



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 30 OF 2018**

**JOSEPH THURANIRA.....APPELLANT**

**VERSUS**

**DAVID BIRITHIA LAURI.....REPOUDENT**

**(Being an appeal against the Judgment and decree of A.G Munene SRM. delivered on 27<sup>th</sup> March, 2017 in the Chief Magistrate's Court at Maua, in Succession Cause No. 1 of 2017)**

**J U D G M E N T**

1. This appeal rises from the judgement of the Chief Magistrate's Court at Maua in Succession Cause No. 1 of 2017, relating to the Estate of **M'Mucheke M'Anaiba alias Duati M'Mucheke M'Anaiba** who died intestate on 26<sup>th</sup> November, 2015. He left behind a wife, **Sabina Kauki M'Mucheke** and five children **David Birithia Lauri, Patrick Kang'uura Mucheke, Esther Laala, Njabani Florah Mucheke** and **Joseph Thurania**. The deceased's estate was comprised of **ITHIMA/ANTUAMBUI/2448, ITHIMA/ANTUAMBUI/495, ITHIMA/ANTUAMBUI/3671**
2. On 11<sup>th</sup> January, 2017, the appellant petitioned for letters of administration intestate to which the respondent filed an Objection on 20<sup>th</sup> January, 2017. He contended that the signature appearing in the consent to the filing of the petition was a forgery. The two were subsequently appointed as joint administrators of the estate of the deceased.
3. On 4<sup>th</sup> August 2017, the appellant applied for confirmation of the grant and gave his own proposed mode of distribution. The same was protested to by the respondent as well as the widow. They both gave their own modes of distribution.
4. The protests were determined by way of written submissions on the witness statements and affidavits that had been filed by the parties and their respective witnesses. After considering the evidence and submissions, the Learned Trial Magistrate identified the issue for determination as the mode of distribution and, relying on **sections 28 and 31 of the Law of Succession Act, Cap 160 of the Laws of Kenya ("the Act")**, distributed the estate as follows:-

**ITHIMA/ANTUAMBUI/ 2448**

David Birithia Lauri - Wholly

**ITHIMA/ANTUAMBUI/ 3671**

Joseph Thurania and Patrick Kanguura - Equally

**ITHIMA/ANTUAMBUI/ 495**

a) David Birithia - 0.18 HA

b) Joseph Thurania - 0.25 HA

c) Patrick Kanguura – 0.25 HA

d) Esther Laala – 0.88 HA

e) Sabina Kaku – 0.88 HA

f) Flora Nchabani – 0.88 HA

5. On 2<sup>nd</sup> May 2018, the court reviewed and corrected the said judgment whereby the undistributed 0.88 Ha in **ITHIMA/ANTUAMBUI/495** was distributed equally to Joseph Thurania and Patrick Kanguura making their shares 0.69 Ha each.

6. Against this decision, the appellant preferred this appeal setting out 4 grounds of appeal which can be collapsed into three; that:-

*a) the trial court erred in disregarding the affidavits of the beneficiaries and their submissions;*

*b) the trial court erred in awarding the whole of **ITHIMA/ANTUAMBUI/2448** to the respondent against the wishes of the deceased and the beneficiaries, and*

*c) that the distribution of the estate was contrary to law and the wishes of the beneficiaries.*

7. This being a first appeal, it behoves this court to re-evaluate the evidence afresh and reach its own independent conclusions and findings. (**See Selle v. Associated Motor Boat Co. Ltd (1968) EA 123**).

8. As earlier on stated, the matter was determined on affidavits and witness statements filed by the parties and their respective witnesses. The respondent's case was that **ITHIMA/ANTUAMBUI/2448** was given to him by the deceased during his lifetime in 1983. That pursuant thereto the deceased went to the local land board, obtained its consent to transfer and executed a transfer of the said property to him but the appellant cautioned the land before the transfer was registered. He stated that he had occupied the said property and had extensively developed the same. He further contended that he had compensated those who had occupied the property before he took possession thereof.

9. It was his case that while **Patrick Kangura Mucheke** was in exclusive possession of **ITHIMBU/ANTUAMBUI/3671**, the appellant was in exclusive possession of **ITHIMBU/ANTUAMBUI/495** while he, the respondent fully occupied **ITHIMBU/ANTUAMBUI/2448** He gave his own preferred mode of distribution.

10. **Mwilabua Baikilanya, M'Imaana M'Anaiba, M'Imunya M'Ithubutu, Murungi Mwirabua, Muroki M'Imungiri and Matundu M'Kuchiana** all filed affidavits in support of the respondent's case. They supported the testimony of the respondent in all respects. They stated that **ITHIMA/ANTUAMBUI/2448** belonged to the deceased. That the respondent had assisted the deceased in acquiring that property. That the respondent had been given the same by the deceased. That on being given, he took possession thereof and greatly developed the same.

11. I have looked at the entire record to see the evidence of the appellant. The only affidavit he swore was one against an application for injunction. In that affidavit, his contention was that all the properties of the deceased were available for distribution. **Sabina Kauku Dauti**, the widow of the deceased, swore in her affidavit of protest that she wanted to be allocated 0.20 ha in **ITHIMBU/ANTUAMBUI/2448**.

12. The trial court visited the estate properties on 6<sup>th</sup> December, 2017 and made observations as to occupation and developments thereon. On **ITHIMBU/ANTUAMBUI/2448**, the court found that the same was occupied and fully developed by the respondent. On **ITHIMBU/ANTUAMBUI/3671** the court noted that the same was exclusively occupied by **Patrick Kanguura Mucheke** and had fully developed it. Finally, the court noted that the appellant was in occupation of **ITHIMBU/ANTUAMBUI/495** and had carried out substantial developments on a portion thereof but the rest of the property remained.

13. It is on the foregoing evidence, untested though, that the trial court held that **ITHIMBU/ANTUAMBUI/2448** had been gifted to the respondent by the deceased during the latter's lifetime. The trial Court then proceeded to distribute the rest of the estate properties equally amongst the beneficiaries.

14. I have considered the respective Counsels' submissions. On the first ground of appeal, it was the appellant's contention that the trial court erred in disregarding the affidavits of the beneficiaries and their submissions. I have thoroughly perused the record of appeal as well as the original trial court record and the only affidavits that I could see are those of the appellant responding to the application for injunction and for maintenance of the status quo. It was not clear which affidavits the trial court ignored.

15. Indeed, the trial court found as a fact, which I agree with that the appellant did not controvert, deny or challenge the evidence tendered by the respondent. To that effect, the trial court cannot be blamed for not referring to that which was not there.

16. Regarding the submissions, the Judgment is clear the court considered the submissions of both parties. To that extent, the first ground of appeal fails.

17. The second ground was that the trial court erred in distributing **ITHIMBU/ANTUAMBUI/2448** to the respondent. The record shows that the respondent contended that the said property had been gifted to him by the deceased during his lifetime. That the deceased went to the local land board and obtained the consent to transfer the same to him. However, the transfer could not be registered as the appellant lodged a caution against the title.

18. In support of his case, the respondent produced the following documents; a transfer dated 3<sup>rd</sup> March, 2014 duly signed by the deceased; a letter of consent dated 25<sup>th</sup> February, 2014 from the Ntonyiri Land Control Board; a letter dated 15<sup>th</sup> January, 1992 by the deceased to the District Valuation Officer, giving his authority to the respondent to construct his house on that property and photographs showing the massive developments which the respondent had carried out on that property. All these were never controverted or challenged by any of the beneficiaries.

19. In Halsburys Laws of England, 4th Edition Volume 20(1) at paragraph 67, the authors comment on incomplete gifts as follows:-

***“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, It is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.” (underling mine)***

20. In the present case, the deceased not only obtained the letter of consent from the local Land Control Board, he also signed the transfer in favour of the respondent. The respondent produced sufficient evidence that supported his claim that the deceased intended to transfer the land to him and that he had extensively developed the said land. In this regard, the trial court was right in its decision as the provisions of **section 31 of the Act** had been complied with. That ground also fails.

21. The third ground was that the distribution of the estate was contrary to law and the wishes of the beneficiaries. The law is clear. There are rules that govern intestate succession. The estate of the deceased was to be distributed in accordance with **section 35 of the Act** because the widow was still alive. Under that section, all the property is supposed to be distributed to the widow for a life interest thereon to hold for the benefit of all the beneficiaries equally.

22. However, in the present case, the widow was in agreement with the proposed distribution of the estate by the appellant. Save that she wanted a share from **ITHIMBU/ANTUAMBUI/2443** to the extent of 0.20 ha This meant that she was not averse to the estate being distributed in accordance with **section 38 of the Act** provided she was taken care of.

23. I have looked at the distribution of the estate by the trial court. The court applied the principle of equality which is found in the entire **PART V** of the **Act**. It should be recognized that, unless ALL the beneficiaries of a deceased person agree to a particular mode of distribution, by signing a consent thereto, a court of law is not bound by any proposition by either the majority of the beneficiaries or otherwise. The court is bound to distribute such intestate estate in accordance with the provisions of **PART V** of the Act. I likewise find that ground to be unmeritorious and the same is rejected.

24. Accordingly, the entire appeal has no merit and the same is hereby dismissed. Although this is a family matter, the appeal having been totally unfounded, I order that the appellant do bear the costs of the respondent in this appeal.

**DATED and DELIVERED at Meru this 29<sup>th</sup> day of November, 2018.**

**A. MABEYA**

**JUDGE**