



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: TUNOI, WAKI & AGANYANYA, JJ.A)
CIVIL APPEAL NO. 128 OF 2004

BETWEEN

FRANCIS MUCHIRI WAIRIAAPPELLANT
AND
ALICE WANGARI WAIRIA 1ST RESPONDENT
MWANGI WAIRIA 2ND RESPONDENT

An appeal from a judgment of the High Court of Kenya at Nyeri (Juma, J.) dated 30th May, 2002
in

H.C.SUCC. C. NO. 3 OF 1999)

JUDGMENT OF THE COURT

1. The main issue that arises in this appeal is whether *section 40 of the Law of Succession Act, Cap 160*, Laws of Kenya, applies, and if so, the construction of that section in relation to the distribution of the estate of a deceased polygamist. The appellant herein contends that the estate ought to have been shared out according to the number of children in each house pursuant to the provisions of the section, while the respondent contends that it should be shared out in accordance with the number of houses as held by the superior court. The section provides as follows: -

“40. (1) Where an intestate has married more than once under any system of the law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

We shall revert to that issue presently. What are the circumstances surrounding the appeal.

2. *Wairia Muhoro* (“*the deceased*”) who was a peasant, died of natural causes in Chinga Location, Nyeri, on 15th April, 1968 aged 75 years. He was survived by two wives; *Teresiah Wambui*, the first wife, and *Alice Wangari*, the junior wife. Between Teresiah and the deceased, they had four sons namely: -

1. Mwangi Wairia.
2. Wilson Wanjohi.

3. Vincent Mbao.

4. Francis Muchiri (born 1948)

They also had two daughters who were married. Teresiah died in the year 1980.

With the second wife, Alice, the deceased had seven daughters and no sons. All of them except one, **Veronica Wairia** (born 1953), were married.

3. At the time of his death, the deceased was the registered proprietor of land parcel **Chinga/Kagongo/305** (the “Kagongo land”) measuring 4.6 acres, since 17th February, 1958. There was a claim that he had also purchased another four acres of land situate at Mucharage from one **Dishon Wachira** (“the Mucharage land”) in 1963 but there was no evidence that it formed part of the estate of the deceased. Indeed the evidence accepted by the superior court was that the sons of the seller had refunded the deposit paid by the deceased to his two wives who shared it and there was no further claim made for the land. On our own evaluation of the recorded evidence, the deceased had no entitlement to Mucharage land and the superior court was right in so finding. The only property available for distribution in the estate was thus the Kagongo land.

4. None of the deceased’s sons, except the eldest, **Mwangi**, resided on the Kagongo land where their mother, Teresiah, was buried on her death in 1980. The other sons had acquired their own lands elsewhere. Indeed **Vincent Mbao** was living with Alice at his home in Kariko until 1998 when she shifted to the Kagongo land together with her unmarried daughter, Veronica and her children, and built her own house, thus sharing the use of the land with Mwangi.

5. None of the family members took any action to obtain Letters of Administration in respect of the deceased’s estate for a period of twenty five (25) years until December, 1993 when the first born son of the first house, Mwangi, and Alice of the second house went before the Principal Magistrate’s Court in Nyeri and petitioned for grant. Their petition was advertised in the official Kenya Gazette on 6th January, 1994, and no objection was raised within the prescribed period. A temporary grant was therefore issued by the Senior Principal Magistrate to Alice and Mwangi on 23rd May, 1994, and on 29th November, 1994, they applied for confirmation of the grant. In his affidavit in support of the confirmation Mwangi swore, *inter alia*, that:

“The identification and shares of all persons beneficially entitled to the said estate (i.e) Parcel of Land No. CHINGA/KAGONGO/305 app. 4.6 acres or thereabouts has been ascertained and determined as follows: -

(a) Alice Wangari Wairia2.3 Acres.

(b) Mwangi Wairia2.3 Acres.”

6. Before the confirmation could be made, the last born son of the first house and therefore Mwangi’s younger brother, Francis Muchiri, filed an objection to the grant on the basis that there was no disclosure that the deceased had four sons and seven daughters who had all survived the deceased. He also cross-petitioned for the grant to be made to him. Both the objection and cross-petition were opposed by Alice and Mwangi who deponed that their application for grant was made with the full knowledge of all family members and that due notices had been published but elicited no objections.

7. It would appear that those applications were still pending hearing and determination when directives were issued by the Deputy Registrar, High Court, that all succession matters pending before the Principal Magistrate’s Court be transferred to the High Court on the basis that the subordinate court had no jurisdiction by virtue of **section 48** of the Law of Succession Act. Alice and Mwangi formally applied for the transfer in March, 1995 as did Francis Muchiri in May 1995. In the meantime both parties attempted to settle the issue of mode of distribution of the deceased’s estate but were unable to agree.

8. In March, 2000, the matter was placed before the superior court (Juma, J) when an order was recorded by consent that a grant of Letters of Administration would be jointly issued to Alice, Mwangi and Francis Muchiri pending determination of the issue of distribution of the estate through oral evidence. The grant was issued on 5th March, 2000. The superior court heard the evidence of Alice (PW1) and her daughter, Veronica (PW2) in support of distribution of the estate to the two houses of the deceased in equal shares according to the wishes of the deceased. It also heard the evidence of Francis Muchiri (DW1) in support of distribution to the four sons of the deceased and Alice. His brother Vincent Mbao, who also testified as DW2 was of the view that the Kangongo land should go to the four sons only, while Alice should follow up the Mucharage land.

9. After considering the evidence on record as well as the submissions of counsel for the parties, the superior court dismissed the existence of any other piece of land, apart from the Kagongo land, forming part of the estate of the deceased and held that the Kagongo land be equally shared between the two houses. It expressed itself thus:

“The issue for determination is whether the suit land should be shared equally between the two houses or among the sons and their step mother. The evidence shows that it is only the Petitioners who are residing on the suit land. The other sons are residing in their own personal lands elsewhere. I am not satisfied that Alice Wangari received money from Dishon’s sons as a refund of the land purchased and used it exclusively for herself. The evidence shows that Alice Wangari and her co-wife were in good terms and at one time stayed on a piece of land owned by one of the sons of the co-wife after they had come from Dishon’s place. There were no differences between the two co-wives and I am therefore satisfied that Alice Wangari shared the money that was paid in respect of Dishon’s land with her co-wife.

In view of the foregoing, there remains no evidence to support the Objector’s contention that the suit land should not be divided into two equal portions according to the houses. Indeed Mwangi Wairia, the co-petitioner had sworn an affidavit to this effect. I therefore hold that land parcel No. CHING/KANGONG/305 be divided into two equal portions with one portion being registered in the name of Alice Wangari Wairia and the other to be registered in the names of the four (4) sons of the deceased who belong to the house of Wambui Wairia. The Objector shall pay the costs of the suit together with interest.”

10. Neither Alice nor Mwangi challenged those orders and indeed the full grant which set out the mode of distribution was confirmed on 30th May, 2002 before they sought to enforce the orders in October, 2002. Francis Muchiri was however aggrieved and filed a notice of appeal as well as an application for stay of execution pending the appeal. It is not clear whether the order for stay of execution was granted as there is no such order on record, but the appeal was not filed until after two years on 25th May, 2004, time having been extended by a single judge of this Court to do so. By the time the appeal came up for hearing on 28th October, 2009, Alice had died on 6th February, 2009 and no substitution had been made for the appeal to proceed against her estate. It was adjourned to give an opportunity to seek substitution. When the appeal came up again two years later on 18th May, 2011, no substitution had been made and the appellant’s advocate Mr. K. Wachira opposed further adjournment sought by the respondents’ advocate in order to complete the process of substitution. He asserted that the appeal against Alice had abated and he wished to proceed against the remaining respondent, Mwangi.

11. The court agreed with Mr. Wachira that the appeal against Alice had abated under **rule 99 (2)** of this Court’s Rules and made the appropriate order. It also rejected the adjournment sought and proceeded to hear the appeal limited to the second respondent only. As the decree in favour of Alice thus remained unchallenged, it follows that the portion of 2.3 acres of Kagongo land that was shared out to Alice, remains unaffected by any orders that we may issue in this appeal.

12. The five grounds set out in the memorandum of appeal were as follows: -

“1. The learned Judge erred in law and in fact in delivering a judgment that was contrary to the

provisions of the Law of Succession Act.

2. *The learned Judge misconstrued the provisions of the law concerning distribution of the estate of the deceased who was polygamous.*
3. *The learned Judge erred in law in relying on speculations about how the two wives of the deceased allegedly shared money refunded by sons of one DISHON WACHIRA and yet no proof was adduced.*
4. *The learned Judge erred in condemning the objector to pay costs of the entire cause and yet normally costs in succession causes are always in the estate.*
5. *The learned Judge erred in condemning the objector to pay interest on costs and yet the same were not claimed nor proved.”*

In arguing grounds 1 and 2 of the appeal, Mr. Wachira emphasized that the mode of distribution of the estate ought to have been in accordance with **section 40** of the Law of Succession Act which the learned Judge did not even refer to. Under that section, in his view, the four surviving sons of the first wife would receive their separate shares as would the surviving wife and one unmarried daughter. The distribution followed by the superior court, he submitted, was in accordance with Kikuyu customs and therefore erroneous. On ground 3, Mr. Wachira submitted that there was no evidence that a refund of the purchase price paid for the Mucharage land was made to the family. The evidence was that it was made to Alice only and therefore the distribution of the estate should take into account that fact. Finally Mr. Wachira attacked the order on costs and interest, stating that the normal order in the matters of estates of deceased persons was that the estate would bear the costs.

13. In response to those submissions, Mr. Wachira Wamahi who held brief for Wahome Gikonyo, counsel on record for Mwangi, submitted that the superior court made no error in sharing the property between the two houses and resisting the call by the appellant to discriminate against one house on the basis that it had daughters only. As for costs, Mr. Wamahi submitted that they lay in the discretion of the court and there was no reason to interfere with that discretion.

14. We have carefully considered this succession matter and the oral evidence tendered before the superior court. We must reiterate, as we stated earlier, that there was no firm evidence to support any finding that the deceased had another piece of land which formed part of his estate. The evidence tendered by Alice (PW1) and believed by the trial Judge displaced the allegations put forward by Vincent Mbao (DW2) that the Mucharage land belonged to the deceased. In all probability, some payment towards the purchase of the said land had been made either by the deceased or by Vincent Mbao and the deceased, but the sellers later refunded the money and repossessed the land. There was no evidence that Vincent Mbao or any member of the family of the deceased sought to challenge the repossession of the Mucharage land by the family of Dishon Wachira. Furthermore no questions were raised during the lifetime of Teresiah, in relation to the refund which Alice swore was made to both of them. In sum, we find as the trial Judge did, that the evidence of the appellant and Vincent Mbao in relation to a second parcel of land belonging to the deceased was a red herring. Ground 3 of the appeal must therefore fail.

15. As to the main issue raised in grounds 1 and 2, we must decide firstly, as posed at the beginning of this judgment, whether **section 40** of the Law of Succession Act applies to this estate. This is because the Act came into operation on 1st July, 1981 and the deceased herein died in 1968. The application of the Act is spelt out in **section 2** of the Act as follows:

“2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) the estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates

shall commence or proceed so far as possible in accordance with this Act.”

On the face of it therefore, the estate of the deceased in this matter is not governed by the Act and is “*subjectd to the customs applying at the date of death*”. Only the administration process would be applicable, but even then only to the extent that it is possible. We need not therefore consider the applicability of **section 40** to the estate.

16. The administrators of the estate have already been determined in accordance with the Act. The extent of the estate has also been determined as one parcel of land in Kagongo measuring 4.6 acres. The decision of the superior court that half portion of that estate be given to Alice is no longer the subject of this appeal as it abated without determination of the intended challenge. The appellant therefore has an uphill task in challenging the propriety of the lower court’s decision in that regard. The decision nevertheless appears to accord generally with the Kikuyu customs of the deceased as spelt out in “*The Law of Succession*” by Eugene Contran, thus:

“In a polygamous household, the distribution is by reference to the house of each wife. Widows, though not entitled to an absolute share of the estate, have a right of use during their lifetime of a portion of land and certain movables. Daughters are normally excluded, but may also receive a share if they remain unmarried.”

As Contran rightly observed in his report, however, customary law is always in a fluid state and changes occur due to various factors such as education, the influence of religion and social and economic advancement. The application of it is also subject to the caveat spelt out in **section 3 (2)** of the Judicature Act, that “*it is not repugnant to justice and morality or inconsistent with any written law*”. The retired Constitution, under which this matter was decided provided protection against discrimination on the basis of sex and therefore any custom which was antithetical to that provision would be unenforceable.

17. On our own evaluation of the judgment of the superior court, we think it came to the right decision regarding distribution of the estate of the deceased. Consequently grounds 1 and 2 of the appeal fail.

18. The last ground of appeal relates to costs but these are always at the discretion of the trial court whether they are pleaded or not. Ordinarily costs will follow the event of the litigation unless for reasons given by the trial court a different order is appropriate. We find no basis for the submission that costs in succession matters are born by the estate as substituted by Mr. Wachira and we reject that proposition. There is no reason why we should interfere with the discretion of the superior court judge on costs and we reject that ground of appeal.

19. The upshot is that this appeal has no merits and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 8th day of July, 2011.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR