



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 131 OF 2012

DOUGLAS NJUGUNA MUIGAI.....APPELLANT

VERSUS

JOHN BOSCO MAINA KARIUKI

JERIOTH WANGECHI MUIGAI RESPONDENTS

(Being an Appeal against the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 23rd September, 2011 and the subsequent final order of 24th October, 2011)

in

H.C. Succ. C. No. 422 of 2006)

JUDGMENT OF THE COURT

[1] This is an appeal against the Judgment of ***Sergon, J.*** delivered on 23rd September, 2011, and the subsequent order of 24th October, 2011 in ***H. C. Succession Cause No. 422 of 2006***. The dispute is over the mode of distribution of the estate of the late Kariuki Mbaka (deceased) who died intestate on 29th July, 2004. The deceased was polygamous in his lifetime. He was survived by three wives and fourteen children. Two of the wives subsequently passed away. There was no dispute over what constituted the deceased's estate, the only dispute that has persisted in this appeal, is how certain assets should be shared between the beneficiaries. The letters of administration in respect of the deceased's estate were granted through the consent of all the beneficiaries to Jerioth Wangechi Muigai, John Bosco Maina Kariuki and Douglas Njuguna Muigai on 21st August, 2007.

[2] It would appear a dispute arose over the mode of distribution and as the three administrators did not agree, Douglas Njuguna Muigai singularly applied for the confirmation of the grant. The other two administrators, Jerioth Wangechi Muigai and John Bosco Maina Kariuki filed their affidavits of protest. They were joined by several other beneficiaries of the estate of the deceased who filed their separate affidavits protests as follows:

1. ***Consolata Wambui Muigai.***
2. ***Aurelia Muthoni Muigai.***
3. ***John Ndiritu Muigai.***

4. **Fransca Wambui Kiraithe**
5. **Elena Wairimu Muthee**

[3] All the seven affidavits of protest were similar in their averments on how the deceased's estate should be distributed. The learned Judge also heard the parties through oral evidence. The protestors called 4 witnesses who gave evidence in support of their proposed mode of distribution. Douglas Njuguna Muigai who filed the summons for confirmation also gave evidence in support of his proposed mode of distribution. He did not call any independent evidence. In a fairly well considered Judgment and upon evaluation of the evidence and consideration of the proposed modes of distribution by Douglas Njuguna and the seven protestors, this is what the Judge concluded in his judgment:

***“At the close of evidence, parties to this dispute were invited to file and exchange written submissions. I have considered the evidence and those submissions. In the case before this court, there is no dispute that the deceased was married to three wives. There is also no dispute that the beneficiaries and the assets of the estate have been identified. There is further no dispute that the deceased distributed part of his land intervivos. What is in dispute is the mode of distribution of the remainder of the estate. The protestors are proposing for the estate to be shared according to the houses whereas the applicant seeks to have the same distributed according to the children. After a careful consideration of the evidence and the submissions, I have come to the conclusion that the dispute over the mode of sharing should be resolved according to the provisions of Section 35 as read with Section 40 of the Law of Succession Act. It should also be remembered that the benefits which some of the beneficiaries have received should be taken into account pursuant to the provisions of Section 42 of the Law of Succession Act. The applicant had opposed the sharing of the property according to the house because two of the deceased's wives are dead. This submission cannot stand in view of the definition attached to a house under Section 3 of the Law of Succession Act which clearly states that a 'house' means a family unit comprising a wife, whether alive or dead at the death of the husband, and the children of that wife.*”**

In the end, I find the protest to be well founded. However, the proposal contained in the affidavits of protest does not strictly comply with Sections 35, 40 and 42 of the Law of Succession Act. I hereby direct all the protestors and or any one of them to file a further affidavit of protest which strictly complies with the aforesaid provisions of the Act (i.e. Section 35, 40 and 42 of the Law of Succession Act) within 30 days from the date hereof. Mention on 23rd October, 2011, to confirm whether or not the protestors have complied with the above directive and to formally confirm the grant. Since the dispute involves members of the same family, I direct that each one of them meets his or her own costs.”

[4] On the 7th October, 2011, John Bosco Maina Kariuki filed a further affidavit sworn on 6th October, 2011 as directed by the Judge. It was considered on 24th October, 2011, and the Judge issued the final order confirming the grant of letters of administration in accordance with the aforesaid further affidavit sworn on 6th October, 2011. It is the foregoing judgment that provoked this appeal based on the following four grounds of appeal:

1. ***The learned Judge erred in law and in fact in finding the protest for confirmation of grant well founded yet the mode of distribution proposed by the respondent was based on customary law which was not the applicable law at the time of the death of the deceased.***
2. ***The learned Judge erred in law and in fact in ignoring the arrangement the deceased had made during his lifetime where each of the three families were living exclusively on certain parcels of land.***
3. ***The learned Judge erred in law and in fact in mixing the families thus relocating them to places they have never lived on.***

4. ***The learned Judge erred in law and in fact in failing to find that the proposal for distribution by the appellant was non-discriminatory and equitable to all the beneficiaries.***

[5] When the appeal came up for hearing before us, Mr. Kebuka Wachira, learned counsel appeared for the appellant but both respondents John Bosco Maina Kariuki and Jerioth Wangechi Muigai were not represented by counsel, they appeared in person.

[6] In addressing the court, Mr. Kebuka Wachira for the appellant argued two grounds of appeal. He based his submissions on the provisions of **Sections 35 and 40** of the **Laws of Succession Act** which he said were not followed. According to counsel for the appellant, the only properties that were disputed was the mode of sharing of 6 parcels of land and money in the bank; He faulted the Judge for not dividing the entire 6 parcels of land among the 14 beneficiaries plus Jerioth Wangechi who was the only surviving widow; he argued that the estate was shared among the three houses and the surviving widow was given a 'registrable' interest instead of being given a 'life interest' on the parcels of land. He submitted that the deceased distributed part of his estate in his lifetime to some of his children which was not taken into account, and further, the deceased's widow who is surviving was given a portion of land where she does not occupy. Lastly, counsel argued that by allocating the surviving widow a 'registrable' interest alongside other beneficiaries who were the deceased's children, that amounted to double allocation as far as her house was concerned as her children would benefit twice.

[7] The appeal as aforesaid was opposed by the two respondents although acting in person; they put up a formidable opposition to the appeal. Both John Bosco Maina Kariuki is a son of the deceased and his stepmother Jerioth Wangechi supported the judgment of the High Court. They submitted that the land was shared according to the way the deceased had settled all the members of the family. According to the 1st respondent, the deceased used to look after his widows and considering their stepmother is now aged and also the fact that she worked very hard with the deceased and contributed to the acquisition of the deceased's estate, he and the other protestors who swore the affidavits of protest in the High Court were not opposed to the deceased's surviving widow benefiting from the estate as per the orders.

[8] On the part of the 2nd respondent, she argued that she was the first wife of the deceased. She told us that she even participated in paying the dowry when the deceased married her co-wives. She did not see any justification for her exclusion from sharing the deceased's estate merely because she is a widow. She said she contributed to the acquisition of the estate with her deceased husband. For the properties the deceased acquired independently, he distributed to some of the children while he was alive; the family was left by the deceased occupying the respective portions as approved by the court.

[9] This is a second appeal, and that being so, we are mandated to re-evaluate the evidence, assess it and make our own conclusions. See ***SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD., [1968] EA 123 at page 126 and WILLIAMSON DIAMOND LTD. V BROWN, [1970] EA 1.*** We also have to caution ourselves that we never heard or saw the witnesses testify and give due allowance for that. It is in view of the aforesaid principles enumerated in the authorities cited above that we have endeavored to summarize what was before the superior court.

[10] In our considered view, the issues that were before the High Court and persist in this appeal remain twofold: that is whether the learned Judge followed the provisions of **Sections 35 and 40** of the **Law of Succession** when he determined the distribution of an estate of a deceased who was polygamous. Secondly, whether the surviving widow Jerioth Wangechi Muigai the share of 1.66 acres which she is registered jointly with John Ndiritu Muigai, Aurelia Muthoni Muigai and Francisca Wambui Kireithe in land parcels Nos. ***Thegenge/Unjiru 447 and Thegenge/Karangia 75*** is an absolute or a life interest.

[11] This is the distribution that was approved by the court:

“THEGENGE/UNJIRU/447 MEASURING 5 ACRES

Jerioth Wangechi Muigai

)

John Ndiritu Muigai) 1.66 acres jointly
Aurelia Muthoni Muigai)
Fransca Wambui Kiriethe)
John Bosco Maina Kariuki)
Consolata Wambui Muigai) 1.66 acres jointly
Elena Wairimu Muthee)
Douglas Njuguna Muigai)
Mary Wambui Ndung'u)
Charles Ndiritu Muigai) 1.66 acres jointly
Priscilla Muthoni Muigai)
Grace Warukira Kariuki)
Samuel Muriithi Kariuki)
Felishita Wairimu Kairu)
Margaret Wangari Mwangi)

THEGENGE/KARANGIA/75 MEASURING 5.5 ACRES

Jerioth Wangechi Muigai)
John Ndiritu Muigai) 1.66 acres jointly
Aurelia Muthoni Muigai)
Fransca Wambui Kiriethe)
John Bosco Maina Kariuki)
Consolata Wambui Muigai) 1.83 acres jointly
Elena Wairimu Muthee)
Douglas Njuguna Muigai)
Mary Wambui Ndung'u)
Charles Ndiritu Muigai)
Priscilla Muthoni Muigai)
Grace Warukira Kariuki) 1.83 acres jointly
Samuel Muriithi Kariuki)

Felishita Wairimu Kairu)

Margaret Wangari Mwangi)

EUSONYIRO/SUNGOROI/BLOCK VII/277 MEASURING 9.5 ACRES (3.84 HA)

Aurelia Muthoni Muigai)

Fransca Wambui Kiriethe)

Consolata Wambui Muigai) 9.5 acres jointly

Elena Wairimu Muthee)

Mary Wambui Ndungu)

Priscilla Muthoni Muigai)

Grace Warukira Kariuki)

Felishita Wairimu Kairu)

Margaret Wangari Mwangi)

ACCOUNT NO. 501-06-00222 AT NYERI FARMERS SACCO

Jerioth Wangechi Muigai)

John Ndiritu Muigai) 1/3 of the funds jointly

Aurelia Muthoni Muigai)

Fransca Wambui Kiriethe)

John Bosco Maina Kariuki)

Consolata Wambui Muigai) 1/3 of the funds jointly

Elena Wairimu Muthee)

Douglas Njuguna Muigai)

Mary Wambui Ndungu)

Charles Ndiritu Muigai)

Priscilla Muthoni Muigai) 1/3 of the funds jointly

Grace Warukira Kariuki)

Samuel Muriithi Kariuki)

Felishita Wairimu Kairu)

Margaret Wangari Mwangi)

CO-OPERATIVE BANK OF KENYA SHARES B CLASS

Jerioth Wangechi Muigai)
John Ndiritu Muigai) 583 of the shares jointly
Aurelia Muthoni Muigai)
Fransca Wambui Kiriethe)
John Bosco Maina Kariuki)
Consolata Wambui Muigai) 583 of the shares jointly
Elena Wairimu Muthee)
Douglas Njuguna Muigai)
Mary Wambui Ndungu)
Charles Ndiritu Muigai)
Priscilla Muthoni Muigai) 583 of the shares jointly
Grace Warukira Kariuki)
Samuel Muriithi Kariuki)
Felishita Wairimu Kairu)
Margaret Wangari Mwangi)

390 NATIONAL INDUSTRIAL CREDIT BANK LTD. SHARES

Jerioth Wangechi Muigai)
John Ndiritu Muigai)
Aurelia Muthoni Muigai) 130 of the shares jointly
Fransca Wambui Kiriethe)
John Bosco Maina Kariuki)
Consolata Wambui Muigai) 130 of the shares jointly
Elena Wairimu Muthee)
Douglas Njuguna Muigai)
Mary Wambui Ndungu)
Charles Ndiritu Muigai)
Priscilla Muthoni Muigai) 130 of the shares jointly

Grace Warukira Kariuki)

Samuel Muriithi Kariuki)

Felishita Wairimu Kairu)

Margaret Wangari Mwangi)

6. *That all of the properties herein below mentioned be divided as in all of the others hereinabove quoted and in the same manner that is, 1/3 of each for the three family groups and then shared in equal shares or as the family units may deem fit thereafter.*

That is:

***1182 BARCLAYS BANK OF KENYA LTD. SHARES.**

***2192 COMMERCIAL SHARES GATHUTHI TEA FACTORY.**

***5 FOUNDER SHARES, GATHUTHI TEA FACTORY.**

***26 SHARES K.T.D.A. FARMERS CO. LTD.**

***50 SHARES NYERI FARMERS SACCO SOCIETY LTD.**

***330 SHARES TETU HOUSING CO-OP. SOCIETY LTD.**

***200 GROUP SHARES GATHUTHI TEA FACTORY.**

[12] We have considered the above distribution alongside the provisions of **Sections 35 and 40** of the **Law of Succession**. The deceased was polygamous, he was married to three wives, Jerioth Wangechi was the 1st wife. She has 3 children. The other two wives died but they are survived by their children. The second wife had 3 children while the 3rd wife had 8 children. It was not disputed that the deceased distributed some of his properties and the Judge who heard the evidence even from independent witnesses approved the distribution of the estate while taking that factor into consideration.

[13] We should also state, in addition, a Judge dealing with probate and administration issues is given inherent powers to make any orders for ends of justice and to prevent the abuse of the court process. See **Section 47** of the **Law of Succession Act** and **Rules 63** of the **Probate and Administration Rules**. What we discern from these records is that every beneficiary of the deceased was provided for. Another factor that we discern is that parties are now settled in their respective parcels of land and they have been in occupation in those respective parcels even in the lifetime of the deceased and they have carried out their developments according to the proposals that were propounded by the protesters and were largely included in what was approved by the court.

[14] In our view, we do not see any material variance between what was adopted by the court and what is provided for under Section 40 which provides:

***“40(1) 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 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.*”**

2. ***The distribution of the personal and household effects and the residence of the net intestate within each household shall then be in accordance with the rules set out in Section to 38.”***

[15] The provision of the law that Mr. Kebuka Wachira for the appellant contends was not followed is section **35 (b)** which provides:

“35(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 residual of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person. Emphasize ours.

Mr. Kebuka Wachira's specific argument is that the fact that the court did not indicate that the share of the two portions of land which are to go to Jerioth Wangari and her children, the court failed to indicate that Jerioth was to hold her portion for life which according to him is contrary to the provisions of Section 40 of the Act. On the same breath counsel stated that he was not opposed to Jerioth Wangechi getting a share altogether but he insisted the law must be followed such that her share should be indicated it was held for life. To us this argument cannot hold jointly because Jerioth is not even getting an independent parcel of land but she is to hold it with her children, even if her interest was for life, the residue would always revert to the co owners.

[16] From the aforesaid distribution that was approved by the court, Jerioth Wangechi was to share the two portions of land being *Thegence/Unjiru/447* and *Thegence/ Karangia/758* measuring 1.66 and 166 respectively jointly with her three children. We do not share the view by counsel for the appellant that the Judge erred by not indicating that Jerioth Wangechi was to hold her share for life. Firstly, the percentage of the portion of what would be her eventual share is fairly insignificant. Secondly, Jerioth was a spouse of the deceased; the first wife whose submission that the deceased had settled her and other beneficiaries during his lifetime was not challenged by the appellants evidence before the trial court. All the parties agree that she is entitled to a share of the deceased estate as a spouse.

[17] We also observe that being a spouse and an elderly one for that matter; Jerioth was entitled to the support of the deceased. We were also informed that all the children of the deceased are of the age of majority and for this reason; that would give justification for the share that was given to Jerioth. Beside the above, we are of the view that the provisions of **Section 35(b) and 40** are discriminatory against Jerioth and the female gender. The Legislature should consider those sections for amendment. Our findings on this issue are not at all novel as shown below the State is obligated under **Article 27(b)** of the **Constitution** to take such legislative measures. To illustrate that **Section 35(1) (b)** and the proviso thereto provides for a differential treatment of a widow and a widower, this is what it states;

“(b) a life interest in the whole residual of the net intestate: provided that if the surviving spouse is a widow, that interest shall determine upon re-marriage to any person.”

[19] A plain reading of the above proviso is that a widower (a male) can remarry without losing the enjoyment of the 'life interest' of the spouse's estate while the widow (a female) loses her life interest upon re-marriage. It goes without saying that this is against the letter and spirit of the Constitution. **Article 27** provides:

“27(1) Every person is equal before the law and has a right to equal protection and equal benefit of the law.

- 2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***
- 3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***
- 4. The State shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age,***

disability, religion, conscience, belief, culture, dress, language or birth
5. ...

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take Legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”

[20] In a land mark decision in the case of ***Rono v Rono & Another, 2008 1 KLR (G & F)*** page 803, this Court differently constituted went to great length in discussing the issue of discrimination on the basis of sex. Waki, J.A., in the lead judgment quoted extensively the various international instruments on human rights that outlaw discrimination against women. This is what the learned Judge posited on a pertinent part of the judgment:

“Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two International Human Rights Covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966). In 1984, it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women in short “CEDAW”. Article 1 thereof defines discrimination against women as: -

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field”.

Thankfully, under the Constitution of Kenya 2010, all these rights are enshrined and they cannot be derogated against, they are *jus cogens*. The general rules of international law also form part of the Law of Kenya. See **Article 2(5)** of the **Constitution**. The yoke and burden of discrimination should not be worn by the female gender anymore, the Constitution set it apart.

[21] Back to **Section 40(1)**, the **Law of Succession Act**, that provides that a widow shall be considered as a unit alongside the children of the deceased when it comes to the distribution of the deceased's estate. In this case, Jerioth Wangechi the first wife of the deceased who even participated in the dowry negotiations for her co wives is equated to the last born child of the 3rd wife of the deceased. Her contribution and support to the deceased as a spouse is not recognized and in our view that failure to recognize her contribution is tantamount to discrimination.

We think we have said enough to demonstrate this appeal lacks merit. Accordingly, it is hereby dismissed with costs to the respondents.

Dated and delivered at Nyeri this 21st day of January, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. 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 to the original.

DEPUTY REGISTRAR