



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 180 OF 2013

CECILIA WAMBUI MWANGI.....APPELLANT

V E R S U S

JOHN MAINA NJOROGE.....RESPONDENT

JUDGMENT

1. The appellant Cecilia Wambui Mwangi filed this appeal against the Judgment in Succession Cause No. 120/2010 dated 22/9/2011. The appeal is based on four grounds:-

- a) **THAT the Learned trial Magistrate erred in law and in fact in delivering a Judgment that was contradictory.**
- b) **THAT the Learned trial Magistrate erred in law and fact in reaching a decision that was at variance with the reasons given for the said decision.**
- c) **THAT the Learned trial Magistrate erred in law and in fact in awarding the appellant 2 acres out of L.R. No. Kiine/Ruiru/415 yet she had made a finding that the appellant was entitled to ½ portion of the suit land.**
- d) **THAT the Learned trial Magistrate erred in law and in fact in giving 28 days right of appeal when no such provision exist in the Law of Succession Act Cap 160 Laws of Kenya.**

2. She prays that the appeal be allowed. The Judgment of the Senior Principal Magistrate Court Kerugoya be set aside and be substituted with an order awarding ½ portion if LR Kiine/Ruiru/415 to the appellant. That she be awarded costs in this appeal and in the lower court.

3. Background:

This matter relates to the estate of Prisca Muthoni Njoroge alias Pilsca Muthoni Njoroge. A Grant of Letters of Administration was issued to John Maina Njoroge, the petitioner and a son of the deceased. He proposed to distribute the estate which comprised Land Parcel No. Kiine/Ruiru/415 as follows:-

- i) **Cecilia Wambui - 2 Acres**
- ii) **John Maina Njoroge**
- iii) **Peterson Irungu Njoroge**
- iv) **Moses Mwangi Njoroge - who are the sons of the deceased to share the remaining portion equally.**

4. The appellant Cecilia Wambui Mwangi opposed the mode of distribution and filed an affidavit of protest. The appellant Cecilia Wambui is a sister to the deceased Pilsca Muthoni Njoroge. The Land Parcel No. Kiine/Ruiru/415 belonged to their father Njoroge Karuiru. Her sister inherited the piece of land when she (appellant) was away. That is why she was claiming half share of the estate.

5. In her Judgment, the trial Magistrate held that the appellant would get two acres while the remaining portion would be shared equally among the four sons of the deceased. It is against that Judgment that the appellant has appealed against.

6. The appellant submits that the trial Magistrate in the body of her Judgment had stated the land should have been shared equally between the appellant and the petitioner and his brothers. However she concluded that the appellant would get two acres. The appellant urges the court to rectify the anomaly.

7. For the respondent it is submitted that the appeal is an afterthought as the appellant had the land surveyed soon after the judgment and had her two acres curved out and started development on the land. The appeal was filed in bad faith. The appellant is married and has land elsewhere.

8. Determination:-

The issue for determination is whether the appeal has merits. From the record of the Lower court, at Page 31, when the appellant testified she stated that she was aware of the tribunal case "**RMC Kerugoya CC 13/92**". The trial Magistrate referred to the Judgment, Page 35 of the record. The trial Magistrate stated that the award in the case which was given in 1992 was adopted as the Judgment on 19/7/1993.

9. The trial Magistrate in my view expressed her views on the Judgment of the tribunal. The trial Magistrate was not dealing with an appeal against the Judgment of the Tribunals Award. Indeed in her Judgment she never set aside the Judgment of the Tribunal. The trial Magistrate ended up distributing the estate in accordance with the Judgment of the tribunal.

10. The appellant when she testified, Page 31 of the record referred to proceedings in CC 13/92. The proceedings are in the Lower court file. They show that this was a civil suit between the appellants and the deceased Prisca Muthoni Njoroge. The case was referred to arbitration by consent of the parties and an award was filed. From the proceedings, the appellant moved the court to confirm the award as the Judgment. In a ruling of the court, E. N. Maina R.M (as she then was,) Judgment was entered in terms of the award. The award which is annexed, shows that the elders entered a unanimous decision that the plaintiff (the present appellant) gets two acres and the defendant (now the deceased) to get four acres.

11. As at the time the dispute was heard by the elders, the deceased had been registered as the owner of the land. The appellant had filed a civil case. What was before the Resident Magistrate's court was a land dispute and not a succession matter. The elders had jurisdiction to entertain the dispute as it was an arbitration by an order of the court.

12. The views by the trial Magistrate that the elders had no jurisdiction as the matter was concerning beneficial interest to land was clearly made in error. The trial Magistrate also erred by stating that the land should have been shared equally. A certificate of official search which was filed shows that the deceased Prisca Muthoni Njoroge was the registered owner of the land parcel No. Kiine/Ruiru/415 measuring 2.11 Ha as at 16/10/09. So as at the time the trial Magistrate gave Judgment the land in dispute was registered in the name of the deceased and she could not purport to distribute the land as though it was the estate of the father of the deceased and the protestor. My view is that the sentiments made by the trial Magistrate which the appellant is urging court to enforce were made in error and cannot be upheld by this court. The appellant submits that the deceased had inherited the land in unclear circumstances. The appellant was aware that the land was not in the name of her deceased father. The trial Magistrate was dealing with the issue of the estate of the deceased Prisca Muthoni.

13. I find that as submitted by the respondent, this appeal is an afterthought. The record shows that the appellant applied for the confirmation of the award of the elders. The court obliged and adopted the award as the Judgment on 19/7/1993. The appellant cannot challenge the mode of distribution of the estate of the deceased which is in accordance with the award which she had accepted and was confirmed as the Judgment. The issue of her share from the father's estate is res judicata as it was determined between the parties in **R. M. Civil Case No.13/1992** and there was no appeal. The appellant was aware of the Civil Suit. I find that the appeal is sham and is without merits. The Judgment of the trial Magistrate was in accordance with the decision in R. M. C.C. No. 13/1992 which awarded appellant two acres.

14. I find no reason to interfere with the Judgment. I order as follows:-

a) The appeal is without merits and is dismissed.

b) The grant of Letters of Administration shall be confirmed in terms of the Judgment, that is to say:

Land Parcel No. Kiine/Ruiru/415 be distributed as follows:-

i) Cecilia Wambui Mwangi - 2 Acres.

ii) John Maina Njoroge

iii) Peterson Irungu Njoroge

iv) Moses Mwangi Njoroge – To share the remaining portion equally.

v) I award the costs to the respondent.

Dated at Kerugoya this 14th day of March 2019.

L. W. GITARI

JUDGE