



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 26 OF 2019**

**MWANIKI MURANGIRI.....APPELLANT**

**VERSUS**

**NDWIGA MURANGIRI MURUAMBUKI.....1<sup>ST</sup> RESPONDENT**

**SELESTE MBOGO NJERU.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This appeal impugns the decision of *Hon. M.N. Gicheru (CM)* dated 6<sup>th</sup> August 2018 delivered in Embu Succession Cause No. 446 of 2017 regarding distribution of the estate of the late *Njeru Muruambuci* who died intestate on 14<sup>th</sup> September 2002.

2. From the record, it is clear and undisputed that the estate comprised of two parcels of land, namely, Gaturi/Nembure/1435 measuring 5.16 acres and Gaturi/Nembure/4098 measuring 1.93 acres. It is also not disputed that the deceased was survived by three sons who are, the appellant who was also appointed as the administrator of the estate and the two respondents in this appeal.

3. The record further shows that when the appellant filed summons for confirmation of the grant proposing that the two parcels of land comprising the estate be distributed to himself and the two respondents in equal shares, the respondents filed an affidavit of protest in which they averred that the deceased had in his lifetime gifted the appellant with Land Parcel No. Gaturi/Nembure/1409 measuring approximately 4 acres and that this land should be taken into account when distributing the estate.

4. The hearing proceeded by way of *viva voce* evidence at the end of which the learned trial magistrate rendered his decision upholding the position taken by the respondents that the appellant was not entitled to any share in the estate considering that he had previously obtained Land Parcel No. Gaturi/Nembure/1409 which was bigger in size than the share each of the respondents would get if the estate was distributed amongst them.

The learned trial magistrate after applying *Section 42* of the *Law of Succession Act* made the following finding:

***“I find that the estate of the deceased should be shared equally between the protestors and that the petitioner has no share because he already has Gaturi/Nembure/1409 which is bigger than what the protestors will get after sharing land parcel Gaturi/Nembure/1435 and 4098.”***

5. The petitioner (appellant) was aggrieved by the trial court’s decision hence this appeal. In his memorandum of appeal, he relied on seven grounds of appeal in which he mainly complained that the learned trial magistrate erred in law and fact in: finding that the appellant was not entitled to a share of his father’s estate in total disregard of the law governing intestate succession; finding that the deceased gave the appellant Land Parcel No. Gaturi/Nembure/1409 (subject land) whereas the land was given to the appellant by the kina clan; applying the provisions of *Section 42* of the *Law of Succession Act* when it was inapplicable in the circumstances of this case; disregarding the evidence of the appellant and his witness who testified that the appellant got the subject land from the clan and not from his father.

6. By consent of the parties, the appeal was prosecuted by way of written submissions.

7. This being a first appeal to the High Court, it proceeds by way of a retrial and I am thus duty bound to revisit and subject the evidence and material placed before the trial court to a fresh and exhaustive analysis to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses and give due allowance to that disadvantage. See: ***Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123.***

8. I have carefully considered the parties’ rival written submissions and the authorities cited together with the grounds of appeal and the evidence on record. I have also studied the judgment of the learned trial magistrate. Having done so, I find that two key issues crystallize for my determination which are:

i. Whether the learned trial magistrate erred in his finding that Land Parcel No. Gaturi/Nembure/1409 was given to the appellant by the deceased or at his behest during his lifetime.

ii. Whether the appellant is entitled to a share of the estate.

9. To resolve the first issue, it is important to revisit the evidence that was adduced before the trial court.

The appellant testified that the subject land was given to him by the clan in the same way that the deceased was given the parcels of land comprising the estate and the 0.25 acre plot that was given to the 1<sup>st</sup> respondent; that the clan allocated land to each person depending on the amount of money the person contributed. He produced a title deed for the subject land claiming that it was his land and was not subject to distribution. Further, he testified that he was entitled to a share of his father's estate.

10. During cross-examination, he denied that he was allocated the subject land by the clan as a result of the deceased's influence. He also denied that he used to live on the land comprising the estate before he left to occupy the subject land.

11. His witness, *Japhet Munyi* recalled that he was part of the Kina clan and was involved in the allocation of land during land consolidation. He testified that the clan gave the appellant 3.86 acres of land while the deceased got 5.56 acres since he gave a lot of *njiga* (food). The 1<sup>st</sup> respondent got 0.25 acres in Kavote town but the 2<sup>nd</sup> respondent did not receive anything since at the time, he was a small child.

12. He supported the appellant's case that he was entitled to a share of the deceased's estate since the same ought to be distributed amongst all his children.

The respondents did not offer any evidence in support of their protest.

13. In the course of arriving at his decision, the learned trial magistrate stated, *inter alia*, as follows:

***"... that law of section 42 provides that the land allocated in the lifetime of the deceased be taken into account. I find that the land should be taken into account because the petitioner got it because of being a son of the deceased and for nothing else."***

14. Upon my own independent appraisal of the evidence on record, I find that there was nothing in the evidence that demonstrated or proved on a balance of probabilities that the subject land was gifted to the appellant by the deceased in his lifetime or that he received it from the clan in his capacity as the deceased's eldest son. The evidence is clear that the appellant received the land directly from the clan because of the money he contributed towards its allocation. The copy of green card exhibited at page 50 of the record of appeal shows that title to the subject land was first registered in the name of *Ndwiga Maranya* before it was registered in the appellant's name on 10<sup>th</sup> August 1999. The deceased's name does not appear anywhere in the register.

15. The law as set out in *Sections 107 to 109 of the Evidence Act* is that he who asserts the existence of certain facts has the burden of proving that those facts exist. Having alleged that the appellant was not entitled to a share of the estate because he had been gifted with the subject land during the deceased's lifetime, the respondents had the onus of proving that the land initially belonged to the deceased before he gave it to the appellant prior to his death. The respondents chose not to call any evidence during the trial to substantiate their claim which means that they did not discharge their burden of proof.

16. The learned trial magistrate in his judgment failed to address his mind to the incidence of the burden of proof and as correctly pointed out by the appellant, he failed to consider the evidence adduced by the appellant which clearly proved that the subject land never belonged to the deceased at any point in time and that it was given to him by the Kina clan not the deceased. It is thus my finding that the learned trial magistrate erred in his finding that *Section 42 of the Law of Succession Act* applied in this case. The section provides that gifts or property given by a deceased in his lifetime to a child, grandchild or house should be taken into account during distribution of the estate.

17. My analysis of the evidence on record leads me to the conclusion that the subject land was privately acquired by the appellant independently from the deceased. I find no evidence on record to support the trial court's finding that the appellant got the land simply because he was the deceased's son.

18. Having found that the trial court erred in its finding that the subject land was gifted to the appellant by the deceased, I now turn to consider whether the appellant was entitled to a share of the deceased's estate. To answer this question, I only need to refer to *Section 38 of the Law of Succession Act* which 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."***

19. Since it is not disputed that the appellant was one of the children who survived the deceased, he had every right to share the net intestate estate of the deceased in equal shares with the respondents who were his brothers. The fact that he owned another bigger parcel of land elsewhere was immaterial. It could not disentitle him from inheriting a share of his late father's estate.

20. For all the foregoing reasons, I find merit in this appeal and it is hereby allowed. The judgment of the trial court is consequently set aside. It is substituted with a judgment of this court ordering that Land Parcel No. Gaturi/Nembure/1435 measuring 5.16 acres and Land Parcel No. Gaturi/Nembure/4098 measuring 1.93 acres shall be distributed to the appellant and each of the respondents in equal shares.

For the avoidance of doubt, each of the parties will get a share of 1.72 acres from Land Reference No. Gaturi/Nembure/143 and a share of 0.643 acres from Gaturi/Nembure/4098.

21. Costs follow the event and are at the discretion of the court. Given that this appeal emanates from a succession cause involving brothers, the order that best commends itself to me is that each party shall bear his 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 Muthoni Ndeke for the Appellant

Mr. Okwaro for the Respondents

Esterina: Court Assistant