



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL NO. 218 OF 2009**

**CHARLES NDUNG’U WAMBUGU.....APPELLANT**

**VERSUS**

**PAULINE WANGARI WAMBUGU**

**REGINA NYANJUMBI WAMBUGU**

**PETER GICHUKI WAMBUGU**

**..... RESPONDENTS**

**CAROL WANGARI WAMBUGU**

**SIMON KAGUORA WAMBUGU**

*(Being an appeal from Judgment of the High Court of Kenya at Nyeri*

*(Makhandia, J.) dated 29<sup>th</sup> day of January, 2009 in H.C. Succ. C. No. 144 of 2004)*

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the High Court of Kenya (Makhandia, J.), (as he then was), dated 29<sup>th</sup> day of January, 2009, in H.C. Succession Cause No. 144 of 2004.

In that Judgment, the appellant Charles Ndung’u Wambugu along with other beneficiaries of the estate of the late Christopher Wambugu Mariara (deceased) filed an affidavit of protest. He was protesting against the summons for confirmation of the grant of letters of administration that were issued to the widows of the deceased namely Regina Nyanjumbi Wambugu and Pauline Wangari Wambugu. The late Christopher Wambugu Mariara died intestate on 19<sup>th</sup> November, 1999. The grant of letters of administration was issued to the two widows of the deceased on 30<sup>th</sup> May, 2000 by the Chief Magistrate’s Court at Thika. The succession matter was subsequently transferred to the High Court Nyeri. The widows of the deceased filed a summons for confirmation of the grant of letters of administration. There were several protests and the appellant in the instant appeal was one of the protesters.

The summons for confirmation and the several protests were heard by way of affidavit evidence and written submissions. Upon considering the matter this is what the trial Judge held in regard to the appellant’s protest:

***“How about the 5<sup>th</sup> Protestor, Charles Ndung’u Wambugu? He claims that the deceased had left behind a will in which he had distributed the estate that the petitioner and his younger brother, the 4<sup>th</sup> protestor were given land by the deceased at Muhotetu in his lifetime. He pleaded the court to distribute the deceased’s property according to the will. The answer to the above contentions are twofold. This cause was commenced as a petition for the grant of Letters of Administration Intestate and not as grant of probate. Accordingly, it is irrelevant that the deceased left behind a written will. The estate of the deceased will thus have to be distributed as intestate. In any event other than making the bold statement that the deceased left behind a will, no such will was exhibited in the affidavit of protest. If the documents filed on 24<sup>th</sup> June, 2008, titled “Speech from Mr. Wambugu Mariara (Mukamba) and the result of the following three elders” is what this protestor is referring to (sic) a will, in my considered judgment, the same cannot pass the slightest test of a valid written will. As for the gift intervivos, what I have already said with regard to the same in connection with the 1<sup>st</sup> protestor applies equally here. To this end, I would dismiss the protests filed by the 1<sup>st</sup> and 5<sup>th</sup> protestors. I direct that the grant be confirmed in terms proposed in the application for confirmation of grant dated 26<sup>th</sup> January, 2005. I make no orders to costs”.***

This is the judgment that provoked this appeal. The appellant who was acting in person proffered 6 grounds of appeal which can be summarized as follows in order to avoid repetition. The appellant challenged the judgment on the grounds that:

- u. His mother (Pauline Wangari Wambugu) ought not to have been given a share of the deceased’s estate as the deceased settled her in other parcels of land after they separated in 1960.***
- u. The deceased had settled all his children in various parcels of land except the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> protestors.***
- u. The appellant had settled with his family and made permanent developments on a parcel of land that ought to have been given to him.***
- u. The court failed to consider that the appellant settled the deceased’s hospital bills.***
- u. The deceased had left a written will which was disregarded.***
- u. The deceased’s estate should have been distributed by the appellant being allocated Thegenge/Karia/177 and plots R 81 and R 84, Kiawara Nyeri with the 1<sup>st</sup> and 2<sup>nd</sup> protestors as he has been paid rates and other liabilities for the plots.***

During the hearing, the appellant reiterated the above grounds and argued that since the grant of letters of administration was obtained fraudulently through concealment of material facts, that grant could not have been confirmed. The widows of the deceased secretly applied for the grant in Thika Magistrate’s Court whereas the properties of the deceased were located in Nyeri County where the deceased was also domiciled; therefore, the grant should not have been confirmed. He further argued that the estate of the deceased was distributed during his father’s lifetime. The deceased left a will in which the appellant was supposed to inherit the entire parcel of land at Thegenge/Karia and the two plots at Kiawara in Nyeri.

This appeal was opposed by Mr. Ndirangu, learned counsel for the 1<sup>st</sup> appellant. He emphasized in his submissions that the deceased died intestate, there was no valid will and in any event the petition was in respect of an intestate estate. All the parties including the appellant acknowledged in his affidavit of protest and objection that the deceased died intestate. Regarding the issue that the deceased was survived by three (3) wives including the appellant’s mother; Mr. Ndirangu submitted that there was no such evidence before the Judge of the High Court to show that the said 3<sup>rd</sup> wife was a dependant of the deceased or that she existed. In other words, the appellant introduced new evidence by including

irrelevant documents that were not before the High Court. Counsel supported the distribution of the estate as done by the High Court; as the appellant failed to produce any evidence to support the allegations that some beneficiaries were given gift intervivos by the deceased; the estate was distributed proportionately and the appellant was given appropriate shares while Regina Nyanjumbi Wambugu, a widow of the deceased was given a larger share as she held it in trust of two of her children who are also children of the deceased.

Mr. Kebuka Wachira, learned counsel for the 2<sup>nd</sup> respondent also opposed this appeal. He clarified that although the appellant was now seeking for revocation of the grant, what was before the High Court was a summons for confirmation and affidavits of protest and the instant appeal is as a result of dismissal of the appellant's protest. The widows of the deceased applied for confirmation of the grant and proposed a mode of distribution that took into account all the beneficiaries of the deceased according to houses. There was no will before the court and the trial Judge adequately addressed the issue of the will, counsel urged the appeal be dismissed as it was only the appellant who is disgruntled and wants to dispossess the 2<sup>nd</sup> respondent who was the senior wife of the deceased.

Several issues were raised in the memorandum of appeal, however, they boil down to two issues; whether the learned Judge erred by failing to consider the deceased had left a will in which he had distributed in his estate to all the beneficiaries and whether the appellant's mother was disinherited from the deceased's estate.

There were no witnesses that testified even on the contentious issue of whether the deceased disposed of some of his assets as gifts intervivos; whether there was a will and whether the appellant's mother was a dependant of the deceased. Nonetheless this being a first appeal, it is the duty of the 1<sup>st</sup> appellate court to re-evaluate the evidence, assess it and make its own conclusions.

See the case of ***Selle and Another v Associated Motor Boat Company Ltd and Others***, [1968] EA 123 at P.126. Sir Clement Lestang VP said: -

***“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of facts by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abani Hameed Saif v Ali Mohamed Sholaw [1955] 22 Each 270)”***

As stated above, this matter was determined by way of submissions and affidavit evidence. As regards the second issue of whether the deceased had three wives and whether the appellant's mother was a dependent of the deceased; that was an issue of fact that was not before the High Court and certainly, it cannot be introduced in this appeal. Moreover, there was admission by the appellant that his mother separated with the deceased in 1960 and was married elsewhere; how then does she become a dependant or beneficiary of the deceased's estate when no evidence was adduced regarding her dependency?

On the other issue of whether the deceased left a will; the learned Judge carefully considered this issue and rightly held that there was no valid will. This, of course, being a 1<sup>st</sup> appeal it is the duty of this court to re-evaluate the evidence, assess it and arrive at its own independent conclusions. Did the deceased leave a will? This is what constitutes a valid will according to **Section II** of the **Law of Succession**:

**.....II “No written will shall be valid unless –**

- a. ....
- b. ....

***the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person, and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary”.***

There was no evidence before the trial court that the deceased left a valid will. We agree with the trial Judge that the matter before the trial court was in regard to an intestate estate. Moreover, the appellant did not cross-petition for the grant of a probate in regard to a deceased written will if indeed he was convinced the deceased distributed his estate by way of a written will. We are also in agreement with the trial court that the documents the appellant presented as the will of the deceased did not meet the test of a valid will; it cannot also be construed as an oral will made under customary law as there was no evidence adduced before the trial court in support thereto. Indeed, this matter was determined based on affidavit evidence and written submissions. Given the evidence that was placed before the learned Judge, we are unable to fault the conclusions arrived at in regard to the appellant’s protest which we have reproduced verbatim elsewhere in this judgment.

Accordingly, we find no merit in this appeal which we dismiss with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

***Dated and delivered at Nyeri this 5<sup>th</sup> day of November, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***M. K. KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO – ODEK***

.....

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**