



M’Murithi v Murithi (Civil Appeal 3 of 2015)
[2015] KECA 347 (KLR) (14 October 2015) (Judgment)
Stephen Gitonga M’murithi v Faith Ngira Murithi [2015] eKLR
Neutral citation: [2015] KECA 347 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 3 OF 2015
PN WAKI, RN NAMBUYE & PO KIAGE, JJA
OCTOBER 14, 2015

BETWEEN

STEPHEN GITONGA M’MURITHI APPELLANT

AND

FAITH NGIRA MURITHI RESPONDENT

(Appeal from the Judgment and Order of the High Court of Kenya at Meru (J.A. Makau, J.) Dated 30th October, 2014 in (Meru H.C. Succ. Cause No. 575 of 2011)

JUDGMENT

1. The litigation resulting in this appeal has its roots in Meru High Court Succession Cause No.575 of 2011 taken out by Stephen Gitonga M’Murithi a son of the deceased, M’Murithi, M’Mutungi, Alias M’Murithi M’Mutungi Alias Murithi S/O Mutungi Alias Misheck Murithi Mutungi who died on 4th June, 2004.
2. The list of beneficiaries comprised the deceased wife Naomi aged 85 years;(Naomi) Stephen Gitonga M’Murithi a son aged 64 years (Stephen); Agnes Josephine Karegi Mwiti a daughter aged 60 years; (Agnes) Polly Mwari Mwebia a daughter aged 57 years; (Poly) Patrick Kiriinya Murithi a son aged 54 years; (Patrick), Francis Kithinji Murithi a son aged 52 years; (Francis) Daniel Mbichi Murithi a son aged 51 years; (Daniel) Mary Wanja Mugambi a daughter aged 40 years; (Mary), Faith Ngura Murithi a daughter aged 42 years; (Faith), Grace Gakii Murithi a daughter aged 46 years; (Grace), Lucy Gacheri Murithi a daughter aged 47 years; (Lucy), Winfred Gatwiri Murithi, a son aged 44 years; (Winfred), Florence Kinanu Kinoti a daughter aged 41 years; (Florence), Peter Kimathi a son aged 42 years; (Peter) and lastly Julius Mutwiri Misheck a son aged 37 years (Julius).
3. The deceased’s estate comprised land parcel numbers Abothuguchi/Katheri/1220, 1590 and 1503 respectively.



4. The temporary grant of representation was issued on 21st day of March, 2011. Summons for confirmation of grant dated the 29th day of January, 2013 were taken out. Faith Ngira Murithi filed an affidavit of protest deposed on the 8th May, 2013 supported by a letter to the Deputy Registrar of Daniel Mbichi Murithi of 24th March, 2014. Directions were given on 26th March, 2014 for the matter to proceed by way of viva voce evidence. Both sides were heard resulting in the impugned judgment of 30th October, 2014.
5. The Appellant who was the only party aggrieved by that judgment has appealed to this Court raising eight (8) grounds of appeal. These are that the learned trial Judge erred in both law and in facts:-
 - i. in failing to consider the appellants evidence in his findings and judgment.
 - ii. by only considering the respondents evidence in his findings and judgment.
 - iii. by failing to appreciate that all the defendants of the deceased had agreed on a mode of distribution which the respondent denounced in court.
 - iv. by failing to appreciate that the surviving widow of the deceased who was aged was only entitled to a life interest in the whole residue of the net intestate and not an absolute interest.
 - v. by failing to share the deceased's estate equally to all dependants of the deceased and discriminated on some daughters of the deceased.
 - vi. by ordering for the sale of Abothuguchi/Katheri/1590 and sharing of the proceeds to some of the deceased's dependent's and exclusion of others without any basis.
 - vii. by failing to hear the appellant's witnesses and other dependants of the deceased who were not parties in this cause to enable him arrive at a just finding.
 - viii. that the judgment was against the weight of the facts and evidence.
6. Mr. Gichunge Muthuri learned counsel for the Appellant urged us to allow the appeal on the sole ground that the learned trial Judge's mode of distribution was unfair as the learned judge failed to properly take note of and apply correctly the provisions sections 38 and 40 of the Law of Succession Act Cap 160 Laws of Kenya to the issues in controversy before him and thereby arrived at a wrong conclusion on the matter.
7. In response to the appellant's submissions Mr. M. Kariuki learned counsel holding brief for Kaumbi for the respondent urged us to dismiss the appeal on the sole ground that although section 40 of the Law of Succession Act was couched in mandatory terms, the learned trial Judge was entitled to take into account other considerations in order to arrive at a just decision as he did.
8. This is a first appeal. Our mandate is to reappraise the evidence and draw inferences of fact. See Rule 29(1) of the Rules of this Court. We are also enjoined generally to defer to the trial Judge's findings of fact unless there is demonstration that such findings were based on no evidence; or they were based on a misapprehension of the facts or that the judge was shown to have acted on a wrong principle in reaching the findings See *Sumaria and another versus Ached Industries Limited* [2007] 2KLR 1.
9. The Appellant's mode of distribution as at the conclusion of the trial was in favour of the land being divided equally amongst all the children of the deceased irrespective of their gender or marital status. The respondent's proposed mode of distribution on the other hand set out in paragraph 6 of her affidavit of protest.



10. After hearing testimonies of both sides, assessing and analyzing the facts before him the learned trial Judge distributed the deceased's estate as hereunder:-

Abothuguchi/Katheri/1220

- a. Patrick Kiriinya Murithi-1.067 acres
- b. Daniel Mbichi Murithi- 1.067 acres
- c. Julius Mutwiri Mishek- 1.067 acres
- d. Naomi Mberanya Murithi- 1.067 acres
- e. Faith Ngira Murithi- 1.067 acres
- f. Lucy Gacheri Murithi -1.067 acres

Abothuguchi/Katheri/1503

- a. Stephen Gitonga Murithi – 1.1. acres
- b. Francis Kithinjo Murithi – 1.1. acres
- c. Peter Kimani – 1.1 acres
 - i. Agnes Josephine Karegi
 - ii. Poly Mwari Mwebia
 - iii. Grace Gakii Murithi 1 acre jointly in equal shares
 - iv. Winfred Gatwiri M.
 - v. Florence Kinaru Kinoti
 - vi. Mary Wanja Mugambi.

East Africa Breweries shares be shared to:

- i. Stephen Gitonga jointly in equal shares
- ii. Peter Kimathi

Abothuguchi/Katheri/1590 to be sold to any family member or an outsider and proceeds shared amongst:

- i. Patrick Kiriinya Murithi
- ii. Daniel Mbichi Murithi
- iii. Julius Mutwiri Mishek
- iv. Naomi Mberanya Murithi
- v. Faith Ngira Murithi in equal shares
- vi. Lucy Gacheri Murithi
- vii. Stephen Gitonga Murithi
- viii. Francis Kithinjo Murithi
- ix. Peter Kimani



Each party was ordered to bear its own costs.

11. The Appellant's complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 and 40 of the *Law of Succession Act*, Cap 160 Laws of Kenya. Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased.
12. Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the *Law of Succession Act* by discriminating against the married daughters of the deceased. See *Rono versus Rono & another* [2008] 1KLR (G&F) 803.
13. As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased's estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest.
14. In the result, we find merit in the Appellant's appeal. We allow the appeal, set aside the judgment of the 30th day of October, 2014 and substitute it with an order that all the property forming the net intestate estate of the deceased subject of this appeal be and is hereby directed to be distributed equally amongst all the beneficiaries. Each party will bear its own costs both on appeal and the court below.

DATED AND DELIVERED AT NYERI THIS 14TH DAY OCTOBER, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

