



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 124 OF 2003

REGINA WANJIRA KIGARA.....APPELLANT

VERSUS

MARY WANJA KINGAU

VERONICA KAMIRA KINGAU.....RESPONDENTS

(Appeal arising from the judgment of Hon. W.N. Njage Senior

Resident Magistrate in Kerugoya Civil Case No. 88 of 1999)

JUDGMENT

1. The Respondent MARY WANJA KINGAU and VERONICA KAMIRA KINGAU petitioned for grant of letters of administration of the estate of FRANCIS KINGAU KEGARE in Kerugoya Succession Cause No. 88 of 1999 and named the following survivors:

- a. HANNAH WAGICHUGU
- b. FIRIDA WANGITHI
- c. RICHARD MUCHIRI KIGARI
- d. JOSEPH NYAGA
- e. HANNAH WANGU
- f. NJERI MACHARIA
- g. MERCY KARUANA MATHU
- h. WAMBURA MACHARIA
- i. NJOKI KINGAU
- j. SELINA KINGAU
- k. MWANGI KINGAU

2. On 31st March 2000 the appellant herein REGINA WANJIRA KIGARI filed a protest on the

ground that the deceased who was her brother left her living and depending on the land parcel No. INOI/KAMONDI/67 together with her family of which she was entitled to 1 acre and not ½ as proposed by the petitioner.

3. On 4th August 2000 the said protest was determined when the court ruled that the deceased was not holding the land in trust for the appellant and confirmed the grant as proposed by the respondent as follows.

VERONICA KAMIRA KINGAU - 2.32 acres

MARY WANJA KINGAU - 2.32 acres

REGINA WANJIRA KIGARI - 0.5 acres

4. Being aggrieved by the said decision the appellant filed this appeal and raised the following grounds in her memorandum of appeal filed on 6th October 2003.

1. The learned trial magistrate erred in law and fact on his decision on the distribution of the estate of Francis Kingau Kigara by awarding the appellant only ½ acre, without a scribing any reason thereto.

2. The learned trial magistrate erred in law and fact in failing to direct his mind to the fact that the deceased held the land INOI/KAMONDO/67 in trust for himself and the appellant and therefore arrived at the wrong conclusion in distributing the estate of the deceased.

3. The learned trial magistrate erred in law and fact in deciding to give the Petitioner only ½ acre on the basis that that is what the respondents wanted and therefore used the wrong principal in distribution of the estate.

4. The learned trial magistrate misdirected his mind on the law applicable in distribution and therefore arrived at the wrong decision.

5. The learned trial magistrate erred in noting that the appellant had no witnesses, while in fact the appellant had witnesses in court whom the trial magistrate ignored saying they were in court, and therefore failed to record vital evidence.

6. The learned trial magistrate erred in law in failing to distribute the whole of land Parcel INOI/KAMONDO/67.

7. That the decision is manifestly unfair against the appellant.

5. On 27th May 2011 directions were given that the appeal herein be determined by way of written submissions and at the time of writing this judgment it is only the appellant who had filed her written submissions.

SUBMISSIONS

6. It was submitted on behalf of the appellant that the appellant is a sister of the deceased and that it is not in dispute that the appellant was living on land No. INOI/KAMONDO/67 measuring 5.189 acres of which the appellant is seeking 1 acre while the respondents are willing to give her 0.5 of an acre.
7. It is submitted that the lower court did not prescribe or infer any reason for awarding the appellant only ½ acre out of the suit land. It was further submitted that section 29(b) of Succession Act recognizes the status of the appellant as a relative who was dependant upon the deceased and that the deceased was registered on this land as land that belonged to the common parents of the appellant and the deceased. It is submitted that the court should have found that the 1 acre sought

- out of more than five acres was a reasonable provision.
8. This being a first appeal the court is supposed to reevaluate the evidence tendered before the trial court and to come to its own conclusion on the same.
 9. It was the appellant's case that she had lived on the suit land since she was born having never been married. She stated that her father died during demarcation and that the land was registered in the name of the deceased for himself and herself. She stated under cross examination that the deceased did not leave her with $\frac{1}{2}$ acre.
 10. The 1st respondent VERONICA KAMIRA KINGAU stated that the deceased had left $\frac{1}{2}$ acre for the appellant and that the balance thereof was to be shared between the two widows. That the deceased was married to Ndambiri Nyaga but later divorced. Under cross examination the respondent stated that the appellant has one child and that the land did not belong to the appellant.
 11. The 2nd respondent WANJA KANGAU also stated that if the appellant was entitled to more than $\frac{1}{2}$ acre the deceased would have given her her share in his lifetime. She stated that the appellant has four children while the 1st respondent has four and the 2nd respondent seven.
 12. In cross examination the 2nd respondent confirmed that the deceased obtained the land from his father and that they were giving the appellant land on humanitarian grounds because she had been dependant on the deceased.
 13. The only issue before this court for determination is whether the proposed mode of distribution is equitable. It is not in dispute that the appellant was dependant upon the deceased. It is also not in dispute that the deceased inherited the suit land from his father and had the succession cause been in respect of the father of the deceased and the appellant been in issue the appellant would have been entitled to half of the said land.
 14. I have noted that there is one fundamental evidence which was not put before the trial court by both the appellant and the respondent and that is the measurement of the portion of land occupied by the appellant as at the time of the death of the deceased. If this evidence was present the same would have assisted this court in arriving at a just determination.
 15. From the proceedings it is clear that the appellant has not given any justification for her demand of 1 acre neither have the respondent given any justification for the $\frac{1}{2}$ acre proposed. What is clear from the record is that the appellant is divorced sister of the deceased with four children who are all dependants upon the said land.
 16. Section 28 of the Succession Act provide that in considering whether any order should be made under this part and if so what order the court shall have regard to:-
 - a. *The nature and the amount of the deceased property.*
 - b. *Any past, present or future capital or income from any source of the dependant .*
 - c. *The existing and future means and needs of the dependant.*
 - d. *Whether the deceased had made any advancement or other gift to the dependant during his lifetime.*
 - e. *The conduct of the dependant in relation to the deceased.*
 - f. *The situation and circumstances of the deceased's other dependants and the beneficiaries under any will.*
 - g. *The general circumstances of the case including, so far as can be ascertained, the testative reasons for not making provisions for the dependant.*
 17. Having confirmed that the appellant was a dependant of the deceased under the provisions of section 29(b) and having taken into account that the suit property was inherited by the deceased from their parents the trial magistrate fall into error by holding that the deceased gave the appellant land on humanitarian grounds.
 18. In view of the provisions of section 28 of the Law of Succession Act I allow the appeal herein set aside the judgment of W.N. Njage then Senior Resident Magistrate and substitute the same with

distribution as follows:

a. L.R. INOI/KAMONDO/67

1. REGINA WANJIRA KINGAU - 1.0 acres
2. MARY WANJA KINGAU - 2.4 acres
3. VERONICA KAMIRA KINGAU - 2.4 acres.

b. PLOTS NO. 11A KERUGOYA and PLOT NO. 40C KUTUS to be shared by MARY WANJA KINGAU and VERONICA KIMIRA KINGAU.

19. Each party shall bear their own costs that of the lower court and this appeal this being a family dispute.

Dated signed and delivered at Nyeri this 4th day of April 2014.

J. WAKIAGA

JUDGE

Court: The ruling is delivered in open court in the presence of Mr. Kariuki Advocate.

J. WAKIAGA

JUDGE