IN THE COURT OF APPEAL
AT NYERI

[CORAM: OKWENGU, SICHALE & MBOGHOLI, JJ.A]

CIVIL APPEAL NO. 100 OF 2019

BETWEEN

EVERLYN WANJA ..... 1ST APPELLANT
NAOMI MWENDWA MAJAU ..... 2ND APPELLANT
AND
GLADYS NKIROTE M'ITUNGA ..... RESPONDENT

An Appeal from the judgment of the High Court of Kenya at Meru (Gikonyo, J) dated 13th December, 2019

IN
SUCCESSION CAUSE NO. 46 OF 2013)
****

JUDGMENT OF THE COURT

The issue to be addressed in this appeal is the extent, if at all, a court can interfere with the testamentary disposition of a deceased person.

M'Itunga M'Imbutu (the deceased) died on **11th June, 2012**. He was survived by:

(1) **Gladys Nkirote Itunga** - Widow
(2) **Julia Mbuthu Itunga** – Daughter
(3) **Charity Muthoni Itunga** - Daughter
(4) **Lydia Maiti Francis** - Daughter and
(5) **Julius Majau M'Itunga** - Son

Before his death, the deceased caused a Will to be prepared by the firm of **Meenye & Kirima Advocates**. The Will is dated **22nd February, 2012**. In the Will, the deceased made a testamentary distribution as follows:

> "
> ***[10]. Land parcel NO. ABOGETA/UPPER KITHANGARI/732 to be distributed as follows:***
>
> ***(a) Charity Muthoni to get two (2) acres bordering ERASTUS NDEGE.***
> ***(b) LYDIA MAITI to get two (2) acres next to CHARITY MUTHONI***
> ***(c) GLADYS NKIROTE my wife to get two (2) acres where my houses are located next to the land of GLADYS MAITI.***
> ***(d) The balance of nine (9) acres to go to the administrator who is my son JULIUS MAJAU M'ITONGA who is already using it for cultivation and that is where he has tea bushes and his home.***
>
> *[11]* ***Land parcel ABOGETA/UPPER KITHANGARI/486 to be administratored as follows:***
> ***(a) JULIA MBUTHU to get one (1) acres neigbouring my neigbour NAFTARY M'RINYIRU.***
> ***(b) The balance of seven (7) acres to go to the administrator JULIUS MAJAU who is already cultivating and utilizing the same portion."***

This distribution did not sit well with the judge who in the penultimate part of his judgment stated:

"[12] However, I am perturbed by one important thing: discrimination of daughters on the basis of gender and status. The will provides in paragraph 12 that his daughters are married and he had called upon the fathers of his grandsons to come for their children. He stated in the will that he had provided each daughter with 2 acres and that he had advised them to do whatever they wanted with the said land. Hon. Kirima also stated that the deceased told him that he had given the bulk of his land to his son because the daughters were married. He also informed the court that the deceased was apprehensive that the children of the daughters were going to disinherit his son. He was so preoccupied with daughters taking more land yet they were married. Clearly, the deceased made the will to disinherit his own daughters. Accordingly, a will that offends the law and the Constitution is invalid. I find this will offends the law and the Constitution. Therefore, on the basis of this finding, I declare the will herein invalid.

Distribution

[13] In light thereof, this estate will be governed by law on intestacy. The deceased died intestate. He left a widow and the following children:

(a) JULIA MBUTU

(b) CHARITY MUTHONI

(c) LYDIA MAITI and

(d) JULIUS MAJAU (deceased)

[14] By the dictates of the Constitution and the law, surviving spouse should get a distinct portion of the estate. Very soon and very soon, I prophesy, courts will start reconciling the matrimonial property law and the Law of Succession Act with article 45 of the Constitution with regard to the property of marriage

between the deceased and the surviving spouse before distribution of the estate of the deceased spouse. This is a call by section 7 of the Sixth Schedule and article 259 of the Constitution. Accordingly, the surviving spouse will take two acres and the balance shall be shared equally amongst all the children of the deceased.

[15] I now appoint Everlyn Wanja and Charity Muthoni Ikiugu as joint administrators of the estate. I make a grant to them. The grant is also confirmed in the above terms."

The appellants, **Everlyn Wanja** (presumably a daughter-in-law to the deceased and her daughter **Naomi Mwendwa Majau**) were dissatisfied with the outcome and in a Memorandum of Appeal dated **16th March, 2019,** they listed 13 repetitive grounds of appeal. Fortunately however, in the appellants' undated written submissions, the issues were reduced into three namely:

(i) Failure to recognize the powers of a testator in bequeathing his property;
(ii) Whether unfair distribution is discriminatory; and finally,
(iii) Whether the court can introduce and grant an order in respect of an issue not pleaded.

On **16th May, 2022**, when the appeal came up before us for hearing, **Mr. Munene Karimi** for the appellants informed us that he was to rely wholly on the undated written submissions. There was no

appearance for the respondent inspite of service of a hearing notice on **20th April**, **2022**. However, since the respondent had filed her written submissions dated **6th July, 2020**, we opted to rely on them. Suffice to state however, that this was half-a page of submissions that emphasized that "…***all children irrespective of gender should be looked at with the same favour***".

On behalf of the appellants, it was submitted that under section 5 of the Law of Succession Act, a testator has unfettered discretion in the disposition of his/her property; that unfair distribution does not amount to discrimination and finally, that the trial judge erred when he proceeded to consider the issue of whether there was discrimination, an issue that was not pleaded.

We have considered the record, in particular, the submissions of the parties, the authorities cited by the appellants and the law.

This being a first appeal our mandate is as set out in ***Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*** wherein it was stated:

> "***An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own***

conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270."

The facts of the dispute herein are fairly straight forward. The deceased was survived by his wife (the respondent herein), three daughters and a son (now deceased, and whose widow **Everlyn Wanja** & daughter **Naomi Mwendwa Majau** are appellants herein). It is also not in contention that the trial court found that the deceased's Will was valid. The respondent who had initially objected to the validity of the Will seems to have come to terms with the court's finding on the validity of the Will as she did not file a cross-appeal.

Having recognized that the deceased's Will was valid, was the judge right in re-distributing the deceased's property on the basis that it was unconstitutional as it discriminated against the deceased's daughters? Section 5 of the Law of Succession Act provides that:

> ***"Subject to the provisions of this part and part III, any person who is of sound mind and not a minor may dispose of all /or any of his property by a Will*** …".

In our view, the law recognizes a testator's power to distribute his property as he deems fit. He may give unequal shares to his children, be they boys or girls. He can even opt to give his estate to charity. A court can only interfere with this testamentary freedom if a testator has failed to make reasonable provision for his/her dependents as was held in ***Erastus Maina Gikunu & Another vs. Godfrey Gichuhi Gikunu & another [2016] eKLR*** wherein this Court stated:

> *"**although there is this freedom, section 26 of the Act enjoins the testator to make reasonable provision for his dependents. The court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom but also imposing certain limitations and protection against disinheritance.***

In our view, to interfere with the deceased's Will and proceed to distribute property as if the deceased had died intestate, would be to make a mockery of a deceased's free will to distribute his/her

property as long as he/she has made reasonable provision for his dependents.

Further, the fact that the distribution was unequal is not tantamount to discrimination. In ***John Gitata Mwangi & others vs. Jonathan Njuguna Mwangi & Others [Nairobi CA No. 213 of 1997]***, **Justice Shah, JA** held:

> ***"The question is whether the Will or the disposition has made reasonable provision and not whether it was unreasonable on the part of the deceased to have made no larger provision for the applicant. It is not for the court to step into the shoes of the testator and substitute for the Will what it thinks the testator should have done."***

We agree. A testator is at liberty to distribute his/her estate as he/she deems fit as long as he/she has made reasonable provision for his/her dependents.

Finally, the issue of unfair (or unequal) distribution was not raised by the parties. This was picked up by the trial judge who was "*perturbed*" by what he considered discrimination. In our view, he had no reason to do so as this was not an issue raised in the pleadings.

In ***David Sionga Ole Tukai vs. Francis Arap Muge & 2 others, Civil Appeal No. 76 of 2014 [2014] eKLR*** this Court stated:

> ***"In an adversarial system such as ours, parties to litigation who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for this purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as pleaded. The purpose of the rules of pleading is to ensure that parties define succinctly the issue so as to guide the testimony required on either side with a view to expedite litigation through diminution of delay and expense".***

Similarly, in ***IEBC & Another vs. Stephen Mutinda Mule & 3 others, Civil Appeal No. 219 of 2013 [2014]*** **eKLR,** This Court stated:

> ***"...Parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned judge, no matter how well intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error and the appeal succeeds on that score."***

In our view, the court overreached itself by considering a matter not in dispute. Having raised it *suo moto* and proceeding to determine it thereafter, no doubt, denied one of the parties an opportunity to

respond to the issues framed by the judge. With respect, we think that this was not proper on the part of the judge.

We think we have said enough to show that this appeal should succeed. Accordingly, the appeal is allowed and the judgment of **Gikonyo, J**. dated **13th December, 2018** is set aside. We direct that the estate of the deceased be distributed in accordance with the deceased written Will dated **22nd February, 2012**. Given that the disputants are family members, we direct that each party shall bear his/her own costs.

It is so ordered.

Dated and delivered at Nairobi this 29th day of July, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR