IN THE COURT OF APPEAL

AT NYERI

CIVIL APPEAL 341 of 2002

CHARLES MURITHI MUTHURI ……..……...1ST APPELLANT

JOSPHAT NTURIBI MBOROTI ……..…..…..2ND APPELLANT

GEOFFREY GITONGA MBOROTI ……..... 3RD APPELLANT

AND

ESTHER KARAMBU ……..…… RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya

Meru (Tuiyot, J) dated 15th October, 2001

in

H.C. Succession Cause No. 233 of 2000)

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JUDGMENT OF THE COURT

This is an appeal from the ruling and order of the superior court, at Meru (Tuiyot, J) made on 15th October, 2001, in its Succession Cause No. 233 of 2000, wherein the learned Judge, in pertinent part, ordered that the estate of M'Mboroti M'Impwi, consisting of a parcel of land No. Ntima/Ntakira/473, be divided into two equal parts as follows:

"The petitioner and the 1st and 2nd objectors' mother Esther Kathure should share the deceased's estate equally so that each in turn will have her share with her children if she wishes."

The appellants were aggrieved and hence this appeal. Five grounds of appeal have been proffered, namely:

"**(1) That the learned Judge erred in law and facts in distributing the estate of the deceased without any clear evidence before him which rendered him to misdirect (sic) the facts and the law.**

2. That the learned Judge erred in law and facts by making a person who was not a party to the proceedings and not interested an administrator in the intestate estate.

3. That the learned Judge failed to direct his mind on the issue of distribution to the parties

before him and went overboard to rely on customary law which was not applicable.

4. That the learned Judge also misdirected himself on the principles of the law concerning the administration of intestate (sic) specially (sic) section 40 Law of Succession Cap 160 Laws of Kenya.

5. That the learned Judge's judgment was against the facts and the law applicable and thus bad in law."

The respondent in this appeal, **Esther Karambu**, was the petitioner in the aforesaid succession cause. She was the first wife of the deceased. She had five daughters with the deceased but no son. Stella Ruguru, was one of those daughters and was the mother of **Geoffrey Gitonga**, the third appellant in this appeal. The remaining two appellants, **Charles Murithi Muthuri** and **Josphat Nturibi Mboroti,** (the 1st and 2nd appellant respectively) are the sons of Esther Kathure, the second wife of the deceased.

The deceased died on 16th January, 1997. At the time of his death, he owned parcel number, Ntima/Ntakira/473. No mention is made of any other assets owned by him. It was common ground that he left no will. The petition for grant of letters of administration of his estate was not made until October, 2000, when the respondent in this appeal filed her petition. In her affidavit in support of the petition she named her co-widow and their surviving children as persons who survived the deceased, but she left the name of the third appellant.

Notice of the filing of the petition was published in the Kenya Gazette on 3rd November, 2000, and on 24th November, 2000, the appellants served on the Deputy Registrar of the High Court, "a Notice of Objection" to a grant of representation being made in favour of the applicant citing three grounds, as follows:

"**(1) That the petitioner is dishonest in that she has failed to name the 3rd objector as the benefitiary.**

(2) The petitioner fraudulently filed this petition secretly and without objector's consent.

(3) The petitioner is untruthful and therefore unlikely to render a proper distribution of the estate of the deceased as the deceased prior to his death had distributed his asset (sic) among his sons while the petitioner was away from the matrimonial home."

Thereafter, the appellants filed a cross-petition, citing the same reasons, seeking that the first appellant be granted letters of administration. They also filed an answer to the petition citing the same grounds as a basis for opposing the petition.

The matter was placed before Tuiyot J., and by consent of the parties, the matter was determined on the basis of affidavit evidence. For the appellants, the 1st appellant swore the leading affidavit, and exhibited what he described as minutes of a meeting of elders called by the deceased to witness the sub-division and distribution of his aforesaid parcel of land among the appellants. He also filed affidavits of several people, male and female, who each deponed that he or she was present during that meeting and heard and saw the demarcation and distribution of that land. Each of the other appellants filed affidavits deponing to the same effect.

The respondent does not seem to have filed any further affidavit. On the basis of those affidavits and submissions of counsel, Tuiyot J. gave his judgment as aforesaid.

When this appeal came up for hearing, there was no representation of the respondent, though her counsel on record, Mr. Mutiso, was duly served with a hearing notice to attend the hearing. Mr. S.N. Mukunya stated from the bar that he had been asked by the clerk of Mr. Gikunda Anampiu, counsel on record for the appellants, to apply for adjournment on the ground that Mr. Gikunda had just filed a motion seeking leave to cease acting for the appellants. We declined to grant the application for adjournment and

ordered that the hearing proceed, whereupon Mr. Mukunya stated as follows:

"**I can only rely on the record. I refer to the grounds in the memorandum of appeal and rely on them. That is all."**

As there was no representative from the respondent, we reserved judgment.

This being a first appeal, it is trite that notwithstanding that no submissions were made before us on each of the grounds of appeal, it is still our duty to re-evaluate the evidence and come to our own conclusion of course without overlooking the conclusions reached by the trial Judge.

In coming to his decision, Tuiyot J. considered the provisions of **section 40** of the Law of Succession Act, **Cap 160** Laws of Kenya and held that it provided the formula for apportioning the estate of the deceased. As we stated earlier, the appellants' case is that the section was inapplicable because, in their view, the deceased had shared out his property among the appellants' *inter-vivos*.

Section 40 aforesaid provides; as material to this appeal, as follows:

"**40(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects of 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."**

Sub-section (2) deals with distribution of the residue of the net estate within each household. "Net interstate estate" means, the estate of a deceased person "in respect of which he has died intestate after payment of the expenses, debts, liabilities and estate duty ….." (**see section 3** of the Succession Act). It then follows that the land in issue in this appeal was part of the deceased's net intestate estate, in view of the fact that the deceased left no will, nor is there evidence that there were any debts or liabilities which had not been paid at the time of his death.

The learned trial Judge did not make any finding on the question whether or not the deceased had shared his land, *inter-vivos* to the appellants. Several people deponed in their respective affidavits filed on record that they were present and witnessed the deceased sharing his land among the appellants. The first appellant seemed to suggest that the deceased signed the minutes of that meeting. It is not, however, possible to confirm that the signature purported to be that of the deceased was indeed his signature. Besides, the minutes are not a will. The 1st appellant is the author. There is no evidence on record that he had disclosed these minutes to other members of the deceased's family before the respondent filed her petition. These alleged minutes are self serving and in our view, they do not advance the appellants' case any further. Besides, as the deceased left no will, and having not transferred the respective shares to the appellants during his lifetime, they cannot override the clear provisions of the statute.

For the foregoing reasons, the grounds of appeal earlier on reproduced are without basis, with the result that we find no basis for faulting the decision of the superior court. The appellants' appeal fails and is dismissed with no order as to costs, as neither the respondent, nor her counsel, attended court though duly served with a hearing notice.

Dated and delivered at Nyeri this 26th day of October, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR