



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 36 OF 2016

ONESMUS KASAKI MBUTHI.....APPLICANT

VERSUS

PAUL SAITI MUTHUI.....1ST RESPONDENT

FRANCIS MUSYOKA MUTHUI.....2ND RESPONDENT

J U D G M E N T

1. The background of this matter is that **Muthui Mwinzi** (Deceased) died on the **22nd August, 1979**. A Petition of Letters of Administration Intestate (grant) was filed by **Paul Saiti Muthui** and **Francis Musyoka Muthui** in their capacity as his sons on the **19th October, 2004**. On **11th January, 2005** the grant was issued to Petitioners.

2. Subsequently objections to making of the grant were filed by various persons including the Appellant, **Onesmus Kasaki Mbuti** out of time and he also filed a caveat pursuant to the provisions of **Rule 15(2)** of the **Probate and Administration Rules**.

3. Summons for confirmation of grant were filed on the **23rd June, 2006**. The Deceased was stated as having been survived by the following children:

- a. Nzisa Muthui - Daughter.
- b. Katulu Muthui - Daughter.
- c. Munzau Muthui - Daughter.
- d. Kiema Muthui - Son.
- e. Mitau Muthui - Son.
- f. Paul Saiti Muthui - Son.
- g. Syonzau Muthui - Daughter.
- h. Mutua Muthui - Son.
- i. Francis Musyoka Muthui - Son.
- j. Kavata Muthui - Daughter.
- k. David Musemi Muthui - Son.
- l. Kiminza Muthui - Daughter.
- m. Muia Muthui - Daughter.

4. He was also indicated as having been survived by Dependants as follows:

- a. Mutinda Muthui (Wife – Deceased).
- b. Mundue Muthui (Daughter – Deceased).
- c. Kiseki Muthui (Wife – Deceased).
- d. Muthengi Muthui (Son – Deceased).
- e. Kitonyi Muthui (Wife – Deceased).
- f. Mulau Muthui (Wife – Deceased).
- g. Mukumbi Muthui (Son – Deceased).

5. Assets left by the Deceased were identified and proposed to be shared as follows:

Plot No. Matinyani/Mutulu/716 measuring **4.8 Ha** was to be shared thus:

i. Muleso Muthengi w/o Muthengi.

ii. Muthui – 0.6 Ha.

iii. Kiema Muthui – 0.6 Ha.

iv. James Mitau Muthui – 0.6 Ha.

v. Paul Saiti Muthui – 0.6 Ha.

vi. Mutua Muthui – 0.6 Ha.

vii. Francis Musyoka Muthui to hold in trust 0.6 Ha on behalf of Muthui Mukumbu, Katiwa Mukumbu, Musee Mukumbu, Kalimu Mukumbu and Mwendu Mukumbu.

viii. Francis Musyoka Muthui – 0.6 Ha.

ix. David Musembi Muthui – 0.6 Ha. James Mitatu Muthui

- *Plot Matinyani/Mutulu/811 measuring 0.49 Ha.*
- *Plot No. Matinyani/Mutulu/820 measuring 0.17 Ha.*
- *Plot No. Matinyani/Mutulu/862 measuring 0.14 Ha. Syombua Muthengi w/o Muthengi Muthui (Deceased)*
- *Plot No. Matinyani/Mutulu/896 measuring 0.33 Ha. Syombua Muthengi and Kyendwa Mwinzi*
- *To share Plot No. Matinyani/Mutulu/874 measuring 0.43 Ha.*

6. Affidavits of Protest were filed by six (6) protesters. The Appellant in particular protested on grounds that he is in occupation of **1½ acres** being part of Land Parcel **Matinyani/Mutulu/716**. Having been born and brought up on that parcel land. The Deceased was his paternal uncle. The Parcel No. **Matinyani/Mutulu/716** belonged to his late grandfather, **Mwinzi Nguma** the father of the Deceased herein and his father **Mbuki Mwinzi** now Deceased. That his grandfather had four (4) sons – **Muthui Mwinzi, Mwendwa Mwinzi, Mbuti Mwinzi** and **Iloo Mwinzi** and after his death **Muthui Mwinzi** was registered as a trustee of the land for his siblings pursuant to the customary law. In **1988** when he got married he established a matrimonial home on that land and the Petitioners his cousins never claimed that portion of land that he has developed. That their clan, **Mbaa Kulia Kitondo Union** is handling the issue as the parcel of land ought to be shared amongst the families of the four brothers. Other Protesters argument was that Parcel No. **716** was ancestral land and family property.

7. The Protest was disposed of by way of *viva voce* evidence. The learned trial Magistrate analyzed evidence adduced and reached a finding that the Protesters were not Dependants of the Deceased and there was no documentary proof that their grandfather owned Parcel No. **Matinyani/Mutulu/716**. Accordingly, he dismissed the Protest and ordered the Appellant to vacate the disputed parcel of land within ninety (90) days, failure to which he was to be evicted.

8. Aggrieved by the order of the Court he appealed on grounds that the learned Magistrate erred and misdirected himself in both law and fact by:

- Holding that he was not a Dependant entitled to share in the Estate of the Deceased.
- Failing to recognize that as the Deceased died prior to the commencement of the **Law of Succession Act** the distribution of the Estate was subject to the customs subsisting at his death.
- Holding that the Deceased did not hold title **Matinyani/Mutulu/716** in trust for the Appellant and others.

- By requiring documentary evidence to support a customary trust when it's a fact such trust was not registrable at the time of registration and could only be implied then as overriding interest.
- That the Appellant's father having been born, brought up, lived, died and buried in the portion under the Appellants occupation was clear and sufficient evidence that the Appellant was entitled to be shared the same by the Respondents.

9. The Appeal was canvassed by way of written submissions. I am seized of the fact that this being a first Appeal, the Court is duty bound to analyze and re-assess the evidence on record and reach its own conclusion bearing in mind that it neither saw nor heard witnesses who testified. (See *Selle vs. Associated Motorboat Co. (1968) EA 123; Kiruga vs. Kiruga & Another (1988) KLR 348*).

10. I have carefully considered rival submissions filed by both Counsels for the Appellant and Respondents.

1. It is not disputed that the Deceased dies in 1979 and the **Law of Succession Act** came into force in 1981. **Section 2(2)** of the **Law of Succession Act (Act)** provides thus:

“The Estate of persons dying before the commencement of this Act are subject to written laws and customs at the date of death, but nevertheless the administration of their Estates shall commence or proceed so far as is possible in accordance with the Act.”

12. In the matter of the Estate of **Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (Deceased) Nbi High Court Succession Cause No. 935 of 2003** the Court found that since the Deceased died before the Act came into force, the applicable law on the distribution of the Estate was Customary Law, but the law applicable to the administrative and procedural aspects of the Estate of the Deceased was the **Law of Succession Act** and the grant holder was bound by the provisions of the Act.

13. From evidence adduced what was established was that prior to **Mutulu Sub-Location of Matinyani Location** being declared an Adjudication Area in 1971 the portion of land that came to be known as **Matinyani/Mutulu/716** was an ancestral land occupied by the families of the Petitioners and the Protesters (Now Respondents and Appellant). It was argued by the Respondent that the Appellant and the Protesters were supposed to move out of the parcel of land to occupy what they inherited from their respective parents. On the **5th September, 1979** the subject **Plot No. 716** was registered in the name of **Muthui Mwinzi**. Contrary to the allegation of the Appellant and others who protested in the Lower Court, that the Deceased was to hold the land in trust for his siblings, the Registration Documents holds out the Deceased as the sole proprietor of the land.

14. It is now submitted that the Appellant was a Dependant of the Deceased an issue that was disregarded by the Lower Court. It is argued that the subject land was a family unit that was occupied by the Deceased and his brothers. Evidence adduced showed that the Appellant lived on the property and is still in possession of the same. He has made substantial development thereon. However, at the point of registration the Deceased was the sole owner. It is not indicated that he was to hold it in trust for his other relatives. Therefore whether the land was an intergenerational trust would have to be resolved by the Land and Environment Court.

15. The Appellant argued that he was a Dependant of the Deceased. **Section 29** of the **Law of Succession Act** defines a Dependant as:

“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.”

16. It was incumbent upon the Appellant to prove that in fact he depended on the Deceased prior to his death. There is no evidence that the Deceased was maintaining the Appellant prior to his death and he does not fall in the category of Dependants recognized by law.

17. In the premises his Appeal is devoid of merit. Accordingly, it is dismissed with costs to the Petitioners.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 15th day of February, 2018.

L. N. MUTENDE

JUDGE