REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 75 OF 2008

AURENZIA GIKIRI NJERU.....APPELLANT

VERSUS

KIMANI KABENGE .....1ST RESPONDENT

DAVID NJERU KABENGI.....2ND RESPONDENT

JOHN NJERU KABENGI.....3RD RESPONDENT

(Being an Appeal from the Judgment and orders of D.O. ONYANGO Resident Magistrate Runyenjes in Succession Cause No. 71 of 1998 of 27/9/2007)

J U D G M E N T

The appellant was the petitioner while the respondents were protestors in the Magistrate's Court. The respondents were opposed to the mode of distribution propose by the appellant. After hearing the protests by the respondents the learned trial Magistrate made orders to the effect that the 1st and 2nd respondents were entitled to a share of the deceased's estate. It is this finding that aggrieved the appellant who has appealed raising the following grounds:-

1. ***The learned magistrate erred in law and fact in making judgment against the weight of evidence.***
2. ***The learned magistrate erred in law and fact in disregarding the fact tat the respondents had not proved their protest on the balance of probabilities.***
3. ***The learned magistrate erred in law and fact in failing to find that the affidavit of protest sworn by Kimani Kabegi on 26/10/1999 merely raised the issue that LR. KAGAARI/KIGAA/446, was held in trust for them and that the Court having dismissed the claim of trust made by the respondent s ought to have dismissed the protest entirely.***
4. ***The learned magistrate erred in law and fact in making orders that had not been applied for.***
5. ***The learned magistrate erred in law and fact in failing to find that none of the respondents had made an application to be declared a dependant of the deceased.***
6. ***The learned magistrate erred in law and fact in sharing out the estate of the deceased in a manner that contravenes the Law of Succession Act Cap 160 of the Laws of Kenya.***

The facts of this case are that the deceased was the husband of the Petitioner and a brother to the respondents. The father of the deceased and respondents had two wives. The deceased and the respondents belonged to the 2nd house and the deceased was the eldest son in that house. Their father was called Benson Kavengi Ngaruri.

Land demarcation was done in their area when Benson Kavengi Ngaruri had already died. During land demarcation three sons from the 1st house were each given land by the clan. In the 2nd house only two sons got clan land. The two sons are DW3 and the deceased. The sons in the 2nd house were staying on the land of one Nduma Makambu who chased them away. After being chased away DW3 went to live on his parcel while the 1st and 2nd respondent went to stay on the deceased's land. They have continued to stay there. Another son from the 2nd house John Njiru stays at Gichiche where he bought land. The deceased got registered as the proprietor of land parcel No. Kagari/Kigaa/446 which forms the estate of the deceased.

The appellant who is the widow of the deceased applied and was issued with grant of letters of administration. Her position is that the beneficiaries of the deceased's estate are herself and her children.

When the appeal came for hearing both counsels filed written submissions in support of the position taken by their clients. Ms. Magee for the appellant argued that since the Court found that there was no trust proved he should have dismissed the protests altogether. He submitted that the learned trial Magistrate granted orders which had not been sought. Mr. Kathungu submitted that the learned trial Magistrate gave full meaning to Section 29(b) of the Law of Succession Act and Rule 73 of the Probate & Administration Rules to do justice the parties.

This is a first appeal and this Court has the duty to review the evidence afresh. The case of ***SELE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] EA 123*** which was followed in ***KAMAU VS MUNGAI & ANOTHER [2006] 1 KLR 150*** held that a first appeal Court has the duty to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses hence making due allowance for that.

I have carefully considered the submissions by both counsels and the grounds of appeal. I have equally considered the evidence on record. The grounds of appeal all relate to the weight of the evidence adduced. I will therefore deal with them together. The issues to be addressed are:-

i. ***Whether the deceased held the subject land in trust for the respondents.***
ii. ***In what capacity the 1st & 2nd respondents have been living on the deceased's land.***

The protestor's evidence is that the deceased held the land Kagaari/Kigaa/446 in trust for them. The first entry on this land was made in 1960. The 1st, 2nd and 3rd respondents were then aged 5 years, 12 years and 2 years respectively. Their father had died. All that the respondents say is that their brother held the land in trust for them.

This element of a trust was not registered in the land register. It therefore became a matter of evidence. The respondents who were relying on it had the duty to prove that fact.

He who pleads a fact must prove it".

The assumption is that all rights and interests of persons in the land subjected to such a new system would have been ascertained and recorded before registration. If that was not done then the respondents were to avail evidence to prove their claims. As its noted above the protestors were very young at the time of registration in 1960.

The respondents ought to have called much older independent witnesses or even clan elders to explain to the Court how this trust came about. DW2 - DW4 testified. They are from the protestors' clan. Infact DW2 is their brother. They denied knowledge of the trust. PW3 stated this in Court at page 24 lines 37-38.

"Some of the elders we asked to testify have declined to come".

The deceased died on 10/2/1997. By this time the 1st, 2nd and 3rd respondents were aged 42 years, 49 years and 39 years old respectively. During all this time they never raised issue with their shares of the

land the deceased was allegedly holding in trust for them. They were comfortable staying on the land, inspite of the fact that PW3 had bought his own land. There is no single witness who explained to the Court the history of the suit land and the relevant customary law on which the High Court could find that a customary law trust had been established.

The second issue is to ascertain the reason for the continued stay by the respondents on the deceased's land. In dealing with this issue the learned trial magistrate found that the respondents were dependants of the deceased. The appellants in her grounds of appeal and submissions states that the respondents did not make an application to be considered as dependants and so the learned trial magistrate erred in getting into that arena and making orders not asked for.

The record shows that the father of the protestors had several sons. Majority of them got parcels of land from the clan. However from the 2nd house it is only the deceased who got 4 acres while DW3 got 2.2 acres. Its not clear what the other brothers got. But a few things come out clearly from this evidence:-

(i) The 1st and 2nd respondents occupy a small portion of this land.

ii. The 1st and 2nd respondents occupied this land with the full knowledge and consent of the deceased. They have built homes on it.
iii. The deceased at no time evicted them from the land. He was aware they had nowhere to go to.
iv. The appellant adduced no evidence that the deceased sued or attempted to evict the respondents.
v. The respondents mother was buried on this land.

Even if the respondents did not file any application under the Law of Succession Act to be considered as a dependant the Court had the duty to evaluate the evidence and come to a just conclusion.

The bottom line is that the respondents were claiming for a share in the estate of the deceased. The 1st and 2nd respondents may not have been depending on the deceased for their daily subsistence but he had allowed them to live and build on the land. This is what the learned trial magistrate states at page 33 lines 32 – 39 through to page 34 lines 1 – 2:-

"As at the time of the death of the deceased in 1997 they were settled on the suit land with their families. There is evidence that they have established homes on the suit parcel. Though it is alleged that the deceased had wanted the 2 to vacate the suit parcel it appears no serious moves were made to evict them. I therefore do not believe the evidence that the deceased did not want them to live on the suit land. The 2 had lived on the suit land for a long time with the consent of the deceased and they continued so live as at the time he passed on. I find that the 2 protestors named above qualify to be called dependants of the deceased under Section 29 of Cap 160".

I entirely agree with the learned trial magistrate as those are the facts. My finding is that though registered as the proprietor, the deceased allowed the 1st and 2nd respondents to live on this land because he knew they were landless. They had nowhere to go and they were his mother's sons and he was the eldest son. And if the deceased did not throw them out then the appellant cannot do so.

Under the peculiar circumstances of this case, I do find that the learned trial magistrate well applied the provisions of Section 27 and Section 29 of the Law of Succession Act. The respondents are brothers to the deceased and are covered under Section29(b) of the Law of Succession Act. The ends of justice will only be served if the 1st and 2nd respondents are apportioned the areas they occupy on the suit land.

I have no reason to interfere with the judgment of the learned trial magistrate. The result is that the appeal has no merit and is dismissed. Each party to bear his or her own costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 20TH DAY OF FEBRUARY 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Kathungu for Respondents

Mr. Njoroge for Magee for Appellant

Njue CC