



REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL NO. 19 OF 2018

IN THE MATTER OF THE ESTATE OF KABATA MUNYUKO (DECEASED)

ELIUD NGUGI MBUGUA.....APPELLANT

VERSUS

SOLOMON MUNIU KABATA.....RESPONDENT

(Being an appeal from the ruling/decision of the Senior Principal Magistrate Limuru Hon. G.H. Oduor in Limuru succession cause No. 127 of 2008 in the matter of the estate of Kabata Munyuko delivered on 11/1/2018).

J U D G M E N T

1. BACKGROUND

Grant of letters of Administration Intestate was on the 26th May, 2014 granted to the **Appellant Eliud Ngugi Mbugua**, a nephew of the deceased and **Solomon Muniu Kabata** the Respondent and son of the deceased.

2. **By an application dated 25th March, 2014**, the Respondent sought confirmation of the grant and proposed a mode of distribution of the deceased's estate. In particular, he proposed that **Land Parcel No. Limuru/Rironi/T.190** be divided equally to himself and Stephen Kironji Kabata a son to the deceased.

3. This proposal was objected by Solomon Muniu (1st protestor) and Mungai Munyako (2nd Protestor) a son and brother of the deceased respectively by an affidavit of protest by the 1st protestor on the 14th August, 2014.

The protest was heard by viva voce evidence.

4. The trial Magistrate made findings that **Land Parcel No. Limuru/Rironi/T. 190 was not held by the deceased Kabata Muyuko in trust for the 1st protestor and his cousins, and therefore found in favour of the Respondent Solomon Muniu Kabata's proposed distribution that Land parcel No. Limuru/Rironi/ T. 190 be shared to himself and his brother Stephen Kironji Kabata as they were children of the deceased** in line with Section 38 of the Law of Succession Act.

5. The Appellant was dissatisfied with the above decision leading to this appeal on grounds that:

(1) The Hon. Magistrate erred in law and fact in failing to hold that the deceased Kabata Munyuko held Land parcel No. Limuru/Rironi/T.190 in trust for the Appellant and his two cousins.

(2) That the Hon. Magistrate erred in law and fact in departing from the earlier court's finding dated 16/4/2012 that the deceased held the Land parcel in trust for the objector(Appellant) without an appeal or review of the earlier finding.

(3) That the Hon. Magistrate erred in dismissing the Appellants protest dated 12/8/2014 by misdirecting himself in the appraisal of the evidence thus arrived at wrong conclusions.

6. I have considered the parties written submissions and earlier court proceedings and orders.

7. The ISSUES FOR DETERMINATION.

(1) Whether the deceased Kabata Munyuko held Land parcel No. Limuru/Rironi/T.190 in trust for the Appellant and his two

cousins pursuant to the court ruling dated the 16/4/2012.

(2) Whether the trial Magistrate misdirected himself in the appraisal of the evidence thus dismissing the Appellants protest dated the 12/8/2014.

8. This is the first Appellate court. It is mandated to re-evaluate and reconsider the evidence adduced before the trial court and make its own findings and conclusions, being cautious that the judge never saw or heard the witnesses testify – **Butt -vs- Khan (1987) KLR, Mwanasokoni –vs-Kenya Bus Service Ltd and others (1982 – 88)1 e KLR 27.**

9. However, if the court finds that the trial court's findings are based on no evidence or on misapprehension of the evidence, it will readily interfere with the findings – **Mwanasokoni case (Supra).**

10. I have considered the summons for confirmation of Grant, the affidavits in support and the schedule of mode of distribution dated the 25th March, 2014. The trial court by its order dated **16th April 2012** allowed the objection dated 18th March, 2011 and cross petition dated 20th May, 2011. This was following an objection dated 15th March, 2011, for making a grant to the objectors who are also beneficiaries.

11. By the **Ruling** of the trial Magistrate the court held that

“...it would be unjust to lock out the objectors in the Administration of the property clearly held in trust for them I grant the objection dated 18th March 2011 and the cross petition for grant dated 20th May 2011 with costs in the Cause. Grant be re-issued to at least include a member from the objectors side. Other formalities to follow”.

12. The above ruling in my view did not determine the distribution of the deceased's Estate, but directed that the objectors be represented in the Administration of the Estate.

The objectors therein were the nephews and brothers of the deceased. In line with the above ruling a grant was issued jointly to one of the objectors Eliud Ngugi Mugua (deceased Nephew) and Solomon Muniu Kabata a son of the deceased.

13. The issue for determination by the learned Magistrate was for inclusion of the objectors as Administrators but not distribution of the deceased Estate. To that extent I find no fault with the trial Magistrate's departure from the order dated 16th April, 2012, the same having been complied with and therefore spent.

14. What was before the trial court leading to the ruling subject of the appeal was the Mode of distribution of the deceased Estate there being two rival camps and not who were the Administrators of the Estate. That issue was thus settled by the court's ruling dated the 16th April, 2012.

15. In my view the question was whether the deceased held plot No. Limuru/Rironi/T.190 in trust for the Appellant 1st protestor, his nephew and his two cousins. The trial court considered the customary law applicable to a Muramati in Kikuyu customs guided by extracts from **Eugene cotrans Restatement of African Law (Law of Succession)** sweet and Maxwell, London 1969 and **Henry Mukora Mwangi -vs- Charles Gichina Mwangi (2003) e KLR as well as Njuguna -vs- Njuguna (2008 1 e KLR 889.**

16. What then was for determination before the Hon. G.H. Oduor, Chief Magistrate that lead to the Ruling or decision dated the 11th January, 2018 subject of this Appeal?

17. By an application dated 25th March, 2014, Eliud Ngugi Mbugua Kabata one of the Administrators of the deceased Estate sought an order for Confirmation of Grant issued to him on the 9th July 2013. He stated all the beneficiaries to the Estate including the widow, sons and daughters of the deceased, his brothers and Nephews and also drew a schedule of the proposed mode of distribution.

18. On the plot under dispute Limuru/Rironi/T.190 he proposed distribution to himself (nephew) 1/3 share to Peter Mungai (nephew), 1/3 to Elizabeth Mugure Kabata (widow) 1/3 share.

19. The issue that the trial Magistrate set down to determine and rightly so was how the suit plot should be distributed and whether or not the deceased held the plot in trust for Eliud Ngugi Mbugua (1st protestor) Peter Mungai and Solomon Muniu Kabata.

It is evident from the record that evidence was taken from the beneficiaries. Upon such evidence the trial court made findings that the protestors including the Appellant did not demonstrate how the suit plot was gifted to them. The court visited the suit plot and made observations that the Appellants family occupied the larger part of the plot.

20. Citing the case the **estate of the late Gideon Manthi Nzioka** (deceased) (2005) e KLR the court held that

“Gifts of land must be by way of registered transfer or if the land is not registered it must be in writing....that the protestors did not meet the above condition, and reverted the distribution in terms of Section 38 of the law of succession Act.”

The said section however deals with distribution where intestate has left a living child or children but no spouse.

21. This is not the circumstances in the present matter. I do not find the section relevant. Notwithstanding, the trial court analyzed the totality of the evidence before him, and made a determination that the protestors did not establish on a balance of probability that land parcel No. Limuru/Rironi/T.190 was held by the deceased in trust for the protestors, and reverted to the distribution proposed by the Applicant and proceeded to confirm the Grant dated 8th July, 2014 together with the proposed schedule of distribution.

22. I have carefully considered the reasons for the ruling. All the protestors and applicants were declared to be beneficiaries. Upon the finding that the ruling dated 16th April, 2012 did not address the issue of distribution of the deceased Estate including the plot in dispute.

23. Looking at the proposed schedule of distribution by the applicant in respect of the Plot Limuru/Rironi/T.190 being

Eliud Ngugi Mbugua - 1/3 share

Nephew

Peter Mungai - 1/3 share

Solomon Muniu and Stephen Kironji Kabata – 1/3 share-sons.

It is clear that **Section 66 (a)** of the law of successions Act was not followed in the proposed distribution.

24. The spouse of the deceased (widow) was not given a share of the plot except her two sons who were to share 1/3, whereas the protestor/Appellant Eliud Ngugi Mbugua and Peter Mungai both Nephews of the deceased were to get 1/3 share each of the plot.

25. **Section 66 (a) of the Act** gives the court final discretion as to persons to whom a grant of letters of Administration should be given and further states the priority preference.

I have noted the Appellant's interest in the suit plot. He settled on the plot in 1973. The trial Magistrate upon visiting the suit plot observed that the Appellants family occupies the larger part of the plot.

26. In 1995 a panel of elders determined that the plot be divided among the three beneficiaries, the Appellant and his two cousins. This is alluded to in the trial court's ruling.

Several witnesses, **PW2, PW3** agreed that the plot was gifted to the Appellant and the 1st protestor.

27. The trial court also considered proceedings of the Limuru Land Dispute Tribunal dated the 20th June, 1998 and the green card.

It was its finding that the deceased was the registered owner of the plot and a certificate of title issued to him on the 3rd September, 1976. In his findings the learned Magistrate stated that

“... given that the title was originally registered in the name of Kabata Munyuko (deceased) that he was holding the land in trust for his two brothers...”

28. By that holding, it is clear to me that the two brothers referred to the above are the Appellant and Peter Mungai his brother. That holding is therefore not in tandem with the final findings that the protestors did not establish their claim on a balance of probabilities that the deceased held the suit plot in trust for the 1st protestor Eliud Ngugi Mbugua the Appellant and his two cousins. I therefore agree with the Appellants submissions that all the proceedings before the Land Tribunal and the elders pointed to the same conclusion, **that the suit plot was held in trust by the deceased for the Appellant and his two cousins**

29. It has not been explained why for instance the Land parcel No. Limuru/Rironi/51 was not objected to, yet it was a decision by the same Land Disputes Tribunal. Is it a matter of selective justice?

I also agree with the Respondent's submissions that the ruling dated 12th August, 2014 was not binding to the trial Magistrate as it was not about distribution of the deceased's estate. I have rendered myself on this earlier in this judgment.

30. Having re-examined the totality of the evidence, I find that the appeal is merited, and thus allowed with the result that the trial Magistrate's ruling **dated 20th December, 2017** is set aside and substituted with one that **the Appellant's protest dated the 12th August, 2014** together with the **proposed mode** of distribution in regard to **Land Parcel No. Limuru/Rironi/T.190** are allowed and the land parcel shall be distributed in the following manner:

1. 1/3 to Eliud Ngugi Mbugua the appellant.

2. 1/3 to Peter Mungai

3. 1/3 to be shared equally between Solomon Muniu Kabata and Stephen Kironji Kabata.

31. The appeal having arisen from a family dispute each party shall bear their own costs.

Dated and Signed at Nakuru this 27th day of March 2019.

J.N. MULWA

JUDGE

Dated, Signed and signed at Kiambu this 10th day of April 2019.

C.MEOLI

JUDGE