



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

P&A APPEAL NO. 6 OF 2009

MWANGI MBANYA.....APPELLANT

VERSUS

JENNIFFER NJERI KABEKENYA.....RESPONDENT

(Being an appeal against the Judgment of the learned Magistrate Joseph Gathuku, Resident Magistrate Muranga, delivered on 13/3/2009 in Muranga PM. Succ. Cause No. 258 of 2001)

JUDGMENT

On 13th March, 2009, the grant of letters of administration intestate in respect of the Estate of **Kabekeny Mugachi**, deceased and given to **Jennifer Njeri Kabekeny** and **Mwangi Mbanya** was confirmed by Hon. Gathuku learned Resident Magistrate vide **Muranga SPM Succession Cause no. 258 of 2001**. **Mwangi Mbanya**, the appellant herein, was dissatisfied with the decision hence he was prompted to file this appeal. He put forward the following grounds in his memorandum of appeal:

1. **The learned trial Magistrate erred in law and fact by including land parcel No.Loc.10/Wanjengi/1242 registered in the names of appellant while distributing the deceased's estate when it was not a free property of the deceased.**
2. **The learned trial Magistrate erred in law and fact by his failure to note that the respondent had conceded during the hearing that land parcel No. Loc.10/Wanjengi/1181 should be inherited by the appellant yet he went ahead to distribute it between the appellant and the respondent with respondent getting a bigger share.**
3. **The learned trial Magistrate erred in law and fact in the mode of distribution of the deceased estate which was against the evidence on record.**

When the appeal came up for hearing, this court recorded a consent order to have the appeal determined by written submissions. At the time of writing this judgment, **Jennifer Njeri Kabekeny**, the Respondent herein was the only party who had filed her submissions. The history of this appeal started when the Respondent applied for a grant of letters of administration in respect of the deceased's estate. Objection proceedings were lodged by the appellant. The objection was resolved when the trial court decided to issue the grant of letters of administration intestate in the joint names of the Appellant and the Respondent. Thereafter, the Respondent applied for the grant to be confirmed. The Appellant opposed the application by filing an affidavit of protest. The learned Resident Magistrate heard the dispute and in the end he confirmed the grant and ordered for the estate to be distributed as follows

1. **Jennifer Njeri Kabekeny- Loc.10/Wanjengi/1180**

2. **Jennifer Njeri Kabekenya- 0.6075 Ha to be excised from Loc.10/Wanjengi/1181**

3. **MwangiMbanya- The remainder of Loc.10/Wanjengi/1181 i.e 0.285Ha so that the appellant and the Respondent each get 1.0125Ha.**

It is the appellant's submission that the parcel of land Known as Loc.10/Wanjengi/1242 was registered in his name at the time of confirming the grant hence the same was not part of the deceased's estate hence unavailable for distribution. The appellant further argued that the trial Magistrate erred when he failed to take into account the fact that the Respondent conceded at the hearing that Loc.10.Wanjengi/1181 should be given to him.

The Respondent on her part urged this court to strike out the appeal on the ground that the same was filed out of time without leave of court. She also pointed out that there was no sound grounds capable of upsetting the trial court's judgment. The Respondent argued further that the trial court found as a matter of fact that the appellant had fraudulently transferred the land to himself hence the appellant could not be allowed to retain the same.

I think it is important to consider the preliminary point of law raised by the Respondent first before considering the merits or otherwise of the appeal. It is apparent from the record that the decision sought to be impugned on appeal was delivered on 13th March 2009. The appeal was filed on 14th April, 2009. The law requires appeals to this court to be filed within 30 days from the date of delivery of such a decision. It is clear from the provisions of **Section 57 (a)** of the **Interpretation and General Provisions Act**, that the day of the delivery of the decision is excluded when computing time. In this appeal, time started to run as of 14th March 2009. The last day for the appellant to file the appeal was therefore 14th April 2009. In my humble view, I think the Respondent's preliminary objection lacks merit, it is refused thus paving the way for this court to consider the merits of the appeal.

I have already stated the grounds relied on appeal. It is not in dispute that L.R Loc.10/Wanjengi/1242 was already registered in the name of the appellant at the time of distribution after the deceased had passed on. The trial Magistrate went ahead to state that there was evidence showing that the appellant was given the aforesaid parcel by the deceased *intervivos* after the subdivision of L.R.Loc.10/Wanjengi/1182. The trial Magistrate did not distribute the aforesaid parcel of land but he merely took into account as one of those gifts given *intervivos*. The trial Magistrate in fact distributed what was in the deceased's name hence whatever he distributed was available for distribution. The learned Resident Magistrate further applied the correct provisions of the law hence he cannot be faulted.

In the final analysis, I see no merit in the appeal. It is ordered dismissed. Since the dispute involves members of the same family I decline to give costs to any. Each one of them to meet his or her own costs.

Dated, Signed and delivered this 16th day of December 2013.

J.K.SERGON

JUDGE

- In open Court in the presence of Mr. Wachira holding brief Kirubi for Appellant.
- N/A for Respondent.