



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 140 OF 2011

(An appeal from the Judgment of the Senior Resident Magistrate, Runyenjes in Succession cause No. 81 of 2011 dated 4/11/2011)

MADRIS MUKWAMBIRO MUCHIRI.....1ST APPELLANT

JUDITH RUNJI MUCHIRI JOHN.....2ND APPELLANT

LOISE MARIGU MUCHIRI.....3RD APPELLANT

VERSUS

NJERU MUCHIRI.....RESPONDENT

RULING

1. This is an appeal against the judgment of the Senior Resident Magistrate, Runyenjes in Succession cause No. 81 of 2010 delivered on 4/11/2011. The court heard and determined the protest of the three daughters of deceased namely Madris Mukwambiro, Judith Runji and Loise Marigu who are the appellants herein.
2. The protesters had disagreed with the administrator Njeru Muchiri's proposed mode of distribution. It was ordered that L.R. Kyeni/Mufu/4259 be shared as follows:-

Judith Runji (unmarried daughter) – 0.1 ha.

The remaining portion to be shared equally between all the other nine (9) children of the deceased.
3. The protesters were dissatisfied with the judgment of the trial court and filed this appeal.
4. The grounds of appeal are that the magistrate; failed to consider the oral will of the deceased; that he declined to consider the exhibits produced in court by the appellants; disregarded the fact that the succession cause was filed without the appellants' knowledge and that the consent of other beneficiaries was not obtained. Finally, that the court lacked the jurisdiction to determine the succession cause.
5. Further grounds of appeal are that the magistrate did not consider the appellants evidence on the protest. That the court accepted forged documents produced by the Land Registrar and failed to note that the trial proceeded with some witnesses inside the court.
6. Finally, the appellants stated that the magistrate failed to consider that the respondent and his four brothers had each been given 1½ acres from Kyeni /Mufu/764 and that the deceased's land Kyeni/Mufti/764 had not been sub-divided when the deceased died.

7. The appeal was canvassed by way of written submissions. The advocates for the appellants were Muthoni Ndeke & Co. advocates while Messrs Joe Kathungu & Co. represented the respondents.

8. The appellants submitted that Kyeni/Mufu/764 had not been subdivided when the deceased died yet the magistrate found that it had been sub-divided and that each of the beneficiaries was living in his respective parcel of land. The green card produced in court and which the magistrate relied on, indicated that the new parcels arising out of the sub-division were still in the name of the deceased.

9. The evidence of the Land Registrar was clear that there was no transfer with respect of the new parcels. The magistrate disregarded the fact that the deceased had made an oral will that he wished Kyeni/Mufu/764 to be divided equally among his children.

10. The distribution of the estate of the deceased was not fair and was in contravention of Section 35(5) of the Law of Succession Act. The magistrate did not consider the protestor's evidence in his judgment.

11. The respondent's submissions were to the effect that it is clear from the evidence that Kyeni/Mufu/764 was sub- divided during the lifetime of the deceased and the green card clearly indicates that the title deed was closed upon the sub-division into numbers 4358-4266. This was according to entry number 5 which the Land Registrar explained had been left out.

12. The land was sub-divided and each of the children other than the married daughters given their respective parcels. There are application forms signed by the deceased for the resultant parcels from the original parcel 764. The magistrate was therefore right in finding that the original parcel had been sub-divided and was no longer existent. There was no statement to show that the deceased had made an oral will.

13. 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”

14. DW1 testified that she is the eldest child in the family of the deceased and that she is aware that LR. Kyeni/Mufu/764 was never sub-divided during the lifetime of the deceased. She said she was given a green card by the registrar showing that the land was not sub-divided. DW1's proposal is that the land should be divided among the ten children of the deceased.

15. PW1 testified that he was the petitioner and son to the deceased who had three wives. The 1st wife had two children while the 2nd wife had one child and the third wife had seven children. According to him, the deceased's property was Kyeni/Mufu/4259 which resulted from the sub-division of Kyeni/Mufu/764 sub-divided in 1995 into parcels 4258, 4259, 4260, 4261, 4262, 4263,4264, 4265 and 2466. The Land Control Board gave transfer forms in 2004. The land was later surveyed and everyone lives in their own parcel.

16. The respondent further stated that the land which is the subject of succession is parcel 4259. it was further proposed, that the land 4259 be divided among the 5 sons of the deceased. The two married daughters of the deceased be given half an acre jointly, while the remaining parcel be left for the daughters of the deceased who might leave their husbands' homes. It was not said who would be registered as proprietor of this portion since it is not known which daughter may leave or be left by her

husband.

17. PW2 the District Land Registrar, Embu District testified that he checked the records for Kyeni/Mufu/764 and established that it was registered in the name of Erasto Muchiri Mbirianju under entry 4 made in 1996. There was an entry 5 which was made on 31/8/99 allowing the land to be subdivided into 9 portions Nos. 4258-4266.

18. The witness further testified that the mutation of parcel 764 was brought to the attention of their office in 1999 and that the green cards were opened and signed. Parcel No. 764 was then declared as subdivided and that no transfer of the new parcels was registered in respect of the new parcels. The Land Control Board consented to the transfer of some of the parcels in the year 2003.

19. I proceed to look at the law applicable in this case. Article 27 of the Constitution provide:-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law. (2) equality includes the full and equal enjoyment of all rights and fundamental freedoms. (3) women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. (4) the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. (5) a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

20. Section 38 of the Law of Succession Act provides that:-

"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."

21. The applicability of section 38 of the law of succession act was discussed in the case of **CHRISTINE WANGARI GACHIGI VS ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR**.

22. Section 42 of the Law of Succession Act provides that;

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.

23. The deceased had given some of his children land during his lifetime and Section 42 is therefore applicable. In the case of **SAMUEL MAINA MWANGI & 2 OTHERS VS MUTHONI KAGIRI [2013] eKLR** the court held that:-

"the trial court was correct in holding that the parcels of land that were given to the appellants would be taken into account in distribution of the deceased's estate."

24. The appellants challenged the jurisdiction of the learned magistrate in determining the succession cause. Section 48 of the Law of Succession Act which was applicable when the judgment was delivered provided that;

Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application

other than an application under section 76 of this Act 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 one hundred thousand shillings.

25. The issue which arises is whether the appellants adduced evidence to prove that the magistrate had no jurisdiction to hear and determine the case. It was argued that the deceased's estate was valued at several hundreds thousands and was far more than Kshs.100,000/=. According to Form P&A.5 the estate of the deceased was valued at an estimated figure of KShs.100,000/=.

26. In the case of **DANIEL TOROITICH ARAP MOI VS MWANGI STEPHEN MURIITHI & ANOTHER [2014] eKLR** the court held that;

"In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the Evidence Act, as follows;

Section 107

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.

Section 109

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person."

27. Apart from the allegation that the deceased's estate was valued at "hundreds of thousands" the appellant did not provide any proof that the estate exceeded the value of Shs.100,000/= as shown in Form P&A5. A valuation report of the estate at the time the succession cause was filed ought to have been provided. In absence of proof, this ground of appeal cannot stand in my opinion.

28. The appellants stated that the magistrate relied on forged documents but did not explain which documents they were referring to. It was held in the case of **DANIEL TOROITICH ARAP MOI** (Supra) that he who alleges must prove. The appellants made not attempt to prove that there were any forged documents let alone whether they were relied on by the court. The copy of register and map produced by the appellants did not have the date of issue rendering their authenticity questionable. The magistrate was right to rely on the evidence of the District Land Registrar who is the authority on the issue at hand and who produced authentic documents.

29. The appellant alleges that the deceased left an oral will. Oral wills are provided for under Section 9 of the Law of Succession Act which provides:-

(1) No oral will shall be valid unless

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

30. It was not however demonstrated that such a will existed and that if it did, that it met the requirements of Section 9 of the Act.

31. The respondent admits that the deceased sub-divided parcel number 764 before he died. The subdivision was entered in the register in 1999 and transfer of some parcels done in 2003. The deceased died in 2005. This evidence was confirmed by the Land Registrar and is as follows;

| | |
|------------------------------------|-----------|
| LR. 4258 - Rufus Mbirianjau | - 0.57 ha |
| LR. 4259 - Erasto Mbirianjau (dcd) | - 0.57 ha |
| LR. 4260 - Samuel Njue | - 0.57 ha |
| LR. 4261 - Njagi Muciri | - 0.57 ha |
| LR. 4262 - Loise Marigu | - 0.10 ha |
| LR. 4263 - Madris Mukuabiro | - 0.10 ha |
| LR. 4264 - Victor Murangiri Njeru | - 0.10 ha |
| LR. 4265 - Peter Njagi | - 0.57 ha |
| LR. 4266 - Weston Njeru | -0.57 ha |

32. The respondent said that all the children were given a portion of land except Judith Runji and Orinda Kamuru who were by then are married.

33. According to form P & A 5, the Chief's letter Kyeni North Location and from the evidence of the parties the deceased did not have a surviving spouse and had the following children;

- 1) *Orinda Kamuru Muchiri*
- 2) *Madris Mukwambiro Muchiri*
- 3) *Judith Runji John*
- 4) *Loise Marigu Muchiri*
- 5) *Weston Njiru Muchiri*
- 6) *Samuel Njue Erasto*
- 7) *Njeru Muchiri*
- 8) *Rebecca Muthoni Muchiri - deceased*
- 9) *Rufas Mbirianjau - deceased*
- 10) *Peter Njagi Muchiri - deceased*

34. It was not in dispute that LR. No. Kyeni/Mufu/4259 measuring 0.57 ha was the only land available for distribution in the deceased's estate.

35. According to Section 38 of the Act, this parcel is 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.

36. The respondent admits that the deceased had given some of his children including himself land during his lifetime. The provisions of Section 42 of the Act require that such property should be taken into consideration when distributing parcel number 4259.

37. In the case of **AGNES KWAMBOKA OMBUNA VS BIRISIRA KERUBO OMBUNA [2014] eKLR** it was held that;

The practice is evidence of discriminatory practices in favour of male children who in most traditional African societies were the only ones entitled to inherit real estate. That changed with the coming into force of the Law of Succession Act – Cap 160, Laws of Kenya, which does not make a distinction between sons and daughters of a deceased intestate. The position was crystallized by the Constitution of Kenya 2010 which, in Article 60(1), provides as follows:

“60(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles -

(f) elimination of gender discrimination in law and practices related to land and property in land.”

38. Article 27 as noted earlier, criminalizes any form of discrimination on any ground. The law treats every person as equal before the law and confers has the right of equal protection. Women and men are accorded equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. The article is crucial in ensuring equal and equitable inheritance.

39. It is not in dispute that Judith Runji and Orinda Kamuru were not given property during the lifetime of the deceased but the other children of the deceased were allocated portions of land.

40. The trial magistrate relied on the documentary evidence produced by the Land Registrar to support the fact that L.R. Kyeni/Mufu/764 had been sub-divided and allocated to most of the children. It was noted that some had already obtained Land Board consents and the parcels were registered in their respective names. These steps already taken by the deceased in distributing his land were not reversable as the trial court rightly found.

41. The appellants did not adduce any documentary evidence to the contrary. The magistrate relied on the evidence before him to find that the deceased had allocated land to ten of the children leaving out only two married daughters Orinda Kamuru and Judith Runji. The magistrate cannot be said to have erred in his findings on sub- division of LR. Kyeni/Mufu/764 and distribution of land during the lifetime of the deceased.

42. Orinda Kamuru had consented to the mode of distribution of the respondent which did not give her any share. This was construed by the magistrate to mean that Orinda had surrendered her share in the estate for the benefit of the other beneficiaries. I find that the learned magistrate made the correct decision in regard to the case of Orinda Kamuru.

43. The 2nd appellant Judith Runji did not receive a share during the deceased's lifetime claimed her rights of inheritance in the protest. The court gave her 0.15 ha. out of LR. Kyeni/Mufu/4259. All the other children who got land during the lifetime of the deceased shared the remainder of the parcel equally resulting into shares 0.05 ha. for each of them. The magistrate therefore took into consideration the fact that Judith Runji had not benefited from allocation of land during the lifetime of the deceased.

44. I note that the deceased in sub-dividing the land did not allocate equal shares to his children. Each of his sons got 0.57 ha. while the daughters got 0.10 ha. each. The provisions of Section 42 of the Act require that this irregularity be addressed. It therefore follows that the sons of the deceased having received bigger shares, say about five times what the daughter got should not receive any share out of in LR. Kyeni/Mufu/4259.

45. This move may not place the appellants on equal footing with their brothers as required by the provisions of Article 27 of the Constitution. However, I must bear in mind that inheritance is not meant to be equal but equitable.

46. The foregoing reasoning leads to the conclusion that the magistrate erred in failing to give Section 42 of the Act due consideration and therefore arriving at an erroneous finding in distributing the overall distribution of LR. Kyeni/Mufu/4259.

47. I hereby set aside the said judgment and hereby order that LR. Kyeni/Mufu/4259 be shared equally between the appellants as follows:-

(a) Madris Mukwambiro Muchiri - 0.19 ha.

(b) Judith Runji Muchiri - 0.19 ha. - Equal shares

(c) Loise Marigu Muchiri - 0.19 ha.

48. The judgment of the learned magistrate is hereby set aside.

49. The appeal is therefore allowed based on the law applicable and on different reasons other than those reflected in the grounds.

50. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

The appellants (3)

The Respondents

Ms. Muthoni for the appellants