REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI

Civil Appeal 34 of 2004

CATHERINE NYAGUTHII MBAUNI .....APPELLANT

AND

GREGORY MAINA MBAUNI .....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at

Nyeri (Juma, J.) dated 11th February, 2003

in

H.C.SUCC. CAUSE NO. 6 OF 1999)

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JUDGMENT OF THE COURT

On the 14th day of January ***PETER MBAUNI MAINA*** (hereinafter"*the deceased"*) died of natural causes at the age of 83 years. He died intestate. It follows therefore that his estate falls for administration under the **Law of Succession Act, Cap 160, Laws of Kenya** ("*the Act"*) which came into force on 1st July, 1981 despite enactment by Parliament in 1972.

It is common ground that the deceased was married to his first wife, ***Wandeto (or Watetu) Mbauni*** who died in 1941 leaving two children of that marriage: ***Gregory Maina Mbauni*** (Gregory) and his sister ***Njamie Mbauni*** (Njamie). Seven years after the death of the first wife, the deceased married another wife; **Catherine Nyaguthii Mbauni** (Catherine) with whom he had three sons and one daughter, namely: ***Gabriel Thuita***, ***David Maina***, ***Michael Githuku*** and ***Margaret Wanjiru***. Njamie, the daughter by the first wife, cohabited with a man, since deceased, between 1954 and 1957 when Njamie died. She had two children out of that cohabitation; ***Salome Wanjiru*** and ***Moses Mbauni***. The two were brought up by Gregory after their mother's death. Margaret Wanjiru, the only daughter of Catherine never married. All the children and grandchildren were over 35 years old, Gregory, the first born being 56, by the time the deceased died.

It is also common ground that the deceased owned a piece of land in Nyeri otherwise known as **Nyeri/Gatarakwa/866** measuring approximately 19.5 hectares or 48.2 acres. It was jointly occupied and used by Catherine and her children, and by Gregory and the two children of Njamie. There was also some money in Gatarakwa Co-operative Society, and Barclays Bank as well as some few livestock.

Upon the deceased's death, an attempt was made by his clan to distribute the estate but a disagreement

arose between Catherine and Gregory. Catherine was of the view that she should administer the estate and distribute it to the children of the deceased, while Gregory was of the view that the two wives, and therefore, the two houses of the deceased, should be recognized and the estate be distributed accordingly on 50/50 basis. On 7th January, 1999, without the knowledge of Gregory, but with support of her children, Catherine filed a petition in the superior court for grant of letters of administration with her as the sole adminstratix. Gregory subsequently objected to the petition and cross-petitioned for grant of letters of administration to the estate on 25th January, 1999. Catherine then applied by Chamber Summons under ***rule 73*** of the Probate and Administration rules for directions as to the right person to be issued with the grant of letters of administration. That is the matter which came up before the superior court on 19th November, 2001 and the following order was recorded.

"**By consent the petitioner and the objector be appointed administrators of the estate. Hearing by viva voce evidence in court for one day."**

The parties were represented by counsel on both sides. Pursuant to that consent order, the grant of letters of administration intestate was issued jointly to Catherine and Gregory on 19th November, 2001. That should have been the end of the matter if the parties merely wanted to identify the administrators of the deceased's estate. But the parties went further and called *viva voce* evidence to establish the extent of the estate and to determine the distribution thereof. Catherine testified and called one witness while Gregory testified and called one witness too. Counsel on both sides filed written submissions in relation to the two issues and in the end the superior court (Juma, J) reviewed the evidence and in his judgment shared the estate equally between the houses of Wandeto and Catherine. The learned Judge stated: -

"**The issue for determination is whether the objector is entitled to half share of the estate of his father. It is clear from the evidence that at the time the Deceased was allocated land by the Settlement Fund Trustees as an ex-detainee he did not have any money. The evidence shows that he was employed as a petrol attendant at a salary of Ksh.60/- which was not enough even as a deposit to buy the land. There is also evidence on record that the deceased had two wives the mother of the Objector and the present petitioner. The Objector was an educated person; he was a teacher, a very respected profession by the time. The Objector played a big role in managing his father's land and advising him on the financial aspect. The Objector also educated the children of the Petitioner thereby allowing his father to utilize his salary on the farm. The Petitioner has admitted that the Objector and his sister were brought up by her mother in-law.**

The Objector had a sister who was living with a man and had two children who were taken over by the Deceased and were the responsibility of the Objector. At the end of the day we have the Petitioner with her 4 children on one side and the Objector with the two children of his sister on the other. It should be noted that the two children have never known any other home apart from that of the Deceased and the Objector. The Objector is still residing on the suit land though he has another piece of land elsewhere. The evidence also shows that the Petitioner and two of her children reside on the suit land but have other pieces of land elsewhere.

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I am satisfied on the evidence adduced before me that the Objector being the only living child of Wandeto, the first wife of the Deceased, is entitled to share equally with the Petitioner the estate of his father, Mbauni the deceased. The children of his sister who were dependent on the Deceased will share with him his mother's portion and the children of the Petitioner will share the half portion of the Petitioner. The upshot is that the estate of the deceased shall be shared equally between the house of Wandeto, mother of Objector and the house of Nyaguthii, the Petitioner."

Catherine was aggrieved by that judgment and she obtained leave to appeal to this Court. No less than 18 grounds were laid out in the memorandum of appeal, but learned counsel for the appellant Mr. P.G. Ng'ang'a argued them in two tranches after combining various grounds. He argued in one tranche grounds 1 to 7, 8 to 11 and 15 to 18 which contend that the learned Judge erred in considering and deciding on unpleaded issues. The remaining grounds of appeal related to the substance of distribution of

the estate on the assumption that the court had the jurisdiction to do so.

On the first ground of appeal, Mr. Ng'ang'a submitted that the only matter before the Judge was the chamber summons seeking directions on the rightful person to administer the deceased's estate and all the Judge ought to have done was to determine that issue and no more. That issue was determined on 19th November, 2001 when a joint grant was agreed on by the parties and no further proceedings should have been admitted on record or considered. The decision subsequently made on distribution of the estate was therefore, in his view, made without jurisdiction and ought to be reversed. On the same issue, learned counsel for the respondent, Mr. Kebuka Wachira contended that it was the parties themselves who by consent disposed of the issue of grant of letters of administration leaving out the issue of distribution which they further agreed to resolve by *viva voce* evidence. As such the appellant cannot be heard to complain about the procedure adopted before the superior court.

We have already reproduced above the consent recorded by the parties on 19th November, 2001. It was not merely intended to settle the issue of grant of representation of the estate as indeed the parties went further and agreed to tender evidence relating to the distribution of the estate. There is no challenge to that consent and, in our view, it does not

fall in the appellant's mouth to question it at this late stage. Both parties intended that the court determines not only the issue of grant, but also the distribution of the estate and we find no reason to fault the learned Judge for making that determination. The only issue is whether the decision on the distribution of the estate was in accordance with the law and the evidence on record. The first ground of appeal therefore fails.

On the second ground of appeal, Mr. Ng'ang'a submitted that the decision was bad in law since the deceased was admittedly polygamous and therefore the distribution ought to have been in compliance with ***section 40*** of the Act. The section provides as follows: -

"**40. (1) Where an intestate has married more than once under any system of 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 intestate estate within each house shall then be in accordance with the rules set out in section 35 to 38."

Those provisions according to Mr. Ng'ang'a were not applied since the learned Judge treated the two parties – Catherine and Gregory – as the only heirs and distributed the estate, to them. He referred us to the confirmed grant issued on 11th January, 2003 indicating that the only property for sharing in the estate was **Nyeri/Gatarakwa/866** and only Catherine and Gregory were to get 9.75 Hectares each; total 19.5 Ha. All beneficiaries were not considered and therefore the grant was erroneous. Finally Mr. Ng'ang'a submitted that according to the evidence, the appellant had four children in her house while the other house had only the respondent and his sister. The ration for distribution of the estate should therefore have been 5:2 and not 5:5. The grandchildren of the deceased, that is Salome Wanjiru and Moses Mbauni, had no place in his estate and they could not be considered.

For his part, Mr. Wachira contended that the distribution had to consider the fact, as proved, that Gregory assisted the deceased with the purchase of the land since he was already a teacher, when it was purchased in 1964, earning more than his father who was an ex-detainee

and was working as a petrol attendant for little money. As for the application of ***section 40***, Mr. Wachira submitted that a wife should only have a life interest in the estate and should not be treated as a unit. Finally, he submitted that of the two children of Njamie who became dependant on the deceased and were educated by Gregory were also entitled to a share in the deceased's estate.

We have carefully considered the second ground of appeal, the evidence on record, the submissions of

counsel and the relevant law, and we think there is some force in the submissions made by Mr. Ng'ang'a on behalf of the appellant. ***Section 40***, which is conceded by both counsel as applicable to this estate, is reproduced above. The superior court made no reference to the section and did not explain the basis of the distribution made in its judgment. To be fair to the learned Judge, the application of the section was not seriously argued before him or at all. The learned Judge also treated the two grand children of the deceased as part of the second house. We have no hesitation in making the finding that this was erroneous. Grand-children play no part in the scheme of things spelt out under ***Section 40*** of the Act. The definition of "*house"* is also statutory and is spelt out under ***section 3*** of the Act as amended by Act 10/81, as follows:-

"**house", a family unit comprising a wife, whether alive or dead at the date of the death of the husband, and the children of that wife; "**

There is no discrimination of the children on grounds of their sex and therefore the first house of the deceased would include his daughter Njamie, who was survived by two children. The inheritance of those children is through their mother and not their grand father. At any rate there was no application made under ***Part III*** of the Act to make provision for them. On the facts however, they are all adults, the eldest having served as a District Commissioner and therefore capable of pleading his own case. We find no basis for the submission that the wife is only entitled to a life interest under ***section 40***.

In the end, the view we take in the application of ***section 40*** to the estate of the deceased is that the net intestate estate of the deceased should be shared out at the ratio 3:5 which reflects the number of units in the two houses of the deceased. We allow the appeal to that extent only and set aside the decision of the superior court and all consequential orders. We substitute an order that the net intestate estate of the deceased be distributed at the ration 3:5. As this is a family matter, each party shall bear its own costs of the appeal.

Dated and delivered at Nyeri this 10th this day of July, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR