



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 187 OF 2017

BETWEEN

LAWRENCE GATUKU KARANJA..... 1ST APPELLANT

JOSEPH WAINAINA KARANJA.....2ND APPELLANT

MARGARET NDUTA KARANJA.....3RD APPELLANT

MOSES MWAURA KARANJA..... 4TH APPELLANT

AND

JOSEPH WAINAINA GATUKU..... 1ST RESPONDENT

STANLEY MURAGA KARANJA.....2ND RESPONDENT

JANE NJERI KARANJA..... 3RD RESPONDENT

(Being an appeal from the whole of the ruling of the Senior Principal Magistrate Hon. L.W. Wachira in Gatundu Succession Cause No. 36 of 2010 – Estate of late Gatuku Githengi)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The deceased herein, GATUKU GITHENGI died on 20th September, 1988 at Nembu Kiganjo aged 90 years as per the certificate of death No. 213225 dated 2nd December, 1988. He is said to have died of old age. According to form P & A 5 the deceased was survived by the following:-

- a. Joseph Wainaina Gatuku – Son
- b. Lucy Wanjiru Karanja – Daughter-in-law
- c. Lawrence Gatuku Karanja – Grandson
- d. Stanley Muraga Karanja – Grandson
- e. Wainaina Karanja – Grandson
- f. Margaret Nduta Karanja – Granddaughter
- g. Bonface Waweru Karanja – Grandson

h. Jane Njeri Karanja – Grandson

i. Moses Mwaura Karanja – Grandson

j. Alfred Kinyanjui Karanja – Grandson

2. From the same form P & A 5, the deceased left behind one parcel of land being KIGANJO/NEMBU/203 valued at Kshs 300,000/= as at 2nd July, 2010. The land measures 4.6 acres.

3. Upon the death of the deceased Joseph Wainaina Gatuku, Lawrence Gatuku Karanja and Jane Njeri Karanja petitioned for grant of Letters of Administration intestate. The same were issued on 21st June, 2017.

4. By the Summons for Confirmation of the Grant, dated 3rd August, 2017, it was proposed that Joseph Wainaina Gatuku, son to the deceased would get a half of the 4.6 acres of KIGANJO/NEMBU/203 while the other beneficiaries would share the remaining half of the estate equally among themselves. Those who consented to the proposed mode of distribution were Stanely Muraga Karanja and Bonface Waweru Karanja.

5. By the affidavit of protest dated 8th September, 2017 Lawrence Gatuku Karanja objected to the mode of distribution proposed in the Summons for Confirmation of Grant dated 3rd August, 2017, the main grounds being that the mode of distribution had not been agreed upon by all the beneficiaries and also that he petitioners had declined to consent to the services of a surveyor for purposes of erecting beacons and confirming boundaries which would also ascertain the correctness of the beacons of the neighbouring parcel of land No. 101. The protestor also filed an affidavit in support of the protest.

6. Upon hearing the said application, the learned trial court made a finding that the only issue in dispute was who of the beneficiaries takes which part of the deceased's estate. The court distributed the property KIGANJO/NEMBU/203 as follows:- Joseph Wainaina Gatuku to take one half ($\frac{1}{2}$) while the rest of the beneficiaries would share the remaining half in equal shares. The learned trial court also directed that the actual location of the shares would be determined through balloting save that Alfred Kinyanjui Karanja would occupy the portion that falls where the house of his late mother stood.

The Appeal

7. Being aggrieved by the said ruling the appellants brought this appeal which is premised on the following grounds: -

1. The learned magistrate erred in law and in fact by failing to put into consideration the primary oral Will of the late Gatuku Githengi which was sealed with slaughtering of two goats in 1984 which gave directions of sharing the land when he was alive.

2. The learned magistrate erred in law and in fact in making the decision that some of the beneficiaries go for balloting and failed to consider the evidence which proved occupation existed according to the directions of the late Gatuku Githengi.

3. The learned magistrate erred in law and fact by deciding that some of the beneficiaries go for balloting without considering that houses had been erected long way back, electricity connected to the houses, boreholes made, cows sheds constructed, activities of livestock keeping, tree farming activities and other developments on respective parcels of the land of the appellants.

4. The learned magistrate erred in law and fact by not considering the beneficiaries and failed to appreciate that for example as at 1984 the 1st grandson to the deceased was 24 years and the last was 4 years and it would not have been possible for the former to wait for the latter to attain maturity age (18 years) for them to be treated at par at the succession cause. There are those who are ahead of others and natural justice allows them to put up developments as others grow.

5. The learned magistrate erred in law and fact by failing to acknowledge the pecuniary aspect of the developments described in item 3 above.

6. The learned magistrate erred in law and in fact by not preserving the existing common water drawing point which has been in use since demarcation of the land and which was set aside by the late Gatuku Githengi because he understood the terrain of the land by virtue of the fact that part of it have a topography of like cliffs and it was difficult to access river by some of the beneficiaries of those areas and as well for those who wanted to draw water in bulk.

7. The learned magistrate erred in law and fact in reaching to a conclusion that was contrary to the evidence placed before the court.

8. As this is a first appeal, this court is under a duty to analyse and or re-assess the evidence on record with a view to reaching its own conclusions in the matter. In ***Selle –vs- Associated Motor Boat Co. [1968] EA 123***, a case that was cited by the ***Court of Appeal at Nyeri in Macharia Mwangi Maina & 87 others –vs- Davidson Mwangi Kagiri (ante)***, the duty of the first appellate court was clearly spelt out thus:-

“An 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

allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances of probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholan [1955] 22 EACA 270.)'

Case in the Lower Court

9. The 1st appellant herein was the protestor in the court below. He was supported by Joseph Wainaina Karanja, Joseph Wainaina Gatuku. Both Joseph Wainaina Karanja and Joseph Wainaina Gatuku testified that because of the acrimonious relationships in the family the distribution of the deceased's estate which they agree should be divided into two portions should be done through balloting. As far as they are concerned this would ensure fairness. Stanely Muraga Karanja also testified and supported distribution by balloting. Jane Njeri Karanja also testified and stated that because the parties are unable to agree and because Lawrence Gatuku Karanja is manipulative and selfish the court was best placed to carry out distribution of the deceased's estate. It was alleged that Lawrence Gatuku Karanja had intermeddled with the deceased's estate.

Submissions

10. The appellants' submissions were filed by Lawrence Gatuku Karanja. During the hearing of this appeal, he confirmed to the court that he spoke on behalf of the other appellants. The 2nd, 3rd and 4th appellants confirmed that position to the court. The submissions were not highlighted except during the reply.

11. I have read through the submissions which are a replica of the proceedings during the hearing before the learned trial magistrate. The appellants cited **Civil Appeal No. 7 of 2019** in the High Court of Kenya at Siaya – **In the matter of the estate of Zakayo Ogima Onyango between John Omollo Onyango and another –vs- Topas Wandae Odera and 2 others [2019] eKLR** as well as **Succession Cause No. 51 of 2003** – in the High Court of Kenya at Kitale, **In the matter of the Estate of Paul Mkik Lonyangapoi – deceased, between Laban Ruto Likolai and Joyce Chenangat**. The appellants also placed reliance on **Court of Appeal Civil Appeal No.s 26 and 27 of 2011** between **Macharia Mwangi Maina and 87 others –vs- Davidson Mwangi Kagiri [2014] eKLR**.

12. On my own reading of the Court of Appeal decision in the **Macharia Mwangi Maina case** (above) the circumstances of that case are distinguishable in that the appellants who were purchasers for value were put in possession of their respective portions of the suit property by the respondent himself, and that as such the appellant's rights were protected by the provisions of Section 30 (g) of the Registered Land Act as the possession by the appellants created an overriding interest in their favour in relation to the suit property. That is not the case in the matter before me.

13. The respondents' submissions were filed by Stanley Muraga Karanja. The gist of these submissions, which submissions represented the position taken by all the three respondents, is that the position stated by the appellants that each beneficiary already has his or her own portion of the estate which they occupy is not true. The respondents aver that the first appellant has been intermeddling with the deceased's estate to the extent that he has been subdividing the estate in spite of the pendency of this succession cause, a fact which the respondents say is admitted by the first appellant vide his replying affidavit dated 12th February, 2014. The respondents also aver that the first appellant's contention that the deceased made an oral will is not correct. All the respondents support distribution by ballot, since any developments by the appellants, if at all, were done through intermeddling.

Issues, Analysis and Determination

14. The issue that arises for determination in this appeal is whether the appellants have shown that their grandfather, the deceased herein, demarcated the various parcels for each of the beneficiaries herein. Having carefully considered the evidence on record both from affidavits and oral evidence, and further taking into account the grounds of appeal and the ruling of the learned trial magistrate, I am not satisfied that the appellants have done so. The only two issues agreed upon by all parties are first that the deceased's estate should be shared equally between two houses after which the half share not given to Joseph Wainaina Gatuku is to be shared equally amongst the beneficiaries as named in the learned court's ruling of 29th November, 2017. The second agreed issue is that Alfred Kinyanjui Karanja, being the youngest of the children is entitled to that portion of the estate where the house of their mother stood or stands. Apart from these two issues the distribution of the rest of the estate was not agreed. Apart from Lawrence Gatuku Karanja, the rest of the beneficiaries wanted the rest of the deceased's estate to be distributed through balloting.

15. On perusal of the record, this court has established that the parties herein live in a very acrimonious environment and that there is no chance, if left on their own, of ever agreeing on who takes what part of the estate save for the share for Alfred Kinyanjui Karanja. I also saw the parties at the hearing of the appeal and their demeanor revealed as much. This was the reason why, in my considered view, the learned trial magistrate concluded that the best way out for resolving the issue of distribution was through balloting. The learned trial magistrate added:-

“In the said ballot the ballot Number (1) shall be the nearest to Joseph Wainaina Gatuku's share. Thereafter the members shall follow consecutively excluding the portion that is being taken over by Alfred Kinyanjui and ballot Number 7 (seven) shall be the portion that borders Kiganjo/Nembu/1371. The subdivision shall also be in such a way that each of the beneficiaries shall have access to the river and the road.”

Conclusion

16. For the above reasons, I find that the appellants' appeal has no merit. The same is accordingly dismissed in its entirety.

17. Since this is a family issue the parties shall each bear their own costs. The right of appeal to the Court of Appeal is available to whichever party is aggrieved by this judgment.

18. Orders accordingly.

Judgement written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 12th day of March, 2020

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HON.LADY JUSTICE.CHRISTINE W. MEOLI

JUDGE

In the Presence of

.....**Present**..... 1st Appellant

..... **Present**2nd Appellant

..... **Present** 3rd Appellant

.....**Present** 4th Appellant

..... **Present** 1st Respondent

..... **Present** 2nd Respondent

..... **Present** 3rd Respondent

.....**Nancy/ Kevin**..... Court Assistants