



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, GATEMBU KAIRU & ODEK, J.J.A.)**

**CIVIL APPEAL NO. 277 OF 2010**

**BETWEEN**

**MWONGERA MUGAMBI RINTURI ..... 1<sup>ST</sup> APPELLANT**

**FESTUS GUANTAI MUGAMBI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FLORENCE IMATHIU ..... RESPONDENT**

*Being an appeal from the Ruling of the High Court of Kenya at Meru (Kasango, J.) dated 28<sup>th</sup> May, 2010*

*in*

*H.C. Succ. Cause No. 213 of 1997)*

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**JUDGMENT OF THE COURT**

1. The deceased, Perminus M<sup>o</sup>Mugambi Rinturi, (polygamous man) died in 1985. The beneficiaries of his estate have been in litigation ever since and by a judgment dated 1<sup>st</sup> April, 2009; the High Court (***Emukule, J.***), directed the mode of distribution of the estate between the various houses. In the said judgment, the appellants were appointed as joint executors of the estate.
2. By a Chamber Summons dated 16<sup>th</sup> July, 2009, the respondent Florence Imathiu and Josephine Kaarika, now deceased, brought an application before the High Court under **Rules 49** and **73** of the **Probate and Administration Rules** seeking orders *inter alia* that the appointment of the appellants as administrators of the estate of the deceased be annulled and the said Florence Imathiu and Josephine Kaarika be substituted and appointed as joint administrators of the estate. The application was heard before Justice Mary Kasango who by a Ruling dated 28<sup>th</sup> May, 2010, annulled the grant of letters of administration issued to the appellants and appointed Florence Imathiu and Josephine Kaarika as joint administrators of the estate. It is this order of annulment that is the subject matter of this appeal.
3. The appellants in their memorandum of appeal have raised five grounds as follows:

**(i) That the learned Judge erred in law and fact in nullifying the grant issued to the appellants without just cause.**

**(ii) The learned Judge erred in law and fact in confirming a new grant without giving the parties and opportunity of being heard after nullification and revocation.**

**(iii) The learned Judge erred in law and fact in that she confirmed the grant in terms of a judgment that had been arrived at improperly and without giving the appellants an opportunity of being heard.**

**(iv) That the Ruling/decision of the learned Judge is against the weight of evidence, bad in law and illegal.**

**(v) The learned Judge failed to appreciate that the distribution she confirmed had been done unlawfully and was being contested.**

4. The appellants in this appeal are seeking orders to be reinstated as administrators of the estate of the deceased or alternatively for this Court to order a retrial of the whole succession cause to enable the parties adduce evidence and have a fair distribution of the estate.
5. At the hearing of this appeal, the appellants were represented by learned counsel Messrs M. M. Kioga while the respondent was represented by learned counsels Messrs A.G. Riungu & Gikunda Anampiu.
6. Counsel for the appellant submitted that the learned Judge erred in law and fact in annulling the appointment of the appellants as administrators of the estate of the deceased. That there was no proof before the Judge that the appellants as administrators were not doing their work or that there was inactivity on the part of the appellants as administrators. Counsel pointed out that the deceased was a polygamous man; that the 1<sup>st</sup> appellant is a step-brother to the respondent while the 2<sup>nd</sup> appellant is a brother to the respondent. It was submitted that when the learned Judge appointed the respondent and Josephine Kaarika as joint administrators, the two were from the same house and by removing the 1<sup>st</sup> appellant as an administrator, the Judge erred and gave the entire estate of the deceased to one house to the exclusion of other house. It was submitted that what the Judge did was illegal as it was against succession laws where in a polygamous union, each house of the deceased is entitled to be represented by an administrator.
7. Counsel for the respondent opposed the appeal submitting that the learned Judge arrived at a reasoned, elaborate and a proper ruling having evaluated the evidence that was before her. It was submitted that the deceased was polygamous and he had more than two houses. That even when the appellants had been appointed as administrators, not all houses of the deceased were represented and as such, the appellants cannot argue that it is mandatory for all houses of a deceased polygamous man to be represented by an administrator. It was submitted that evidence was tendered before the Judge that showed the appellants had never been in a hurry to administer and distribute the estate of the deceased. That the grant or annulment of letters of administration is at the discretion of a Judge and in the instant case, the Judge properly exercised the discretion. Counsel submitted that the appellants have not shown that the Judge erred in exercising the discretion to annul the grant of letters of administration to the appellants. For the respondent, it was submitted that there is a specific allegation of fact in the present application to wit that the respondent has mismanaged the estate yet no evidence has been adduced to prove the same. The respondent admitted that she has finalized the distribution of the estate of the deceased as per the confirmed grant and there has been no mismanagement or plunder of the estate. It was admitted that an application has been made to the High Court to rectify the grant so that the names of the deceased should be as it appears in the land title documents. It was submitted that the appellants have declined to sign transmission documents to enable them get their share of the estate of the deceased. Counsel submitted that subject to rectification of the grant to reflect all the names of the deceased, the estate has been distributed to all beneficiaries as per the confirmed grant.
8. We have considered the grounds of appeal and taken into account submissions by counsel on the matter. We have analyzed the judgment of the High Court that is subject of this appeal. The learned Judge in annulling the grant and appointing the respondent as administratrix of the estate of the deceased stated as follows:

*“From the reading of this file, it has become clear to me that the administrators have shown that they are incapable of concluding the administration of this estate. As I said at the beginning of this ruling, the deceased died in 1985. This cause was filed in 1987 in the High Court in Nairobi before it was transferred to this court. I am of the view that the interest of justice requires that the grant issued to Mwongera Mugambi and Festus Guantai should be annulled... Section 66 of the Law of Succession Act gives this court discretion on who should be appointed as an administrator of the estate.... Bearing in mind the inactivity of the administrators in this matter and bearing in mind that the administrators have failed to give an account of money received by them..., I hereby annul the grant issued to Festus Guantai Mugambi and Stephen Mwongera Mugambi Rintari. I hereby appoint Florence Kinaitore Imathiu and Josephine Kaarika as joint administrators of this estate. To that end, I order a grant be issued to them. I order that the grant issued to Florence Kinaitore Imathiu and Josephine Kaarika be confirmed in terms of the judgment of 1<sup>st</sup> April, 2009”.*

9. The appellants submitted that the learned Judge erred in law in annulling the grant. **Section 66** of the **Law of Succession Act (Cap 160 of the Laws of Kenya)** provides that when a deceased has died intestate, the court shall have a final discretion as to the person or persons to whom a grant of letters of administration shall be made. The circumstances in which an appellate court can interfere with discretionary orders is well settled in the case of ***Mbogo & Another – v- Shah, (1968) EA 93***, where it was held **at 96** that:

*“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 law that an appellate court should not interfere with the 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”.*

10. In the instant case, the appellants have not demonstrated to our satisfaction that the learned Judge erred in exercising her discretion under **Section 66** of the **Law of Succession Act**. Our analysis of the judgment reveals that the Judge found as a fact that there was inactivity on the part of the appellants as administrators of the estate; there was failure by the appellants to account for monies received on behalf of the estate; that the 1<sup>st</sup> appellant, Mwongera Mugambi, had sold 3 acres of land belonging to the estate before the grant was confirmed. The appellants have not been able to demonstrate that these factual findings by the Judge were erroneous. We have considered the provisions of **Section 66** of the **Law of Succession Act** and the facts before the Judge, we are satisfied that the court did not err in exercising the discretion to annul the grant and appointing the respondent as administratrix of the estate.

11. On the submission that the appellants were not given a right to be heard, we have examined the record and it is clear that the appellants were represented by counsel during the hearing of the Chamber Summons Application dated 16<sup>th</sup> July, 2009. A key prayer in the Chamber application was annulment of the grant issued to the appellants. Not only did the appellants file a replying affidavit to the Chamber Summons, their counsel argued the case. We are satisfied that the appellants were not only given an opportunity to be heard but indeed they were heard.

12. In the present appeal, the appellants are seeking an alternative order for retrial of the whole succession cause to enable the parties adduce evidence and have a fair distribution of the estate. The Notice of Appeal lodged in this appeal relate to the Ruling delivered on 28<sup>th</sup> May, 2010, by the Hon. Justice Kasango. The issue of re-distribution of the estate of the deceased was not canvassed before the learned Judge. In addition, **Civil Appeal No. 32 of 2013**, between the parties hereto challenges the judgment of Justice Emukule which determined the manner of distribution of the estate of the deceased. The alternative prayer in this appeal cannot be considered as it was

not an issue that was canvassed before Justice Kasango and it is also the subject of ***Civil Appeal No. 32 of 2013.***

13. For the foregoing reasons, we find no merit in this appeal and the same is hereby dismissed. This being a family dispute, each party shall bear his/her own costs.

***Dated and delivered at Nyeri this 28<sup>th</sup> day of May, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***S. GATEMBU KAIRU***

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***JUDGE OF APPEAL***

***OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**

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