



**REPUBLIC OF KENYA**

**Court of Appeal at Nyeri**

**Civil Appeal 126 of 2009**

**MARGARET WANJA ELIJA.....APPELLANT**

**AND**

**PETER NGARI ELIJAH KIMANI.....RESPONDENT**

*(Being an appeal from the proceedings and Judgment of the High Court of Kenya at Embu (Khaminwa, J) dated 29<sup>th</sup> January, 2008.*

**in**

**Embu High Court Succession Cause NO. 176 OF 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The proceedings culminating in this appeal arise from Embu HCCC Succession cause No.176 of 2003 relating to the estate of one **Mati Ngari** who had passed on on the 9<sup>th</sup> day of April, 2003. The succession proceedings had been taken out by one **Peter Ngari Elija Kimani** in his capacity as a son of the deceased. Those named as beneficiaries of the said estate and who were all indicated as adults are:-

***(a) Ann Miru Mati- wife***

***(b) Lucy Kagundu Kimani- daughter***

***(c) Beatrice Wakarii Gichabi- daughter in law.***

***(d) Joseph Nyaga- son***

***(e) Peter Ngari- son***

***(f) Peter Ngari- son***

***(g) Mary Muthoni- daughter***

***(h) Faith Wamba- daughter***

***(i) Margaret Wanja- daughter***

***(j) Elizabeth Wambui- daughter***

***(k)Rose Wanjiru- daughter***

***(l) Alabina Wanjira – daughter***

The properties forming the estate of the deceased were enumerated as:-

***(a)Ngariama/Thirikwa/1940 (0.99 Ha)***

***(b)Ngariama/Thirikwa/1941 (1.20 Ha)***

***(c)Ngariama/Thirikwa/1942 (6.99 Ha)***

***(d)Ngariama/Thirikwa/1943 (0.99 Ha)***

***(e)Ngariama/Thirikwa/1735 (0.26 Ha)***

The first grant had been issued on the 16<sup>th</sup> day of March, 2005 in the joint names of **Peter Ngari Kimani and Lucy Kagondu Kimani**. On the 30<sup>th</sup> day of June, 2005, one **Peter Ngari Elijah Kimani** presented an application dated 24<sup>th</sup> June, 2005 seeking confirmation of the grant which had been issued on the 16<sup>th</sup> day of March, 2005. The mode of distribution had been indicated in paragraph 5 of the supporting affidavit along the following lines:-

***(1)Land parcel No. Ngariama/Thirikwa/1735 to be given to Lucy Kagondu Kimani.***

***(2)Land parcel No. Ngariama/Thirikwa/1940 to be given to Joseph Nyaga Mati ID no.1400426.***

***(3)Land parcel No. Ngariama/Thirikwa/1941 to be given to Ann Miru Mati ID. No.1400977.***

***(4)Land parcel No.Ngariama/Thirikwa/1942 to be given to Beatrice Wakari Gichohi ID. No. 2923671.***

***(5)Land parcel No. Ngariama/Thirikwa/1943 to be given to Peter Ngari Elijah Kimani ID. No. 1213010.***

The appellant filed an affidavit of protest against the said application for confirmation deponed on the 24<sup>th</sup> day of August 2005 and filed on the 24<sup>th</sup> day of August, 2005. The major complaints raised by the appellant are that the Respondent **Peter Ngari Elija Kimani** had not included the appellant as one of the beneficiaries of land parcel No. **Ngariama/Thirikwa/275**; that the appellant lived on the said land which formed part of the fathers Estate as an unmarried daughter together with her family and that she (appellant) had built thereon and cultivates thereon for her family and lastly that she was a stranger to the subdivisions effected on land parcel number **Ngariama/Thirikwa/275** which were indicated to be forming the basis of the distribution.

The Respondent filed a supplementary affidavit deponed on the 12<sup>th</sup> day of July, 2006 and filed on the same date. He put forth what is tandem with the wishes of the deceased father. The appellant put in a reply to the said Respondents' supplementary affidavit deponed by the appellant on the 20<sup>th</sup> day of July, 2006 and filed on the 25<sup>th</sup> day of July, 2006.

Parties were heard by way of viva voce evidence. The appellant **Margaret Wanja Elija** gave evidence on her own behalf and called one witness namely **John Muriu**. The Respondent on the other hand gave evidence on his own behalf and called three other witnesses namely **Anna, Joseph Nyaga Mati and Albina Wanja Mati**. The learned trial Judge (**Khaminwa J**) dismissed the protest. The appellant was aggrieved by that dismissal order and she appealed to this court citing six (6) grounds of appeal summarized as:- the learned Judge erred in law and fact by failing to record properly the evidence of the appellant, in failing to take into consideration the fact that the appellant and her children had always resided in original parcel of land **No. Ngariama.Thirikwa/275** and extensively developed a portion

thereof, by totally disinheriting the appellant, by failing to consider that the portion given to the appellant by the deceased in his life time could only have been used to determine the extent of the deceased's estate that the appellant could inherit, by including property that did not belong to the deceased in the confirmed grant and lastly, in taking into consideration documentary evidence that was not properly produced in court.

In consequence thereof the appellant urged this court to allow the appeal and the Judgment delivered on 29<sup>th</sup> January, 2008 to be set aside and/or varied with costs to the Appellant.

Parties appeared in person for the hearing of the appeal. In her oral high lights to court, the appellant stressed that the respondent is her blood brother; he had been appointed as a trustee and or administrator of the estate of their deceased father. He moved to court and presented succession proceedings without her knowledge and had to be directed by the court to bring the proceedings to her notice. She is not married and for this reason she is a beneficiary of the deceased's estate. She felt aggrieved because she was left out of the distribution list and yet she is a beneficiary. She concedes to have been given some property during the life time of the deceased which she maintains should not have been taken into consideration when determining what constitutes the deceased's estate, that the portion she had been given during the deceased's life time is smaller than what her brother the respondent got. To her knowledge, the deceased's parcels of land comprised land parcel numbers Ngariama/**Thirikwa/275 and 1255** and she is a stranger to other subsequent subdivisions giving rise to new resulting numbers. Appellants' further grievances arose from the fact that the court gave prominence to proceedings undertaken before the elders' tribunal which distributed the deceased's' property during the deceased life time to his wife and sons and which had excluded her as a beneficiary. She maintains that she should have been given a share of her inheritance of the deceased estate and she should be adjudged so.

In response, the Respondent urged the court to dismiss the appeal, on the ground that he concedes that he is the administrator of the deceased fathers' estate; confirmed that the deceased had two parcels of land which were indeed subdivided and shared amongst his ten children comprising seven daughters and three sons; confirmed further that indeed there is in place an elders tribunal proceedings in which the deceased distributed his estate during his life time; that when seeking confirmation, he took into consideration the deceased's sentiments in the tribunal proceedings on how the deceased's' estate should be distributed; denied the appellant's assertion that she had been disinherited as she had been allocated parcel number 1733. The Respondent denied the appellant's assertion that she has extensively developed the portion she has exclusive use of on parcel number 275; that all that the appellant wants is to disinherit other beneficiaries inclusive of their own mother. It is the respondent's assertion, that all beneficiaries got equal share holding. The court is invited to be guided by the content of the supplementary affidavit filed in opposition to the protest to which the appellant put in a reply which reply was rejected by the High Court. This court is likewise urged to dismiss the appeal and allow the beneficiaries settle on their respective portions of land.

This being a first appeal, we are reminded of our role as a first appellate court namely to revisit the record, re-evaluate and re-assess the evidence that was tendered before the High Court and then determine whether the conclusions reached by the High Court are to stand or not and give reasons either way. We have duly done so and in our view it is common ground that the deceased, prior to his death was the registered proprietor of two parcels of land namely Ngariama/**Thirikwa/1255** and Ngariama/**Thirikwa/275**. As at the time of the lodging of the protest, the two parcels of land had undergone subdivisions. Subdivision of land parcel number Ngariama/**Thirikwa/1255** had resulted into parcel numbers Ngariama/**Thirikwa/1733, 1734, 1735,1736,1737,1738 and 1739** all of equal size of 0.26 Ha. Parcel number Ngariama/**Thirikwa/275** had also under gone **subdivision** giving rise to land parcels numbers Ngariama/**Thirikwa/1940, 1941, 1942 and 1943**. With the exception of land parcel number Ngariama/**Thirikwa/1941** the size of which is 1.20 Ha, the remaining three are of equal size of 0.99 Ha.

When the respondent presented the application for confirmation, to court, the subdivisions aforementioned had already been effected. As deponed by the Respondent subsequently in the supplementary affidavit filed in the High Court, the source of the respondents authority to effect the said

sub division arose from an elders tribunal proceedings whereby the deceased **Mati Ngari** had been sued by his three sons namely **Francis Gichohi Mati, Joseph Nyaga Mati and Peter Ngari Mati**, the respondent over land issues. A consequent appeal **Kirinyaga 6/1997** resulted in the tribunal ruling that since the two parcels of land belonged to the deceased, he was at liberty to distribute them to his children the way he chose. This “go ahead” resulted in the deceased intimating to the tribunal that land parcel number **Ngariama/Thirikwa/275** was to be subdivided into two. 3 acres (1.21 Ha) was to remain for the deceased and his wife **Ann Mati**. The balance of this portion was to be shared equally between the deceased’s three sons namely **Francis Gichohi Mati, Joseph Nyaga Mati and Peter Ngari, with** each getting an equal share of 0.96 Ha (2.26 acre area). The second parcel **Ngariama/Thirikwa/1255** (1.78 Ha) was to be shared amongst the deceased’s daughters namely **Margaret Wanja Mati, Faith Wawira Mati, Elizabeth Wambui Mati, Rose Wanjiru Mati, Albina Wanjira Mati, Lucy Kagonde Mati, and Mary Muthoni Mati**. The share holding was equal of 0.26 Ha for each. The appellant **Margaret Wanja Elija** is included in this second group.

The appellant had protested the mode of distribution set out above arguing that although she concedes to have been given a share of land parcel number **Ngariama/Thirikwa/1255** of about ½ an acre, and even had a title deed to that effect, none the less she should not have been left out of the share holding with regard to land parcel number **Ngariama/Thirikwa/275**, allegedly because the deceased father had settled her on this land, and she had duly developed the portion under her control which portion should be distributed to her considering, further that her brothers have bigger shares than herself.

The respondent reached to the protest by way of an explanation contained in his supplementary affidavit that all he had done was firstly to respect the wishes of the deceased father, secondly that the distribution was fair evidenced by the fact that the sharing was equal. Thirdly that all the other beneficiaries except the appellant were in agreement with the mode of distribution proposed and had agreed to go by the wishes of the deceased and the few who had objected to that mode of distribution alongside the appellant had withdrawn their objections.

The learned trial Judge weighed the afore said two versions and rejected the version of the appellant and accepted the version of the respondent for the reason that the proposed mode of distribution was, firstly in line with the deceased’s wishes, and secondly that it was in compliance with the provisions of section 35 of the law of succession Act cap 160 laws of Kenya.

We have revisited the learned trial Judge’ reasoning and conclusion and we are of the view that those conclusions are sound and proper and we are inclined to uphold them because they are in line with the deceased’s wishes. There is nothing in the law of succession Act cap 160 laws of Kenya which authorizes a court of law to disregard a deceased person’s wishes on how his estate is to be distributed especially where the same is within the parameters permitted by the said succession Act, and it is also fair to the satisfaction of the court and all or a majority of the beneficiaries of the deceaseds’ estate with the exception of the appellant.

We note that the appellant’s major complaint against the mode of distribution which had been proposed by the Respondent was that it is in tandem with the decision of the elders tribunal, which tribunal’s decision should not have been imported into the succession proceedings. We have given due consideration to this assertion, and we are satisfied that even if we were to ignore the proceedings which took place before the elders tribunal, the respondents’ deponements in the supplementary affidavit are in compliance with the prerequisites of section 35(4) of the law of succession Act (Supra) which enjoined the grant holder at the time of seeking confirmation of the grant and the court at the time of confirming the grant, to consider the nature and amount of the deceased’s property, any past, present or future capital or income from any source, of the appellant and of the surviving spouse, the existing and future means and needs of the appellant and the surviving spouse, whether the deceased had made any advancement or other gifts to the appellant during his life time or by will, the conduct of the appellant in relation to the deceased and to the surviving spouse, the situation and circumstance of any other person who had any vested or contingent interest in the estate of the deceased or as a beneficiary under his will if any, and lastly the general circumstances of the case including the surviving spouses, reason for withholding or exercising the power in the manner in which he or she did, and any other application made under that

section. Apart from the appellant asserting that she should not be displaced from the portion which she currently occupies on plot Number **Ngariama/Thirikwa/275**, she did not satisfy the High Court neither has she satisfied this court, that she has been disadvantaged in any way to the advantage of other beneficiaries. Neither did she demonstrate to the High Court's satisfaction that if allowed to keep the ½ acre given to her by the deceased as a gift *intervivos*, and in addition be given the portion she is claiming, she will not in the process displace or disinherit the other beneficiaries who are also equally entitled to inherit the deceased.

On our part we are satisfied that the distribution is in line with the provisions of section 35(5) of the L.S.A. (Supra) which requires that it be on equal basis as between children. Herein we note the sons got a bigger share than daughters but to us no, prejudice was suffered by the appellant considering that two parcels of land were involved and may be consolidation of the parcels before distribution may very well have caused logistical complications. Considering that it was not clear before the High Court and now before us whether the parcels were adjacent to each other making consolidation and re-alignment of the boundaries easily feasible. In consequence thereof, we are of the view that ordering consolidation before distribution is likely to lead not only to unnecessary inconvenience to the beneficiaries but also to unnecessary expense which the appellant has not stated that she was or is willing to shoulder.

We feel we have said enough on the issues raised herein. The upshot of the above is that the appeal has no merits. The same is dismissed. On the issue of costs, we appreciate that this is a family issue and although we are in agreement that both the protest and appeal were unnecessary, and as a result the respondent as well as the other beneficiaries were put to great anxiety and expense, we are none the less constrained to order that each party do bear own costs and we so order.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of February, 2013.**

**J.W.ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**