



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 32 OF 2013

BETWEEN

MWONGERA MUGAMBI RINTURI.....1ST APPELLANT

FESTUS GUANTAI MUGAMBI.....2ND APPELLANT

AND

JOSPHINE KAARIKA.....1ST RESPONDENT

FLORENCE IMATHIU.....2ND RESPONDENT

ADVENTURE TECHNOLOGY CO. LTD.....3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (Emukule, J.)

dated 1st April, 2009

in

Succession Cause No. 213 of 1997)

JUDGMENT OF THE COURT

Perminus M'mugambi Rinturi (the deceased) died nearly 30 years ago on 15th November, 1985. A succession cause over his estate was commenced on 4th July, 1987 by way of a Petition for letters of administration. The succession cause was marred by a plethora of applications by the parties resulting in the matter pending before the High Court for a period of over 22 years.

The deceased was a polygamous man of two wives and two acknowledged 'concubines'. His first wife, Grace Nkoroi Mugambi was blessed, with four children while his second wife, Karambu Mugambi, was blessed with three children. He also had three children with his concubines. The letters of administration over the deceased's estate were initially issued to Charles Guchera Mugambi, a son of the first wife; subsequently the deceased's first wife and the 1st appellant were added as joint administrators with Charles Guchera Mugambi. Following the demise of both the first wife and Charles Guchera, the 2nd

appellant was appointed as a joint administrator with the 1st appellant. The 1st appellant represented the second house while the 2nd appellant represented the first house. The 1st and 2nd respondents were the deceased's daughters and members of the first house.

After several attempts to distribute the deceased's estate came to naught, the parties referred it to the clan elders under the chairmanship of the District Officer, Miriganeiru Division for arbitration between the years 2001-2002. The 1st appellant and the second house refused to participate in the arbitration proceedings, however, on the ground that their then advocate had entered into the said consent for it without their instructions. At the conclusion of the arbitration, the clan elders issued their award on 15th March, 2002. By an application dated 29th July, 2002, they successfully applied for the award to be set aside.

Consequently, the parties were directed to meet and agree on the terms of distribution. It was not to be. The parties were unable to agree even on the beneficiaries of the estate, let alone the mode of distribution, hence the matter was set down for hearing. On 3rd June, 2008 Emukule, J. directed the parties to file their respective proposed mode of distribution of the estate.

The 1st and 2nd respondents complied and filed their proposed mode of distribution. The appellants did not do so, contending that the deceased had made an oral will which ought to be enforced; and that the estate ought to be distributed by the clan elders.

After taking into account the evidence on record, the proposed mode of distribution by parties and the oral submissions by counsel, Emukule J distributed the deceased's estate by a judgment dated 1st April, 2009. He found that the appellants had failed to prove the existence of an oral will, thus the estate would be distributed intestate under the provisions of **Section 40** of the **Law of Succession Act**. The deceased had two houses, that is, of his first and second wife and two 'shadow' houses representing the two acknowledged concubines. Since the children born of the concubines were cared for by the first wife, they were incorporated as beneficiaries under the first house. In distributing the estate the trial court took into account that the beneficiaries of the estate could not be limited as set out in the Petition; some of the beneficiaries including the widows had since died and their interests had been transmitted to their beneficiaries/dependants. The court also took into account the properties which the 1st appellant had sold in apportioning his portion of the estate, and the settlements which had been made by the deceased during his lifetime. The matrimonial homes of the deceased's widows were distributed to the beneficiaries of their respective houses.

In addition, the trial court directed that in the event that any of the properties had been sold before the finalization of the cause, the appellants would account for the sale proceeds and compensate the beneficiaries thus deprived of their respective shares. The appellants were also directed to prepare and file in court within 60 days of the judgment, the true accounts of all monies received as rent from the 3rd respondent, a tenant of the estate, from 30th November, 2007.

The appellants were aggrieved by the learned judge's decision and preferred this appeal. They filed a Memorandum of Appeal citing a dozen grounds of complaint and which were the basis of the submissions before us by their learned counsel, Mr. Kioga.

He submitted that the learned Judge erred in refusing to determine who were the administrators and beneficiaries of the deceased's estate; in relying on facts which he got extraneously from one Bishop Imathiu who he was alleged to be protecting and was biased against the appellants; in misconstruing the appellants' affidavit and erroneously rejecting their request to have the distribution determined by the clan elders; in refusing to accept oral evidence despite the fact that parties had agreed to determine the matter through oral evidence; in accepting and considering the 2nd respondent's proposal for distribution yet she lacked the *locus* to make such a proposal and in introducing the concept of a 'shadow house' which is non-existent in customary law.

Mr. Kioga submitted that the learned trial Judge further erred by quoting and relying extensively on arbitration proceedings that were not before him; refusing to determine the status of the 3rd respondent and the appellants' application seeking the 1st and 2nd respondents to account for the rent they had collected from the 3rd respondent; listing non-existent properties as part of the deceased's estate and not distributing the vehicles which were part of the estate; misconstruing the provisions of **Section 40** of the **Law of Succession Act** which did not prohibit arbitration; failing to determine the appellants' complaint regarding the 3rd respondent's illegal lease and instead usurping the role of the administrators and distributing the estate and finally failing to make any finding as to whether Mr. Riungu, the 2nd respondent's counsel was properly on record.

Mr. A. G. Riungu, learned counsel for the 2nd respondent, in opposing the appeal, submitted that the entire estate had been distributed and there was nothing pending; each of the 16 beneficiaries had been given their respective shares and it was only the appellants who have refused to sign the necessary documents to facilitate the transmission of the properties held by them. Consequently, in his view, the appeal herein has been overtaken by events. The judgment dated 1st April, 2009 has never been stayed despite several applications by the appellants.

In respect of his standing in the matter, Mr. Riungu submitted he was properly on record and had been representing the estate since the year 1998. He had done nothing wrong both professionally and personally. As to the issue of the number of houses of the estate, this had been dealt with at the High Court; he submitted, and this Court could not start correcting the same, as there is a pending application for review and amendments of names and numbers before the High Court.

Mr. Riungu submitted that the appellants were administrators for seven years but failed to point out the 'shadow' beneficiaries, that is, the children born out of wedlock, and to administer the estate. The learned Judge did not err in referring to the arbitral proceedings. He contended that the only property in issue was Ntima/Igoki/93; it was divided into 11 portions each party getting 1 ½ acres under **Section 40** of the **Law of Succession Act**; the learned trial Judge did not restructure the land. He further submitted that **Section 66** of the **Law of Succession Act** gave the Judge the final discretion to appoint an administrator.

In response to those submissions, Mr. Kioga contested the respondents' contention that the estate was completely distributed as rectification and correction proceedings are still pending at the High Court. He posited that this Court can still nullify any transfers that are illegal, and in his view, any transfers that have occurred during the pendency of this appeal are illegal notwithstanding the absence of orders of stay. He asserted that the first respondent (Florence) should not have been a beneficiary and the learned Judge should have excluded her because;

“when Florence administers and benefits from the estate, it is actually her husband Imathiu who does so”

He maintained this paradoxical position even as he conceded that on the authority of this Court's holding in **RONO –VS- RONO [2005] 1EA 363**, which he himself cited, it was impermissible for a person to be excluded from inheriting from a parent for the reason only that she is a daughter.

Counsel's concluding submission was that the appellants were not given a chance to administer the estate.

Having gone through the record before us, we are constrained to observe that in alleging that the learned judge erred by being partisan and partial, the appellants used language that was grossly intemperate and made extravagant claims which, on the face of them, they were in no position to prove or substantiate. For instance, in Ground 1 (iv) they asserted that;

“The Judge also tried to protect and to shield her husband Bishop Lawi Imathiu whom the appellants believed was the moving spirit behind his wife Florence”.

In some instances, the Memorandum of appeal in clear contravention of the requirements of Rule 84 of the Rules of Court contained pure polemics, dripped with sarcasm, and was interspersed with rhetorical questions;

“3. The learned Judge erred in fact in making distribution to parties he neither knew nor appearing before him, nor filing any claim over this estate. (The shadow houses’ – was this a new concept on law or an invention by the Judge?

4. THAT it is a wonder who told him the details of this family although there was no record there before him or before any other judge.

. . . .

7. The evidence the judge seems to rely on is from;

(i) Grace Nkoroi, (ii) Naaman Mwirichia

(ii) Stanley Thiora. Did these people give evidence before him? Where did he get their evidence?

Did he follow their verdicts?

. . . .

12. That the learned judge failed to determine, any issues raised by the appellants and instead straight away went to usurp the role of the administration and on that role, he made a mess of the entire process”

(Our emphasis)

With respect to the appellants and their counsel, an advocate of considerable experience, litigation is conducted with clear rules with regard to the manner in which pleadings, submissions and other court papers are framed. The rule of thumb is courtesy, respect and decorum. Disagreements of opinion, dissents and disappointments will always occur but in the expression of discontent parties must always maintain and employ measured, tempered and temperate phraseology especially towards the Court. It sounds ill for words such as we have set out to be employed in the process of impugning the judgment of a Judge, quite irrespective of what views a party or his advocate may hold about the person or character of the Judge. One of the cardinal duties that an advocate owes the court is to ensure that he does not do anything that would undermine the dignity or reputation of the court. See Robin Palmer and David McQuoid–Mason; ***BASIC TRIAL ADVOCACY SKILLS Lexi, Nexis-Durban, (2007) p.9*** and Keith Evans, ***COMMON SENSE RULES OF ADVOCACY*** The Capital Net [2004] p 221.

A party is of course entitled to raise issue with and properly assail a judge’s determination or conduct on grounds of bias and the question that we have to determine is whether indeed, the learned Judge was partisan and partial as complained. Counsel based the complaint on the fact that the learned Judge did not accept oral evidence; and rejected the request to have the matter determined by elders and “***trashed***” the appellants’ submissions.

We do not for a moment diminish the seriousness of any allegations of bias made against a judge since a fair and impartial judge is the fulcrum on which the wheels of justice turn and is, moreover, a constitutional entitlement of all who seek justice in our courts. Such demonstrable fairness and impartiality are critical in ensuring and maintaining public confidence in the judicial process and the administration of justice. This is what this Court had in mind in ***SERAH NJERI MWABI –VS-JOHN KIMANI NJOROGE [2013] eKLR*** when it observed;

“It is a tenet of a fair trial that all parties to a dispute must have the right to due process of law

in order to resolve the dispute, and due process of law requires that the parties be given a hearing before an unbiased impartial decision maker as part of the resolution process. The reason is clear to us. In a constitutional order like ours, grounded on the rule of law, it is imperative that judges make decisions according to law, unclouded by personal bias or conflicts of interest. Accordingly, this in our view, is the basis upon which when a Judge is appointed to the bench, he/she takes an oath to uphold the Constitution and administer justice without fear or favour. Public confidence in the administration of justice is indispensable. It is not enough that judges be impartial, the public must perceive them to be so”.

Having perused the record and taken into account the entire circumstances of this case, not least the length of time the matter had taken unresolved and the checkered history it had gone through, including a detour to arbitration by elders, we are not persuaded that the learned Judge in dispensing with oral evidence and proceeding with the distribution of the estate, instead of sending the case to elders again, was acting out of any bias. Nor do we find any basis for the allegation that he (**trashed**) the appellants’ submissions. We think that the manner in which, he exercised his discretion was expedient and desirable in the circumstances. He was rightfully concerned that the estate was remaining unadministered and undistributed in perpetuity despite clear time lines in **Sections 73 and 83** of the **Laws of Succession Act**.

We do not therefore find justification or entitlement to interfere with that exercise of discretion bearing in mind the decades-long. Sentiments expressed in **MBOGO & ANOTHER-VS-SHAH [1968] EA. 93 and 96;**

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice”.

Turning now to the issue of the “Shadow House”, it was submitted for the appellants that the term and concept was unknown under the Meru Customary Law which required that estates are to be distributed in accordance with “houses”. See **Section 3 of the Law of Succession Act** and **CATHERINE MBAUNI – VS- GREGORY MBAUNI [2009] EKLR.**

We do not understand the learned Judge to have been creating a new concept or category of beneficiaries when he talked of “*shadow houses*”. Rather, he was listing the deceased’s children and appreciated evidence that had been previously placed before the panel of elders that other than his two wives, he did have a son called Murithi Mugambi by an unnamed “**Kikuyu lady**” and two other children Euticus Kithure and Kagwiria Gitau who he sired with a lady called Marion. In the initial listing the learned Judge, no doubt for convenience, listed the two sets of children as Shadow House 1 and 2 respectively. In the end though, nothing turned on this characterization because, in the learned Judge’s own words;

“Section 40(1) of the [Laws of Succession] Act requires that in a polygamous family the net intestate estate shall, in the first instance be divided among houses according to the number of children in each house, adding any wife surviving him as an additional unit to the number of children”.

In this case the two widows are both deceased, the children of the shadow houses were to be provided through the 1st wife according to evidence before the Panel of Arbitrators under the chairmanship of the District Officer, Miriga Mieru West Division. The first house would therefore include the “**shadow houses and the second house would be alone**”.

We do not find anything amiss with the learned Judge’s reasoning on this score which we think was informed by a thorough consideration and appreciation of both the law and the evidence as had been placed before him. We shall not interfere.

The appellants did not seriously contest the respondents' contention that save for some minor misdescriptions of properties and beneficiaries, which are currently subject of rectification proceedings at the High Court, the distribution of the estate is virtually complete and that of all the 16 beneficiaries, only the two appellants have any grouses over the distribution as ordered by the Judge. The other 14 have already taken their shares without complaint and some have even gone as far as disposing of the same, as they are entitled to. The transfer to those satisfied beneficiaries and any subsequent ones, argued the respondents, are all legal as there has been no legal hindrance to the same, the appellant's various attempts to obtain stay of execution orders having been disallowed by this Court and the High Court. We take this position to be uncontested and therefore correct.

It would appear from the totality of the submissions made before us and the stance adopted by the appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratrix of the estate. That much was clear from Mr. Kioga's resort to Meru Customary Law which stipulated, as captured by **Dr E. Cotran** in his **Restatement of African Law: Vol 2 Laws of Succession** at p30;

“Daughters receive no share of the estate. In the absence of Sons, the heirs are the nearest paternal relatives of the the deceased, namely father, full brothers, half-brothers and paternal uncles”.

With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority Kenyas' communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What **RONO –VS- RONO (Supra)** decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010. See also **GRACE WACHUKA –VS- JACKSON NJUGUNA GATHUNGU [2014] eKLR**. We have already noted that Mr Kioga did concede, as he had to, that one cannot exclude daughters. We have also adverted to the irony of his then asserting in the same breath ,that Florence should nevertheless have been excluded.

The appellants did also fault the learned judge for “refusing to determine the locus of the counsel for the so called interested parties – Mr. Riungu – who had not excluded himself from representing the original petitioner. With respect, we find this complaint to be wholly without substance.

Mr. Riungu made an impassioned submission that he has all along acted professionally and properly in this matter for the estate. He considered this line of attack to be personalized and uncalled-for, and we cannot but agree. We think it is yet another example of what strikes us as the appellants' penchant for throwing brickbats at whomever they disagree with. The complaint is without merit.

At ground 11 the appellant raises the issue of the 9 month delay before the learned Judge delivered his judgment. In arguing this ground, however, Mr, Kioga did not lay much emphasis, on it, and in fact characterized the particular complaint as “***obiter***”. It doubtless is a matter of importance that judges should render their decisions in timely fashion. Counsel cited the case of **GOVERNMENT OF THE UNITED STATES OF AMERICA-VS-GITHONGO [1999] EA 115** where this Court stated, albeit obiter, that a delay of nearly nine months before delivering judgment by the High Court was inordinate and denuded the judgment of reliability or respectability”. We do agree with those sentiments but are also alive to the fact that a judge may be prevented by pressure of work or other vicissitudes from delivering a judgment within the time expected. The delay herein did not affect the validity of the judgment, however, and we did not understand Mr. Kioga to say that it did. Nothing therefore turns on this ground.

The upshot of our consideration of this appeal is that it must fail. We affirm the decision of the learned judge and order this appeal be and is hereby dismissed with costs.

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

P. N. WAKI

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JUDGE OF APPEAL

R. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR