impugned ruling was then delivered on 27th June 2013 in which the court stated thus:

“Having considered affidavits, the Elder’s award, the surveyor’s report and the written submissions by the parties, it is clear that these parties will never agree on the mode of distribution. The court will therefore strictly apply the provision of Section 40 of the Law of Succession Act which relates to the distribution of the estate of a polygamous person who dies intestate.”

The court then proceeded to distribute the estate in the manner already indicated.

9. Aggrieved, the appellant lodged this appeal.

The appeal and submissions by counsel

10. As indicated, the appellant’s complain is that the court erred in ordering the distribution of the estate in accordance with Section 40 of the Law of Succession Act, when, according to the appellant, there was already an earlier order of the court given by Rawal J, on 29th June 2009 directing a different mode of distribution that purportedly gave effect to the status obtaining on the ground.

11. Appearing for the appellant, learned counsel Mr. N. K. Njau referred us to the appellant’s written submissions and urged that the impugned ruling of 27th June 2013 was clearly in error as the judge failed to consider an earlier order by a judge of equal jurisdiction directing the mode of distribution.

12. On her part, learned counsel for the respondent, Ms. Michuki, referred us her written submissions and submitted that the order appealed from is compliant with the law; that there was no order issued prior to the ruling of 27th June 2013 on the basis of which the estate could be distributed; and that the appeal is wholly unmerited.

Determination

13. We have considered the appeal and the submissions by learned counsel. We have set out above, at some length, the proceedings and sequence of events before the lower court. We are unable to discern from the record, any order made on 29th June 2009 or at any other time prior to the ruling on 27th June 2013, on the basis of which the appellant contends that the court overlooked an earlier order on distribution. There is no such order.

14. As the learned Judge correctly observed, the proceedings attest to unsuccessful attempts to agree on the mode of distribution. Although Rawal J, ordered a survey to be undertaken, the proceedings subsequent to the filing of the surveyor’s report indicate that there was no consensus that that report should form the basis of distribution of the estate. Accordingly, the learned Judge had no choice and was right to invoke Section 40 of the Law of Succession Act.

15. The appeal must therefore fail. We accordingly dismiss it. Having regard to the family relations between the parties, we think the appropriate order as to costs is for each party to bear its own costs.

Orders accordingly.

Dated and delivered at Nairobi this 2nd day of December, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR