



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 7”B” OF 2019

MARY NYAMBURA KATHIACA.....APPELLANT

VERSUS

DAVID MWANGI MURAGURI.....RESPONDENT

JUDGMENT

1. This appeal impugns the judgment of *Hon. M.N. Gicheru (CM)* dated 28th January 2019 delivered in Embu Succession Cause No. 386 of 2016 regarding distribution of the estate of the late *Eliud Kathiaka Daniel Alias Gathiaka Daniel* (hereinafter the deceased) who died intestate on 6th November 2004.

2. Upon the deceased’s demise, his widow, *Hannah Wambui Gathiaka* petitioned and obtained a grant of letters of administration of his estate on 2nd March 2011. The record shows that thereafter, due to ill health, her daughter, *Mary Nyambura Kathiaka* who is the appellant herein was appointed by the court on 21st April 2016 to be her guardian *ad litem*.

3. The record further shows that on 24th July 2012, the appellant’s mother (petitioner) filed a summons for confirmation of the grant issued on 2nd March 2011 and listed the following as the deceased’s beneficiaries:

- i. *Hannah Wambui Gathiaka* – widow
- ii. *Jane Wambui Gathiaka* – daughter
- iii. *Mary Nyambura Kathiaka* – daughter

4. In the summons, Land Parcel No. Kiine/Kibingoti/Nguguini/366 (the suit land) was identified as the only asset comprising the deceased’s estate. She proposed that the estate be distributed as follows:

- i. *Hannah Wambui Gathiaka* – 1 acre
- ii. *Jane Wambui Gathiaka* – 1.25 acres
- iii. *Mary Nyambura Kathiaka* – 1.83 acres

5. The confirmation of grant in the manner proposed was opposed by *Sterah Wamaita Muraguri*, *David Mwangi Muraguri* (the respondent) and his brother *Elijah Muriithi Muraguri* who jointly filed an affidavit of protest. According to the court record *Sterah Wamaita Muraguri* (*Sterah*) was the 2nd and 3rd protestor’s mother.

6. The protest was based on the claim that in 1964, *Sterah* had purchased 2^{1/2} acres of the suit land from the deceased as evidenced by an agreement dated 5th September 1964; that upon execution of the agreement, the protestors took exclusive possession of the suit land and have extensively developed it by *inter alia* building four houses, planting coffee and assorted fruit trees and connecting it with water from an irrigation scheme.

7. The protestors also averred that they have had uninterrupted occupation of the suit land for a total of 48 years; that though the deceased did not transfer title to the land to *Sterah* before his demise, they had acquired its ownership by virtue of the doctrine of adverse possession and the grant should be confirmed on terms that the 2nd and 3rd protestors be registered as joint proprietors of two and a half acres of the suit land to hold the same in trust for the family of *Sterah*.

8. The protest was heard by *viva voce* evidence. The parties testified in support of their respective cases. The 2nd protestor (the respondent) testified on behalf of the other protestors and called one additional witness. I wish to point out at this juncture that at the time he testified, the respondent alleged that the other protestors had passed on though he did not produce their death certificates to prove this claim. The court record however confirms that the death of *Sterah* was reported to the court on 26th March 2013 through an application which sought to stop her burial on the suit land.

9. The appellant testified on behalf of the petitioner and denied the protestors' claims that her late father had sold a portion of the suit land to *Sterah* in 1964 and that ever since, *Sterah's* family had lived on the land. She testified that if indeed the land had been sold as alleged, the protestors would have sued the deceased in his lifetime seeking to compel him to transfer title to *Sterah* and the deceased protestors would have been buried in the suit land. She described the respondent as a stranger who had no right to benefit from the deceased's estate. She maintained that the suit land belonged to the deceased and produced in evidence a title deed bearing his name.

10. In cross-examination, the appellant claimed that the suit land is 3¹/₂ acres; that it is the deceased who was farming on the land and is the one who planted coffee trees; that the deceased was buried on the suit land and that during his burial, she did not see any building or other people living on the land.

11. On his part, the respondent maintained his claim that the deceased sold 2¹/₂ acres of the suit land to his late mother in 1964 as evidenced by a sale agreement dated 5th September 1964; that among other witnesses, he witnessed execution of the sale agreement as witness number 3; that though his family moved into the land in 1964, the deceased did not effect transfer of the land to his mother; that the deceased never lived on the land but he was buried there.

12. He further testified that he had developed the land by building 6 houses; established a fish pond and planted assorted fruit trees and 250 coffee bushes and that he had buried seven of his relatives in that land.

13. In cross-examination, the respondent confirmed that he was relying on the sale agreement dated 5th September 1964 as a basis for claiming a share of 2¹/₂ acres of the suit land being the portion his late mother had purchased from the deceased. He claimed that throughout his lifetime, the deceased was aware but did not complain about his occupation of the suit land.

14. His witness, *Cyrus Kigotho Kariuki*, testified that during some undisclosed period, he was the Chairman of Kibirigwi Irrigation Scheme and that on two undisclosed dates, he sought and obtained the deceased's consent to have the respondent connect water and to plant coffee bushes on the suit land since according to the scheme's regulations, those two activities could not be undertaken without the title holder's consent.

15. In his judgment, the learned trial magistrate, relying on the sale agreement dated 5th September 1964 and the evidence adduced by the respondent found as a fact that the late *Sterah* had bought 2¹/₂ acres of the suit land from the deceased and that since 1964, her family had occupied the suit land. He dismissed the summons for confirmation of grant and ordered that the deceased's estate be distributed as follows:

i. Family of *Sterah Wamaitha Muraguri* – 2¹/₂ acres

ii. Family of *Gathiaka Daniel* – 1 acre.

This is the decision that aggrieved the appellant hence this appeal.

16. In her grounds of appeal, the appellant basically complained that the learned trial magistrate erred in law and fact by: disregarding the substance of her evidence including her claim that the sale agreement was invalid as it was made after the deceased's death; failing to appreciate that the respondent entered into the land after her father's death not during his lifetime; and misinterpreting her evidence and holding that it lacked consistency.

17. This is a first appeal to the High Court. As such, it is an appeal on both facts and the law. A first appeal proceeds by way of a retrial and it is thus my duty to revisit and to re-evaluate the evidence and material placed before the trial court to draw my own independent conclusions bearing in mind that unlike the trial court, I did not see or hear the witnesses testifying and give due allowance to that disadvantage. See: ***Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123*** and ***Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR***.

18. I have carefully considered the grounds of appeal, the evidence adduced before the trial court and the parties' rival submissions. Having done so, I find that the only issue which crystallizes for my determination is whether the learned trial magistrate erred in his finding that *Sterah* had bought 2¹/₂ acres of the suit land from the deceased in his lifetime and that her family was therefore entitled to a share of the deceased's estate.

19. As noted earlier, the trial court's finding that the late *Sterah* had purchased 2¹/₂ acres of the suit land from the deceased way back in 1964 was based on the sale agreement dated 5th September 1964. I have examined the said sale agreement. I note that it is written in the Gikuyu language but contrary to the appellant's assertion in her written submissions, there is an English translation of the agreement in the original record of the trial court though for some undisclosed reason it was omitted from the record of appeal.

20. Though the agreement is on its face value an agreement for the sale of land and apparently met the requirements for contracts for disposition of an interest in land as set out in Section 3 of the *Law of Contract Act*, it did not specify the land which was subject of the sale agreement. I have used the word "apparently" deliberately because though the agreement was in writing and was attested by several

witnesses, it is not clear whether it was actually executed by the contracting parties. The agreement bears a signature attributed to the vendor being the deceased and a thumbprint allegedly affixed by the purchaser whose identity is not properly revealed.

21. A close scrutiny of the agreement shows that though it indicates sufficient details identifying the vendor by stating two of his names, namely *Gathiaka Daniel* leaving no doubt that the vendor was the deceased, it only mentioned the Christian name of the purchaser, namely *Stellah* without indicating her full names or giving any other description that would have properly identified the alleged purchaser.

22. The law as encapsulated in *Sections 107 to 109 of the Evidence Act* is that he who alleges the existence of certain facts has the burden of proving that those facts exist. Having relied on the aforesaid agreement as proof of his claim that his late mother had bought a portion of the suit land from the deceased which claim was strongly contested by the petitioner through the appellant, considering that it is common knowledge that there are many women who have *Stellah* as their first names, the respondent had the onus of proving on a balance of probabilities that the lady described as *Stella* in the agreement referred to his late mother and that the thumbprint attributed to the purchaser actually belonged to her. He did not adduce any such evidence.

23. More fundamentally, as noted earlier, the agreement did not specify the land that was being sold. It therefore related to an unknown and undisclosed parcel of land. In the premises, the agreement could have related to any other parcel of land that the deceased may have owned at the time other than the suit land. The respondents claim that he witnessed execution of the agreement does not help matters and is immaterial since this claim cannot change the content of the agreement.

24. Further, my perusal of the title document issued in the name of the deceased in respect of the suit land which was produced in evidence by the appellant clearly shows that it was issued on 10th January 1972 about eight years after the purported agreement was entered into making it more probable than not that the agreement could have been entered into in respect of a different parcel of land.

25. I fully agree with the holding of *D.K.Kemei in Tanathi Water Services Board V Pasha Enterprises Ltd [2020] eKLR* that:

“For a contract to be valid and legally enforceable, there must be: capacity to contract; intention to contract; consensus ad idem; valuable consideration; legality of purpose; and sufficient certainty of terms. If in a given transaction any of them is missing, it could as well be called something other than a contract.”

In this case, it is my finding that though the agreement related to sale of some parcel of land, it was ambiguous as to the identity of the purchaser and the particular parcel of land subject matter of the sale transaction. In my view, the agreement could not for that reason form the basis of a valid and legally enforceable contract.

26. In any event, having not specified the land which was allegedly being sold, the agreement could not have constituted evidence to prove that the deceased actually sold a portion of the suit land to the respondent's late mother. The same case applies to the subsequent agreement dated 4th March 1984.

27. If indeed the deceased had sold a part of the suit land to the respondent's late mother, it is perplexing that though the deceased died in the year 2004, about 40 years after the alleged sale, he did not transfer title to the alleged purchaser prior to his death and the said purchaser for all those many years did not institute suit against him for specific performance of the agreement or a declaration that she was the owner thereof by virtue of the doctrine of adverse possession.

28. The invocation of the doctrine of adverse possession by the respondent in the proceedings before the trial court was misplaced because as a succession court, the court did not have any mandate to settle ownership disputes. Its mandate was limited to distribution of the deceased's free estate amongst his heirs or dependants in accordance with the law. *Article 162 (2) of the Constitution, 2010* is clear that disputes related to the environment, use, occupation and title to land can only be determined by the Environment and Land Court. The claim that the respondent had acquired ownership of the suit land through adverse possession which was repeated in the respondent's written submissions in opposition to the appellant's appeal ought to have been made in a court competent to try it which is the Environment and Land Court.

29. In view of the foregoing, it is my considered opinion that the learned trial magistrate erred in finding that the respondent had proved to the required standard that his late mother had purchased 2^{1/2} acres of the suit land from the deceased. The finding was not supported by the evidence on record.

30. I now wish to consider whether the learned trial magistrate erred in his finding that *Sterah's* family including the respondent had been in occupation of the suit land since 1964. In his evidence, the respondent claimed that he had been in occupation of the suit land since 1964 and had effected several developments thereon including construction of several houses, constructing a fish pond and planting of assorted trees. He further claimed that he had buried seven of his relatives on the land. These claims were vehemently denied by the appellant.

31. As noted earlier, the law is that he who alleges must prove. The record shows that the respondent did not tender documentary or any other cogent evidence to substantiate or prove his aforesaid assertions. He did not also produce a single death certificate of the seven relatives he claims he buried on the suit land. The evidence on record therefore amounted to the word of the respondent against that of the appellant which was not sufficient to discharge the respondent's burden of proof.

I am fortified in this finding by the provisions of *Section 3 (4) of the Evidence Act* which clearly stipulates that a fact is not proved when it is neither proved nor disproved.

32. Upon my independent appraisal of the evidence on record, it is my finding that the learned trial magistrate failed to thoroughly interrogate the evidence before him and thereby arrived at the erroneous conclusion that the respondent had proved to the required standard that the late *Sterah* had purchased a portion of the suit land from the deceased in 1964 and that her family had been in its occupation since

then.

33. Before I pen off, I wish to comment on an issue of law regarding the capacity of the respondent to lodge and sustain a protest in the proceedings before the trial court which neither of the parties raised in their written submissions.

It is clear from the protest and the evidence tendered before the trial court that the respondent was not claiming a share of the deceased's estate on his own behalf as a creditor who had purchased a portion of the suit land from the deceased but he was doing so on behalf of his late mother who had allegedly bought some land from the deceased.

34. Assuming that the late *Sterah* had actually bought land from the deceased in his lifetime, that land would have formed part of her estate. I carefully scrutinized all the material that was placed before the trial court and I did not come across any evidence that the respondent had informed the court or produced any evidence to show that he had been appointed as the legal representative of his late mother's estate.

35. In the absence of evidence that he had been appointed as administrator of his late mother's estate, it is my finding that the respondent lacked capacity to institute or defend any action concerning the estate.

The learned trial magistrate therefore erred in failing to appreciate this fact and in entertaining hearing of a protest in which the surviving protestor, namely the respondent, lacked *locus standi*.

36. For all the foregoing reasons, I find merit in this appeal and it is hereby allowed. The judgment of the trial court (described as a ruling) is hereby set aside. The estate of the late *Eliud Kathiaka Daniel Alias Gathiaka Daniel* shall now be distributed as proposed by the petitioner in paragraph 5 of the affidavit supporting the summons for confirmation of grant dated 23rd July 2012.

37. Costs follow the event and are at the discretion of the court. The best order that commends itself to me on costs is that the appellant is awarded costs of the proceedings in the lower court but each party shall bear own costs of the appeal.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH 2021.

C. W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF MARCH 2021.

L. NJUGUNA

JUDGE

In the presence of:

Ms Muriuki holding brief for Mr. Ithiga for the appellant

No appearance for the respondent

Esterina: Court Assistant