



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 141 OF 2006

NJERI MBUGUA
TABITHA WATIRI MBUGUA APPELLANTS
AND
PETER KARIUNDI GATHAIYA
DAVID M. GATHAIYARESPONDENTS

(An appeal from the ruling & orders of the High Court of Kenya at Nairobi (Rawal, J) dated 2nd May, 2006

in

SUCC CAUSE NO. 2141 OF 1998)

JUDGMENT OF THE COURT

This is an appeal against the ruling and order by Rawal, J [*as she then was*] in the High Court of Kenya at Nairobi in Succession Cause No. 2141 of 1998, in the matter of the estate of Rachel Wairimu Mbugua. Rachel died on 22nd September, 1998, at the age of 70 years and was not survived by a spouse or children. During her lifetime, she was married to Paul Mbugua Mukora who predeceased her in July 1992. Paul was also married to two other wives, namely NJERI MBUGUA and TABITHA WATIRI MBUGUA [the appellants]. When Paul died, the three widows applied for letters of administration in respect of his estate.

The appellants contend that a parcel of land registered as DAGORETTI/MUTUINI/488 was part of the estate of their late husband, Paul. When Rachel died, Peter Githaiya, David Githaiya and Dickson Githaiya, petitioned for letters of administration intestate on 23rd June, 1998, in their capacity as brothers. According to the affidavit in support of the petition, the deceased was survived by the three petitioners and she left the following assets:

- (a) Plot No 488 C, Dagoretti;
- (b) Plot D Dagoretti with nine rooms;
- (c) Her share in a room owned by her and Serah Njeri Mbugua and Tabitha Mbugua; and

(d) *Her share in a room owned by her and the above two Plots No. 2 Kimende area.*

The grant was issued on 22nd September, 1998. On or about 10th February, 1999, her co-wives filed a summons for revocation of the grant. This was on the ground that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant. Rachel was legally married to Paul and she became co-administrators with the appellants. The deceased [Rachel] had no children, thus, the appellants were the rightful beneficiaries as they contended that the respondents were strangers. This application was supported by the affidavit sworn by the 1st appellant which expounded on the above grounds.

In response to the summons, the respondents swore replying affidavits. They claimed that as their sister Rachel was not survived by any spouse or children, they were her next of kin. The respondents disassociated themselves with any claim over the estate of Paul [Rachel's late husband]. They annexed a copy of the Title Deed for **DAGORETTI/MUTUINI/488** which was issued on 21st November, 1990 to Paul Mbugua Mukora, Rachel Wairimu Mbugua and Young Timber Mart Limited. The title measures 1.0522 hectares and the proprietorship section shows that Paul and Rachel were registered as joint proprietors of 5,222 shares, while Young Timber Mart Ltd was the owner of 5,300 shares. The 1st respondent also swore a further affidavit annexing copies of consents to making of a grant of letters of administration intestate to the respondents which were signed by his sisters: Esther Mukami, Jane Wangari, Isabel Wangui, Virgina Nyakiiga and Monica Wachuka. They are also sisters of Rachel who were entitled to the grant of representation but they renounced their rights. After several adjournments of the matter, on 30th September, 2002, counsel for both parties agreed the dispute be determined by oral submissions based on filed affidavits. They also argued on four issues for determination by a consent letter dated 14th March, 2005:

- a) *Who is entitled to apply for letters of administration in regard to the estate of Rachel Wairimu Mbugua?*
- b) *Whether the grant was issued to the petitioners fraudulently?*
- c) *Are the applicants entitled to the orders sought in their application?*
- d) *Who is to bear the costs of this application?*

After considering the application, the affidavits on record and submissions on the matter, the learned judge dismissed the summons for revocation; she observed in part of her ruling thus:

“As herein before observed, it is not disputed that the deceased herein was a co-widow and inherited that share in her husband's estate. That share, which is part of property in question, became her own property on such devolution. She died after inheriting the said share and thus left that share in her intestate estate. She did not have children, her husband had predeceased her, so were her parents. Her estate thus shall divided as per the provisions of Section 39 of the Act which has not made any distinction between married male or female. Such distinction, in my view, shall be in breach of Section 82 of the Constitution of Kenya which has guaranteed equality of sex. The estate of the deceased herein, as per law, shall thus devolve on brothers and sisters in the absence of father and mother. The applicants are brothers of the deceased and which fact is not in dispute. The objectors have no right to inherit the estate of the deceased as per the Act. ...”

Following that ruling, the appellants have appealed and although they listed eight grounds of appeal, during the hearing, Mr Kituku, learned counsel for the appellants argued all the grounds together. His submissions can be broken down to two issues of fraud and failure to mind the applicable customary law. That is, the ruling of the learned judge failed to consider there was fraud and concealment of material facts; the respondents failed to disclose the appellants were regarded as co-wives and they had all applied for letters of administration in respect of their late husband in Succession Cause No. 169 of 1996. The respondents should have applied to substitute their sister in that succession cause which was still pending

for confirmation; they also failed to disclose or misled the court that they were the only beneficiaries while Rachel was survived by other beneficiaries. The appellants and Rachel's sisters who filed their renunciation after 2¹/₂ years after the grant had been issued. The respondents also misdescribed the property known as **DAGORETTI/MUTUINI/488** by merely describing it as plot 488C. The other issue was regarding the application of Kikuyu Customary Law, which Mr Kituku argued was relevant as the appellants were co-wives of the late Rachel.

On the part of the respondents, this appeal was opposed. Mr Chege, learned counsel submitted that the ruling strictly followed the law. Rachel was not survived by any spouse or child and the law clearly sets out the next of kin. Although the respondents had sisters, they renounced their rights and filed the requisite consents. The only property that was in issue was **DAGORETTI/MUTUINI/488**, other properties were not in issue. The shares due to Rachel were clearly spelt out in the title, the proprietorship section where she and her husband were registered as joint proprietors. Under the law, when one proprietor dies, the surviving proprietor became the owner under **Section 102** of the repealed **Registered Land Act**. The judge appreciated the elements of customary law and distinguished the present case from the facts of the case of **JULIUS WAINAINA MWATHI & BETH MBENE MWATHI & ANOTHER, CA NO. 123 OF 1993.**

The first issue we have to address after briefly recapitulating the summary of the matters as we have done, is whether the respondents were fraudulent or withheld material information when they applied for the letters of administration in respect of Rachel's estate. The fraud alluded to herein is deceit or concealment of material information with intent to deny the appellants a right to the deceased's estate. As indicated earlier on in this judgment, it is not disputed that Rachel was not survived by children or a spouse. Thus the learned judge was guided by the provisions of **Section 39 of the Law of Succession** which provides:

“Where an intestate has left no surviving spouse or children, the net estate shall devolve upon the kindred of the intestate in the following order of priority:

- (a) father, or if dead;*
- (b) mother, or if dead;*
- (c) brothers and sisters and any child or children of deceased brothers and sisters in equal shares or if none”*

The appellants although co-wives, in law are not recognised as relatives of Rachel but apart from the above, when a court has to determine the party who has priority or who is entitled to be issued with letters of administration, **Section 66 of the Law of Succession** gives general guidance on how the court should exercise its discretion to grant the letters of administration while bearing in mind the priority of the beneficiaries as provided for under **Part V of the Law of Succession Act**. Thus the guiding law is still the provisions of **Section 39**. The appellants are claiming that by reason that Rachel was their co-wife and they were co-administrators in the estate of their late husband first, the appellants should have sought to substitute Rachel in Succession Cause No. 60 of 1996 and secondly, since they have an interest on plot no. **DAGORETTI/MUTUINI/488**, the respondents should have notified them. On this issue, the respondents were categorical that they were not interested with any properties accruing from the estate of the late Paul. They are only interested with the properties that belonged to Rachel. They contend that the late Paul had other properties. As regards the title known as **DAGORETTI/MUTUINI/488**, an extract copy of the title on record shows that Rachel was a joint proprietor and when the co-proprietors passed away, **Section 102 of the Registered Land Act** provided:

“(1) Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently:

- (a) dispositions may be made only by all the joint proprietors; and*
- (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the*

surviving proprietors jointly.

(2) For avoidance of doubt, it is hereby declared that:

(a) the sole proprietor of any land, lease or charge may transfer the same to himself and another person jointly; and

(b) a joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.”

These were the main issues that were before the learned judge and with some sympathy to the appellants, the Kikuyu Customary Law had no application in this succession cause. Although the appellants were co-wives with Rachel, the Law of Succession does not recognize them as having priority as administrators of her estate. The law recognizes her brothers and the ruling by the learned judge on this aspect is spot on the law. The appellants’ application before the High Court was principally for the revocation of the grant on the grounds of fraud and misrepresentation. In view of the provisions of the law, these grounds lack merit. We also wish to mention that this was not an application for provision and there were no allegations that the appellants were being supported by Rachel. The grounds upon the application for revocation were based lacks merit and they were rightly dismissed by the learned judge.

For the foregoing reasons, we find no merit in this appeal. In the result, it is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 9th day of November, 2012.

E. M. GITHINJI

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR