IN THE COURT OF APEAL AT NAIROBI

(CORAM: GATEMBU, M'INOTI & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 229 OF 2004

BETWEEN

GWM……...……..…
APPELLANT

AND

D W M..……
RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mulwa, J.) dated 14th July, 2000

in

H.C.P & A.C. No 1934 of 1995)

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JUDGMENT OF THE COURT

The only question raised in this appeal is whether the property known as ***LR No. [particulars withheld] Karen, Nairobi*** ("the suit property") is part of the Estate of ***J M K (deceased)*** and therefore available for distribution to his heirs, or whether 50 per cent of the suit property belongs to the respondent by virtue of her contribution to its acquisition, thus making half of it unavailable for distribution. The appellant, ***G W M***, maintains that the entire suit property is part of the estate while the respondent, ***D W M*** claims 50 percent of it as her personal property.

It is common ground that both the appellant and the respondent are widows of the deceased, who died on 9th March, 1995. Both are also the administratrixes of the estate of their late husband by virtue of a grant of letters of administration intestate issued by the High Court on 18th July, 1996.

The appellant was married to the deceased under the ***Marriage Act, cap 150*** (now repealed), in 1972. They have five children, namely, ***I W, C M, J W B, E M*** and ***J N.***

In 1981, the couple became estranged and separated. The marriage was however never dissolved. In the same year, 1981, the deceased started cohabiting with the respondent as husband and wife and they had three children namely, ***J N, D K*** and ***K K***. There is no dispute that the respondent is a widow of the deceased and her children heirs of the deceased by virtue of ***section 3(5) of the Law of Succession Act, cap 160 Laws of Kenya***.

As of the time the appellant and the deceased separated in 1981, the suit property had not been acquired. The same was acquired in 1992, during the marriage between the deceased and the respondent. The deceased and the respondent lived on the suit property as their matrimonial home, while the appellant lived in Dandora, Nairobi.

> On 28th December, 1994, barely three months before he died, the deceased took the appellant back as his wife. The appellant went to live in Mwea while the deceased and the respondent continued to live on the suit property in Nairobi. After the death of the deceased, the appellant and the respondent were involved in the usual legal tussles and skirmishes entailing petition for grant, objections and cross petition for grant. Sanity somewhat prevailed and on 18th July, 1996, the High Court issued letters of administration intestate jointly to the appellant and the respondent.

Kindred harmony however did not hold for long, for on 23rd September, 1998, the respondent alone applied for confirmation of grant. The appellant immediately filed an objection to confirmation of grant, and on 20 th October 1998 filed her own application under ***Rule 49 of the Probate and Administration Rules*** praying the High Court to hear and determine the distribution of the estate of the deceased among the beneficiaries, because the two administratrixes had failed to agree on distribution.

The real bone of contention, as it turned out, was the suit property. The respondent had in her application for confirmation of grant proposed that the same be given to her on her own behalf and in trust for her children, while the appellant in hers had proposed that the suit property be valued, sold and the proceeds distributed equally among all the children of the deceased. This last proposal drew the retort from the respondent that the appellant was merely intent on disinheriting her from her matrimonial home, the suit property, the acquisition of which she had contributed to.

On 27th April, 1999 the parties appeared before ***Mulwa, J.*** and agreed that the only issue of disagreement was whether the suit property belonged to the estate of the deceased or to the respondent. The parties proposed to call evidence to determine that issue. Consequently on the same date the learned judge made the following order:

> ***"The property LR No [particulars withheld] seems to be the source of the disagreement. It will be necessary to determine whether the property belongs to the estate or to the applicant. I order that there shall be hearing to determine the issue."***

After hearing evidence from the appellant and the respondent, and considering submissions by their respective counsel, the learned judge, in a judgement dated 14th July 2000, held that the respondent had contributed to the acquisition of the suit property and was therefore entitled to half share of the same. After taking into account the number and ages of children in the two houses of the deceased, as well as the property available to the appellant, the learned judge gave the suit property to the respondent to hold in trust for her children. The appellant was given the property in Mwea, to be similarly held in trust for her children. The latter order was, in our view, unnecessary because the issue was not before the court and in any event, the parties themselves had already agreed that property was to go to the appellant.

Aggrieved by the judgement, the appellant preferred the present appeal. The appeal is founded on the following 4 grounds of appeal:

> ***"1. The learned trial judge erred in law and in fact in failing to apply the Succession Act and instead deciding the case by applying the law and principles provided under section***
>
> ***17 of the Married Women's Property Act, 1882;***
>
> ***2. The learned trial judge erred in law and fact in failing to find and treat the property subject matter in dispute LR No. [particulars withheld] Karen, Nairobi as***

property of the Estate;

3. The learned judge erred in law and fact by totally ignoring the Succession Act, cap 160 in determining the distribution of the property which formed part of the estate of the deceased to the survivors and children of the deceased;

4. The learned judge erred in making findings against undisputed facts and weight of evidence.

The appeal was heard by way of written submissions and oral highlights of the written submissions. We must note from the outset that in their written submissions, the appellant and the respondent veered off the real issue and introduced a multitude of other side issues such as the rejected will of the deceased and the existence, status and distribution of other properties of the deceased. We do not see how those issues can be introduced in this appeal. Firstly it is on record that the parties themselves informed the learned judge that the distribution of the other properties in the estate had been agreed upon and that there was no dispute in that regard.

Secondly, the only issue that the parties submitted to the learned judge for determination was whether the suit property belonged to the estate or to the respondent, and the evidence that was led before the trial court focused on that issue. Lastly, the grounds of appeal put forth by the appellant cannot allow introduction of new issues that were not placed before the learned judge and which he did not adjudicate upon. We shall accordingly consider only the submissions that are relevant to the issue decided by the learned judge, and the grounds of appeal before us.

Mr Munyasia, learned counsel for the appellant argued all the grounds of appeal globally. Counsel submitted that the procedure adopted by the learned judge to determine ownership of the suit property was fatal. He contended that the learned judge did not have jurisdiction to hear the dispute in the manner he did and that even though the parties had participated in the proceedings, that in itself could not confer jurisdiction where the law had conferred none.

Counsel further submitted that the trial judge had erred by relying on the principles of the ***Married Women's Property Act, 1882*** rather than the provisions of the Law of Succession Act in determining the ownership of the suit property. As far as he was concerned, the principles that the learned judge used to award 50% of the suit property to the respondent were drawn from ***section 17*** of the 1882 statute, yet the dispute before him was not a dispute between a husband and wife over matrimonial property, but a dispute on distribution of property to heirs of a deceased person.

It was Mr Munyasia's view that since the suit property was registered in the name of the deceased who had died intestate, the same should have been distributed exclusively in accordance with sections 35 to 38 and 40 of the Law of Succession Act. Had the respondent contributed to the acquisition of the property as she had alleged, counsel continued, her name could have been on the register.

Lastly Mr Munyasia argued that there was sufficient evidence adduced to show that the respondent did not own the suit property or any share therein because by her past conduct and in previous family meetings, she had not laid any claim to the suit property. The impugned will of the deceased, he continued, had listed the suit property as the property of the deceased. In addition, counsel contended, the respondent had acquired some other property during the subsistence of her marriage to the deceased, which was registered in her name. We were invited to draw the inference that her moneys went to buy that property or that if she had contributed to the purchase of the suit property, she would have been similarly registered as proprietor.

Mr Munyalo, learned counsel for the respondent opposed the appeal as lacking in merit. Counsel submitted that under the Law of Succession Act, the High Court has wide powers to hear and resolve all disputes pertaining to succession and that all the parties to this appeal had voluntarily and actively taken part in the proceedings which the appellant was now challenging.

Learned counsel submitted that when the appellant separated from the deceased in 1981, the two had literally no property, save a grassthatched house on the ancestral land in Mwea. All the property of the Estate was acquired, Mr Munyalo contended, after the appellant had left the deceased and the respondent had come into his life.

Counsel urged that there was credible and consistent evidence that the respondent was earning a steady salary and that she had was engaged in large scale irrigation and lucrative horticultural farming, which brought in high and regular income. That income, it was contended, contributed to the purchase of the suit property and consistent with the practice of many Kenyan families, the property was registered in the name of the deceased as the husband.

Counsel invited us to find that there was no misdirection on the part of the trial judge; that his conclusion was arrived at on the basis of the evidence that was adduced; that the decision was in accordance with the law and fair; and that there was therefore no ground for interfering with the conclusion by the learned judge.

This is a first appeal from the decision of the trial court. In ***SUSAN MUNYI V. KESHAR SHIANI Civil Appeal No. 38 of 2002*** this Court explained its duty and approach in a first appeal as follows:

> ***"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."***

In ***RAMJI RATNA AND COMPANY LIMITED V WOOD PRODUCTS (KENYA) LIMITED Civil Appeal Number 117 of 2001*** this Court further stated that in a first appeal it will interfere with the decision of the trial judge only where the it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the findings he did.

The first issue that we must dispose of is jurisdictional, namely whether the learned judge had the jurisdiction to hear and determine the issue before him. As ***Nyarangi, JA*** stated in ***THE MV LILIAN S (1989) KLR 1*** jurisdiction means the authority which a court has to decide maters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. We readily agree with the appellant that the court can only entertain a matter in respect of which it has jurisdiction, and that in the absence of jurisdiction, the court must down its tools. The Supreme Court made the very point in ***IN RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION (SC Const. App. No. 2 of 2011)*** in the following terms:

> ***"…jurisdiction flows from the law, and the recipientCourt is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."***

In our view, we do not have to look beyond the Law of Succession Act to find that the High Court had jurisdiction to hear and determine the issue that was presented before it by the parties to this appeal. That Act expressly confers jurisdiction on the High Court to hear and determine any dispute relating

to succession of estates of deceased persons. Section 47 thereof provides as follows:

> ***"47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient…"*** (Emphasis added).

Under the Law of Succession Act, the estate of a deceased person, capable of being inherited by his or her heirs, comprises his **"free property".** Section 3 of the Act defines free property of a deceased person as:

> "***[T]he property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."***

In the dispute before the High Court, the respondent contended that 50% of the suit property was not the free property of the deceased which he could have disposed during his life time, because that share comprised her own contribution to the acquisition of the property. In our view, it was competent for the High Court to hear and determine whether the entire suit property constituted free property of the deceased which was available for distribution to his heirs.

It is possible that the appellant's real complaint is that the respondent's claim to 50% of the suit property should not have been adjudicated in the succession cause, but rather in a separate suit. In ***BENSON NJENGA KIMANI & OTHERS VS SIMON KINUTHIA KARIUKI & OTHERS HCP&AC No. 109 of 1994 (Eldoret)***, the High Court held that a succession cause was not the appropriate avenue for the determination of whether some assets of the estate were held in trust for the objectors, and that the claim of trust ought to be the subject of separate proceedings.

It is important to point out that in that case the objectors who claimed that the disputed property was held in trust for them were not dependants of the deceased or beneficiaries of his estate. They were not parties in the succession cause; they were primarily objecting to the issuance of grant of letters of administration in respect of the Estate. The High Court, correctly in our view, held that the grant of administration would first issue to the petitioners and thereafter the objectors would be at liberty to bring separate proceedings against the administrators of the estate of the deceased for determination, before distribution for the estate, whether the property in dispute or any part thereof, was held in trust to them.

In this appeal however, the administratrixes of the estate were already appointed. The respondent, who claimed half share of the suit property, was one of the administratrixes, and also one of the dependants and beneficiaries of the estate of the deceased. We are satisfied, having found that section 47 of the Law of Succession Act confers jurisdiction, that the course adopted by the High Court with the concurrence of the parties, to hear and determine the issue in the succession cause, was the most efficient and convenient method of resolving the dispute. Otherwise it would not have advanced efficient and cost effective determination of disputes to demand that the respondent files a separate suit to agitate her claim to a share of the suit property, in effect requiring her, as an administratrix to bring a claim against herself.

The decision of the High Court in ***RE KATUMO & ANOTHER (2003) 2 EA***, where it was held that although the High Court has under section 47 of the Law of Succession Act the power to hear and determine all manner and nature of applications, that jurisdiction has to be exercised within the provisions of the Act, can be easily distinguished on the same grounds. The claim to part of the property of the estate in that cause was made before a grant of letters administration was issued and the court held that such a claim amounted to intermeddling in the estate.

We are equally satisfied that the respondent adduced cogent and convincing evidence regarding her contribution to the acquisition of the suit property and that the trial court did not treat the matter before it as an application under the Married Women's Property Act, 1882. It is common ground that save for the ancestral property in Mwea, all the other properties of the estate were acquired

after the deceased had separated from the appellant and started cohabiting with the respondent. There was evidence of the considerable income that the appellant was generating from her farming activities and her contribution and involvement in the development of the suit property. In accepting the respondent's evidence regarding the acquisition and development of the suit property, the learned judge observed:

> ***"I accept her evidence (respondent's) on the business and the building of the Mwea and Nairobi houses. I was impressed by the manner in which she gave her evidence and even under aggressive crossexamination by Ms Mavisi, the learned counsel for the objector, she gave cogent replies which all along tied up with her explanation in the evidence in chief."***

That the appellant could have used the same kind of evidence in support of a claim under the Married Women's Property Act, 1882, is no ground for ignoring the evidence of her contribution to the acquisition and development of the suit property, in her personal claim to a share of the property, independent of her status as a dependant and beneficiary of the deceased. We do not see any misdirection by the learned trial judge or any basis for disagreeing with or disregarding his factual findings. In this regard we are accordingly guided by

the views of this Court in ***JOHN GATIBA BURUNA & ANOTHER VS JACKSON RIOBA BURUNA, CA No. 89 of 2003*** where it was stated:

> ***"While the Court of Appeal has jurisdiction to review the evidence in order to determine whether the conclusion reached by the superior court should stand, nevertheless, the court cannot properly substitute its own finding for that of a trial court unless there is no evidence to sport the finding or unless the findings are shown to be plainly wrong. Indeed it is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses."***

The appellant's other complaint was that the learned judge totally ignored the provisions of section 40 of the Law of Succession regarding distribution of the estate of a deceased person in a polygamous setting. The judgement of this Court in ***RONO VS RONO (2005) 1 EA 263*** was cited in support of the appellant's contention that in polygamous households, the applicable law is section 40 of the Law of Succession Act which provides for distribution of the estate to the households according to the number of children, adding the wife as an additional unit to the number of children.

We must reiterate that the parties themselves had agreed upon the distribution of the estate, save for the suit property. The distribution of the rest of the estate was not contested and was not an issue before the trial judge.

RONO VS RONO (supra) cannot avail the appellant on the facts of this appeal, in so far as the distribution in ***RONO VS RONO*** was unequal and distorted, giving far much less to daughters compared to the sons. We must also emphasize that in ***RONO VS RONO*** this Court held that notwithstanding the provisions of section 40 of the Law of Succession Act, the court has discretion

to take into account fairness in determining the distribution to dependants.

Omolo, JA expressed the point thus:

> ***"…I do not understand the learned judge to be laying down any principle of law that the Law of Succession Act (Chapter 160) of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the state where such a deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr Gicheru. I can find no such provision in the Act."***

Later in the same judgement, his Lordship added:

> ***"Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part I am satisfied the Act does not provide for that kind of equality."***

In this appeal the learned judge found that the respondent had contributed 50% of the suit property and was entitled to that share independent of her status as a beneficiary. In distribution of the other half of the suit property, the learned judge, properly in our view, and in accordance with the judgment in ***RONO VS RONO*** took into account the fact that the respondent's three children were still young and in school while the other children were already fairly well established, either working or married. On that basis the learned judge gave the suit property to the respondent to hold in trust for her children.

In our view, on the facts of this appeal, the conclusion and order of the learned judge cannot be faulted.Ultimately, we have come to the conclusion that this appeal has no merit, and the same is accordingly dismissed. This being a long drawn out family dispute with no real winners and losers and conscious of the urgent need for the parties to now settle down and live their lives as the family of the late J M K, we direct that each party bears its own costs.

Dated and delivered at Nairobi this 18th day of July, 2014.

S. GATEMBU KAIRU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original

/jkc

DEPUTY REGISTRAR