IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 8 OF 2015

BETWEEN

FRANCIS MWANGI THIONG'O……..……....1ST APPELLANT

ESTHER MWITHAGA THIONG'O……..……2ND APPELLANT

JECINTA WANJIKU THIONG'O……...…….3RD APPELLANT

PAUL WAITHAKA THIONG'O……..……..4TH APPELLANT

SAMUEL MUIRURI THIONG'O……..…….....5TH APPELLANT

AND

JOSEPH MWANGI THIONG'O……..……. RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Murang'a (Ngaah Jairus, J.) dated 6th October, 2014

In

H.C. Succession Cause No. 338 of 2013)

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JUDGMENT OF THE COURT

The appellants are members of the second house of the polygamous **David Thiong'o** (deceased) who died intestate on **12th August 2008**. That house comprises three sons; Francis, Paul and Samuel and a daughter, Jecinta, together with their mother, Esther. The respondent Joseph Mwangi Thiong'o (Joseph) is the only son in the deceased's first house which also comprises his mother, who predeceased the deceased, and his three sisters; Margaret Wanjiku Mwangi, Jane Gitiko and Eunice Muthoni Waweru. The deceased had balanced the children in the two houses at four each.

Following the death of their father, Joseph and Francis, representing their respective houses, jointly petitioned for letters of administration intestate. The intestate estate was one landed property, **LR NO. LOC.20/KAMBIRWA/477** measuring approximately **3.2 Hectares** or **8 acres.** All the other siblings

and the surviving widow consented in writing to the issuing of a grant to the brother- petitioners.

The Grant of letters of administration was duly made to them on 18th July 2011 and all was well until Joseph filed a summons for confirmation of grant on 30th January 2012. He supported the summons by his affidavit in which he proposed that the estate be distributed to the two houses in equal shares. Francis responded to that proposal by filing an affidavit of protest sworn on 1st March 2012 in which he objected to the proposed mode of distribution. He went further to depose that the deceased had made known his intention that the land be shared upon his demise equally between his four sons to the exclusion of their sisters. Francis averred that the deceased had in fact signed a note signifying his said wishes.

The matter having turned contentious, it was heard before Ngaah J. who, by a judgment dated and delivered on 6th October 2014, rejected Francis' objection and confirmed the grant on the basis of a 50:50 distribution of the estate between the two houses.

Aggrieved by that judgment, the appellants have come to this Court stating in their memorandum of appeal that the learned judge erred by;

a. **Misinterpreting the provisions of Section 40 (1) of the Law of Succession Act with the effect of giving the second house comprising 5 units less than he gave the 1st house comprising 4 units.**

b. **Failing to consider that the deceased's daughters had renounced their shares in favor of the 4th and 5th appellants.**

c. **Disregarding the deceased's wishes that his estate be distributed equally among his sons to the exclusion of the daughters.**

At the hearing of the appeal, **Miss Kimotho** learned counsel held brief for

Mr. Mwangi Ben, Advocate on record for the appellants; while the respondent was in person.

We did not benefit from the learned and robust advocacy that we expect and consider litigants to be entitled to. Rather, counsel simply stated that she relied on the three grounds in the memorandum of appeal and so asked us to allow the appeal. With respect, it behoves counsel to put greater effort in the prosecution or defence of appeals before this Court and indeed every court. Preparation, study, citation of statutory and judicial authority and persuasive urging of the case are the basic minimum that we expect. Anything less is a disservice not just to the Court, but to the litigants, the public and counsel who fail to rise to the occasion. A culture of legal excellence and industry needs to be embraced anew and entrenched among counsel.

In answer to counsel's submissions, such as they were, the respondent stated simply that he agreed with the decision of the High Court **"because it was justified and fair"** and that he therefore opposed the appeal.

Did the learned Judge misinterpret **Section 40(1)** of the Laws of Succession **Act Cap 162** as charged? We are afraid so. The provision, which the learned judge cited in his judgment, is in these terms,

"where an intestate has married more than once under any system of law permitting polygamy, his personal 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."

(Our emphasis)

It is followed by **Sub-Section (2)** thus;

"The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38".

We apprehend that the wording of the Section seems, on the face of it, convoluted and has in the past attracted varying interpretations from

trial Courts. It is clear to us, however, that the intention of the legislature in enacting this Section was to lay down a two step-process of division of the personal and household effects together with the residue of the net intestate estate of a polygamous person thus;

i. By number of houses in proportion to the number of children.
ii. Each houses' portion as per the general rules of intestacy established under section **35** to **38** of the Act.

The starting point in this appeal revolves around the effect of the deceased's wives in the distribution of the intestate estate.

The learned judge, placing reliance on the definition of "***house"*** found in **Section 3** of the **Act** decided that the wife who had pre-deceased the deceased needed to be reckoned as a unit in deciding the portion to go to the house to which she belonged.

We respectfully think he erred in so deciding. **Section 40(1)** aforesaid states that it is any wife surviving the deceased that would be considered as an additional unit in the number of children. The learned judge was thus wrong to include the respondents' mother as she had died before the deceased, since **Section 40(1)** expressly excluded such inclusion. The provision addresses succession and survivorship and there is no portion for the dead among the living. This is the more so considering that a surviving spouse obtains a life interest under Sections 35, 36 and 37 of the Act. It is co-terminus with life unless sooner ended by re-marriage. This is not at all altered or in any way effected by the **Section 3** definition of "***house***" which is merely descriptive and not at all distributive. The learned judge was therefore wrong to hold that the prior demise of the wife in the first house was of no consequence. It was.

That ground of appeal therefore succeeds as the Judge should have found that the first house had four units and the second, comprising the respondents, had five units. The land should therefore have been subdivided in the first instance along the ratio of **4:5.** This is the approach to **Section (1)** of the **Act** that this Court has followed in many cases including **MUSA IMBIAKHA –VS- KHAYANGA IMBIAKHA** [2015] eKLR.

As regards the second ground of appeal namely that the female appellants had renounced their entitlement to the estate in favor of the male appellants, we do not find much substance. Upon our own perusal of the record with a fresh, independent and exhaustive eye, as we are enjoined by Rule 29 of the Court of Appeal Rules to do in a first appeal, as we proceed by way of re-hearing; and having warned ourselves that we did not have the advantage the learned Judge had of hearing and observing live testimony, we find that we agree in full with his observations that;

"As for the allegations that the deceased's daughters in the second house had renounced their right no inherit, there is no evidence of such renunciation on record; if per adventure some of the deceased's daughters chose not to inherit the estate of their deceased father, their choice should not affect the right of the rest of the deceased's children who want to and are rightly entitled to a share of the deceased's estate".

That ground fails.

Turning to the final ground, we see in it the all too familiar, though anachronistic contention that the deceased's daughters should have been excluded from the estate. This Court cannot endorse such an argument in this day and age.

This Court has set itself on a path that espouses a jurisprudence of equality of all children be they male or female. The Law of Succession Act neither distinguishes nor discriminates between male and female. Nor will this Court. We repeat what we recently stated in **MWONGERA MUGAMBI RUNTURI & ANOR –VS- JOSEPHINE KAARIKA & 2 OTHERS** [2015] eKLR;

"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 [once] the norm for a vast majority of Kenya's communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstances 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 [[2005] 1 EA 363] 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 100"

We are not persuaded that a discriminatory testamentary intent was ever disclosed by the deceased as contended in the memorandum of appeal. If such an intent had been established, the court would have overriden it in the name of the law and the Constitution. At any rate, the petition filed before the High Court was always on the basis that the deceased had died intestate and the grant of letters of administration to the joint petitioners was also on that basis. The alleged reduction into writing of the deceased's intention to exclude his daughters was not established and was properly rejected by the learned judge.

The upshot of our consideration of this appeal is that it succeeds in part. The learned judge's, rejection of the appellant's protest is upheld. The confirmation of the letters of administration is upheld but the terms thereof are set aside with the following substitution;

1. The parcel **LOC.20/KAMBIRWA/477** shall be divided between the first and the second houses in the ratio of **4:5.**
2. Joseph Mwangi Thiong'o, Margaret Wanjiku Mwangi, Jane Gitiko and Eunice Muthoni Waweru shall have equal shares in the portion allocated to the first house.
3. Esther Mwithaga Thiong'o, Francis Mwangi Thiong'o, Jecinta Wanjiku Thiong'o, Paul Waithaka Thiong'o and Samuel Muiruri Thiong'o shall have equal shares in the portion allocated to the second house.
4. Esther Mwithaga Thiong'o shall hold a life interest in the portion to be allocated to her.

The parties shall bear their own costs of this appeal.

Dated and delivered at Nyeri this 30th day of September 2015.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL