



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 94 OF 2011

(An appeal from the Judgment of the Senior Resident Magistrate, Runyenjes in Succession Cause No. 10 of 2010 dated 26/04/2011)

MICHAEL MWANGI JORAM.....APPELLANT

VERSUS

ROBIN NJUE NJAGI.....RESPONDENT

J U D G M E N T

1. This is an appeal from the judgment of the Runyenjes Senior Resident Magistrate delivered on 26/4/2011 in Succession Cause No. 10 of 2010.
2. The magistrate in his judgment distributed the only asset of the deceased Beatrice Iguna Joram LR. KAGAARI/KANJA/ 6235 measuring 0.38 hectares in equal shares between the four daughters of the deceased namely Rudia Thaara Njeru, Mary Njura Njoka, Marion Igandu Njeru and Betha Gitiri Ngari.
3. The appellant Michael Mwangi Joram was dissatisfied with the judgment and lodged this appeal. He faulted the mode of distribution arguing that the land ought to have been shared equally between him and the respondent Robin Njue Njagi and that each of them to hold his share in trust for their four sisters in the event that they are separated from their husbands.
4. The deceased died on 16/8/2009 leaving behind six adult children being two sons and four daughters. The daughters are all married and staying with their husbands at their respective matrimonial homes.
5. The letters of administration intestate were granted to the petitioner/respondent on 3/06/2010. An application for confirmation was filed by the respondent on 2/12/2010 in which it was proposed that the parcel No. KAGAARI/KANJA/ 6235 be held jointly by the four daughters bearing in mind that the deceased had already given the respondent and the appellant 2 acres each out of the original parcel LR. No. KAGAARI/KANJA/1109.
6. The appellant had filed an affidavit of protest before the trial court against the proposed mode of distribution in which he deponed that the land KAGAARI/KANJA/6235 be shared equally between him and the respondent for each to get half share and hold it in trust for their sisters. The appellant proposed that he holds his share in trust for himself for Rudia Thaara Njeru and Mary Njura Njue and that the respondent holds his share for himself, Mariam Igandu Njeru and Betha Gitiri Ngari.
7. The appellant testified that his sisters were married and were not entitled to be given direct shares. He

explained that the reason for holding the sisters shares in trust for them being that in the event that they are chased away by their husbands, they would have a place to settle. In case the sisters remained with their husbands, the shares held by the appellant and the respondent respectively would remain their property.

8. The appellant called two witnesses who testified that the deceased had allocated two acres of land to each of her two sons during her lifetime. DW2 Simon Karani the Secretary General of the Gitare Clan to which the deceased belonged testified that the clan held a meeting to deliberate on the distribution of the deceased's estate. It was resolved that the land KAGAARI/KANJA/6235 be divided equally between the two sons of the deceased and in the event that any of the married daughters came back home. His evidence was supported by DW3, the Secretary of the clan.

9. The respondent testified that the appellant and himself were given 2 acres of land each by the deceased out of LR. KAGAARI/KANJA/1109 five acres and that the remaining one acre was registered in the name of the deceased Beatrice Iguna Joram which is now KAGAARI/KANJA/6235. The wish of the deceased was that the one acre would be shared between her four daughters. The respondent therefor argued that the land of the deceased should be inherited by her four daughters.

10. The duty of an appeal court was explained in the case of **SELLE & ANOTHER VS 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”

11. The law applicable in this case is Article 27 of the Constitution and Section 38 and 42 of the Law of Succession Act.

Article 27 of the Constitution

(1) *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

(2).....

(3) *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

38. *Where an intestate has left a surviving child or children but no spouse Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.*

42. *Previous benefits to be brought into account*

Where—

(a) *an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

(b) *property has been appointed or awarded to any child or grandchild under the provisions of*

section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

12. In the matter of the estate of **ELLAH WARUE NTHAWA (DECEASED) NAIROBI HIGH COURT SUCCESSION CAUSE NO.971 OF 2001**, the court relying on Section 38 of the Act found that the estate should be divided equally between the three children of the deceased.

13. Under section 42 of the Law of Succession Act, property that was given to both the appellant and the respondent during the lifetime of the deceased ought to be considered in the distribution of the estate as was held in the case of **SAMUEL MAINA MWANGI & 2 OTHERS VS MUTHONI KAGIRI [2013] eKLR**.

14. In view of the provisions of Section 42 of the Act the appellant and the respondent who had already been given land by the deceased were not entitled to any share of the remaining one acre forming the estate. The appellant was wrong to suggest that his married sisters were not entitled to inherit direct shares from the estate. The law treats all the children of the deceased equally, whether married or unmarried.

15. The learned magistrate rightly found that the appellant wanted to discriminate against his sisters contrary to the provisions of Article 27 of the Constitution which provide that women and men have the right to equal treatment including equal opportunities in all spheres of life. The magistrate observed that the two sons got the lion's share of the deceased land and the appellant's desire to get more land and disinherit his sisters was driven by greed.

16. It was also observed that the appellant's proposal that he hold his share in trust for his adult sisters is contrary to the law. It was also unfair for him to suggest through one of his witnesses that any of the sisters who separated would come to him and be shown where to settle. The trial court found this proposal to be against the principles of natural justice.

17. It was argued by the appellant that under Embu customary law, the land held by the mother is shared by her daughters. He stated that this custom if implemented would vindicate the wishes of the deceased and that it was not repugnant to justice and morality in pursuance with the provisions of Article 159 of the Constitution.

18. The appellant argued that the trial magistrate lacked pecuniary jurisdiction to handle this succession matter. However, he did not avail any evidence to prove that the value of the land measuring one acre and situated in Kanja area of Embu County would have exceeded the pecuniary jurisdiction conferred by the law on a Senior Resident Magistrate in the year 2010 when the case was decided given that Section 49 of the Law of Succession Act confers such jurisdiction. It is trite law that he who alleges must prove as was held in the case of **DANIEL TOROITICH ARAP MOI VS MWANGI STEPHENMURIITHI & ANOTHER [2014] eKLR**. The appellant failed to prove that the magistrate lacked pecuniary jurisdiction in this case.

19. It is my finding that the appellant has failed to satisfy the court as to the grounds of appeal which is evident in the foregoing evaluation of the evidence.

20. It is my considered opinion that the judgment of the trial magistrate dealt with all the issues raised, applied the relevant law and reached the right conclusion as to the distribution of the deceased's estate.

21. I find no merit in this appeal and dismiss it with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF MARCH, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Okwaro for Respondent

Respondent