



In re Estate of Kamau Kimiti alias Kamau Kemiti (Deceased) (Succession Appeal 3 of 2020) [2022] KEHC 14258 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL 3 OF 2020**

JN NJAGI, J

OCTOBER 26, 2022

**IN THE MATTER OF THE ESTATE OF KAMAU
KIMITI ALIAS KAMAU KEMITI (DECEASED)**

BETWEEN

MARGARET NYAGUTHII KAMAU PETITIONER

AND

VIRGINIA WANJIKU GITHOGORI PROTESTOR

JUDGMENT

1. The deceased herein Kamau Kamiti disappeared from home without trace and was presumed dead vide an order issued on 14th June 2018 in Karatina Misc Application No.5 of 2018. He was survived by a daughter, the appellant herein and a daughter-in-law, the respondent who is a wife to the late son of the deceased. He left behind land parcel No. Kirimukuyu/Ngandu/313 measuring 5 acres. Upon the issuance of certificate of presumption of death, the appellant filed a succession cause at Karatina Law Courts. A grant of letters of administration was issued to her. She thereupon filed summons for confirmation of grant in which she proposed that the subject land be shared equally between her and the respondent. The respondent filed a protest in which she proposed that she be given 4 acres of the land and the appellant be given 1 acre. After a full trial in which parties called witnesses, the trial magistrate agreed with the respondent. The appellant was aggrieved by the decision and filed the instant appeal.
2. The grounds of appeal are that:
 - a. That the trial magistrate erred in law and facts in holding that the deceased had distributed his estate prior to his death.
 - b. That the trial magistrate erred in law and fact in disregarding the relevant law applicable in this case.



- c. That the trial magistrate erred in law and fact in upholding the protestor's protest even after the protestor disowned it.
 - d. That the trial magistrate misapprehended the petitioner's evidence and her witness evidence and as a result arrived at a wrong decision to the prejudice of the petitioner.
3. The appeal proceeded by way of written submissions. The advocates for the petitioner/appellant, Mercy Kabethi & co. Advocates, submitted that the deceased was survived by a daughter and a daughter-in-law. That the estate should therefore have been distributed in accordance with the provisions of section 38 of the Law of Succession Act which provides for equal sharing between the children.

Counsel submitted that the respondent at the lower court denied that she had signed any affidavit suggesting how the estate should be shared. That it was an error for the trial court to rely on the same affidavit in its determination as parties are bound by their pleadings.

4. It was submitted that the appellant and the respondent use different parts of the suit land with part of the land set aside for grazing. That the petitioner testified that there was a time she had been told to plant coffee but she was unable to do so as she was in business. That that area is now being used for grazing. That her witnesses confirmed that the petitioner has been living on her father's land since childhood. It was submitted that the trial court was wrong in concluding that the place which the appellant never utilized was left to the protestor. That the court disregarded the evidence that apart from the area that the appellant utilizes the common grazing area was allocated to her. That the size of the portion each party utilizes has not been ascertained by a surveyor.
5. Counsel submitted that the Law of Succession Act treats all children of a deceased persons equally where the deceased dies intestate. Therefore, that the appeal is merited and ought to be allowed.
6. The advocates for the respondent, M.C.K. Kamwenji & Co Advocates, on the other hand submitted that the respondent showed in her evidence that she was utilizing about 4 acres of the land while the appellant was using 1 acre. That the land had been given to her by her father-in-law before his disappearance.
7. It was submitted that the respondent did not disown her protest but only said that she believed that the deceased was in Tanzania. That the trial court rightly observed that this was not an intestate succession case as the deceased had shown the applicant her place to work and leaving the rest to the respondent. That the place allocated to the appellant is still unutilized as she did not plant coffee on the place. That this is clear indication that each of the parties knew her specific portion though not documented. Therefore, that the appeal has no merit and ought to be dismissed.

Analysis and determination-

8. This being a first appeal, the duty of the court is to analyze and re-evaluate the evidence adduced before the trial court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – see *Selle & another vs. Associated Motor Boat Co. Ltd & others* (1968) EA123.
9. The standard of proof in civil cases is on a balance probabilities. In *Monarch Insurance Company Ltd v Warucia Mwangi* (2020) eKLR it was held as follows:

The duty of the plaintiff is to prove his claim against the defendant on a balance of probabilities. What amounts to proof on a balance of probabilities was discussed by Kimaru,



J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 where the Court stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that is probable than not that the allegations that he made occurred.”

10. The trial magistrate in her judgment stated that the evidence before the court indicated that the appellant had been given a parcel of land by her father to plant coffee. That she did not utilize the land. That after her father left her uncle gave her one acre to utilize but that she now wanted the land to be shared equally as per the provisions of section 38 of the *Law of Succession Act*.
11. The magistrate held that section 38 was not applicable in this case as the deceased had granted the appellant a parcel of land before he disappeared. That she did not develop it and is now a grazing field. That she now cannot demand that the section the respondent has developed for years be shared equally. That demanding an equal share would go against the wishes of her father. That the best she can do is to start utilizing her portion as had been given but not to demand for equal distribution in a part in which she had not been allocated. That the court has no power to distribute an estate which had already been distributed.
12. The issue for determination is whether the trial court was correct in holding that deceased had distributed the suit land to the parties before he disappeared.
13. It was the evidence of the appellant/petitioner that her father had allocated her land to plant coffee before he disappeared in the year 1978. That she was unable to plant coffee as she was busy running a business. That the place she had been shown to plant coffee is currently being used as a grazing field by both parties. That she utilizes a separate portion of the land for farming. That the respondent also utilizes another portion for farming but the portion being utilized by the respondent for farming is bigger than that which she utilizes. That this is because each was utilizing according to her capability.
14. The appellant called two witnesses in the matter. John Kagiri Wachira DW2 stated that the parties herein are her co-villagers. That they live on the land belonging to the deceased in this matter.
15. The other witness, James Macharia DW3 testified that the parties herein are his neighbours. That they live on the land of the deceased in this succession matter. That they use different parts of the land but the portions are not demarcated. That there is a big common area for grazing. That the two parties should share the land equally.
16. The respondent/protestor on the other hand stated in her evidence in court that the deceased left her and the appellant on the suit land at the time of his disappearance. That the appellant was allocated part of the land by her uncle measuring about one acre. The rest measuring about 4 acres was left with her. In cross-examination she stated that her father-in-law did not distribute the land before he disappeared.
17. The respondent called two witnesses. Muthigani Muriuki Mborora PW2 stated that his father was a brother to the deceased. He adopted his written statement as evidence in the case. He stated in the said statement that at the time the deceased died he had only allocated the appellant a place to reside. That this was through persuasion from PW2's father as the deceased had not allocated her any portion. That currently the appellant is occupying a portion measuring about one acre. That having been put



in possession of one acre by the deceased and his brother she should get the one acre. When cross-examined in court he stated that the one acre was allocated to her by his (PW2's) father for purposes of farming as the deceased was not there that time.

18. The other witness, Lucy Wangui Maina PW3 testified that the appellant is a sister to his mother. That she, PW3, was born in 1973 and did not meet the deceased. She found both parties residing on the land. That the appellant was utilizing one acre and the rest was with the respondent. That she does not know who distributed the land that way.
19. From the evidence that was placed before the trial court, I do not think that the trial court was correct in holding that the deceased had distributed the land between the parties before he disappeared. In the first place the respondent/protestor was categorical in her evidence in court that the deceased had not distributed the land before he disappeared. It was her evidence that it is a brother to the deceased who allocated the appellant a portion measuring about one acre for purposes of cultivation which was after the disappearance of the deceased. This evidence was supported by her witness Muthigani Muriuki Mbora PW2 who stated that it is his father who allocated the appellant the one acre. He confirmed that the deceased was not there when his father allocated the appellant the one acre. It was however not clear from the evidence of this witness whether this information was from his own personal knowledge or from other sources. It has to be noted that the deceased disappeared more than 40 years ago and it was therefore important for the witness to tell the court the source of his information.
20. Both parties admitted that each of them is utilizing separate portions of the land for purposes of cultivation. The respondent/protestor said that the portion she utilizes is about 4 acres while the appellant utilizes about one acre and something. That currently the appellant is occupying a portion measuring about one acre. I have also to observe that though the respondent was quick at telling the court that it is an uncle who allocated the appellant the one acre, she did not say who allocated her the 4 acres.
21. The appellant on her part did not tell the court the estimated size of the portion that she utilizes for cultivation. She however said that there is a separate portion of the land that is used for grazing by both sides. A neighbour to the parties, James Macharia DW3, confirmed that there is indeed a big portion of the land that is used as a common grazing area by both sides. The evidence of the appellant and the said witness to that end was not challenged. I therefore accept the evidence that there is a portion set aside for common grazing. However, the size of the grazing area is not known. It was not clear whether the respondent included the said portion when asserting that she utilizes 4 acres. This would mean that if the area used as common grazing is removed from the total acreage, the respondent is utilizing less than the 4 acres that she alleges to be utilizing.
22. It is not in dispute that the respondent is utilizing a bigger portion of the land than the appellant. There is no evidence that she was allocated the land she utilizes by the deceased. It would appear that after the deceased disappeared, a brother to the deceased tried to ameliorate the dispute between the parties by allocating the appellant a portion of the land for purposes of cultivation. The respondent is taking advantage of this arrangement to argue her case. However, the respondent having conceded that the deceased did not distribute the land before he disappeared, her argument is in vain. The trial magistrate erred in holding that the deceased had distributed the estate before he disappeared. The deceased died intestate.
23. Section 38 of the *Law of Succession Act* provides as follows:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.



24. The deceased in this matter had 3 children – the appellant, the late husband to the respondent and the late mother to Lucy Wangui Maina PW3, whose family renounced their interest in the estate. That leaves the appellant and the respondent as the only beneficiaries of the estate. The respondent is taking the share of her late husband. The estate therefore ought to be shared equally between the appellant and the respondent in accordance with the provisions of section 38 of the *Law of Succession Act*.
25. The upshot is that the trial magistrate erred in holding that the deceased had distributed the suit land before he disappeared. The appeal is merited. The judgment of the trial magistrate is set aside. I order that the estate of the deceased herein be shared equally between the appellant and the respondent.
26. As the matter involves members of the same family, I order each party to bear its own costs to the appeal.

Signed by:

J. N. NJAGI

JUDGE

DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF OCTOBER, 2022.

By:

HON. JUSTICE M. MUYA

JUDGE

In the presence of:

Mrs. Wahome: for Appellant

Kawenga absent: for Respondent

Appellant.....

Respondent

Court Assistant

30 days R/A.

