



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 60 OF 2017**

**PATRICIA MUTHONI NJUKI.....1<sup>ST</sup> APPELLANT**

**MARGARET GACHONI MUCIRI.....2<sup>ND</sup> APPELLANT**

**SHADRACK NJOGU NJUKI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**FAUSTINO NJERU NTHIGA.....1<sup>ST</sup> RESPONDENT**

**JULIETA MUTURI MUNGAI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. Vide the judgment of the trial court delivered on 9/10/2017, the trial court upheld the protests filed by the 3<sup>rd</sup> Appellant and 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, in which they they opposed the application for confirmation of grant filed in the trial court by the appellant on the grounds that the deceased had shown each of them their respective land parcels out of his estate but which land parcels the appellant herein had disinherited them and given to other people and/or beneficiaries. The court upheld the said protests and dismissed the Appellant's application for confirmation of grant.

2. It is this judgment which necessitated the appeal herein and which appeal was instituted vide the memorandum of appeal dated 8/11/2017 and filed in court on 19/11/2017. The gravamen of the said appeal as can be deduced from the said memorandum of appeal is that **the** trial court erred in fact and in law and further misapprehended the provisions of Section 3(2) of the Law of Succession Act by making a finding that the 1<sup>st</sup> Respondent (Faustino Njeru Nthiga) was a child of the deceased within the meaning of Section 29 of the Act and in dismissing the Appellant's application for confirmation of grant and upholding the protest which was not merited.

3. At the hearing of the appeal, the court gave directions that the same be canvassed by way of written submissions and the parties herein filed their respective and rival submissions.

**B. Submission by the parties**

4. The appellant in support of the appeal submitted that the trial court erred in holding that the 1<sup>st</sup> Respondent herein was a child of the deceased within the meaning of Section 3(2) of the Law of Succession Act whereas the 1<sup>st</sup> Respondent did not fall under the said description. It was further submitted that the trial court erred in law and fact by finding that the 1<sup>st</sup> Respondent herein was a dependant within the meaning of Section 29 of the Act.

5. It was submitted on behalf of the Respondent that the deceased herein took him at a very tender age after his biological father passed away and took him as his own. That he was later gifted by the deceased LR. Mbeti/ Kiamuringa/711 and the deceased proceeded to obtain Land Control Board's consent but passed on before he could transfer the said land parcel to the 1<sup>st</sup> Respondent. That as such, from the evidence, the deceased considered the 1<sup>st</sup> Respondent as his child who was entitled to inherit from his estate and that from the said evidence, it was evident that the 1<sup>st</sup> Respondent was a child of the deceased within the meaning of Section 3(2) of the Law of Succession Act. As such, he was entitled to the share already gifted by the deceased during his (deceased's) lifetime i.e. LR. Mbeti/Kiamuringa/711.

**C. Re-evaluation of evidence**

6. The role of this court (first appellate court) is well settled and the said role is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). The court nonetheless ought not to 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**).

7. In a nutshell, the appellant herein is a co-administrator of the estate of the deceased- Njuki Njogu. She filed summons for confirmation of grant dated 17/07/2012 wherein she sought to distribute LRs. Mbeti/Kiamuringa/710, Mbeti/Kiamuringa/ 711 and Mbeti/Kiamuringa/721 amongst the various beneficiaries in the manner indicated in the affidavit in support of the summons. The said summons was later amended to include LR Mbeti/Kiamuringa/715 and which was also distributed to the various beneficiaries.

8. The said summons and the subsequent amendments were opposed by 3<sup>rd</sup> Appellant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein in their various affidavits of protests. The gist of these affidavits of protest was to the effect that the deceased herein had distributed his land amongst his children (including the 3<sup>rd</sup> appellant, 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent's deceased husband). However, the petitioner (appellant herein) wanted to disinherit them and that the appellant had included other people in the distribution of the estate and sold some part of the estate to third parties. The 1<sup>st</sup> Respondent specifically deposed to the effect that the deceased had allocated him 1.20 Ha and which land was designated LR Mbeti/Kiamuringa/714 and whose land they obtained Land Control Board Consent to transfer the land to him on 8/06/1987 but he later discovered that he was occupying LR Mbeti/ Kiamuringa/711 which had been transferred to the deceased' daughter one Esther Nguku Njuki while the said daughter was occupying LR Mbeti/Kiamuringa/ 711 which had been allocated to the said daughter and the deceased directed them to exchange the titles once the objector obtained his title but the deceased passed on before effecting the transfer to him. He thus objected to the Appellant herein inheriting LR Mbeti/ Kiamuringa/711 and prayed that the same be allocated to him.

9. The Appellant herein replied to the said affidavits of protest vide a replying affidavit dated 8/10/2015 wherein she deposed that the 1<sup>st</sup> Respondent was not a beneficiary of the estate of the deceased but of his father one Nthiga Njogu and as such she could not have provided for him. Further that the consent attached to the protest was not sufficient to warrant protest against the confirmation of grant as the protester stated that they obtained consent for transfer of LRs. Mbeti/Kiamuringa/714 but later discovered that he occupied LR Mbeti/Kiamuringa/711 yet the consent was for LR Mbeti/Kiamuringa/711 and thus the protest was an afterthought and the same ought to be dismissed.

10. The parties herein proceeded to file their statements after which the trial court rendered itself in the judgment delivered on 9/10/2017 and wherein the summons for confirmation of grant was dismissed and the court proceeded to find in favour of the protestors.

#### **D. Issues for determination**

11. I have read through and considered the memorandum of appeal and the rival submissions filed herein. Further, I have read and evaluated the record of appeal and evidence adduced before the trial court by the parties herein.

12. From the analysis of the evidence before the trial court and the submissions herein, it is clear that it was not disputed that the deceased had sub-divided his land into various parcels. What seems to be in dispute is who should inherit which land parcel? Narrowing down to the appeal herein, the dispute seems to be whether the 1<sup>st</sup> respondent ought to inherit LR. Mbeti/Kiamuringa/711. **It was the appellant's case at the trial court and further in her submissions herein that the 1<sup>st</sup> respondent was not a child of the deceased within the meaning of section 3(2) of the Law of Succession Act and further that he was not a dependant within section 26 therein. On his part, the 1<sup>st</sup> Respondent's position is that he was left in the hands of the deceased when his father passed on in 1960 and the deceased herein took him as his child and even educated him. Further that the deceased sub-divided his land in his lifetime and in doing so allocated the 1<sup>st</sup> respondent LR. Mbeti/ Kiamuringa/711.**

13. It is my view therefore, that the main issue which this court is invited to determine is whether the 1<sup>st</sup> respondent herein was a child of the deceased and thus entitled to share the estate of the deceased?

#### **E. Determination of the issue**

14. I note that the deceased herein passed away on 19/12/1992. As such, pursuant to section 2(1) and (2) of the Law of Succession Act, his estate was subject to the said Act.

15. Section 3(2) of the Act provides that: -

**“References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”**

Sub-section 3 provides that: -

**“A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”**

16. What the above provision means is that any child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility (where the deceased is a male person) and upon the death of such a male deceased, the child will qualify to have a share of the intestate estate. {See **In the Matter of the Estate of Stephen Wanyoike Muhia**

17. The Court of Appeal noted that: -

**“the definition in Section 3(2) of a child whom the deceased in fact had accepted as his own or for whom the deceased had assumed permanent responsibility only applies to a child whom a male deceased person had accepted or assumed permanent responsibility over.”**

18. It is trite law that in civil cases, the burden of proof is always on the claimant. As such, in the instant case, the burden was on the 1<sup>st</sup> respondent herein to prove that the deceased had expressly recognized him as his child or in fact accepted him as such or that the deceased had voluntarily assumed permanent responsibility of the 1<sup>st</sup> respondent. This section does not require proof of the three conditions but any of them. The standard of proof is always that of balance of probabilities.

19. When the matter came up for hearing before the trial court, the 1<sup>st</sup> respondent gave evidence wherein he reiterated the fact that he was taken in by the deceased herein after the death of his father and was shown some place to build. That the deceased proceeded to sub-divide his land and he (1<sup>st</sup> respondent) was allocated LR Mbeti/Kiamuringa/711, however, he occupies a different land being LR. Mbeti/Kiamuringa/714. The protestors in the trial court filed witness statements in support of their protests wherein they all acknowledged that the 1<sup>st</sup> respondent was given LR Mbeti/Kiamuringa/711 by the deceased and that he was taken in by the deceased after the death of his real father (a brother to the deceased). After the 1<sup>st</sup> respondent testified, it appears from the court record that the matter was transferred to the lower court wherein it proceeded by way of statements and documents filed in court. The 1<sup>st</sup> respondent filed his list of documents which included an application for consent for LR Mbeti/Kiamuringa/711 to transfer as a gift to the 1<sup>st</sup> Respondent herein and Consent from Gachoka Land Control Board in relation to the said land parcel. This evidence was never controverted by the appellant. She did not explain how the said Land Control board's consent would have been obtained in favour of the 1<sup>st</sup> respondent by the deceased if it was not for the purposes of transferring the suit land to the 1<sup>st</sup> respondent herein. There was no evidence as to the lack of authenticity of the said documents. Further the 1<sup>st</sup> appellant herein never dislodged the strong evidence by the 1<sup>st</sup> respondent to the effect that the deceased took him as his son.

20. It is my view therefore that without any evidence in rebuttal, the 1<sup>st</sup> respondent was able to prove that the deceased had allocated him the suit land. There is nothing which would have spoken louder on the fact that the deceased had recognized the 1<sup>st</sup> respondent as one of beneficiaries to his estate other than the acts of the deceased in commencing the process of transferring the land parcel in issue to him. In my opinion, this implies the recognition by the deceased of the 1<sup>st</sup> respondent as a beneficiary of the estate and therefore having expressly recognized him and in fact accepted him as a child of his own.

21. The 1<sup>st</sup> appellant alluded to the effect that the 1<sup>st</sup> respondent ought to follow up on the estate of his real father. The evidence on record and which was not controverted is to the effect that the deceased recognized the 1<sup>st</sup> respondent as one of his heirs and commenced the process of bequeathing him his share from the estate.

22. It is my finding therefore that the trial court did not err in finding that the 1<sup>st</sup> Respondent was a child of the deceased within the meaning of section 3(2) of the Law of Succession Act and in allocating LR Mbeti/ Kiamuringa/711 to him.

23. However, in the course of its judgment, the trial court found that the 1<sup>st</sup> respondent herein knows no other home than that of the deceased and that the deceased allowed him to settle on his land and even started the process of transferring the land to him. Based on this, the trial court found that the 1<sup>st</sup> respondent was a dependant within the meaning of section 29 of the Act. Section 29 provides that: -

**“For the purposes of this Part, "dependant" means—**

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

24. From the above, it is clear that proof of dependency is a condition precedent to the exercise of the discretion in section 29(b) cited hereinabove. In the case of **Beatrice Ciamutua Rugamba .v. Fredrick Nkari Mutegi & Others, Chuka Succ. Cause No. 12 of 2016 the court held thus: -**

**"From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."**

25. As to the 1<sup>st</sup> respondent being in occupation of LR. Mbeti/Kiamuringa/714 which was allocated to one Esther Nguku Njuki, and further that Esther was in occupation of his land the said (LR Mbeti/Kiamuringa/711), Esther in her statement averred that she was indeed ready to swap her land with the 1<sup>st</sup> Respondent herein. It is my view that the trial court was right in giving the two individuals the liberty to exchange the said land parcels. In my view, the reasons given as to why the two were occupying each other's land parcel were sufficient.

26. Taking all the above into consideration, it is my considered view that the trial court was right in finding that the 1<sup>st</sup> respondent was entitled to LR Mbeti/Kiamuringa/711 as a child of the deceased within the provisions of Section 3(2) of the Law of Succession Act.

27. As such the appeal herein lacks merit and the same is dismissed with costs to the respondent.

28. It is so ordered.

**Delivered, dated and signed at Embu this 25<sup>th</sup> day of November, 2020.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent