



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 198 of 2016

IN THE MATTER OF THE ESTATE OF JOSEPH GITHIRI GITAU (DECEASED)

BETWEEN

JAMES GITAU GITHIRI.....APPELLANT

AND

JECINTA WAIRIMU THUMBI.....1ST RESPONDENT

SUSAN WANGUI THUO.....2ND RESPONDENT

PETER KAGWE GITHIRI.....3RD RESPONDENT

MICHAEL NJIHIA GITHIRI.....4TH RESPONDENT

JANE WAIRIMU GITHIRI.....5TH RESPONDENT

(An appeal from the Ruling and Order in Kiambu Succession Cause no. 341 of 2009 by Hon. S.Atambo (SPM) on 14th November, 2016)

JUDGMENT

Introduction

1. **JOSEPH GITHIRI GITAU (DECEASED)** died sometimes on 25th March, 2009.
2. The deceased's family comprised of the following:

Wife

Grace Wairimu Githiri

Children

- 1) **Jecinta Wambui Thumbi**
- 2) **James Gitau Githiri**
- 3) **Susan Wangui Thuo**
- 4) **Peter Kagwi Githiri**
- 5) **Jane Wairimu Githiri**

6) Michael Njihia Githiri

3. Deceased's estate comprised of the following properties.

i. Naivasha/ Maraigushu Block 1/6/Missouri

ii. Kimunyu/Kanunga T.554

iii. Kimunyu/Kanunga T.484

iv. Kiambaa/Kanunga/T.130

v. Account Number [.....]at Cooperative Bank Kiambu

4. Letters of administration were granted to Susan Wangui Thuo on 15th November, 2010. By a Certificate of Confirmation of Grant dated 26th January, 2011, the estate was distributed as follows:

i. Naivasha/Maraigushu Block 1/6/Missouri

James Gitau Githiri - 4 acres

Peter Kagwi Githiri - 3 acres

Michael Njihia Githiri - 3 acres

ii. Kiambaa/Kanunga/T.130

Jecinta Wambui Thumbi

Susan Wangui Thuo

iii. Kimunyu/Kanunga T.484

Grace Wairimu Githiri

iv. Kimunyu/Kanunga T.554

Grace Wairimu Githiri

Michael Njihia Githiri

v. Account Number [.....] at Cooperative Bank Kiambu Grace Wairimu Githiri

5. By an application dated 08th June, 2016, Appellant applied for rectification of the grant to delete **Naivasha/Maraigushu Block 1/6/Missouri** which he stated was not part of deceased's estate. The application was supported by Appellant's affidavit sworn on 08th June, 2016 in which he averred that **Naivasha/Maraigushu Block 1/6/Missouri (hereinafter referred to as the disputed property)** was registered in his name in 1996 and did not form part of deceased's estate. He annexed to his affidavit a copy of title deed marked as **JGG1** issued in his name on 05th February, 1996.

6. The protest was opposed by Susan Wangui Thuo (*hereinafter referred to as the administrator*) by her replying affidavit sworn on 01st August, 2016 in which she maintained that the disputed property belonged to the deceased and that their mother and grandmother were buried on that land. Annexed to the affidavit is a document in Kikuyu language which she stated was deceased's will and an affidavit sworn by one Dominic Nganga Gathitho who averred that he was chairman of Missouri Safari Farmers Company Limited and that the disputed property belonged to the deceased.

7. In a supplementary affidavit sworn on 09th August, 2016, Appellant averred that the disputed property originated from a Share Certificate No. 57 issued to him by Missouri Safari Farmers Company Limited on 1st March, 1978 which he annexed to the affidavit.

8. The protest was heard by viva voce evidence. By a ruling dated 14th November, 2016, the trial court ruled that **Land Reference No. Naivasha/Maraigushu Block 1/6/Missouri** formed part of deceased's estate and dismissed the protest and distributed it to the three sons of the deceased with the Appellant getting 4 acres and the other two getting 3 acres each.

Appeal

9. Aggrieved by the lower court's decision, the Appellant preferred this appeal and on 16th February, 2018 filed the Memorandum of Appeal dated 08th December, 2016 which set out 3 grounds as follows:

1) The learned trial magistrate erred in holding that Land Reference No. Naivasha/Maraigushu Block 1/6/Missouri which is registered in the name of the Appellant formed part of deceased's estate

2) The learned trial magistrate erred in disregarding Appellant's evidence

3) The entire finding is against the established facts and law

ANALYSIS AND DETERMINATION

10. I have carefully considered the appeal in the light of the evidence contained in the record of appeal and supplementary record of appeal and submissions for both parties and I have identified the following issues for determination.

1) Was appeal filed out of time without leave

2) Did deceased make a written will

3) Was Land Reference No. Naivasha/Maraigushu Block 1/6/Missouri registered in the name of the Appellant as a trustee

4) Does Land Reference No. Naivasha/Maraigushu Block 1/6/Missouri form part of deceased's estate

a) Was appeal filed out of time without leave

11. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order”.

12. The impugned ruling was delivered on 14th November, 2016 whereas this appeal was filed on 16th February, 2018 which was outside the time limited for filing an appeal.

13. There is no evidence that the Appellant sought leave to appeal. The issue between the parties herein is a succession matter that is ordinarily emotive. Although the Appellant did not seek leave to appeal out of time, I find that this court has discretion under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice. I am not persuaded that any prejudice will be suffered by the Respondent if the appeal is heard as filed and I hence order that the appeal shall be deemed as having been filed in time.

b) Did deceased make a written will

14. The Law of Succession Act cap 160 of the Laws of Kenya (*the Act*) at Section 8 and 11 which provides:

8. A will may be made either orally or in writing.

11. No written will shall be valid unless—

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

15. The document which the administrator alleges to be deceased's will is in Kikuyu language. It contains two signatures. No evidence was led to prove that deceased signed that document; and even if he did, the document is not attested by two witnesses and it therefore fails to meet the requirements of a valid written will. Consequently, there's no doubt that deceased died intestate.

c) Was Land Reference No. Naivasha/Maraigushu Block 1/6/Missouri registered in the name of the Appellant as a trustee

16. In support of this assertion, the administrator relied on an affidavit sworn by one Dominic Nganga Gathitho who averred that he was

chairman of Missouri Safari Farmers Company Limited and that the disputed property belonged to the deceased.

17. I have considered the case of **Re Estates of Kioko Musya & another (Deceased) [2017] eKLR** cited for the Respondent and I associate myself with the holding that:

The concept of a customary trust in relation to land held by a family member is recognized in law, and the fact that a person is registered as proprietor of land as absolute owner does not negate the possibility that he or she holds the land under a customary trust.

18. In his testimony, Appellant conceded that he did not contribute any amount towards the purchase of the disputed property and this gives credence to the administrator's evidence that the said land was bought by the deceased and registered in Appellant's name as the eldest son of the deceased to hold in trust for the family. Having found that the Appellant holds the suit property in trust for the family, it is therefore the position in law that in the absence of evidence of the wishes of the deceased as to how property held in trust is to be divided, it is to be shared according to the rules of intestacy. In this respect, the beneficiaries of a property that is held under customary trust are the siblings of the trustees, in this instance the children of **NGANGA GAITHO (DECEASED)**.

19. I have also considered **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR** and I am persuaded that the Respondent has proved the existence of a customary trust. In the result, I find that the fact that Appellant is registered as proprietor of the disputed property as absolute owner does not negate the fact that he holds the land under a customary trust.

d) **Does Land Reference No. Naivasha/Maraigushu Block 1/6/Missouri form part of deceased's estate**

20. From what is stated hereinabove, I have come to the conclusion that the trial magistrate's finding that **Land Reference No. Naivasha/Maraigushu Block 1/6/Missouri** formed part of deceased's estate was properly founded and the resultant order on distribution of the same is thus upheld.

Disposition

21. For the foregoing reasons, the appeal is found to be unmeritorious and it is dismissed with costs to be borne by Appellant.

DELIVERED AND SIGNED IN KIAMBU THIS 25th DAY OF October 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

Appellant - Present in person

Respondent - Ms. Etole hb for Mr. Kamau