REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CIVIL APPEAL NO. 194 OF 2016

IN THE MATTER OF ESTATE OF JOHN NGUMBA NJOROGE (DECEASED)

(Being an appeal from the Ruling of Honourable Arome Resident Magistrate, delivered on 19th November, 2015 in Kiambu Succession Cause No. 294 of 2012)

JUDGMENT

1. This is an appeal from the ruling delivered on 19/11/15 by Honourable S. K. Arome (Resident Magistrate) in ***Succession Cause No. 294 of 2012-Kiambu in the matter of the estate of John Ngumba Njoroge (deceased)***.

2. The Appellant herein, Albert Wambuu Njoroge, filled this appeal and raised the following grounds:

a) The learned Magistrate erred by failing to determine that its jurisdiction in the administration of the Deceased's Estate was limited to only half share of the property Githunguri/Gathangari/1767 which was held by the deceased John Ngumba Njoroge and not the entire property which was held jointly by the Deceased and the Appellant Albert Wambuu Njoroge in equal shares.

b) The learned Magistrate erred by failing to appreciate that the Appellant Albert Wambuu Njoroge was registered as a proprietor of the subject property Githunguri/ Gathangari/1767 jointly with the deceased John Ngumba Njoroge, each owning an equal share of the property.

c) The learned Magistrate erred by failing to appreciate thus that the Appellant Albert Wambuu Njoroge's half share of the property was not affected by the death of his tenant in common owning the other half share of the subject property.

d) The learned Magistrate erred by purporting to subject the entire suit property Githunguri/Gathangari/1767 to the succession proceedings instead of only considering and subjecting the half share of the property owned by the deceased proprietor/tenant in common.

e) The learned Magistrate erred by subjecting even the Appellant's half share of the property to succession when he is still alive instead of limiting its scope and jurisdiction to the deceased's half share of the property only.

f) The learned Magistrate erred by making a finding that the amended grant of letters of administration intestate issued and also confirmed by the court on 29/05/2014 to the effect that Githunguri/Gathangari/1767 was to be registered in the names of Alberty Wambuu Njoroge and Peter Kimani Njoroge was competent and proper because the finding did not recognize that the Appellant's half share of the property was not subject of the succession.

g) The learned Magistrate erred by confirming the amended Certificate of Confirmation of Grant which purports to interfere with the Appellant's half share of the property instead of only limiting itself to the half share owned and registered in the name of the deceased which is the only subject portion of land affected by the succession proceedings in the cause.

h) The learned Magistrate erred by failing to appreciate and determine that its jurisdiction in the administration of the Deceased's Estate was limited to only the half share of the property Githunguri/Gathangari/1767 which was held by the deceased and not the entire property in which the Appellant held half share.

g) The learned Magistrate erred therefore by simply substituting the deceased with Peter Kimani Njoroge as the other tenant in common owning half share of the property while he is not the sole beneficiary of the deceased's estate to which the Appellant is also a beneficiary.

j) The learned Magistrate erred by failing to appreciate and uphold the law on tenancy in common on ownership of properties whose cardinal consequence upon death of a co-tenant is that the share of the surviving joint tenant remains intact and is not affected by such death.

3. The brief history of the case is as follows.

4. The Deceased died on 02/05/2012. The Appellant filed for Letters of Administration intestate declaring himself as the sole survivor. He was granted Letters of Administration on 20/12/2012.

5. On 24/06/2013, the Appellant filed his Summons for Confirmation of Grant. In it, he proposed himself as the sole heir to inherit the sole asset owned by the Deceased to wit the parcel of land known as Githunguri/Gathangari/1767.

6. Alas! This was not to be. By that time, the Appellant's brother, the Respondent, had gotten wind of the proceedings and he promptly filed a Caveat. The Respondent filed an affidavit in support of the Caveat. The main point of contention was that he was also a brother to the Deceased and that the Appellant had willfully misled the Court that he was the only survivor. The Respondent also opposed the proposed mode of distribution of the Deceased's estate to the Appellant solely. Finally, the Respondent wanted to be appointed as a co-administrator of the estate.

7. The matter was eventually fixed down for viva voce hearing. On the date appointed for the hearing, neither the Appellant nor his lawyer was present. The Learned Trial Magistrate was satisfied that the hearing notice had been properly served and proceeded ex parte. The Respondent testified and called one witness then closed his case.

8. The Learned Trial Magistrate delivered a ruling dated 29/05/2014. In pertinent part, the Learned Trial Magistrate ruled thus:

> *The upshot (sic) I find the Petitioner/Applicant not genuine and misleading. It has been proved [that] the Caveator is a brother to the Petitioner and the Deceased. The Deceased did not marry and did not have children; he was insane and owned property known as Githunguri/Gathangari/1767 equally with the Caveator. The Petitioner/Applicants made the first application for letters of administration without the knowledge of the Caveator who was equally entitled to apply. In sum letter of administration intestate and confirmed grants to issue in joint names of the Petitioner/Applicant and the Caveator.*

9. The Appellant became dissatisfied with that ruling once it was brought to his attention. He approached the Lower Court vide a Notice of Motion dated 29/05/2015 seeking to set aside the ex parte proceedings that gave rise to the ruling and to annul the amended Letters of Administration Intestate issued on 29/05/2014 following the Learned Trial Magistrate's ruling.

10. That Application was fully heard and the Learned Trial Magistrate rendered a ruling dated 19/11/2015 which is the subject of this appeal. In the first place, the Court ruled that he had jurisdiction to revoke the grant that had earlier been issued to the Appellant. In the second place, the Learned Trial Magistrate refused to set aside the ruling and orders earlier granted ex parte finding that it would be futile to do so since there was no "reasonable and considerable ground on the application dated 29/05/2015 to merit the Court to set aside the proceedings of 8th May, 2014."

11. The appeal was canvassed by way of oral submissions.

12. The Appellant through his counsel submitted that the property subject to this matter was registered jointly between the deceased and himself. That upon the deceased's death, the whole parcel of land was subjected to succession by the trial court.

13. Counsel submitted that there existed a joint tenancy and that upon the death of the deceased, the property automatically vested in the survivor, the appellant.

14. It was their submission that the trial court erred in failing to recognize that the appellant owned half of the property.

15. Mr. Ochich counsel for the Respondent submitted that there was evidence suggesting that the deceased was mentally challenged. That the appellant was holding the property in trust for the deceased and that is what informed the trial court.

16. The duty of the 1st appellate court was explained in the case of ***SELLE AND ANOTHER VERSUS ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123,*** where it was observed thus:-

> *"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 conclusion. 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 Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally"*

17. As presented, the appeal confuses a number of issues. First, it is not clear the manner in which the Appellant has deployed the word "jurisdiction". In the Court below, the Appellant seemed to have been questioning the jurisdiction of the Learned Trial Magistrate to revoke or annul an issued grant under the Law of Succession Act. If that is so, I believe the amendments to the Law of Succession Act done in 2015 have now clarified the point. Section 48 of the Law of Succession Act, as amended, now reads as follows:

> *(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.*

18. As ***Re Matter of the Estate of Isaac Kamau Ndoge (Deceased) [2014] eKLR*** made it clear, this amendment now expressly permits magistrates' courts to annul or revoke grants as long as the subject matter is within their pecuniary jurisdiction.

19. However, there is a second sense in which the Appellant appears to be using the term "jurisdiction". The Memorandum of Appeal seems to suggest that the Appellant is arguing that the Learned Trial Magistrate did not have "jurisdiction" to consider half of the property known as Githunguri/Githangari/1767 because that half belongs to the Appellant and is not, therefore, the Deceased's property which is available for distribution in the succession cause. If this is what the Appellant means by "jurisdiction", it is a strange use of the term of art – but he would have a point. I will return to this shortly.

20. There is a second way in which the Appellant has knotted himself in this appeal. It would appear that all along in the Court below and in his Memorandum of Appeal, his position has been that the parcel of land known as Githunguri/Githangari/1767 was co-owned by him and the Deceased as tenants in common. This would explain why the Appellant kept talking of his half share of the property. However, on appeal, during oral arguments, the Appellant's lawyer flipped the script and insisted that, in fact, the Appellant held the property under joint tenancy (as opposed to tenancy in common) and that, therefore, all the shares of the Deceased reverted to him as the sole surviving joint tenant under the doctrine of *jus accrescendi.*

21. I will first address this issue. I have looked at all the documents presented at trial. In particular, I have looked at the copy of the title document. It lists the Appellant and the Deceased as co-owners. It then describes them in the proprietorship section as having "equal shares." Does this create a joint tenancy or a tenancy in common? In my view it creates the latter. Due to the radical implications of a joint tenancy upon the demise of one of the co-owners, Courts are slow to presume joint tenancies. Unless the register is clear that a joint tenancy is intended, the default position is that a tenancy in common is created. This position has now received statutory imprimatur in the new Land Registration Act of 2012 which provides, at section 91(8) as follows:

> *On and after the effective date, except with leave of a court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common.*

22. Having concluded that the parcel of land known as Githunguri/Gathangari/1767, where does that leave the Appellant's other complaints? In my view it comes down to this: To the extent that the Appellant complains that the Learned Trial Magistrate ought to have made it clear that the only asset that was available for distribution in the estate of the Deceased was a half portion of the parcel land known as Githunguri/Gathangari/1767, then he is right. For avoidance of doubt, half of the subject property is owned by the Appellant and is not part of the estate of the Deceased. Of the remaining portion, there being only two survivors who are of equal priority (the Appellant and the Respondent), the portion should be divided equally between them.

23. **The result, then, will be that the Appellant will be entitled to three-quarters shares of the parcel of land known as Githunguri/Gathangari/1767 while the Respondent is entitled to one quarter of the same**.

24. Each party will bear its own costs both in this Court and in the Court below.

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

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JOEL NGUGI

JUDGE