



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 36 OF 2016

IN THE MATTER OF THE ESTATE OF MBURU NG'ANG'A - DECEASED

PAUL NJOROGЕ NGANGA.....APPELLANT

VERSUS

SAMSON NGANGA MBURU.....RESPONDENT

(Appeal from the Decision of the Honourable M.W. Mutuku, Senior Principal Magistrate, Thika Law Courts dated 23/11/2015 in CM Succession Cause No. 172 of 2007)

JUDGMENT

1. This Appeals emanates from Succession Cause No. 172 of 2007 at the Chief Magistrate's Court in Thika. It respects the estate of Mburu Ng'ang'a (Deceased).

2. The Deceased died on 16/06/1999 at the Thika District Hospital. He died intestate. He was not married and did not have any children at the time of his death. According to the records filed in the lower Court, the Deceased was survived by the following siblings:

- a. Paul Njoroge Ng'ang'a – The Appellant who was a brother the Deceased.
- b. Waithaka Ng'ang'a – a brother.
- c. Wanja Ng'ang'a – a sister.
- d. Felister Mugure – a sister.
- e. Muthoni Ng'ang'a – a sister.

3. The following two siblings had pre-deceased the Deceased:

- a. Mburu Ng'ang'a
- b. Wambui Ng'ang'a

4. Mburu Ng'ang'a was unmarried and did not have any children at the time of his death. However, Wambui Ng'ang'a had three children: Samson Ng'ang'a Mburu – the Respondent; Josephine Wanjiru Wambui; and Peris Mugure. Josephine and Peris are deceased. Josephine had five children as follows:

- a. Mercy Wanjiku Njuki
- b. George Macharia
- c. Ann Wambui
- d. Evans Mburu Njuki; and
- e. Peris Mugure

5. The estate of the Deceased comprises of three land assets to wit:

- a. Loc.5/Kabati/12
- b. Loc.5/Kagumo-ini/853
- c. Loc.5/Kagumo-ini/853

6. When the Deceased passed on, the Respondent filed for Letters of Administration. He simultaneously took out Citations on which he served the other potential beneficiaries. Paul Njoroge Ng'ang'a (Appellant); Waithaka Ng'ang'a, Wanja Ng'ang'a, Evans Mburu; Mercy Wanjiku; George Macharia and Ann Wambui Wanjiru responded by filing an Objection to the making of the grant to the Respondent. Additionally, the Appellant; Waithaka Ng'ang'a and Wanja Ng'ang'a filed an Answer to the Petition and a Petition By Way of Cross-Application.

7. Eventually, Letters of Administration were issued jointly to the Appellant and Respondent by consent on 31/03/2010.

8. On 13/09/2010, the Appellant filed a Summons for Confirmation of the Grant and included an Affidavit with a proposed mode of distribution.

9. The mode of distribution was opposed by the Respondent through an affidavit deposed on 10/02/2011. Before the matter could be set down for hearing, Waithaka Ng'ang'a passed on prompting a new round of battles between the protagonists. The Respondent filed a Supplementary Affidavit affirming that the late Waithaka Ng'ang'a had sold his portion of the inheritance to two purchasers and that his portion should, therefore, be distributed to the two purchasers. The Appellant opposed: he argued that he was a stranger to the alleged sales and that with the demise of Waithaka Ng'ang'a he (the Appellant) should get parcel No. Loc.5/Kabati/12 all to himself.

10. The Respondent proposed that Loc.5/Kabati/12 should be divided as follows:

- a. The Appellant to get 0.8 acres;
- b. The two purchasers – John Ndung'u Waweru and Harrison Macharia – to get 0.25 acres each;
- c. The Respondent to get 1.5 acres; and
- d. 0.75 acres to be registered jointly between the Appellant and Respondent.

11. In summary, this paints the controversy which the Learned M.W. Mutuku set out to resolve in her judgment of 23/11/2015 which is the subject of this Appeal.

12. On 14/04/2012, the parties entered a consent on the distribution of two parcels: Loc. 5/Kagumo-ini/1853 and Loc. 5/Kagumo-ini/1275. The Learned Trial Magistrate adopted the consent of the parties. There is no appeal respecting these two portions. Hence, the only portion whose distribution is disputed is Loc.5/Kabati/12 (hereinafter, the "Kabati Plot").

13. After hearing viva voce evidence, the Learned Trial Magistrate came to the following consequential findings:

a. First, she held that the two alleged purchasers were not entitled to the portion belonging to Waithaka Ng'ang'a and dismissed their claims. This was because, the Learned Magistrate concluded, the alleged agreements for sale had not been approved by the Land Control Board as mandatorily required by section 8(1) of the Land Control Act. Additionally, she concluded that the Sale Agreements were not attested by witnesses as required by Section 3(3) of the Law of Contract Act, Chapter 23 of the Laws of Kenya.

b. Second, she concluded that a Court of competent jurisdiction had, in RMCC No. 26 of 1985 ordered that the Kabati Plot be divided as follows:

- i. Njoroge Ng'ang'a (Appellant) – 0.8 acres
- ii. Waithaka Ng'ang'a – 1 acre
- iii. Mburu Ng'ang'a – 1.5 acres

c. Third, she made a finding that Mburu Ng'ang'a had taken in his sister, Wambui Ng'ang'a as a dependant and that, therefore, Wambui's children and grandchildren were entitled to Mburu Ng'ang'a's estate.

d. Fourth, the Learned Trial Magistrate concluded that the portion of land belonging to Waithaka Ng'ang'a should be distributed among the three siblings who are either alive or had children – namely the Appellant; Wanja Ng'ang'a and Wambui Ng'ang'a. Each was to get 0.33 acres with the children of Josephine Wanjiru Wambui sharing the portion of Wambui Ng'ang'a.

e. Consequently, the Learned Trial Magistrate ordered that the Kabati Plot be distributed as follows:

- i. Paul Njoroge Ng'ang'a (Appellant) 1.13 acres
- ii. Wanja Ng'ang'a 0.33 acres
- iii. Samson Ng'ang'a Mburu 1.00 acres
- iv. Josephine Wanjiru's children 0.83 acres

14. The Appellant is dissatisfied with the judgment of the Learned Magistrate and has preferred the present Appeal. He has enumerated at least eight grounds of appeal as follows:

- I. The Learned Magistrate erred in law and fact by finding that the Respondent and his siblings were the dependants of the estate of Mburu Ng'ang'a with reference to **LOC 5/Kabati/12** whereas they were distantly related to the deceased and there was no credible evidence tendered to prove their dependency.
- II. The Learned Magistrate erred in law and in fact by finding that the respondent and his siblings were being discriminated against.
- III. The Learned Magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant.
- IV. The Learned Magistrate failed to appreciate the submissions of the Learned Counsel for the Appellant by finding in favour of the Respondents herein.
- V. The Learned Magistrate misdirected herself and based her finding on discrimination on wrong considerations.
- VI. The Learned Magistrate erred in law and in fact in awarding the Respondent and his siblings a total of 1.8333 acres without any credible evidence for doing so.
- VII. The Trial Magistrate failed to appreciate the appellant's claim that being a direct heir of the deceased's estate he was entitled to the shares which were due to his two deceased brothers.
- VIII. In all the circumstances of the case, the findings of the Learned Magistrate are untenable in Law or on the basis of the evidence adduced.

15. The Appeal is opposed. Both parties agreed to argue the appeal by way of Written Submissions. Each filed their submissions and neither deemed it necessary to orally highlight.

16. I have carefully read all the submissions filed and relied on by the parties. I will begin by re-stating the correct standard of review in appeal cases like this from the Subordinate Court.

17. The duty of the first Appellate Court is to subject the whole of the evidence presented at trial to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that the Appellate Judge did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal such as this one was stated in **Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

18. The Appellant argued all the eight grounds of appeal together. As I understand it, the Appellants biggest problem is that the Learned Trial Magistrate concluded that the children of Wambui Ng'ang'a including the Respondents were dependants and that they should therefore inherit. The Appellant submitted that the entire parcel should have been given to the Appellant "save for the small portion which was occupied by his sister Josephine Wambui (Deceased) and where the Respondent's and his siblings are currently residing." The Appellant says that he derives this conclusion from his reading of section 39(1) of the Law of Succession Act.

19. Section 39(1) of the Law of Succession Act provides as follows:

Where an intestate has left no surviving spouse or children, the net estate shall devolve upon the kindred of the intestate in the following order of priority:

(a) Father or if dead;

(b) Mother or if dead;

(c) Brothers and sisters and any child or children of the Deceased's brother's or sisters in equal share.

20. The Appellant says that as the only surviving blood brother of the Deceased herein, taking into account the provisions of this section, the Appellant is the only direct heir in order of priority of the two Deceased brothers as per the law provided. Conversely, the Appellant claims that the Respondent is a distant relation of the Deceased and the two deceased brothers and is, therefore, not entitled to inherit any shares in the Kabati Plot.

21. Still, the Appellant concedes that the Respondent and his siblings were in occupation of a small portion of the Kabati Plot and submitted that they should be entitled to the actual portion they are in actual possession and occupation of.

22. On their part, the Respondent's counsel made three points in defence of the Learned Trial Magistrate's judgment. First, the Respondent says that section 39(1) of the Law of Succession Act does not lead to the conclusion that the Kabati Plot should be handed over to the Appellant since the Appellant has other siblings – including Wambui Ng'ang'a – who should equally inherit.

23. Second, the Respondent argue that there was overwhelming and undisputed evidence that the Respondent and his sibling qualify as dependants of Mburu Ng'ang'a under section 29 of the Law of Succession Act. It is only proper, therefore, that they had to inherit the property of Mburu Ng'ang'a.

24. Third, the Respondent argued that the Learned Trial Magistrate looked at equity, fairness and equality in ordering the sub-division as she did. The Respondent argues that it should not be forgotten that the Appellant inherited Parcel No. Loc. 5/Kagumo-ini/1275 in its entirety and that it measures 1.9 acres. He, therefore, ended up with a total of 3.33 acres from the Deceased's estate.

25. Looking at the entirety of the evidence presented in the Lower Court, it is important to begin by delimiting the issues. First, the distribution of Parcel No.s Loc.5/Kagumoini/1275 and Loc.5/Kagumo-ini/1853 are not in dispute and there is no appeal respecting them. Second, the Learned Trial Magistrate, rightly, dismissed the claims by the two purchasers who were claiming part of the share of Waithaka Ng'ang'a. That part of the Learned Magistrate's decision is, also, not appealed against. I will leave these aspects of the case undisturbed.

26. Regarding the Kabati Plot, the best place to begin is to recall the un-appealed decision by the Court in Thika RMCC No. 261 of 1985. The judgment in that case was produced and accepted as evidence in this case. The judgment is quite clear: The Deceased was not the sole beneficial owner of the Kabati Plot. Instead, he was only the legal owner who had been registered in trust for himself and his two brothers. The Court ruled that the Kabati Plot was owned in the following proportions by the three brothers:

a. Paul Njoroge Ng'ang'a (Appellant) 0.8 acres

b. Waithaka Ng'ang'a 1.0 acres

c. Mburu Ng'ang'a (Deceased herein) 1.5 acres

27. It, therefore, not in dispute that the Appellant is outright entitled to his 0.8 acres of the Kabati Plot. The question is what happens to the portions owned by Waithaka Ng'ang'a and Mburu Ng'ang'a.

28. There are two competing theories. The first one, favoured by the Appellant is the application of section 39(1) of the Law of Succession Act. The Appellant insists that the proper application of that section will leave him as the sole heir of both parcels.

29. The second theory is that the Application of section 28 of the Law of Succession Act will lead to the conclusion that the Respondent and the children of his sister were dependants of the Deceased and are, therefore, entitled to share the Deceased's share in the Kabati Plot to the exclusion of the Deceased's siblings. The Respondent is, therefore, satisfied with the distribution proposed by the Learned Trial Magistrate.

30. I have reviewed the evidence presented at trial. The undisputed evidence shows that Wambui Ng'ang'a settled on the parcel of land owned by Mburu Ng'ang'a and remained there throughout her life. She was buried there when she died. She raised her children there. She built a permanent house there. Her grandchildren (children of Josephine Wanjiru) were brought up there as well. It is, apparently, the only place they know as home.

31. However, despite these undisputed facts, I am not sure that the Learned Trial Magistrate was entitled to conclude that the Deceased had treated the Respondent, the Respondent's mother, the Respondent's siblings and the Respondent's nieces and nephews as dependants on his estate. Section 29 of the Law of Succession Act talks of "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."

32. The question immediately turns to: Which evidence suggests that the Deceased used to maintain the Respondent and Josephine's children immediately before his demise? No evidence whatsoever was presented in this regard. Instead, the evidence incontrovertibly presented showed that the Respondent, the Respondent's deceased mother and the Josephine's children all lived on the parcel of land owned by the Deceased. In my view, this is not sufficient to establish dependency as defined in section 29 of the Law of Succession Act.

33. Where does that leave us? In my view, the proper course is to apply section 39 of the Law of Succession Act in distributing the portions of the Kabati Plot that are owned by Waithaka Ng'ang'a and Mburu Ng'ang'a. Both Waithaka and Mburu died intestate and neither had a spouse or children. It follows that their property should be shared among their siblings. All the other siblings have either died intestate or have denounced their interests in the properties except three: the Appellant; Wanja Ng'ang'a and children of Wambui Ng'ang'a. Given the terms of section 39 of the Law of Succession Act and my findings above regarding dependency, the children of Josephine are not entitled, in

their own right, to inherit from either Waithaka Ng'ang'a or Mburu Ng'ang'a. It is noteworthy that section 39(1) of the Law of Succession Act does not privilege brothers as opposed to sisters as the Appellant would like the Court to do. Additionally, the section also puts brothers and sisters in the same parity as children of brothers and sister in terms of priority of inheritance.

34. The result, then, is that the 1 acre portion owned by Waithaka Ng'ang'a as well as the 1.5 acre portion owned by Mburu Ng'ang'a should be divided into three among the Appellant; Wanja Ng'ang'a and the children of Wambui Ng'ang'a. In actual fact, the entitlement of each party to the Kibati Plot will be as follows:

- a. Paul Njoroge Ng'ang'a - 0.8 acres + 0.33 acres + 0.5 acres for a total of 1.63 acres.
- b. Wanja Ng'ang'a – 0.33 acres + 0.50 acres for a total of 0.833 acres.
- c. Samson Ng'ang'a Mburu and Children of Josephine Wanjiru Mburu (jointly) – 0.33 acres + 0.50 acres for a total of 0.833 acres.

35. The upshot is that the Appeal has succeed in part. The distribution of the Parcel No. Loc.5/Kabati/12 shall be adjusted to reflect the Court's holding in paragraph 34 above. All the other findings of the Lower Court shall remain undisturbed.

36. Since the Appeal has succeeded in part and since this is a family matter, each party will bear its own costs.

37. Orders accordingly.

Dated and delivered at Kiambu this 2nd day of August, 2018.

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JOEL NGUGI

JUDGE