



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: VISRAM, KOOME, ODEK, J.J.A.)

CIVIL APPEAL NO. 30 OF 2014

IN THE MATTER OF THE ESTATE OF M'IKIUGU M'MWIRICHIA - DECEASED

BETWEEN

JUSTUS THIORA KIUGU.....1ST APPELLANT

DAVID KUBANIA KIUGU.....2ND APPELLANT

JULIUS KATHURIMA KIUGU.....3RD APPELLANT

AYUB MWITI KIGU.....4TH APPELLANT

EDWARD MAITETHIA KIUGU.....5TH APPELLANT

AND

JOYCE NKATHA KIUGU.....1ST RESPONDENT

STEVE MURETI KIUGU.....2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru, (Makau, J.) dated 28th November, 2013

in

H.C. Succ. Cause No. 177 of 2000)

JUDGMENT OF THE COURT

The five appellants are the children of the late M'Ikiugu alias M'Mwirichia (deceased), who passed away intestate on 16th January, 1978. The dispute is over the distribution of the deceased's estate that has put

the five appellants on one side against their mother and widow of the deceased, Joyce Nkatha Kiugu, (1st respondent). After a protracted litigation which at one time was even moved from the High Court and was referred to arbitration before a panel of elders; the matter returned to the High Court unresolved and was finally determined by Makau, J., by a judgment dated 28th November, 2013, which is the subject matter of this appeal.

The single issue that has dogged this family for over a decade is how to distribute the estate of the deceased among his widow and ten children. The matter moved from High Court to the elders and back to court, from one Judge to another and finally a judgment declared how the estate of the deceased was to be shared as follows:

“Having considered all the proposals by the interested party, the Objectors and Petitioner, I find it hard to accept all the proposals as suggested by the parties and do order the deceased’s estate to be distributed as follows:

- i. LAND PARCEL NO. MITUNGUU/KITHINO/100 to be equally distributed amongst all ten (10) children of the deceased.***
- ii. LAND PARCEL KIIRUA/RUIRI/43 be distributed as per Petitioner’s amended proposal dated 14th June, 2012.***
- iii. LAND PARCEL KIIRUA/RUIRI/782 be distributed as per Objectors’ proposal.***
- iv. NTIMA/IGOKI/2871 be distributed as per Petitioner’s amended proposal dated 14th June, 2012.***
- v. KIIRU/RUIRI/1717 and KIIRUA/RUIRI/1237 to be distributed as per Objectors’ proposal.***
- vi. NTIMA/IGOKI/3524 to be shared equally between JUSTUS THIORA KIUGU, DAVID KUBANIA KIUGU, AYUB MWITI KIUGU, JULIUS KATHURIMA KIUGU and STEVE MURETI KIUGU.***
- vii. MERU MUNICIPALITY BLOCK 11/210 to be distributed as per Objectors’ proposal, however, JOYCE NKATHA KIUGU to own her portion absolutely and not to hold the same in trust for anyone as proposed by the Objectors.***
- viii. TUTUA MARKET 24A to STEVE MURETI KIUGU and GLADYS KARWITHA KIUGU in equal shares.***
- ix. KIIRUA/RUIRI/1236 to JULIUS THIORA KIUGU.***
- x. PLANT AND MACHINERY at Plot Meru Municipality Block 11/210, to JOYCE NKATHA KIUGU to own absolutely.***
- xi. SHARES AT COMMERCIAL BANK AND STANDARD CHARTERED BANK to JOYCE NKATHA KIUGU to own absolutely.***
- xii. MOTOR VEHICLE KZE 293 – SAHARA PICK-UP to JOYCE NKATHA KIUGU to own absolutely.***
- xiii. Unregistered LAND PARCEL RUIRI/RWARERA/2798 to be shared equally amongst six (6) sons of the deceased as already done.***
- xiv. POSHO MILL and KIRLOSKER ENGINE to JOYCE NKATHA KIUGU for her benefit and use.***

Confirmed grant to issue in terms of the distribution hereinabove”.

The appellants were not satisfied with the aforesaid mode of distribution hence this appeal which is predicated on the following grounds of appeal:

- 1. The learned Judge erred in law and fact in that he failed to consider or sufficiently consider the proposals put forward by the appellants on distribution.***
- 2. The learned Judge erred in law and fact in that he failed to consider the provisions of the Succession Act and give effect to the same.***
- 3. The learned Judge failed to consider or sufficiently consider the affidavits filed by the appellants on the issue of distribution.***
- 4. The learned Judge erred in law and fact in that he misconstrued and misinterpreted the provisions of the Succession Act and as a result, came to the wrong decision.***

In his address to us, Mr. Rimita, learned counsel for the appellants referred to his written submissions which he relied on in entirety to point out the particular assets that his client's were not happy with their distribution. The appellants in this appeal were objectors or protestors before the High Court, the 2nd respondent who is also a son of the deceased and a beneficiary of the estate was referred to as an interested party and the 1st respondent was the petitioner.

It is common ground that the appellants and the 2nd respondent are children of the deceased and the 1st respondent is their mother and the only spouse and widow of the deceased. Somehow, the widow could not agree with her children on the mode of distribution of her husband's estate. The petition for the letters of administration was filed in the High Court of Meru in the year 2000 by the widow. The children of the deceased filed objections, although it would appear they later consented to the widow being appointed as the administratrix of her husbands' estate but the issue of distribution of the estate was ordered to be determined. The record shows the matter was handled by several judges and after so many adjournments and unsuccessful attempts to settle it out of court, parties agreed to put their respective proposals of how they wanted the estate of the deceased shared among the widow and the children. According to counsel for the appellants, his clients were aggrieved with the way some assets were distributed as highlighted here below:-

1. Land Parcel No. Kiirua/Ruiri/43.

The learned Judge should have adopted the proposal made by the 1st respondent which was that: Land Parcel No. Kiirua/Ruiri/43 16.8 acres – Ruiri home where the deceased's homestead is and where he was buried ought to have been shared as follows:

- a. Edward Maitethia Kiugu 3 ½ acres***
- b. David Kubarua 3 ½ acres***
- c. Gladys Karwithia Kiugu 1 acre***
- d. Monica Ntinyari Kiugu 1 acre***
- e. Ruth Rigiri Kiugu 1 acre***
- f. Mary Mwari Kiugu 1 acre***
- g. Joyce Nkatha Kiugu balance thereof”.***

That was, nonetheless, not the issue; the appellants' request was that the 1st respondent should hold this parcel of land in trust for herself and the sons and daughters of the deceased. The appellants contend that the mode of distribution that was adopted by the learned Judge is not fair as it leaves out some beneficiaries; besides, the 1st respondent gave herself 5.8 acres which she did not need as she is in her 90s.

The second item that is appealed against is the distribution of **Ntima/Igoki/2871**. It is submitted that this parcel of land is jointly owned by the 1st appellant, Justus Thiora Kiugu and the deceased and what is available to the estate is ¼ of an acre which in any event has been occupied by Justus Thiora and Julius Kathurima for the last thirty years. The appellants are also opposed to the mode of distribution of **LR NO. NTIMA/IGOKI/3524**; in particular, they contend that Steve Mureti Kiugu should not benefit from this parcel of land as he cut down and sold trees worth millions of shillings. As regards parcel known as **Meru Municipality/Block 11/2010**, this property was ordered to be distributed to the widow absolutely. The appellants contend that due to the nature of the business carried out on the whole premises and in view of the age of the widow, she should hold this property in trust for all the sons of the deceased and enjoy the life interest.

The appellants proposed that **Plot No. 12, Tutua Market**, should be given to Professor Gladys Karwithia Kiugu as the widow may not have the capacity to develop it. Property known as **Kiirua/Ruiru/1236**, purportedly distributed to Justus Thiora Kiugu despite the fact that it always belonged to him and was not part of the deceased's estate.

Regarding the distribution of plant and machinery on **Plot No. Meru Municipality Block 11/210**, the appellants would wish their proposal be adopted. Their proposal was that Steve Mureti Kiugu should pay the estate a sum of Ksh. 931,250/- regarding the costs of the machinery that he allegedly vandalized. They proposed that the front shop be opened as a family business under a fresh name of Kiugu & Sons Engineering Company Limited in accordance with the deceased's wishes. Finally, this is what counsel for the appellants stated in the submissions regarding the distribution of the deceased shares at Commercial Bank and Standard Chartered Bank:

“These shares are many. The petitioner is on a wheel chair and is too old. She cannot read or write. The appellants propose that if the shares cannot be sold to pay Government taxes owned by the estate and pay for sub-divisions of parcels of land, the same may be held in trust for petitioner by Professor Gladys Karuitha Kiugu”.

This appeal was opposed by Mr. Arithi, learned counsel for the widow of the deceased. He argued that the deceased's widow was a key participant with her late husband in the acquisition of the property under distribution. She is entitled to a life interest over all the assets with a power of appointment. Unless the appellants were challenging the power of appointment, their appeal lacks merit. Counsel cited the provisions of **Article 27** of the **Constitution** that outlaws discrimination on the basis of gender and age. Regarding the distribution of the commercial plot known as **Meru Municipality Block 11/210**; counsel submitted that was the source of income for the 1st respondent who is now elderly and confined to a wheelchair due to illness. Counsel urged us to dismiss the appeal.

On the part of the 2nd respondent, this appeal was opposed; Mr. Kaburu, his learned counsel submitted that the 2nd respondent was also a son of the deceased. However, the appellants have isolated him and filed affidavits stating that he should not get any of the deceased's assets. The 2nd respondent was only interested in 1 acre which he was given during the deceased's life time and that was **Ntima/Igoki 3524**. However, due to the hostilities, he was faced from the appellants for the simple reason that he looks after their mother who is on wheelchair, he would wish to stake his claim for equal shares of his father's estate.

We have given due consideration of the rival submissions with anxious minds because this is an estate of a deceased who died intestate. He left one surviving widow and children. We have wondered as a court time without number why the distribution of an estate such as this one would be protracted. What legal or even moral justification would compel children of the deceased to object to their mother, the only widow of the deceased from obtaining the grant of letters of administration over their father's estate? Secondly why was the estate not distributed simply as provided for under **Section 35** of the **Law of Succession Act**? It was emphatically confirmed that the widow has no intention of disposing or selling any of the assets. The protracted proceedings that have raged on from the year 2000, clearly demonstrate that this family of the deceased is divided. There is rivalry, discontent, hatred and contempt especially as against the

respondents.

It is clear from the record that the appellants are against their own brother, the 2nd respondent whom they wanted to be excluded from the distribution of the estate. The widow is also clinging to the 2nd respondent as she said he is the one who is providing her with care during her sunset days; this is a matter of great concern as it is expected in most customs that children have an obligation not only to honour and respect their parents, but to take care of them. The widow of the deceased is obviously not amused that her own children have no regard for her as their mother and also the role she played and contributions she made together with the deceased in acquiring the estate that the appellants are striving to control. The appellants have also used derogatory adjectives against their mother by referring to her as old, sick, illiterate and not having many years to live. The appellants are on one side; their mother is on another with the 2nd respondent; and it is not known which side the daughters of the deceased are as they did not come out to state their case.

Be that as it may, we need to state that all the rivalry, animosity or protagonism in this matter was unnecessary. We urged the parties in this appeal to attempt and make peace among themselves and to nurture harmony and cordial relationship among themselves because the distribution of the estate of the deceased in this matter, as in every case of a deceased person in Kenya, is governed by the **Law of Succession Cap 160** of the **Laws of Kenya** and the **Constitution**. The distribution of the deceased's estate is not governed by whims, caprice nor is it governed by retrogressive and biased opinions against the aged and the female gender.

It is necessary for us to revisit the provisions of **Article 159 (c)** of the **Constitution** of Kenya which provides:

“In exercising Judicial authority, the courts and tribunals shall be guided by the following principles:

- a.
- b.
- c. ***Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional disputes resolution mechanisms shall be promoted, subject to clause (3)”.***
- d.

We have revisited the foregoing provision because we urged the parties herein to reconcile and if they reach an agreement, we as a court would adopt their written consent to settle this matter. We did this because we appreciate that an estate of a deceased person who died intestate leaving one spouse and children like in this case of M'Ikiungu Mwirichia cannot legally be distributed in any other way other than the parties agreeing among themselves and filing a consent, or by the court following the provisions of **Section 35** of the **Law of Succession**. In the event that parties agree and they record consent on the mode of distribution, the court has no choice but to adopt the consent and make it an order of the court. Short of a written consent on the mode of distribution, the court has no discretion but to distribute the estate of the deceased as per the provisions of **Section 35** of the **Law of Succession** which makes provisions for an intestate who has left one surviving spouse and child or children.

We are aware that there was no cross-appeal but what can be done since the appellants are dissatisfied with the decision of the High Court. We are also aware that we are a first appellate court and we have a duty to re-evaluate the evidence and arrive at our own independent conclusions of the matter; with the usual caution that the trial Judge had the advantage of seeing the witnesses. In this case parties filed their respective preferred mode of distribution and left it to the Judge to decide. We think this was an uphill task that could not possibly be attained with the evidence that was on record. We did not see any valuation reports of the assets, secondly a random distribution is likely to misplace some members of the family who have settled and perhaps developed some assets that are distributed to others which would fuel more conflicts within a family.

The distribution of an estate such as this one is not an easy task; we note there was an order that the estate

be valued, nonetheless we do not see any valuation report. The estate comprises of some developed assets, commercial assets, income generating assets and others not developed. It is obviously difficult for the court to distribute such an estate with mathematical precision as to the portions of shares to give to which beneficiary. This is why the **Law of Succession** made provisions for distribution of an intestate estate as per **Part V** of the **Act. Section 35** of the **Act** provides:

“(1) Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:

- a. **the personal and household effects of the deceased absolutely; and**
- b. **a life interest in the whole residue of the net intestate estate;**

.....

.....

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

The learned Judge of the High Court did not need to attempt a distribution of the estate of the late M’Ikiugu M’Mwirichia when his widow, Joyce Nkatha Kiugu was alive. The Judge did not need to entertain protracted objection proceedings that raged on for over a decade. We cannot in any way blame the Judge, as he was allowing parties to express themselves; the parties were driving the proceedings in their own way by providing the court their own preferred modes of distribution of the deceased’s estate.

We think we have said enough to demonstrate that there is no other legal way of distributing the deceased’s estate other than the **Law of Succession Cap 160**.

Accordingly, the decree or certificate of confirmed grant ensuing from the judgment dated 28th November, 2013, is hereby set aside. All the assets of the deceased stated here below and others residue to shall be registered in favour of his widow Joyce Nkatha Kiugu to hold in trust for herself and the deceased children in equal shares:

1. **Land Parcel No. KIIRUA/RUIRI/43 (16.8 acres).**
2. **Land Parcel No. KIIRUA/RUIRI/782 (7 acres).**
3. **Land Parcel No. MITUNGUU/KITHINO/100 (29 acres).**
4. **Land Parcel No. KIIRUA/RUIRI/1717 (1 acre).**
5. **Land Parcel No. NTIMA/RUIRI/1237 (4 acres being ½ share).**
6. **Land Parcel No. NTIMA/IGOKI/2871 (1/4 acre being ½ share).**
7. **Land Parcel No. NTIMA/IGOKI/3524 (1 acre).**
8. **Plot No. 12 Tutua Market.**
9. **Plot No. 24A Tutua Market.**
10. **Unregistered Land No. RUIRI/RWARERA/2798.**
11. **Plot No. MERU MUNICIPALITY BLOCK II/210.**
12. **Motor vehicle registration No. KZE 293 Nissan Sahara Pick Up.**
13. **Posho Mill with Kirlosker Engine.**
14. **Plant and machinery at Plot No. MERU MUNICIPALITY BLOCK 11/210.**

This appeal is dismissed, this being a family matter, we do not wish to set them any more against each other, we order each party to bear their own costs of this appeal.

Dated and delivered at Meru this 12th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR