



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 52 OF 2019**

**EMILY WAMBUGI GACUMUNI.....APPELLANT**

**VERSUS**

**ESTHER WAMBUI NJINGI.....RESPONDENT**

**JUDGMENT**

1. In this appeal, the appellant challenges the ruling of the Principal Magistrate Hon. Gichimu which was delivered on 10.09.2019 in Runyenjes Succession Cause No. 250 of 2017. The appellant filed a memorandum of appeal and wherein she raised the following grounds of appeal;-

1. That the Learned Principal Magistrate erred in law and in fact when he failed to consider that the appellant has always been in occupation of the suit land since 1950's to the exclusion of the respondent.
2. That the Learned Principal Magistrate erred in law and in fact when he failed to consider the efforts taken by the appellant in developing the plot and the agreement between the original owner of the plot and the appellant's deceased husband.
3. That the Learned Principal Magistrate erred in law and in fact when he totally relied on the documentary evidence adduced by the respondent and failed to consider the weight of the evidence adduced by the appellant.
4. That the Learned Principal Magistrate erred in law and in fact when he ordered that the appellant had not proved her case on a balance of probabilities and that she had failed to prove ownership of the suit land/ plot.
5. That the Learned Principal Magistrate erred in law and in fact when he failed to consider that the appellant has always taken steps to prove ownership of the suit land/ plot since 1950s and did not lodge the protest as an afterthought.
6. That the Learned Principal Magistrate erred in law and in fact when he ruled that the documentary evidence produced by the appellant was not signed not certified and failed to consider the original documents could only be produced during viva voce evidence.

2. The appellant as thus prayed that the appeal be allowed and the ruling of the Principal Magistrate be set aside.

3. The appeal was canvassed by way of written submissions. The appellant in support of the appeal basically submitted that it was wrong for the respondent to include suit land/ plot as part of her deceased husband's estate yet the same did not belong to the said deceased husband. The respondent on her part submitted that there was no sufficient evidence which was presented before the trial court as to the appellant's deceased husband (Gacumuni Munoi) as being the registered owner thereof. Further that the trial court rightly considered the evidence which was presented before it and found that the said Gacumuni Munoi had no proprietary interests in the estate.

4. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). However, this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings { See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga& Another (1988) KLR 348**}.

5. I have definitely analyzed the evidence which was tendered before the trial court. In a nutshell, the respondent herein petitioned for letters of administration intestate in relation to the estate of Isiah Njingi Charles alis Isaiya Njingi Charles whom she deposed was her husband and the grant was made to her in that respect. However, the appellant herein filed an affidavit of protest against the confirmation of the grant. The

basis of the said protest was that the suit land /plot belonged to her deceased husband. The said protest was canvassed by way of written submissions and after which the court retired to determine the same. In the impugned ruling, the trial court dismissed the said protest on the basis that the appellant herein did not prove her case. It is this ruling which necessitated the appeal herein.

6. I have considered the grounds of appeal as postulated in the memorandum of appeal and the rival submissions filed herein. I have also read through the record of appeal. **Analysis of the law and determination**

7. The legal basis of filing an affidavit of protest is Rule 40(6) of the Probate and Administration Rules 1980. The said rule provides that any person wishing to object to the proposed confirmation of a grant shall do so by filing in the cause in duplicate at the principal registry an affidavit of protest against such confirmation stating the grounds of his objection.

8. In the instant case, however, the protestor (appellant)'s grounds were that the suit land did not form part of the estate of the deceased (respondent's husband). She filed a list of documents all in an attempt to prove that the same did not belong to the deceased's estate. What is clear therefore is that the issue in dispute was in relation to the ownership of the said plot. The main issue for determination before the trial court was as to whom between the respondent's husband, the appellant's husband and Gatumu Ngoroi was the owner of the suit land and/ or to what proportion.

9. It is now trite that a succession court does not have jurisdiction to determine issues on ownership of land. The said dispute ought to be adjudicated by the Environment and Land Court as established under the Environment and Land Court Act and Article 162(2) of the Constitution. In the case of **Priscilla Ndubi and Zipporah Mutiga –vs- Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013**, the court held:-

**“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”**

10. In my view, the issue before the trial court having been on ownership of the suit land, the trial court ought to have set aside the said property and refer the matter to the right forum as it has no jurisdiction to determine the said issue. This is despite the fact that no party had raised the said issue as the court can determine an issue on jurisdiction *suo moto*. (See **Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib [2015] eKLR**). The court erred in assuming jurisdiction which it did not have.

11. Further, from the perusal of the trial court's record, it is clear that when the matter came up for directions on 2.10.2018 the court directed that the same be canvassed by way of written submissions. This is despite the petitioner having earlier indicated that she would wish to proceed by way of oral evidence and the parties having proceeded to file witness statements and documents (pre-trial). The nature of the dispute being that concerning land, it is my considered view that the trial court erred on matters procedure in giving directions that the matter be canvassed by way of written submissions more so having earlier directed the parties to file witness statements and documents.

12. How would the same have been admitted as evidence? I believe it is as a result of this that Hon. Gichimu (SPM) upon taking up the matter (from Hon. Kimemia) noted in his judgment that the documents filed in court were not adopted and therefore evidence was not subjected to cross examination and further that the documents were never produced as exhibits.

13. The trial court process was faulty and the proceedings therefrom can only be set aside and a retrial ordered in the proper forum.

14. It is my view that in the instant case, the court having proceeded to determine an issue of jurisdiction, the decision thereon cannot have any legal basis in law. The said ruling is indeed a nullity and the same should be set aside. Further the proceedings by the trial court where it had no jurisdiction cannot stand and the same should be set aside. The parties should refer the dispute to a court with competent jurisdiction.

15. As such, the court makes the following orders: -

- 1. That the ruling of the trial court delivered on 10.09.2019 be and is hereby set aside for want of jurisdiction.**
- 2. That the proceedings before the trial court which culminated to the said ruling be and are hereby set aside in their entirety for want of jurisdiction.**
- 3. That the parties are at liberty to file the dispute before the Environment and Land Court which is the competent court.**
- 4. Each party to bear her own costs.**

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent