Ireri v Njagi & another (Civil Appeal E024 of 2022)
[2022] KEHC 16558 (KLR) (19 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16558 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E024 OF 2022

LM NJUGUNA, J

DECEMBER 19, 2022

BETWEEN

MARY IGOKI IRERI ..... APPLICANT

AND

MARY RWAMBA NJAGI ..... 1ST RESPONDENT

JOHN MUCHANGI NYAGA ..... 2ND RESPONDENT

JUDGMENT

1. The appeal herein was instituted vide an undated memorandum of appeal and wherein the appellant challenged the ruling of the trial court (Hon. J.W Gichimu) SPM in Succession Cause No. 10 of 2017 and which ruling was delivered on March 29, 2022. The appellant raised the following grounds of appeal that ;-

    i. The Learned Magistrate erred in law and in fact by failing to appreciate that the estate of the deceased herein was only one (1) acre being half of the Land Parcel No. Kagaari/ Kanja/ 2885 as the suit land.

    ii. The Learned Magistrate erred in law and in fact in finding that the appellant was not entitled to a share of her deceased mother's estate whereas she is a daughter of the said deceased and the estate being subject of the *Law of Succession Act* by virtue of section 2 of the said Act.

    iii. The Learned Magistrate erred in law and in fact by relying on hearsay evidence to the effect that the deceased herein had expressed her disinterest in the estate herein.

    iv. The Learned Magistrate erred in law and in fact by relying on hearsay evidence to the effect that the deceased's husband had ten (10) acres of land elsewhere and thus disinheriting the appellant of her entitlement to her mother's estate.

v. The Learned Magistrate erred in law and in fact by finding that Land Parcel No. Kagaari/ Kanja/ 2885 was registered in the names of the deceased and her son Allan Nyaga so as to prevent the same being sold and disregarding the notorious evidence that the land was jointly held by the deceased and Allan Nyaga upon the deceased having purchased one acre of the said land and thus violating the parole evidence rule.

vi. The Learned Magistrate erred in law and in fact by failing to appreciate the legal principle governing a situation where a property is registered in more than one name and the register does not specify the nature of the rights by the said owners.

vii. The Learned Magistrate erred in law and in fact by attempting to rewrite the agreement between the deceased and her son Allan in relation to the manner of ownership of Land Parcel No. Kagaari/ Kanja/ 2885 and thus violating the rules of evidence on interpreting terms agreed by the parties to an agreement.

viii. The Learned Magistrate erred in law and in fact when he found that the estate of the deceased herein comprising of Land Parcel No. Kagaari/ Kanja/ 2885 measuring two acres should be inherited by Mary Rwamba Njagi the 1st respondent solely.

ix. The Learned Magistrate erred in law and in fact in allowing the protest by the 2nd respondent in total disregard to the evidence on record and the principles of law relevant to the issue before it.

2. The appellant prayed for orders that the appeal be allowed, that the ruling delivered on 29.03.2022 together with any orders arising therefrom be set aside and that an order be issued allowing the Summons for Confirmation of Grant dated 28.02.2018. She also prayed for the costs of the appeal and costs of the summons in the lower court.

3. The appeal was canvassed by way of written submissions.

4. The appellant condensed the grounds of appeal into two issues namely; the extent of the estate of the deceased herein. She submitted that as the land was held jointly between their deceased mother and her brother (Allan Nyaga- husband to 1st respondent) and which was two acres, then failure to have the mode of ownership in the register means that the suit land was held jointly and as joint tenants. This was so, since the land was registered before the enactment of the *Land Registration Act* 2012. Reliance was placed on the case of Josephat Thuo Githachuri v James Gaitho Kibue & another; Gladys Nduta Mbugua (Interested Party) [2021] eKLR. That being the case, and since the said son Allan Nyaga predeceased the deceased herein, the deceased herein thus became the sole owner of the whole of the suit land under the principle of jus accrescendi and as such, the estate herein was two acres. Reliance was placed on the case of Diana Muchiri v Lydia Wariara Njenga & another [2022] eKLR. That as such, the trial court erred in law in misconstruing the extent of the estate (in support of ground 1 of appeal).

5. Further that, the trial court erred in law and in fact by failing to appreciate the legal principle governing a situation where a property is registered in more than one name and the register does not specify the nature of their rights by the said owners (ground 6 in the memorandum of appeal) and that, death of Allan made the appellant the sole owner of the suit property and as such, the whole was available for distribution. On ground 5, it was submitted that the Learned Magistrate erred in law and in fact by finding that Land Parcel No. Kagaari/Kanja/2885 was registered in the names of the deceased and her son Allan Nyaga so as to prevent the same being sold and disregarding the notorious evidence that the land was jointly held by the deceased and Allan Nyaga upon the deceased having purchased one acre of the said land and thus violating the parole evidence rule and where no evidence was tendered to prove that the joint registration was for the said purpose.

6. The appellant submitted that the deceased having died intestate after the commencement of the LSA, the rules of intestacy ought to apply and wherein the property ought to be shared equally between the surviving children being the appellant and the 1st respondent. Reliance was placed on section 38 of the *Law of Succession Act*. That, the court as such, erred in finding that the appellant was not entitled to a share of her deceased mother's estate. That the land ought to have been distributed equally between the appellant and Allan Nyaga with the respondent holding a life interest in her husband's share.

7. The appellant further submitted that the trial court erred in law and in fact by relying on hearsay evidence to the effect that the deceased herein had expressed her disinterest in the estate herein and which evidence cannot be believed or relied upon because if she had no interest in the suit land, she could not have been registered as joint owner with Allan Nyaga. Further that, there was no evidence which was tendered that the deceased's husband had ten acres of land elsewhere and that even if the said husband had land elsewhere, this does not mean that the appellant does not have any right over her mother's estate. As such, the trial court erred in law and in fact by relying on hearsay evidence to the effect that the deceased's husband had ten (10) acres of land elsewhere and thus disinheriting the appellant of her entitlement to her mother's estate.

8. The appellant invited this court to examine matters of both law and facts and subject the whole of the evidence which was tendered before the trial court to a fresh and exhaustive scrutiny and draw its own independent conclusions, and in so doing, do find that the conclusion reached by the trial court was inconsistent with the evidence before the court and thus allow the appeal herein.

9. On their part, the respondents submitted that after all the facts and the law are considered, the trial magistrate reached a proper finding and as such, the appeal herein should be dismissed. That the appellant confirms that she is married and lives at Manyatta Sub-County and this, clearly shows that she has a place to call home and further, her deceased mother has 10 acres of land elsewhere and for that reason, the appellant reserves the rights to inherit the same. It was their case that the appeal herein has been filed in bad faith and it's only meant to frustrate them and therefore, this court was urged not to condone such. Further, it was their contention that the appeal herein cannot hold for the reason that the land has accrued to them by virtue of adverse possession given that they have stayed in the suit land for a period spanning twelve years. In regard to costs, it was the respondents' contention that following the principle that costs follow the events, it was urged that the appellant should be condemned to pay the costs of the appeal. In the same breadth, the respondents relied on Order 42 Rule 10 (2) of the Civil Procedure Rules to contend that the memorandum of appeal herein ought to have been stamped on presentation; something that was missing in the case herein. Reliance thus was placed on the case of Eddah Wangu & Another v Sacilia Magwi Kivuti (Deceased) [2021] eKLR. In the end, this court was urged to dismiss the appeal.

10. I have considered the appeal and the authorities relied on. This being a first appeal, parties are entitled to, and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial 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 allowances in this respect"

[See also Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR].

11. In re-evaluating the decision of the lower Court, I will heed to the principles set out in the case of Mbogo & Another v Shah [1968] EA where the Court held as follows;

> " An appellate Court will not interfere with the exercise of the trial Courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice."

12. I have analysed the pleadings before the trial court. I note that what was before the trial court was summons for confirmation of grant dated 23.02.2018 and wherein the applicant therein proposed that the suit land be shared equally. This application was remitted to the trial court for retrial by this court vide the judgment of 3.03.2021 and the orders having been premised on the fact that the court ought to have interrogated the evidence on the existence of another land parcel which the appellant herein was said to have inherited. Pursuant to the said orders, the matter proceeded for retrial before the trial court and by way of viva voce evidence.

13. The 2nd respondent who was a protestor against the proposed mode of distribution adopted his witness statement and further testified that the appellant herein did not have any interest in the suit land as her father had land elsewhere in Kamaru and she ought to inherit from the said land. In cross examination, he testified that he did not have green cards for the said land in Kamaru and further that his deceased father was registered as joint owner of the suit land herein together with Allan Nyaga to prevent the same from being sold. PW2 testified on the issue and stated that the suit land was registered jointly with the deceased and one Allan so as to prevent him from selling the same but the land belonged to Allan Nyaga. This was also the evidence by PW3 (that the land was registered jointly so as to prevent Allan from selling the same) and who further testified that the deceased herein indicated that she had no interest in the suit land as her husband had another land measuring ten acres. The protestors closed their case.

14. The appellant herein (applicant in the application before the trial court) testified that Allan was her brother and that he sold 6 acres out of the suit land and the two acres which were left, the deceased (Hellen) bought one acre and the land was thus registered jointly. In cross examination by 1st respondent, she testified that she used to pick tea on the said land. She denied knowledge of any other land which their father had and further testified that the deceased herein paid Kshs. 14,000/= and the same was evident on the green card.

15. Upon hearing the case, the trial court in its ruling made a finding that it was satisfied that the suit land belonged to Nyaga Allan but was jointly registered in his names and that of his mother to ensure that he did not sell the same. The Learned magistrate ordered that the suit land be inherited by Mary Rwamba (1st respondent) solely.

16. Having analysed the evidence before the trial court, as it is the duty of this court, I find that the issues which I am invited to determine are as follows;-

    i. Whether the deceased herein held any share in the suit property, and if so, what size?

ii. What ought to be the mode of distribution of the estate herein?

17. In determining the above issues, it is trite law that he who alleges must prove. In civil matters, the burden of proof is on he who alleges a fact. Sections 107 and 108 of the *Evidence Act* provide as follows:

> 107 "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."
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> [See Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh [2021] eKLR].

18. That the standard of proof in civil cases is proof on a balance of probability. [See Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR].

19. As to whether the deceased herein held any share in the suit property, the appellant submitted that the property was held jointly between the deceased and one Allan, and that, in absence of any evidence on the nature of ownership, the same became the deceased's upon the demise of Allan and this is because of the doctrine of jus ascerandi. The respondents on the other hand submitted that the land was registered jointly in the names of the deceased and Allan so as to protect the same from being sold by Allan.

20. I have perused the record herein and what I note is that the appellant herein produced a copy of the green card to the suit land and which indicates that the same was a sub-division of LR Kagaari/Kanja/2812 and that it was registered in the names of Nyaga Allan on 4.12.1980 and that on 31.03.1981 the same was registered jointly in the names of the said Allan and the deceased herein. The said record indicates a consideration of Kshs. 14,000/= having been paid.

21. From the green card produced before the trial court, it is clear that the land was registered jointly. There was no indication as to the nature of the tenancy as to whether the same was joint tenancy or tenancy in common, despite the respondents having submitted that the same was registered jointly so as to prevent Allan from selling. In my view, there was no evidence presented before this court to support such a contention and in such a case therefore, this court is only left to define ownership of the suit land in reference to the said green card and which registration was never disputed by either party.

22. What is before the court is a document which is silent as to the nature of the tenancy or the purpose for which the land was jointly registered. It is my view, therefore, that the trial court erred in finding that the suit land was registered jointly for that purpose. What is evident from the evidence presented is that the deceased herein was a joint owner of the suit land. The land register indicates that she became the joint owner upon payment of some Kshs. 14,000/= as consideration.

23. Having found that the deceased herein held a share in the suit property, the next issue that I will determine is the size of the suit land that the deceased held.

24. It is not in dispute that the suit land was registered before the enactment of the *Land Registration Act* 2012. The same was registered in the joint names of the deceased and Allan in 1981. Before the said Act came into force, the legal regime applicable was that under the Registered *Land Act*. Further, the green card for the suit land does not indicate the nature of the tenancy the land was held. It is not clear whether it is tenancy in common or joint tenancy.

25. In Josephat Thuo Githachuri v James Gaitho Kibue & another; Gladys Nduta Mbugua (Interested Party) [2021] eKLR the court having been invited to determine on an issue where parties were registered jointly on a land parcel and where the register or the title did not indicate as to the type of ownership, the court while citing with approval the Court of Appeal's decision in Mukazitoni Josephine v Attorney General Republic of Kenya [2015] eKLR held that

> "24. A five judge bench of the Court of Appeal was similarly confronted with the above question in Mukazitoni Josephine v Attorney General Republic of Kenya [2015] eKLR. The five judge bench of the Court of Appeal pronounced itself on the question as follows:
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> > "34.We have considered the appellant's contention and the learned judge's finding. The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.
> >
> > 35. A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in latin as totem tenet et nihit tenet, a joint tenant holds everything and nothing (see Re Foley (deceased) Public Trustee -v- Foley & Another (1955) NZLR 702). In Stack -v- Dowden (2007) UKHL 17, the House of Lords expressed itself as follows: "The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence."

25. The appeal leading to the above pronouncement by the Court of Appeal arose from a dispute that was determined by the High Court prior to the enactment of Section 91 (2) of the *Land Registration Act*. I have not come across any subsequent pronouncement to the contrary by the Court of Appeal on the same issue. The pronouncement by the Court of Appeal is, in the circumstances, the prevailing jurispendence on the issue under consideration.

26. What emerges from the above pronouncement by the Court of Appeal therefore is that prior to the enactment of Section 91 (2) of the *Land Registration Act*, whenever land was registered in two or more names, in the absence of a clear indication in the register specifying the nature of the interest

> of the registered co-proprietors, the property was deemed to be held in joint tenancy (joint proprietorship) and not tenancy-in-common (proprietorship-in-common). Put differently, prior to the enactment of Section 91(2) of the *Land Registration Act*, in the absence of a clear indication of the type of proprietorship in the register relating to land registered in the names of two or more persons, the presumption was that the co-proprietors held the land as joint tenants (joint proprietors). Secondly, the above presumption was rebuttable. Thirdly, the onus of rebutting the presumption was on the party seeking to have the court believe otherwise....."

26. In the instant case, the respondents did not adduce sufficient evidence to convince the court that the land was not held in joint ownership. It was a burden placed on them by the law to prove the allegations that the same was registered in the joint names of the deceased and Allan so as to prevent him from selling the same. [See section 107 of *Evidence Act*].It therefore means that upon the death of Allan and who predeceased his mother (the deceased herein), the suit land automatically became the deceased's. As such, it is my finding that the deceased held the entire suit property (2 acres) upon the death of the joint owner. This was under the principle of jus accrescendi. [See Diana Muchiri v Lydia Wariara Njenga & another [2022] eKLR]. As such the extent of the share of the deceased was two acres.

27. That being the case, the next question will be on the mode of distribution of the said estate. It is not in dispute that the deceased died after the commencement of the LSA 1981. Further, it is not in dispute that the appellant herein is the child of the deceased and so is Allan. Under the Rules of intestacy, where the deceased dies intestate and is survived by children without a spouse, the estate ought to be shared equally between the surviving children. This is provided for under section 38.

28. The above provision therefore means that the estate ought to be shared equally amongst the appellant and the family of Allan. In that regard, I hold the view that the suit land ought to be shared equally between the appellant on one part and Allan Nyaga on the other part. But since the said Allan is deceased, his share ought to go to his children and/or spouse. As it is trite, where a child predeceased the deceased intestate, the children of the said child steps into the shoes of the deceased and takes up their parent's share. Where there is a surviving spouse to that deceased child, she holds a life interest in relation to her husband's share. [See Eddah Wangu & another v Sacilia Magwi Kivuti (Deceased) Substituted with Ribereta Ngai [2021] eKLR].

29. It therefore follows that the estate ought to be shared into two portions in that the appellant ought to get one acre while the 1st respondent ought to get one acre and is entitled to a life interest in the same.

30. I note that the evidence by the respondents in the trial court was that the appellant herein had benefitted from the deceased and that she had other ten acres elsewhere. In the judgment of this court delivered on 3.03.2021, the court noted that the trial court (during the hearing of the application whose ruling was subject of the judgment of the trial court) stated that the allegations made by the protestors that the deceased had expressed her disinterest in the estate for she owned another land was never proven. This court would like to point out that the trial court ought to have interrogated that evidence together with the other evidence to the effect that the respondent had another piece of land. That the trial court ought to have taken viva voce evidence so that the credibility of the said allegation could be tested by way of cross examination. It is for this reason that the proceedings relating to the application for confirmation of grant dated 23.02.2018 were set aside and the application was remitted back to the trial court for hearing and which was to proceed viva voce.

31. What this means is that the parties herein were given an opportunity to prove the issues as to the deceased having been registered as proprietor of the suit land since Allan was a substances' abuser and

further prove that the appellant herein had benefitted from another land elsewhere. In my view, these issues were never proved. The documentary evidence tendered to wit the green card for the land parcel does not indicate any trust and neither was existence of any trust proved. Further there was no green card or any evidence that the appellant herein is registered as proprietor of ten acres elsewhere.

32. Taking into account all the above, I find that the trial court erred in finding that the appellant had land elsewhere and further in finding that the land belonged to Allan Nyaga but was jointly registered in his names and that of his mother to ensure that he did not sell the same and further allowing the protest and finding that the suit estate herein should be inherited by the 1st respondent solely.

33. In the end;

    i. I set aside the ruling of the trial court and substitute the same with the orders allowing the summons for confirmation of grant dated 23.02.2018 as prayed.

    ii. Each party shall bear his or her own costs for the appeal.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1TH DAY OF DECEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent