REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 35 OF 2005

IN THE MATTER OF THE ESTATE OF NJUGUNA GAITHUMA - (DECEASED)

JOSEPH KARANJA NJUGUNA.....APPELLANT

VERSUS

ROBERT MAINA NJUGUNA.....RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the learned Resident Magistrate (Hon. S.N. Mutuku) which was delivered on 30th June 1994 at Thika. The appeal was initially heard by Justice L. Kimaru who reserved judgement for 11th November 2013. The judgment was not delivered following his transfer from this Division. On 16th March 2017 the parties agreed that this court takes over the matter and relies on the proceedings and the written submissions to decide it.

2. The cause related to the estate of Njuguna Gaithuma who died intestate in 1964. The deceased had three wives: Wairimu, Wambui and Nyaruiru. Wairimu had one son Mwangi Njuguna and six daughters. Wambui had three daughters and three sons. Nyaruiru had three sons. One of Wambui's sons was the respondent Robert Maina Njuguna. Mwangi Njuguna filed the petition for the grant of letters of administration intestate. On 14th January 1993 the grant was issued to him jointly with the respondent. The respondent filed summons dated 14th April 1993 for the confirmation of the grant. In the supporting affidavit he proposed a mode of distribution. The deceased had left two parcels of land, namely Loc.3/Kariua/693 measuring 2.98 acres and Loc.3/Gacharage/422 measuring 2.2 acres. The respondent proposed that the two parcels be given to him to hold in trust for their house. Mwangi Njuguna protested and proposed that parcel Loc.3/Gacharage/422 should be shared to the three houses, after considering what he and his brother had bought.

3. The trial court called for *viva voce* evidence to determine the distribution of the estate. During the evidence it was agreed that Loc.3/Kariua/693 should go to the house of Wambui to be shared equally among her sons (the respondent inclusive). The trial court found that Loc.3/Gacharage/422 should go to the house of Wambui to be shared by the members of that house. This is the determination that aggrieved Mwangi Njuguna who filed this appeal. Mwangi Njuguna died before the appeal was heard. Joseph Karanja Njuguna substituted him as the appellant.

4. This is a first appeal. This court is enjoined to reconsider the evidence of the lower court to be able to determine whether the conclusions reached were supported by that evidence. In so doing, the court has to appreciate that it did not have the opportunity to see and hear the witnesses who testified before the trial court **(Peters –vs- Sunday Post Limited [1958]EA 424).**

5. The record shows that the trial court heard the appellant and the respondent, and each called witnesses. It was common ground that Loc.3/Kariua/693 should go to the house of Wambui; that that was the intention of the deceased. As for Loc. 3/Gacharage/422, the appellant's case was that of the 2.2 acres he bought 0.2 acres and Daniel Gaithuma bought 0.4 acres. That left 1.6 acres which belonged to the

deceased which he proposed that should be shared equally among the three houses. The respondent's case was that Loc 3/Gacharage/422 was reserved for their house, considering the acreage that each of the other houses had been allocated. The trial court discounted the claim by the appellant that he and Daniel Gaithuma had bought portions of this land. The court noted that Daniel Gaithuma had not testified to show he had bought any portion and that the appellant had not called as witnesses the people he had named as the sellers of the portion bought and neither had he presented any documentary evidence. It was found that this was the deceased's parcel of land. I find that there was sufficient basis for the trial court to reach these conclusions.

6. The court was told that the appellant, Daniel Gaithuma and Joseph Karanja Njuguna had bought Loc.4/Gakui/1287 and Loc.4/Gakui/1288, but found that was not supported by evidence. The court found that all the parcels in question - some of which were given to the respective houses before the deceased died – belonged to the deceased. The court found that, in all, the appellant's house had got 6.5 acres from the deceased and the 3rd house had got 7.5 acres from the deceased it was, for purposes of fairness, that Loc.3/Gacharage/422 goes to the second house so that it has in total 5.8 acres. After finding that none of the sons of the deceased had bought any land, that all these parcels belonged to the deceased, it was reasonable, in conclusion, to give Loc.3/Gacharage/422 to the second house to be shared among the sons of the house.

7. The result is that I find no merit in the appeal, and it is therefore dismissed with costs.

DATED, DELIVERED and SIGNED at NAIROBI this 17TH day of MAY 2017.

A.O. MUCHELULE

JUDGE