



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 44 OF 2020

IN THE MATTER OF THE ESTATE OF NJUGUNA MUCHIRI (DECEASED)

BETWEEN

JANE MUCHIRI.....APPELLANT

VS

JOSEPH KUNGU NJUGUNA.....RESPONDENT

(Appeal from the judgment and order of the Senior Principal Magistrate's Court at

Githunguri C. Kutwa PM, in Githunguri Succession Cause 94 of 1999 dated on the 20th December, 2018)

JUDGMENT

1. The deceased, **NJUGUNA MUCHIRI** died at the age of 91 years in June, 1996. On 20th December, 2018, by judgment of Principal Magistrate's Court, at Githunguri, the court ordered the estate of deceased be distributed as prayed in the summons for confirmation of grant dated 11th August, 2014. That determination aggrieved **Jane Muthoni Muchiri, Esther Njambi Muchiri** and **George Chege Muchiri**. They, collectively referred to as protestor, have filed this appeal against that judgment. In the determination of this appeal, this Court will be guided by the principles of the case **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123** where the court stated thus:-

"An appeal to this 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 allowance in this respect..."

2. The initial petition for grant of letters of administration intestate, in respect to the deceased's succession cause, was filed by Muchiri Njuguna, who is now deceased. In his petition, he listed himself as the son of the deceased in this cause and also listed the following:-

- (a) Joseph Chege Njuguna - son
- (b) Charles Mwai Njuguna - son
- (c) Mary Wangari Gitau - daughter
- (d) David Githiomi Njuguna - son
- (e) Lucy Njeri Kamau - daughter
- (f) Joseph Kungu Njuguna- son
- (g) Stephen Njoroge Kungu - son

3. On **Muchiri Njuguna** passing away, a grant was issued to Lucy **Ng'endo Muchiri** and on her passing away a grant was issued to **Jospheh Kungu Njuguna**, hereinafter the administrator. That administrator filed summons for confirmation of grant dated 11th August, 2014. The

administrator distributed the only property of the deceased in this cause namely, **GATAMAIYU/NYANDUMA/1250 (the suit property)**. The proposed distribution was objected by the protestors. The trial court ordered the objection to be heard by viva voce evidence. After receiving the evidence of one of the protestors namely, Jane Muthoni Muchiri and one witness for the protestor the administrator and his three witnesses, the court ordered the estate be distributed as sought by the summons for confirmation of grant.

4. The protestors' contention before the trial court was that the suit property was owned by their late father **Muchiri Njuguna** even though registered in the name of **Njuguna Muchiri**, deceased, whose estate is the subject of this cause. That remains their contention in this appeal and by their grounds of appeal, the protestors have faulted the trial court for dismissing their protest, they have also faulted the trial court in failing to uphold their evidence on the alleged purchase of the suit property by their late father and further, they faulted the trial court in ordering their share of the suit property be held in trust for them by the administrator.

5. All the grounds presented in this appeal call upon this Court to determine whether the protestors proved their case.

ANALYSIS

6. Muchiri Njuguna deceased petitioned for grant of letters of administration for the estate of his deceased's father Njuguna Muchiri deceased. In filing that petition, he deponed that the deceased's estate comprised of the suit property. He further deponed that his deceased's father was survived by him and by seven other siblings whose names have been stated above in this judgment.

7. By an affidavit dated 25th November, 1999 sworn by *Gachuki Muchiri and Gitau Muchiri*, both of whom are now deceased, they stated that they were step brothers of the deceased hereof and that the said deceased held the suit property in trust for them. *Muchiri Njuguna* deponed:-

“The land cannot be shared as claimed because I bought the said land from Gachuki Muchiri and Gitau Muchiri during the year 1963, so the land should be the property of Muchiri Njuguna.”

8. As stated above on the demise of Muchiri Njuguna deceased, a grant was issued to Joseph Kungu Njuguna, the administrator.

9. The protestor by their affidavit of protest stated thus:-

“That our father (Muchiri Njuguna deceased) was the owner of Land Parcel No. GATAMAIYU/NYANDUMA/1250 which he purchased from Gachuki Muchiri and Gitau Muchiri but the same was registered in the names of our grandfather the said Njuguna Muchiri (deceased).”

10. In support of the affidavit of protest, **Jane Muthoni Muchiri** testified at the trial that the suit property was purchased by **Muchiri Njuguna** deceased, and that at his death bed, **Muchiri Njuguna deceased** did not indicate that the suit property should be shared with her uncles, **Gachuki Muchiri** and **Gitau Muchiri** yet that the administrator had distributed the suit property to the survivor of her uncles. This witness however confirmed that she was not present when her father **Muchiri Njuguna**, deceased purchased the suit property. She also confirmed that she did not produce a receipt to prove her deceased's father bought the suit property.

11. The second witness for the protestor, **Benson Ng'ang'a Kihihu** testified that **Muchiri Njuguna** deceased gave him, in his capacity as **Senior Assistant Chief**, a document he described as a **Will** but later confirmed that he did not know the history of the suit property.

12. The administrator's evidence was supported by the evidence of **James Njuguna Muchiri** son of **Muchiri Njuguna** deceased. This witness stated the family of **Muchiri Njuguna** deceased was only entitled to 2 acres of the suit property and the remaining 4 acres were for the families of **Gachuki Muchiri** and **Gitau Muchiri**. That evidence was supported by Charles, brother to **Muchiri Njuguna** and by the administrator.

13. I have considered the evidence adduced before the trial court. The protestors bore a burden to prove that the property of deceased was purchased by their father **Muchiri Njuguna** deceased. The civil standard of proof was stated in the case **STRAIGHT SECURITY SERVICES LTD VS. SHONGA OVERSEAS CONSTRUCTION ENGINEERING LIMITED (2021) eKLR** where the court stated thus:-

“That standard of proof was considered in the CANADIAN CASE R. VS. LAYTON, 2009 SCC 36 (CanLII), [2009] 2 SCR 540 as follows:-

“4. What does “proof on a balance of probabilities”

mean? It does not mean proof beyond a reasonable doubt — that standard of proof applies only in criminal trials. In civil trials, such as this one, the party who has the burden of proof on an issue must convince you that what he or she asserts is more probable than not — that the balance is tipped in his or her favour. You must examine the evidence and determine whether the party who has the burden of proof on an issue is relying on evidence that is more convincing than the evidence relied on by the other side. In short, you must decide whether the existence of the contested fact is more probable than not.”

14. Having considered the evidence adduced at the trial, I find the protestors failed to adduce evidence that met the civil standards of proof, proving **Muchiri Njuguna** deceased purchased the 6 acres of the suit property. The evidence at the trial, particularly the evidence adduced by the administrator proved on a balance of probability that **Muchiri Njuguna** failed to pay the full purchase price for the suit property. Accordingly, there is proof that **Muchiri Njuguna** deceased's family are only entitled to the land stated in the summons for confirmation of grant. This Court therefore upholds the finding on that issue by the trial court.

15. This Court is however of the view that, the land which the family of *Ng'endo Muchiri* deceased is entitled to ought not to be held in trust by the administrator for the children of *Ng'endo Muchiri* deceased.

DETERMINATION

16. Having reached the conclusion there above, I make the following orders:-

(a) That of **GATAMAIYU/NYANDUMA/1250** only 1.25 acres shall be registered in joint names of **GEORGE CHEGE MUCHIRI, JANE MUTHONI MUCHIRI** and **ESTHER NJAMBI MUCHIRI**

(b) That a confirmed grant shall therefore issue in the following terms:-

SCHEDULE

| Name | Description of Property | Share of Heir |
|--|--------------------------------|----------------------|
| 1. PETER KURIA GITAU | - GATAMAIYU/NYANDUMA/1250 | - 2 acres |
| 2. STEPHEN MUCHIRI GICHUKI | - GATAMAIYU/NYANDUMA/1250 | - 1½ acres |
| (House of Gitau Muchiri and Gachuki Muchiri) | | |
| 3. JAMES NJUGUNA MUCHIRI | - GATAMAIYU/NYANDUMA/1250 | - 1 acre |
| 4. ROSEMARY WANJIRU WARORUA | - GATAMAIYU/NYANDUMA/1250 | - 0.25 acres |
| (House of Nyambura Muchiri) | | |
| 5. IN THE JOINT NAMES OF :- | - GATAMAIYU/NYANDUMA/1250 | - 1.25 acres |
| George Chege Muchiri, Jane Muthoni Muchiri & Esther Njambi Muchiri | | |
| (House of Ngendo Muchiri) | | |

17. There shall be no orders as to costs to this appeal.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 25TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice/Kinyua

For the Appellant: Ms. Wanjiru holding brief for Mburu Machua

For the Respondent: Mr. Gachoka

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE