IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 29 OF 2014

BETWEEN

DAVID KITHINJI MUGAMBI .....…….....APPELLANT

AND

FLORENCE IMATHIU.....1ST RESPONDENT

JOHN NDIRITU GITHUA.....2ND RESPONDENT

BEATRICE KAARI GUCERA.....3RD RESPONDENT

LYDIA KURI MURERWA.....4TH RESPONDENT

ROSELYNE NKIROTE GUCHERA.....5TH RESPONDENT

MWONGERA MUGAMBI RINTURI.....6TH RESPONDENT

FESTUS MUGAMBI GUANTAI.....7TH RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Meru (Kasango, J.) Dated 21st July, 2011

in

Meru H.C. Succ. Cause No. 213 of 1997)

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JUDGMENT OF THE COURT

Introduction and Background

1. The Appellant ***David Kithinji Mugambi*** presented in the High Court of Kenya at Meru an application dated and filed on the 13th day of June, 2011 in Succession Cause number 213 of 1997

in the matter of the Estate of late ***Perminus Mugambi M'Rinturi*** (deceased), presented under **section 81, 74 & 47** of the Law of Succession Act (cap 160 laws of Kenya) Rules 43 & 73 of the Probate and Administration Rules and any other enabling provisions of the law. It was directed at the surviving administratrix ***Florence Imathiu Mwongera*** whereas ***Mugambi Rinturi, Festus Guantai Mugambi*** and ***John Ndiritu Githua*** were cited as interested parties. The application substantively sought an order that the letters of administration issued to ***Florence Imathiu*** and ***Josphine Kaarika*** (deceased) be rectified and amended by replacing the said ***Josphine Kaarika*** (deceased) with the Appellant ***David Kithinji Mugambi*** as the second administrator.

2. The Application was based on the grounds in the body of the application and the appellant's own supporting affidavit. It was opposed by two replying affidavits of ***Kinaitore Imathiu*** deposed and filed on the 22nd day of June, 2011 and that of ***Roselyne Nkirote Guchera*** deposed on the 28th day of June, 2011 and filed on the 29th June, 2011. It was on the other hand supported by two replying affidavits deposed separately on the 30th day of June, 2011 by ***Mwongera Mugambi Rinturi*** and ***Festus Guantai Mugambi*** and filed on 1st July, 2011.
3. During the pendency of the merit disposal of the above application, one **B*eatrice Kaari*** and ***Lydia Kuri Murerwa*** describing themselves as beneficiaries of the deceaseds' estate presented a chamber summons dated and filed on the 17th January, 2011 under **rule 43(1)** and ***Rule 73*** of the Probate and Administration Rules. These Applicants substantively sought orders that the court be pleased to rectify the confirmed grant to include the full names of the deceased herein that is ***Perminus M'Mugambi***, alias ***Perminus M'Mugambi Rinturi*** alias ***M'Mugambi Rinturi*** alias ***P. M. Mugambi*** and an order of court to order the Land Registrar to dispense with title deeds to LR. No. Ntima/IGOKI/371 and Ntima/IGOKI/943 and BUURI/KIIRUA/206. The Application was based on the grounds in the body of the application and a supporting affidavit deposed by ***Lydia Kuri Murerwa*** on her own behalf and that of her co Applicant ***Beatrice Kaari.*** It was opposed by the replying affidavit of ***Mwongera Mugambi Rinturi***, deposed and filed on the 1st day of July, 2011.
4. ***Beatrice Kaari Guchera*** describing herself as an Applicant and a beneficiary also presented a summons for vesting powers to the surviving administrator brought pursuant to **section 47 and 81** of the Law of Succession Act, cap 80 (sic), Laws of Kenya and **Rules 59(1) and 73** of the Probate and Administration Rules, dated the 23rd day of June, 2011 and filed in court on the 24th June, 2011. It substantively sought an order that the Honourable court be pleased to vest all the powers and duties of the administration of the state of the late ***Perminus M'Mugambi Rinturi***, the deceased herein in ***Florence Kinaitorie Imathiu*** to enable her distribute the net intestate to the beneficiaries. It was based on the grounds in its body and a supporting affidavit of the applicant, ***Beatrice Kaari.***
5. All the above three Applications were heard one after another resulting in the dismissal of the Appellant's application in a ruling delivered on the 21st day of July, 2011 by ***Kasango,J.***

<u>The Appeal.</u>

6. The Appellant was aggrieved and he has appealed to this Court raising four (4) grounds of appeal namely that the learned trial Judge erred in fact and in law:-

- ***by failing to appreciate the fact that the deceased was a polygamous person who had two households which had equal rights and interests in the estate.***

- ***by failing to apply her mind to the fact that there was sibling rivalry in distribution of the estate and therefore a sole administrator would aggravate the said rivalry.***

- ***by misapplying her mind and holding that the appellants intention was to frustrate administration of the estate and yet there was a notice of appeal in respect of the whole***

judgment on distribution which was on record.

- ***by failing to appreciate the fact that the appellant's application was supported by other beneficiaries of the estate.***

Appellant's submission.

7. The Appellant who appeared in person before us submitted that, the superior court had appointed two administrators to administer the estate of the deceased namely ***Florence Imathiu*** and ***Josphine Kaarika*** but one of the two namely ***Josphine Kaarika*** passed on before the conclusion of the administration exercise. It is for the reason of the demise of this second administrator that the Appellant sought leave of court to step into her shoes and complete the administration. He had been supported by two of the beneficiaries namely ***Mwongera Mugambi Rinturi*** and ***Festus Guantai Mugambi*** who are now the 6th and 7th respondents respectively. It was also the Appellant's stand that the remarks by learned counsel ***Mr. Anampiu*** and ***Mr. Riungu*** both for the 1st, 3rd and 5th respondents swayed the mind of the learned trial Judge. According to Appellant, ***Mr. Anampiu*** had been the family lawyer and had fully discussed the case with the Appellant's side and by switching camp to represent opposite interests to that of the Appellant greatly prejudiced the outcome of the Appellant's application. As for ***Mr. Riungu's*** remarks, these allegedly also prejudiced the Appellant's case as they tended to give an impression that the Appellant was not a son of the deceased. On that account the appellant urged us to allow the appeal.

Respondent's Submissions.

8. ***Mr. Gikunda Anampiu*** leading ***Mr. A.G. Riungu*** appearing for the 1st, 3rd and 5th respondents urged us to dismiss the Appellants appeal for the reasons that prior to the presentation of the application giving rise to the ruling sought to be impugned herein, the Appellant had never expressed a desire to administer the estate of the deceased; at the time he showed an interest to administer the said estate, there was nothing to be administered as the estate had been fully distributed; the learned trial judge should not therefore be faulted for ruling that the Appellant's intention in moving to seek representation at that late hour was simply to frustrate the administration of the Estate. ***Mr. Anampiu*** denied influencing the trial Judge in any improper way. He invited us to hold that the learned trial Judge properly addressed her mind to the provisions of **section 66** of the Law of Secession Act, applied a proper interpretation of it and then arrived at the correct conclusion on the matter. The learned trial judge's decision having been supported by the law and the facts it should not be disturbed. Lastly, he submitted that it was not true as claimed by the appellant that the learned trial Judge was biased against any of the participating parties. Each of them inclusive of the Appellant were given an opportunity to express themselves and present their cases fully on all the three applications that were argued one after another before the learned Judge.

6th Respondent's Submissions.

9. The 6th Respondent ***Mwongera Mugambi Rinturi*** appearing in person supported the appeal arguing that they had not been consulted when the decision to proceed on with a sole administrator after the death of the second administrator was reached. He pointed out that he had, together with the 7th Respondent ***Festus Mugambi Guantai*** filed supporting affidavits to the Appellant's application which were not considered by the learned trial Judge and that the learned trial judge was biased against the Appellant and the 6th and 7th Respondents. That is why she refused to disqualify herself when requested to do so and also wrongly introduced and took into

consideration matters which were still pending before the Court of Appeal and which had nothing to do with the Appellant's application then before her.

The 7th Respondent's submissions.

10. The 7th Respondent ***Festus*** simply stated that, he supported the appellant in his application and he still supports him on this appeal.

Appellant's response to the Respondent's submissions.

11. In response to the Respondent's submissions, the Appellant reiterated his earlier stand that there are twelve of them (beneficiaries) and there is no way any one of them could have become a sole administrator; likewise there is no way all the beneficiaries could all have been made administrators and that is why there had to be consensus in the selection of who of them was to be or not to be an administrator. He still maintained that they were not consulted as regards the issue of a sole administrator. He found it strange that the learned judge approved sole administration when the surving administrator had not in fact mentioned in her affidavit to the Appellant's application that she wished to continue with the administration as a sole administrator. He maintained that the learned trial judge was not only biased against him but was also hostile to him. Lastly, he pointed out that it was not true as submitted by ***Mr. Anampiu*** that there were no supportive affidavits from other beneficiaries in support of the Appellants' application. The Appellant invited us to take note of the supportive affidavits of the 6th and 7th Respondents whose content as confirmed by the two Respondents' submissions in court showed clearly that they supported his application.

Analysis and Determination.

12. This is a first appeal arising from the learned trial Judge's exercise of judicial discretion in withholding the relief sought from her by the appellant. The parameters for the exercise of judicial discretion were reiterated by ***Ringera Ag. JA*** (as he then was) in the decision of ***Githiaka versus Nduriri [2004] 2KLR 67,*** which is that such a discretion should be exercised judiciously, that is to say, on sound reason rather than whim, caprice or sympathy. The parameters for interference with the exercise of such a discretion by this Court were also set by **NEW BOLD, P.** in the decision of ***Mbogo & another versus Shah [1988] EA 93*** wherein it was held *inter alia* that:-

> ***"A court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

13. In declining to exercise her discretion in favour of the Appellant, the learned trial Judge after summarizing the rival facts and arguments before her *inter alia* made the following observations:-

> ***"In his oral submissions before court in support of his application, David stated that he was seeking to be appointed as administrator in place of Josephine deceased to:-***

....ensure our interests are taken care of. I will not put into effect the judgment of Emukule, J because we are appealing against it."

The judgment that he mentioned there is the one delivered on 1st April, 2009. He relied on an order made by the Court of Appeal in Civil Application No. Nai 196 of 2010 (UR 140/2010) to support his application that he be appointed as an administrator. It is important to consider that order to see its relevance to this application. It is as follows:-

"As the first respondent Josephine Kaarika is deceased, the motion cannot proceed to hearing today and we adjourn the same to a date to be re-taken in the registry after the parties have sorted out the issues of succession of the 1st respondent."

The order was issued by the Court of Appeal on 11th May, 2011. What I understand from that order is that, the Court of Appeal requires someone to be appointed to represent the estate of Josephine Kaarika deceased. Such a person need not be an administrator in this particular estate. The estate of Josephine Kaarika deceased is different from this estate of Perminus M'Mugambi Rinturi deceased. The application was supported by Mwongera Mugambi Rinturi and Festus Guantai Mugambi. It was opposed by Roselyne Nkirote Guchera, Beatrice Kaari Guchera and Florence Kinaitore Imathiu. David from his submission before court seems to be in support of the appeal filed by Mwongera Mugambi against the judgment of this Court of 1st April, 2009. It seems therefore his intention of being appointed as an administrator in this matter is to frustrate the implementation of the court's judgment of 1st April, 2009 which Mwongera Mugambi has appealed against. Although Mwongera Mugambi has filed an appeal against that judgment, he has not obtained stay pending appeal. In the absence of such stay, it would not be prudent to appoint David as an administrator in this estate, who according to his word would not put into effect the judgment of 1st April, 2009. The purpose for which a party would be appointed as an administrator in this matter would be to execute the judgment of 1st April, 2009. It therefore follows that David Kithinji Mugambi is not a fit and proper person to be appointed as an administrator...."

14. We have on our own revisited the record, re-assessed, re-evaluated and re-analyzed it in the light of the above observations of the learned trial Judge and the rival arguments herein, as well as the applicable principles of law.
15. In response to appellant's ground 1 of the appeal, the criteria the learned trial judge had to bear in mind when considering whether to admit the Appellant as a second administrator to the deceased persons estate is that which has been stipulated in **section 66** of the Act. It provides:-

"When a deceased had died intestate, the court shall save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall , in the best interests of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following order of reference-

a. ***Surviving spouse or spouses with or without association of other beneficiaries.***
b. ***Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V.***

c. ***The Public Trustee***

d. ***Creditors.***

16. The guiding principles enunciated in this section are that, **one,** the decision as to who should be appointed an administrator of any particular estate is a matter of the sole discretion of the court seized of the matter which discretion we have already stated above has to be exercised judiciously without whim, caprice, or sympathy and must be expressed on sound reason. **Two,** the court is also enjoined to ensure that the discretion is exercised in the best interests of justice to all those concerned. **Three**, the court may take the categories stipulated in the said section as general guides. See also the decision in the case of ***Matheka & another versus Matheka [2005] 1KLR 455.*** Wherein this Court held *inter alia* that:-

> ***"When a deceased has died intestate, the Court shall, save otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned, be made but shall without prejudice to that discretion, accept as a general guide the following in order of preference:-***

a. ***Surviving spouse or spouses, with or without association of other beneficiaries.***

b. ***Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V of the Law of Succession Act;***

c. ***The public Trustee; and***

d. ***Creditors.***

17. Applying the above principles to the rival arguments herein and considering them in the light of the learned trial Judges observation set out above, we find nowhere in the above provision and holding in the authority cited, a requirement for balancing the interests of a polygamous deceased person's households as one of the considerations a court of law should consider when deciding as to who to appoint and not to appoint as an administrator to a deceased person's estate. **Section 56(1) (b)** limits the number of administrators to four in number. The Appellant does not therefore mean that where a court of law is confronted with the interests of any intestate polygamous deceased person with more than four (4) house holds in it, it has to ensure that there is balancing in so far as representation from each house hold is concerned. The appellant's arguments that the court ought to have considered his request on the basis he was from an unpresented polygamous household and that therefore his interest would best be served by his appointment as a second administrator, has no merit and should therefore fail.
18. In response to ground 2 of the Appellant's appeal, it is evident from the observations of the

learned trial Judge set out above that what weighed heavily on her mind in arriving at the decision she did was the fact that there was in place the judgment delivered on 1st April, 2009 distributing the entire estate of the deceased. This judgment had been appealed against by only one beneficiary; that is ***Mwongera*** the 6th Respondent who had in fact sworn a supporting affidavit in support of the Appellant's application whose dismissal resulted in this appeal. There were no orders staying the execution of the said judgment. The foregoing being the correct position, the issue of sibling rivalry in the distribution of the said estate was no longer an issue as that had either been stemmed or settled by the judgment of 1st April, 2009. We find no merit in this ground as well.

19. As for ground three of the appeal, we make no hesitation in affirming the learned trial judge's findings, as these were well supported by the Appellant's own oral testimony on the record that "***he was not going to implement the judgment of Emukule, J of 1st April, 2009***". Having said so himself, he cannot turn round and blame the learned trial Judge. The reason why the learned trial Judge so reacted is also borne out by the same observation that ***"the purpose of an administrator is to effect the distribution of the estate as per the judgment already delivered in the absence of a stay order staying its execution".*** Therefore, for the Appellant to rise up two years later in 2011 and assert that he wanted to be an administrator but would not give effect to the judgment delivered two years earlier was a clear manifestation of his intention to frustrate the execution of the said judgment. The learned trial Judge cannot therefore be blamed for believing that the appellant's sole motive for offering himself as an administrator was solely to frustrate the execution of the unstayed judgment. This complaint too has no merit and is rejected.
20. In response to ground 4 of the appeal, we make no hesitation in finding that the learned trial Judge was alive to the two supporting affidavits of ***Mwongera*** and ***Festus,*** the 6th and 7th Respondents respectively and in fact took them into consideration. The Appellant himself has mentioned that they were twelve beneficiaries. **Section 66** enjoined the learned Judge to take into consideration the wider interests of all those concerned. The wider interests of all those concerned is clearly demonstrated by the fact that a majority of the beneficiaries were in favour of the judgment as only one beneficiary ***Mwongera*** had appealed against it and only two of the beneficiaries ***Mwongera*** and ***Festus*** had supported the Appellant's application. The majority of the beneficiaries were therefore in favour of the judgment being executed. It was therefore prudent for the learned trial Judge to have the wider interests of the non-appealing beneficiaries at heart and decline the Appellant room to scuttle the execution of the unstayed judgment through the back door by offering himself as a second administrator with the sole reason of arresting the execution of the Judgment already in place.
21. For the reasons given above, we find no merit in this Appeal. The same is dismissed with costs to the 1st, 3rd and 5th respondents.

Dated and Delivered at Nyeri this 17th day of June 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR