



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 59 OF 2014

BETWEEN

MUSA IMBIAKHA KATIMBA APPELLANT

AND

BELIA KHAYANGA IMBIAKHA RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Chitembwe, J.) dated 25th July, 2013

in

H. C. SUCC. CAUSE NO. 749 OF 2007)

JUDGMENT OF THE COURT

1. This appeal arises from the Judgment of High Court at Kakamega (Said J. Chitembwe, J) delivered on 25th July 2013 in Succession Cause No. 749 of 2007. There are two main issues for determination. The first is whether the holding by the High Court that the deceased, Katimba Imbiakha, (hereafter referred to as “the deceased”) died intestate and had therefore not distributed his estate during his lifetime was well founded. The second issue is whether this Court should interfere with the distribution, by the court, of the deceased’s estate.

Background

2. The deceased was polygamous. He died on 29th April 2007. With his first wife Loice Vusi Katimba who pre-deceased him, they were blessed with three sons, including the appellant, Musa Imbiakha Katimba, and seven daughters. With his second wife, Belia Khayanga Katimba (the respondent), they were blessed with seven sons and seven daughters.

3. On 10th September 2007, the respondent petitioned the High Court at Kakamega for grant of letters of administration intestate of the estate of the deceased. On 28th November 2007 the appellant objected to the making of the grant in favour of the respondent. The grounds of objection were that as the eldest son of the deceased he ought to have been the administrator; that the respondent had not obtained the consent of the family members to administer the estate; and that there were pending proceedings before the magistrate's court at Kakamega touching on the estate. By an application dated 17th December 2007, the appellant also applied to the court to be made a co-administrator of the estate of the deceased.
4. On 27th November 2008 consent orders were recorded before the High Court (F. A. Ochieng, J) as follows:

“By consent:

1. ***The objection proceedings be and is hereby withdrawn, with costs in the cause.***
2. ***The grant of letters of administration to be issued to the petitioner, and the petitioner is to expedite the making of an application for confirmation of the grant. The application for confirmation should be filed by 1/3/2009.***
3. ***The sub-divisions of Land Parcels No. SOUTH KABRAS/CHESERO/1070 and SOUTH KABRAS/CHESERO/828 and its subsequent titles which were created after the sub-divisions, shall remain the property of the deceased. An inhibition shall be placed on those titles no further dealings with the said titles until the confirmation of the grant. (sic)***
4. ***The parties herein are to use the parcels of land as they used to be before the sub- divisions. If there is any development that has occurred after the sub-divisions the same to be dispensed with to the parties who were in occupation prior to the said sub-divisions. (sic)***
5. ***All the parties are to maintain peace until the determination of the cause.***
5. Thereafter, on 23rd June 2009 the court granted to the respondent letters of administration intestate of the estate of the deceased.
6. By an application presented to court on 10th November 2009, the respondent applied for confirmation of the grant of the letters of administration. In that application the respondent proposed that the estate be distributed equally among the beneficiaries of the estate.
7. The appellant filed an affidavit in protest of the summons for confirmation of grant on the ground that the deceased had distributed his estate between his two ‘houses’ during his lifetime. He also opposed the proposal by the respondent for the estate to be distributed equally amongst the beneficiaries of the estate.
8. After hearing the parties and their witnesses, the court was “satisfied that the deceased did not distribute his estate during his lifetime” and proceeded to distribute it as follows:

“1. Plot Number S. KABRAS/CHESERO/828 – 29 acres

to the first house to share equally.

2. ***Plot number S.KABRAS S.CHESERO/828 - 23.2 acres to the second house.***

3. ***Plot number S.KABRAS/CHESERO/744***

- 3.5 acres to the second house.

4. *Plot number S.KABRAS/CHESERO/747 - 6*

acres to the second house.

5. *Plot number S.KABRAS/CHESERO/1061 -*

2.5 acres to the second house

6. *Plot number S.KABRAS/CHESERO/1070 - 8.5 acres to the second house.”*

The appeal and submissions by counsel

9. Dissatisfied with that decision, the appellant appealed to this Court complaining that in reaching that decision, the court ignored the wishes of the deceased; that the court should have given each beneficiary his or her specific share of the estate; that the second house got a larger share of the estate; that the court ignored the judgment that had been given by Kabras Land Disputes Tribunal; and that court failed to consider and analyze the evidence in arriving at its decision.
10. At the hearing of the appeal before us, Mr. P. I. Manyoni learned counsel for the appellant abandoned the complaint that the Judge ignored the judgment that had been given by Kabras Land Disputes Tribunal. He however pressed on with the other complaints arguing that there was ample evidence before the lower court, including an admission by the respondent, that the deceased had distributed his estate prior to his death; that had the lower court properly considered and analyzed that evidence, it would have reached the conclusion that the deceased had indeed distributed his estate in his lifetime.
11. Counsel went on to fault the judgment of the lower court saying that the Judge should have given specific shares of the estate to each one of the beneficiaries, and further that the second house was unjustifiably given a larger share of the estate.
12. Opposing the appeal learned counsel for the respondent Mr. G. I. Ondieki submitted that there is no basis for this Court to interfere with the decision of the lower court; that the only way the deceased could have distributed his estate in his lifetime was through a Will; that in the absence of a Will, the deceased died intestate and his estate must be administered as such.
13. Mr. Ondieki went on to say that the distribution of the estate by the lower court accorded with section 40 of the Law of Succession Act; that the Judge considered the number of children in each of the two houses; that the second house that has more children compared to the first house, justifiably got a slightly larger share of the estate.

Determination

14. We have considered the appeal and the submissions by learned counsel. We are mindful of our role, as the first appellate court. As stated in **Selle and another versus Associated Motor Boat Company Limited & 2 others [1968] EA 123:**

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanor of the witness

is inconsistent with the evidence in the case generally”

15. In effect, we cannot interfere with the findings of fact by the learned Judge unless such findings are not based on evidence or are based on a misapprehension of the evidence or if it is shown that the Judge acted on wrong principles in arriving at those findings.
16. What then is the evidence that was before the court on the question whether the deceased had distributed his estate prior to his death?
17. The appellant’s testimony before the lower court was that his father, the deceased, had five registered parcels of land namely Title Numbers Chesero/828 measuring 52.5 acres; Chesero/744 measuring 3.5 acres; Chesero/747 measuring 6.0 acres; Chesero/1061 measuring 2.5 acres; and Chesero/1070 measuring 8.5 acres. As regards Chesero/1070, the appellant asserted that he purchased the same with his father but it was registered solely in his father’s name.
18. According to the appellant, the deceased distributed the properties on 15th April 2006, about a year prior to his death, in the presence of elders by giving 40 acres of title number Chesero/828 to the first house and the remaining of 12.5 acres of that title to the second house; three acres of title number Chesero/1070 (which he claimed to have co-purchased with the deceased) to himself whilst the deceased retained 5.5 acres; title numbers Chesero/744; Chesero/747 and 1061 were allegedly given to the second house. In that regard he referred to minutes of the meeting held on 15th April 2006 that he signed.
19. To support his assertion that he purchased title number Chesero/1070 with his father, the appellant produced a copy of the agreement for sale relating to that parcel.
20. The appellant conceded, under cross-examination, that he had sued his father during his lifetime over title number Chesero/828 on the grounds that his father had removed sisal boundaries and for allegedly re-distributing that land.
21. The appellant’s brothers Zakayo Katimba (PW2) and Shadrack Katimba (PW3) stated in their evidence that the deceased had sub-divided the land and identified for each of his sons their respective portions; that they took their father to the tribunal claiming entitlement to title number Chesero/828 following the death of their mother; that their father was not happy with the decision of the tribunal and referred the matter to the provincial appeals committee; that at a meeting held on 15th April 2006 that was attended by elders, the deceased agreed to sub-divide the land. PW 2 produced copies of the proceedings of the tribunal and of the Provincial Land Disputes Tribunal as exhibits before the court.
22. Shadrack Katimba (PW3) stated in his testimony that under Kabras culture, land is divided according to the number of houses without reference to the number of children in each house.

Sirema Mutalunga (PW4) who was called to testify in support of the appellant, upon being affirmed was found by the court to have been impersonating another person whereupon, the court ordered his arrest.
24. Shirandula Murudi (PW5) whose credibility was discredited by the lower court observing that he was “*struggling to show honesty as he was obviously coached*” stated that he was present, amongst approximately 50 people at the deceased’s home on 15th April 2006, when the deceased stated that he wanted to give his sons land according to houses; that the deceased gave 12.5 acres to the second house as well as other parcels; that he gave the appellant 15 acres and Zakayo Katimba (PW2) 12.5 acres and that the deceased planted a sisal boundary to demarcate the parcels. He also confirmed having testified before the tribunal over the same matter.
25. The appellant’s last witness before the lower court was Godfrey Chichi Mburu Mukwana (PW6)

who stated that he was the chairman of a meeting of elders that met to distribute the estate of the deceased in April 2006. He stated that 40 acres of title number 828 were given to the first house while the second house was given 12.5 acres of that title; that the three sons of the first house were to divide the 40 acres amongst themselves; that title number Chesero/744, 747 and 1061 were given to the second house; that three acres of title number Chesero/1070 were given to the appellant, and the respondent got over 5 acres of it. He stated that by the time the deceased died, the beneficiaries had not received their titles.

26. In her testimony, the respondent, after explaining that the deceased had two houses and giving the number of children in each house, stated that her husband did not distribute his land before his death; that all the deceased did was to show the children where to cultivate but did not give them title deeds. She stated that all the children of the deceased, including the children of the first house should benefit from the estate. According to her, the deceased called elders to his home but they were chased away by the appellant and the deceased did not proceed with the sub-division of the land.

27. The respondent's son Jonathan Burudi Katimba (DW2) in his testimony controverted the assertion by the appellant that the deceased had distributed his land prior to his death; he stated that after the deceased died, the appellant obtained court orders without disclosing to the court that the deceased had died and based on those orders he subdivided title numbers Chesero/1070 and 828; that those orders and the ensuing subdivisions and the resultant titles were subsequently revoked by the court when truth came to light. DW 2 asked the court to distribute the estate and divide the land equally amongst the beneficiaries.

28. With the concurrence of the parties the lower court conducted a site visit. After reviewing and analyzing the evidence the learned Judge of the High Court concluded that the deceased did not distribute his estate during his lifetime. It is necessary to reproduce at length the words of the Judge:

“It is clear that the objector and his brother have been clamouring to be given a big portion of plot number 828. It is also clear from the evidence on record that the purported distribution of the deceased’s estate on the 15.45.2006 is the objector’s own invention. There never was any subdivision of the estate by the deceased. It is clear that the objector and his brothers wanted to force their father to give them land during his lifetime. The objector went on a great length to take over part of the estate after his father’s death. He gave himself 15 acres from plot number 828 and a further 3 acres from plot number 1070. His two other brothers got 12 ½ acres each. From the evidence on record I am satisfied that the deceased did not distribute his estate during his lifetime.”

29. We have reviewed and re-evaluated the evidence on record. Based on minutes of proceeding of the Land Dispute Tribunal in the District Officer's Office Kabras on 6th September 2006 that was produced before the lower court, the appellant is recorded to have stated that what they were demanding from their father was the land their late mother was using when she was alive. He is also recorded to have said that they had asked their father, the deceased, to give them parcels Chesero/828 and 1017 and that their father had agreed to do so and that he called clan elders and showed them plot Chesero/828; that his father later turned around and decided to go to land control board excluding the appellant, PW 2 and PW3.

30. The appellant and his witnesses testified that the distribution of the deceased's land was done at a meeting of elders called by the deceased on 15th April 2006. Minutes of that meeting were produced before the lower court. In his testimony before the lower court, the appellant was categorical that the deceased had indeed distributed the estate at the meeting on 15th April 2006.

31. Considering that on 6th September 2006 the appellant had testified before the tribunal that the reason they were making a claim against their father was because their father had declined to

accede to their demands, the learned Judge was right to conclude that the deceased did not distribute his estate in his lifetime. It is also noteworthy that when the appellant initially objected to the respondent being granted the letters of administration by the court, his objection of 28th November 2007 did not make any reference to the fact that the deceased had already distributed his estate.

32. As the lower court observed the appellant comes across as a person prepared to go to every length to acquire what he considers to be his entitlement to the deceased's property. In an affidavit in support of an application to restrain the appellant from intermeddling with property of the deceased, the respondent deposed that the appellant obtained court orders in Kakamega Chief Magistrate's Court for the subdivision and for possession of the deceased's land without disclosing to that court that the deceased had died. In his replying affidavit, the appellant stated that the steps he had taken to enforce orders given by the magistrates' court on 25th June 2007 "were as a result of my wrong impression that the orders were valid and enforceable." One of the witnesses that the appellant called to testify before the lower court in support of his case, namely Sirema Mutalunga, PW4, was stepped down as an impostor. The lower court observed and noted on the record that another of the witnesses called by the appellant in support of his case, namely Shirandula Murudi, PW 5, was struggling to show honesty and came across as a coached witness. These examples illustrate the extent to which the appellant is prepared to go to have his way.
33. Based on our re-evaluation of the evidence therefore, we have come to an independent conclusion that the deceased did not distribute his estate during his lifetime. We do not consider the statement by the respondent in her affidavit sworn in reply to the appellant's initial objection to the making of grant to the respondent to the effect that the deceased "*had distributed his land among all his sons and what was remaining was only transfer of the same to the parties concerned*" as amounting to more than her subsequent statement that the deceased had shown his sons where to cultivate.
34. Furthermore, the meeting held on 15th April 2006 at which the deceased is alleged to have disposed of his estate cannot, under section 9 of the Law of Succession Act, be deemed to be a valid oral will as the deceased did not die within three months thereafter and neither would the same qualify as a gift made in contemplation of death under section 31 of that Act.
35. Having concluded that the deceased did not distribute his estate during his lifetime, the next question for us is whether we should interfere with the distribution of the deceased's estate by the court. The court observed that although both parties proceeded on the basis that the land should be distributed amongst the sons of the deceased, the Law of Succession Act does not distinguish between the genders of the beneficiaries. The Judge correctly applied section 40(1) of the Law of Succession Act, which provides that:
- "Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."**
36. The learned Judge took into account that there are ten children from the first house, and fourteen children from the second house with the respondent making up the fifteenth unit in the second house, and divided the total acreage of the estate land available comprising approximately 72 acres into 25 units which resulted in the distribution as indicated above. The distribution of the deceased's estate by the court therefore accorded strictly with the law and we have no basis for interfering with it.
37. For those reasons the appeal fails and is hereby dismissed with costs to the respondent.

Dated and delivered at Kisumu

This 24th day of July, 2015.

D. K. MARAGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

.....

DEPUTY REGISTRAR