IN THE COURT OF APPEAL

AT NYERI

CIVIL APPEAL 22 OF 2008

MARGARET WACHEKE MUTUOTA……
APPELLANT

VERSUS

JANE WANJURU WATORO & 4 OTHERS…….....
……..RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nyeri(Kasango, J.) delivered on 16th November 2007 and the subsequent decree issued 4th day of February 2008

In

Nyeri H.C. Succession Cause No.2 of 1993)

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JUDGMENT OF THE COURT

The proceedings in this appeal stem from Nyeri High Court Succession Cause No.2 of 1993,relating to the estate of **Mutuota Muchui** who died on the 20th day of May, 1992 at **Kiambutha village**. Form P&A filed enumerated the following as the dependants and or beneficiaries:-

(a) Jane Wanjiru Watoro- daughter petitioner.

(b)Priscilla MuthoniThiongo- daughter.

(c) Hannah Wachuka Watoro- daughter

(d)Cecilia Mboo Muriithi-daughter.

(e)Mary Njeri Kihingo- daughter.

(f)Margaret Wacheke Mukuria-daughter.

The proceedings culminated in the issuance of a grant of representation to **Priscilla Muthoni and Margaret Wacheke Mutuota** dated 17th April, 1977. Subsequent to the issuance of the grant of representation, an application for confirmation was filed on a date not legible but was filed in March, 1999. The supporting affidavit in support of the application for confirmation gave the mode of distribution being that of equal distribution but with the first two daughters getting a slightly bigger portion though only by one point while the rest getting an equal share each.

The application for confirmation and the confirmation order granted by **J.V.O. Juma,**J, as he then was, on the 12th day of October, 1999 were made exparte. This aggrieved one of the beneficiaries **Margaret Wacheke Mutuota** who filed an application for annulment or revocation of grant in August 2001. That application was anchored on grounds contained in the supporting affidavit. The application was opposed on grounds of opposition filed on the 28th day of March, 2002 and a replying affidavit filed on the 18th day of April, 2002.Directions were taken on 8th day of May, 2002 before **J.V.O. Juma, J.** that the matter do proceed by way of viva voce evidence.

Two witnesses gave evidence for the petitioner namely **(PW1) Priscilla Muthoni Thiongo and (PW3) Cicilia Mboo**. It was the testimony of **Pricilla Muthoni Thiongo** that the deceased was their late father. He had six daughters namely **Jane Wanjiru Watoro, Anna Wachira, Cicilia Mboo, Mary Njeri, Priscilla Muthoni Thiongo and Margaret Waceke Mutuota.** Their mother died in 1992 shortly after their father's death. Their father was the registered proprietor of the suit land. Before their late fathers' death, he had allocated each daughter a portion of the land to till. They grew coffee, tea, bananas and napier grass on their respective portions. Proceeds from these portions went into their late father's bank account. Their late father wanted the land to be shared equally as he had done. Concerning the objectors' position, the witness confirmed that the objector washer sister whose husband had died and that the objector came to settle in their late fathers' home after the death of their late father.

When cross-examined,**Priscilla Muthoni Thiongo** maintained that when she got married in 1968, the objector was already married; that she was aware their late father had subdivided the land into six portions and he had wanted it inherited that way. She denied allegation that it is her deceased father who returned the objector home or that the said late father returned dowry which had been paid for the objector and that the late father gave the whole of the said land to the objector alone ***Cecilia Mboo*** gave similar evidence in effect.

Four witnesses gave evidence for the objector namely (**DW1) Margaret Wacheke, (DW2) John Muchui Chege, DW3 Stephen Maina Mwan**gi and DW4 **Peter Ngare.** It was the testimony of (DW1) **Margaret Wacheke** that she was a daughter of the deceased; they were six daughters; she got married and had four children all of whom were adults as at the time she gave testimony in court; she came back to their home in 1975 and had been living there since then. She was on good terms with all her sisters but trouble started when the sisters demolished her house after the death of their mother. All her children were allocated portions of the said land which they use. It was her testimony that her late father gave her the whole land. Her sisters cannot get a share of the said land because they were not given land by their late father. She confirmed her sisters are married in the neighbouring village and have children.

(DW2) **John Muchui Chege** and (DW3) **Stephen Maina Mwangi** recalled being present when the deceased allegedly made an oral will giving the suit land to the objector and her children. They however conceded in their cross-examination that the children of the deceased were not present; they do not recall the date when the said oral will was made and that no minutes of the meeting were taken down. DW2 **John Muchui Chege** added that he was aware the deceased had six daughters and that he used to depend on the said six daughters who used to pick tea for him. They were not aware the deceased had gone to the area land control board wanting to subdivide the suit land into six portions. DW4 **Peter R. Ngare** on the other hand translated a letter handed to him bythe objector and **Stephen Maina Mwangi** (DW2) from Kikuyu language into English/Swahili. He is conversant and proficient in all these languages.

Apparently **Juma J.** (as he then was) did not write the judgment after concluding the trial. The matter was then reserved for filing of written submissions. Thereafter the matter came up in court for direction on 24/10/2005, 10/5/2006, 11/10/1006, 13/2/2006, 27/3/2007 and 22/5/2007which directions were deferred to await the typing of the proceedings.After proceedings were typed, the file was handed to **Kasango J.** who drafted a judgment without taking directions on the mode of procedure.

In the assessment of the evidence adduced before Court the learned trial judge, made observations that the evidence demonstrated that the deceased was a father to the petitioner/objector and other beneficiaries; that the mother of the disputants had died soon after the death of the deceased subject of these proceedings; that the land disputed over was 3.2 acres; that evidence on the part of the petitioner was to

the effect that the deceased father had subdivided the land into six portions and given it to each daughter to cultivate her portion; that there was a consent to subdivision granted on 11th May 1990 before the death of the deceased but mutation forms to effect that subdivision was granted on the 27th November, 1992 after the death of the deceased; that the bone of contention between the disputants was according to the petitioner that all the daughters (sisters) had married but their deceased father had wanted all his six daughters to share out his land equally and went ahead to effect that during his life time, whereas the version of the objector was that the deceased father intended her to inherit the whole land to the exclusion of her sisters because they had divorced in the year 1975, and their deceased father had returned the dowry which had been paid for her and her deceased father had allegedly brought her back and settled her in the deceased father's home with her children who acquired her name.

On the basis of the observations made above on the evidence of the parties, the learned Judge made findings to the effect that although the objector claims to have settled on the land in 1975 and exclusively planted tea on the said land, the tea picking licence in her names and the names of her children all bear the years 1990s, and there was no explanation given by the objector as to why she had not produced licences for the previous years; that there was evidence which had been accepted by the objector's witnesses that there was tea on the land even during the life time of the deceased and that the other sisters also assisted in the plucking of that tea; that although the objector had placed great reliance on the alleged deceased father's oral will giving her the whole land, the witnesses called by her were unable to remember the date of the alleged oral will despite their claiming to have been present when the alleged oral will was made.

After weighing the two versions the learned judge rejected the version of the objector and her witnesses; accepted the version of the petitioner which was to the effect that the deceased father intended all his daughters (sisters) to share in the land equally; applied the provisions of section 38 of the law of succession Act cap 160 laws of Kenya; dismissed the application for revocation and directed that land parcel number LOC.14/Kairo/381 to be divided equally amongst the children of the deceased namely **Priscilla Muthoni Thiongo, Mary Njeri Kahingo, Hanna Wachuka Watoro, Cecilla Mboo Murithi and Margaret Wacheke Mutuota.**

The appellant felt aggrieved by that decision and filed this appeal citing 9 grounds of appeal namely that the learned judge erred both in law and in fact:

1. In writing the judgment in the above case when she had not participated in taking the evidence or hearing the same instead of having the same heard denovo.

2. In failing to appreciate that the 1st petitioner had died and there was nothing to be heard before the court before substitution.

3. In failing to revoke the grant in the circumstances of this case and give the necessary directions.

4. In failing to appreciate the appellants evidence of existence of an oral will and that of her witnesses.

5. In failing to appreciate that there were dependant to the deceased who ought to have been considered in the distribution.

6. In distributing the estate as she did whereas there was no evidence for such determination.

7. In failing to appreciate that the respondents had not competently been made parties to this cause.

8. In failing to analyze the entire evidence hence wrong conclusion.

9. In failing to appreciate that there were many procedural requirements that were not met by the parties rendering the proceedings defective.

Before us, Mr. James Nderi, the learned counsel for the appellant urged us to allow the appeal because the

appellant has a genuine complaint that the application for confirmation of the grant was filed without involving the appellant. She only came to learn of the confirmation when the respondents made a move to subdivide the land and that is when the appellant moved to have the said grant revoked and or annulled and instead of the grant being annulled, and or revoked the learned trial judge went ahead to distribute the estate.

In response, learned counsel for the respondent **Mr. Nderi** urged us to dismiss the appeal because the appellant was aware of the proceedings as the same had been gazatted; she had been included as an administrator as well as a beneficiary; the learned judge's appreciation of the facts and application of the law is faultless; the learned Judge rightly rejected the evidence of the oral will, because it had not been proved; there is no discrimination to inheritance on account of marriage under section 38 of the Law of Succession Act.

This being a first appeal, our role as a first appellate court is to re-evaluate and reassess the evidence that was adduced before the High Court; the application of the law to those facts and then determine independently whether the conclusions reached by the High Court are to stand or not and give reasons either way bearing in mind the fact that we neither heard nor saw the demeanor of the witnesses who testified before the High Court.

We have accordingly done so and we proceed to make findings on the issues raised in the grounds of appeal as here under:-

1. We on ground 1, agree with the appellant's submission that the trial was fully conducted by **J.V.O. Juma J** as he then was, while the judgment was written and delivered by **Kasango J** without the learned incoming judge taking directions as to whether to have the matter heard denovo or proceed from where the previous trial judge had left the proceeding, but we are of the view that no prejudice was caused to either side as none has been pointed out and thus no miscarriage of justice has been occasioned to the parties herein as there is no assertion by the appellant that a rehearing of the matter denovo would have altered the nature and content of the evidence as currently on record.

2. We note from the record that the grant of representation herein was made to **Priscilla Muthoni and Margaret Wacheke Mutuota,** both of whom participated in the trial and gave evidence. A reading of the entire record of proceedings does not reveal existence of information or proof that the 1st petitioner had died. The appellant did not also apply under rule 29 of this Court's Rules to introduce that evidence. There is therefore nothing to show that one of the administrators died before the evidence was heard. Even if one administrator is dead, in the case of joint administration unless objection arises, the surviving administrator can continue to administer the estate and wind it up.

3. The application for revocation presented to court had only one ground which read:-

"(a) The applicant was not aware that the matter was coming up for hearing on 12th day of October, 1999 despite the fact that she kept on liaising with her counsel on record as the said counsel never at any one time notify her."

Revocation of grant of representation is provided for in section 76 of the law of succession Act which lays down the pre requisites for seeking either revocation or annulment of grant.

It provides:-

"***a grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion."***

(a)That the proceedings to obtain the grants were defective.

(b)That the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case.

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently.

(d)That the person to whom the grant was made has failed after due notice and without reasonable cause either

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed.

(ii) To proceed diligently with the administration of the estate.

(iii) To produce to the court, within the time prescribed any such inventory or accounts of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is fatal in any material or particular;

(iv) That the grant has become useless and in operative through subsequential circumstances"

This Court draws inspiration from the decision of this court in the case of **MATHEKA AND ANOTHER VERSUS MATHEKA (2005) 1KLR 455** and confirms that in law these are the ingredients required to be established before one can earn a relief of revocation or annulment.

We wish to associate ourselves with the stand taken by this court in the said case and confirm that this is the correct position in law. When applied to the rival arguments herein, we are of the view that none of these statutory ingredients were relied upon by the appellant and for this reason the learned judge rightly discounted the ground relied upon by the appellant as supporting her plea for revocation and rejected it.

4. With regard to the existence of an oral will, we find that the learned trial judge rightly addressed her mind to the provisions of section 10 of the Laws of Succession Act cap 160 laws of Kenya. It provides:-

"If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness."

Herein the learned Judge rejected the evidence of the witnesses called to prove the oral will because firstly they contradicted themselves; secondly they could not remember the date when the oral will was made; thirdly it had not been made in the presence of the beneficiaries and fourthly no minutes had been taken as evidence of it.

5. Form P&A5 filed in court listed only daughters of the deceased as beneficiaries, the appellant included. They are the same beneficiaries who were listed in the affidavit in support of the application for confirmation. In her affidavit in support of her application for revocation and or annulment. The appellant only complains about the disentitlement to inheritance of her sisters. She does not front any other beneficiaries left out of this inheritance. The appellant also gave evidence as DW1. Nowhere in her evidence does she mention other persons who were eligible beneficiaries who had been left out. She only mentioned herself and her children. She did not also mention that her children were direct dependants of the deceased. In the premises, the learned judge was entitled to regard only daughters of the deceased as the only eligible dependants and beneficiaries.

6. On distribution, after the learned trial judge rightly discounted the evidence of existence of an oral will which had allegedly willed the entire property to the appellant and her children; what the court was left with was the evidence of the version of the respondents which was to the effect that, it was the wish of the deceased that all his daughters get a share of the suit land. The deceased had gone further to actualize that wish by allocating each daughter a portion of land to till and to obtain a consent to subdivide the land into equal portions to be shared out to all his daughters and that process would have been completed had the deceased not passed on before the mutation forms were approved.

7. On the application of the law to the facts before the learned Judge, we find no fault because, section 38 of the Law of Succession Act cap 160 laws of Kenya does not make distinction or discrimination between married and unmarried daughters. They are to be treated equally and the learned trial Judge rightly treated them as such.

8. It is the appellant who named the respondents as respondents and if they were unprocedurally joined to the proceedings, then it is the appellant to blame for that error. We however find no irregularity in joining the respondents to the application for revocation because they had benefitted from the distribution and since the appellant was seeking to upset the mode of distribution actualized by the confirmation of the grant, it was proper for all the beneficiaries who were not complaining about the distribution to be brought on board as respondents in order to protect their interests.

In conclusion, we find existence of no procedural errors which could have rendered the entire proceedings to be incompetent considering that the cause was filed, gazette; appellant objected; objection was procedurally processed; application for confirmation filed within the prescribed time; the same confirmed resulting in a fair and lawful distribution of the estate, the appellant thereafter filed an application for revocation which was procedurally processed leading to this appeal. The only procedural error was where no directions were taken by the incoming Judge on the mode of procedure but we find that this had not caused any miscarriage of justice.

For the reasons given we accordingly find no merit in this appeal. The same is accordingly dismissed. This being a family dispute each party will meet its own costs.

Dated, and Delivered at Nyeri this 5th day of July, 2012

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