



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 4 OF 2013

IN THE MATTER OF THE ESTATE OF JAMLICK M'MAGIRI MUGWIKI- DECEASED

ESTHER KAROKI M'MAGIRI.....APPELLANT

VERSUS

GLORY KANANU MAGIRI..... 1ST RESPONDENT

ROSEMARY KAREGA MWIRIGI.....2ND RESPONDENT

(Being an appeal from the Ruling/Order of the High Court of Kenya at Meru

(Lesiit, J) dated 1st November, 2012

in

H C. Succ. Cause No. 164 of 2008)

JUDGMENT OF THE COURT

[1] The dispute in this appeal sadly involves members of the same family. Esther Karoki M'Magiri, the appellant, is the biological mother of Glory Kananu Magiri and Rosemary Karega Mwirigi the 1st and 2nd respondents respectively. This is a sad reminder that family values that are anchored on peaceful co-existence, respect, care for one another and harmony are now replaced by conflict and strive driven by material gain or advantage. The dispute is over the distribution of the estate of the late Jamleck M'Magiri M'Mugwika, deceased who died intestate on 2nd September, 2005. The deceased was the appellant's husband and father of the respondents. He was survived by the appellant and six children two sons and four daughters.

[2] This unbidden persistence in litigation between mother and daughters would probably have rested at the High Court level had the learned Judge who confirmed the grant of letters of administration as per the appellant's proposal, disregarded the proposals put forward for the final distribution of the deceased estate and merely followed the provisions of **Section 35** of the **Law of Succession**. This is because the beneficiaries had not agreed, each had put in their preferred mode of distribution and the estate was not subjected to an independent valuation to enable the court arrive at an equal distribution. However, at the time the grant was issued and confirmed to the appellant, the Judge would not have

known that the two daughters, who claimed their consents were not obtained, were left out of their father's estate. The respondents contend that their consents were obtained through misrepresentation, they were not fully aware of the mode of distribution of their father's estate and they did not renounce their interests thereto. It is not disputed at all that the respondents are entitled to their father's estate and they cannot be faulted for insisting on their rights. What is odd, nonetheless is that between the appellant and the respondents, it is acknowledged that there was no intention of disinheriting the 1st and 2nd respondents of their father's estate, the parties however cannot agree on how to utilize the assets forming part of the deceased's estate for the benefit of everybody, even in the face of clear and unambiguous provisions of the law.

[3] This is how the dispute that has now snowballed into this appeal started. The appellant filed a petition for grant of letters of administration for the deceased's estate on 2nd May, 2008, before the High Court in Meru. According to the affidavit in support of the petition, the deceased was survived by the following:

- (a) Esther Karanu M'M agiri - wife**
- (b) Kenneth Mworio Magiri - Son Adult**
- (c) Beatrice Karimi - Daughter Adult**
- (d) Jacinta Kagwiria - Daughter Adult**
- (e) Rosemary Karega - Daughter Adult**
- (f) Glory Kaguri - Daughter Adult**
- (g) Fanuel Magana M'Magiri - Son Adult**

The deceased left the following properties:

- (a) Ontulili/Ontulili/Block 1 (Katheru) 855**
- (b) Abothuguchi/Katheri/2733**
- (c) Ntima/Ntakira/2573**
- (d) Ntima/Ntakira/1883**

[5] The petition was accompanied by consent by all the dependants of the deceased. The grant of letters of administration intestate was issued to the appellant on 4th May, 2009. On 29th July, 2010, the appellant applied for the confirmation of the grant, it was supported by her own affidavit that provided her preferred mode of distribution of the deceased assets, and an undated consent purportedly signed by all the dependants of the deceased pursuant to the provisions of **Rules 40(8) of the Probate & Administration Rules**. The grant was confirmed on 6th December, 2010. On 21st March, 2012, two of the daughters of the deceased, Glory Kaguri Magiri and Rosemary Karega Mwirigi filed what we would call, an omnibus application by way of a Chamber Summons in which they sought for several orders. The most pertinent order was the one seeking for the revocation of the grant issued to the appellant.

[6] This was on the ground that the respondents, who were daughters of the deceased, alleged that they were duped when they gave their consents that their father's estate was going to be distributed among all of them equally. Just to realize later that they were left out as children of the deceased. The respondents contended that they were not aware of the proposal on distribution that made no provision for them; their two brothers had also sold one of the properties and consumed the proceeds to their

detriment. The appellant in opposing the application, maintained in her replying affidavit sworn on 26th March, 2012, that the respondents gave their consents willingly in the presence of her advocates; the application for revocation of the grant was, therefore, an afterthought.

[7] The application was heard by **Lesiit, J.**, and by her judgment dated 1st November, 2012, the respondents application was allowed. Although the learned Judge did not make a specific order revoking the grant, the Judge made the following orders on how the deceased's estate was to be distributed thereby setting aside the earlier distribution of the estate:-

"1. (a) LR. No. Abothuguchi/Katheri/2733, the petitioner to have life interest.

(b) Upon determination of petitioner's life interest, the same to be shared:

i. 0.285 Ha. to Fanuel Magana Magiri where he has settled.

i Balance to be shared equally between Beatrice Karimi Jacinta Kagwiria, Rosemary Karega and Glory Kaguri.

1. LR. NO. ONTULILI/ONTULILI /BLOCK 1 (KATHERI) 855 to be shared equally among the sons, widow and daughters of the deceased.

2. LR. NO. NTIMA/NTAKIRA/2570, to Fanuel Magana in whole.

3. LR. NO. NTIMA/NTAKIRA/2573 to be shared equally among the daughters of the deceased.

4. LR. NO. NTIMA/NTAKIRA/1883 to be shared thus:

(a) Kenneth Mworja Magiri to take half portion where he has developed.

(b) Other half to be shared as follows:

(i) Esther Karoki Magiri, one front room and five rear rooms.

(ii) Kenneth Mworja Magiri, one front door.

(iii) Beatrice Karimi, one rear room.

(iv) Jacinta Kagwiria, one rear room.

(v) Rosemary Karega, one rear room.

(vi) Glory Kaguri, one rear room

(vii) Fanuel Magana Magiri, one rear room.

5. 1 order cancellation of any of the titles issued earlier which would make the orders herein above inoperable. The affected titles be re-distributed as ordered in this ruling.

6. Plot No. 55A/Likii is unaffected. I am satisfied that the petitioner fully accounted for the money realized from the sale of the same".

[8] In arriving at the above orders of distribution of the deceased estate, the learned Judge considered the provisions of **Section 35** of the **Law of Succession** which she recited in full in her judgment, and the provisions of **Article 27 and 65** of the **Constitution** that outlaw differential treatment on the basis of gender and land ownership respectively. Regarding the issue of consents, that were alleged to have been signed by the respondents, this is what the Judge stated:-

"I have already set out the consent filed herein. They were filed on the same day but one is dated. The dated one is not signed by (sic) the 1st appellant. The crux of the matter is whether it was properly executed as required by law. It ought to have been signed in the presence of a lawyer. Both applicants deny signing in the presence of a Commissioner for Oaths or of the lawyer named. That issue is lightly contentious. The easiest way to resolve that issue was by getting an affidavit from Ireri D. Muchangi, to say the consent in issue was signed in his presence. There was no such affidavit. Mr. Arithi relied on Court of Appeal Dares Salaam Civil Appeal No. 18 of 1975, Brooke Bond Liebig (T) Limited vs Mallya and Nakuru, HCCC No. 243 of Diamond Trust Bank of Kenya vs Supply and Panels Limited. Cases on the circumstances under which a consent order can be set aside. With respect, these cases do not apply to the current case. Section 107 and Section 108 of the Evidence Act provides that the burden of proof lies on the person would fail if no evidence were given by either side, and that he who asserts the existence of facts must prove that these facts exist. I find that the petitioner did not discharge her burden to prove, one that the consent to the mode of distribution of the deceased's estate was signed in the presence of a Commissioner for Oaths, and two, she did not adduce any evidence to prove that the suggested mode of distribution in the supporting affidavit was explained to the applicant. In the circumstances, I believe the Applicant that there was concealment of material facts to them and for that reason, the consent filed in support of the confirmation were flawed. The grant was confirmed on the basis of the said consent".

[9] This is the judgment that triggered the appeal by the appellant. In her Memorandum of appeal before us, she has cited 12 grounds of appeal which were argued in a thematic order. Mr. Arithi, learned counsel for the appellant challenged the format of the application that sought the orders of revocation. He submitted that under **Rule 59(1)** of the **Probate and Administration Rules**, there is no provision for filing a chamber summons; the respondents used the wrong procedure, therefore, the application should have been struck out notwithstanding the provisions of **Article 159** of the **Constitution** that outlaws undue regard to technicality.

[10] The second cluster of arguments presented by counsel for the appellant, touched on the burden of proof. According to counsel for the appellant, the learned Judge wrongly shifted the burden from the respondents to the appellant despite the fact that the respondents who denied having signed the consents bore the burden of calling the Commissioner of Oaths. The family had agreed on the mode of distribution and their agreement was sealed by the consents given by the respondents; that the consent was valid and the respondents did not file an objection but they waited and came to court after the grant was confirmed which was an afterthought.

[11] Thirdly, counsel submitted that as the respondents were fully aware of all that was going on with the deceased's estate, they were not discriminated against and that there was no point of invoking the provisions of the Constitution on gender discrimination. Finally, the fourth argument pursued by Mr. Arithi was that the grant was not revoked, the Judge erred by merely redistributing the estate and thereby marginalizing the appellant who is advanced in age and she had participated with the deceased to acquire the subject properties; also one of the beneficiaries by the name of Kenneth Mworira was only allocated a small portion of the estate described as a 'door of a shop'. Counsel also faulted the distribution which he argued was not practical, he urged us to allow the appeal.

[12] In addition to the oral submissions, Mr. Arithi also referred to several authorities, the case of **Makhangu v Kibwana, Mombasa C.A. No. 84 of 1990**. In that case, this court was dealing with the jurisdiction of the Court of Appeal in Succession matters in the light of the provisions of **Section 47** of the **Law of Succession Act**. We have no doubts in our minds, that we have jurisdiction to deal with the present appeal just as it was held in that case that any order made by the High Court whose outcome is a decree is appealable under **Section 66** of the **Civil Procedure Act**. The other authority touched on judgments or orders recorded by consents of the parties; **Wasike v Wamboko, 1976-1985 IEA 625; Mburugu v Fidelity Shield Insurance Company Limited, 2007 EA 190**; on the standard of proof in civil cases.

[13] For his part, Mr. Mbabu, learned counsel for the respondents saw nothing wrong with the

distribution ordered by the Judge which he defended. He too raised a technical issue regarding the competency of this appeal which he argued was filed out of time. We however promptly pointed out to him the provisions of **Rule 84** of this **Court's Rules** which provide that an application to strike out an appeal should be made within 30 days from the date of service of the appeal. In further arguments, Mr. Mbabu defended the application for revocation arguing that the inclusion of the title "*Chamber*" instead of only the "*Summons*" did not prejudice the appellant. Moreover, under **Article 159 (2) (d)** of the **Constitution**, the Courts are enjoined to take a broad view of justice and not to dwell on technicalities. We agree with this Mr. Mbabu that nowadays the courts are taking a broad view in the administration of justice, and procedural errors such as a title of an application which does not affect the substance of the matter or prejudice the opposite party in any way are to be disregarded.

[14] Regarding the burden of proof, Mr. Mbaabu submitted that under **Section 107-112** of the **Evidence Act**, it was the appellant who alleged the consents were signed before a Commissioner for Oaths and it was upon her to prove the consents did conform with the prescribed Form 37 by **Rule 40(8)** of the **Probate and Administration Rules**: A consent that purportedly disinherited beneficiaries of their legal entitlement could not be taken lightly; the court was justified in its finding that the respondents were discriminated against on the basis of their gender or their marital status as daughters of the deceased. Or the appellant discriminated against her own children through favoritism by the way she distributed the estate of the deceased. Mr. Mbaabu argued that although the Judge ordered a redistribution of the estate, the grant of letters of administration was not revoked: Finally, the court had no choice but to cancel the resulting titles.

[15] We have considered the submissions, the record of appeal and the arguments by counsel in support of their rival propositions. This appeal in our view raises two legal issues: Whether the Judge erred by allowing the respondents' application for revocation and re-distributing the assets of the deceased in the manner it was done? The other issue is whether the re-distribution of the estate is in accordance with the provisions of the **Law of Succession Act**.

[16] The facts of this case are not at all disputed. The gravamen of the appeal is whether the respondents signed the consents thereby relinquishing or renouncing their share and interest in the deceased's estate. The respondents denied that there was full disclosure when they signed the consents or that material information was withheld. The so called consents were also not dated; and the person who allegedly witnessed their signatures did not adduce any evidence. The respondent's denial that they signed the consents; and the fact that the alleged signing took place in the offices of the appellants advocate, we agree with Mr Mbabu that shifted the burden upon the appellant to prove that fact.

[17] The respondents are undisputed beneficiaries of the deceased's estate who are entitled to their father's estate. We are therefore in concurrence with the trial Judge that disinheriting a beneficiary of their entitlement through a court order is a matter that a court should not take lightly. The respondents alleged that they were misled to sign the consent. The consequential effect of the said consents led to their being left out of their father's estate. Did failure by the appellant to disclose the mode of distribution of the deceased estate amount to material non-disclosure? It is imperative in answering the aforementioned question to consider what amounts to a material fact. **The Black's Law Dictionary, 8th Ed** defines material as-

"Of such nature that knowledge of the item would affect a person's decision making."

[18] In determining whether the appellant was guilty of material non-disclosure, the Court has to first consider if the undisclosed fact was material to the decision either to issue and confirm the grant to the appellant. ***In Brink's-Mat Ltd. -vs- Elcombe & Others (1983) 3 ALL ER, 188 & Tweed -vs- Parades Commission for Northern Ireland (2007) 2 WLR, 1.***, it was held that, whether a fact is material depends on the importance of that fact to the issue to be decided. Scrutton L J in ***R-vs- Kensington Income Tax comrs exp princess Edmond de polgnac (1917) KB 486*** held,

"the material facts are those which it is material for the Judge to know in dealing with the application as made "

[19] Secondly, it is imperative for the Court to take into account the motive or intention of the appellant's failure to fully disclose the mode of distribution of the deceased estate. Hancox CJ. In ***Tiwi Beach Hotel Ltd -vs- Stamm - Civil Appeal No. 63 of 1990*** held that in determining whether a litigant is guilty of material non-disclosure, it is important to consider his intention or motive. Hancox CJ. In distinguishing the decision of this Court in ***Owners of the Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1 & R -vs- Kensington Income Tax comrs exp princess Edmond de polgnac (supra)*** held that the non-disclosure in the said cases were of a different nature from the one in ***Tiwi case***. He stated that in the two cases there was clearly a motive to deceive by non-disclosure. In respect of ***Lilian S*** case he expressed himself as follows:-

" It followed in the Lilian S that the applicants for the warrant of the arrest of the ship had failed in their duty of candour to the Court. But it must have been plain to Caltex, and particularly to their employee Mr. Kariuki, that if they had revealed the true facts to the Judge, the court would never have given them the relief sought. So there is an obvious motive to deceive, by misrepresenting the true facts Caltex could obtain the arrest of the ship, which would be of immense advantage to them in pursuit of their claim."

Thirdly, the Court should also consider whether the appellant gained some advantage over the respondents by failing to disclose the mode of distribution of the deceased estate. By failing to disclose the interests of the respondents, they were left out of their father's estate, which disadvantaged them and gave undue advantage to their siblings.

[20] We are also in concurrence with the Judge that the alleged consents could not have been classified or put in the same category as consent judgments or consent orders that are recorded in court. This was a supporting document which was challenged and for good reasons as it was not dated and its authenticity was an issue that was not proved. The respondents gave very cogent reasons why they would never have renounced their interests in their father's estate. The appellant did not give any reasons why she left out or disinherited some of her own children especially when the respondents stated that they were misled in signing the consents. The respondents were entitled to their father's estate as of right and even if for one moment the appellant was made to believe they were not interested, and they turned round to claim their share, we cannot see why the appellant found it difficult to accede to their request as indeed they had a right and make provision for them. For these reasons, the Judge was justified to invoke and recite the provisions of the Constitution to demonstrate that discrimination of a party on the basis of their gender, status or custom has no place in our society. In any case there were allegations made by the respondents in their application that they were discriminated on the basis of their gender, thus the Judge rightly made a finding in that regard.

[21] Having found that the Judge was right to allow the application by the respondents, there are two issues nonetheless that were not addressed by the judgment. Firstly the Judge ordered the estate be distributed as above, and did not mention anything about whether the appellant was to continue as the administratrix of the estate. Having interfered with the mode of distribution, it was imperative for the Judge to make an order regarding the confirmed administrator of the estate. Secondly, there was no valuation done of the assets of the estate to guide the Judge on the equitable distribution of the estate. It is not possible to tell the value of shares distributed to the beneficiaries whether they were equal in value as provided for under Section 35 of the Law of Succession. This mode of distribution is challenged by the appellant, who contends that it is not equitable and also unworkable. Since there was no valuation, we have no way of verifying. Moreover the law provides that the estate of a single household such as this one, should vest upon the surviving spouse for life and upon the determination of her life interests, the residue be shared equally among the six children.

[21] For the aforesaid reasons we are inclined to interfere with the mode of distribution by setting aside the orders made on 1st November, 2012, and substituting with the following orders:-

(i) The certificate of confirmed grant issued to the appellant on 6th December, 2010, and the consequential orders are hereby set aside.

(ii) All the titles of the deceased to revert to the name of the deceased.

(iii) A fresh grant be issued in the name of the appellant and one of the respondents and the grant be confirmed as follows:-

- The Assets of the deceased be held by the appellant for life, and in trust of the deceased six children.*
- Upon determination of the appellant's life interest in the estate, the residue be shared equally among the six children of the deceased.*

This being a family matter, and the appellant's appeal having succeeded partially, we are inclined to order that each party do bear their own costs of appeal.

Dated and delivered at Nyeri this 26th day of February, 2014.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR