



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL APPEAL 89 OF 2006

ANN WANOI THIAKA.....APPELLANT

VERSUS

PENINA MUTHONI GITHIRI..... RESPONDENT

(Being an appeal from the Judgment of J.N. ONYIEGO Senior Resident Magistrate in Succession Cause No. 235 of 1999 at Kerugoya on 17th

March, 2006)

J U D G M E N T

The Appeal is against the Judgment of the Senior Resident Magistrate Kerugoya dated 17th March, 2006 in succession Cause No. 235 of 1999 in the estate of NELSON GITHIORI NJAGI comprised of Land Parcel No. KIRINYAGA/GATHIGIRIRI/162 measuring 16.3 acres. In her appeal the Appellant raises the following grounds:-

- 1. That the learned trial magistrate erred in law and in fact in delivering judgment against the weight of evidence on record.***
- 2. That the learned trial magistrate erred in law and in fact in failing to provide for the protestor who is a child of the deceased and therefore entitled to a share of the deceased estate.***
- 3. That the learned trial magistrate erred in law and in fact in holding that TIMOTHY MURIUKI purchased 2 acres of land parcel NO. KIRINYAGA/GATHINGIRIRI/162 from the deceased whereas no evidence was adduced to prove that there was any such sale.***
- 4. That the learned trial magistrate erred in law and in fact in giving TIMOTHY MURIUKI a share of the deceased estate giving as a purchaser when the evidence adduced by the petitioner as the alleged purchase was contradictory.***

5. That the learned trial magistrate erred in law and in fact in shifting the burden of prove of the alleged sale from the petitioner to the protester.

6. That the learned trial magistrate erred in law and in fact in by unfairly disregarding the protestor's evidence.

Both counsels agreed to file written submissions which they did. Mr. Kiguru Kahigah for the Respondent has raised one issue about the competence of the Appeal which I would wish to address before I deal with any other ground. He says under Section 50 of the law of Succession an appeal from the subordinate court to the High Court lies against an order or decree only and not otherwise. He submitted that the Appellant did not extract any formal order or decree embracing the Judgment of the lower court dated 17/3/2006.

I have keenly perused the record of appeal and do not see any formal order or decree forming part of the record. Order 42 Rule 2(2) of the Civil Procedure Rules provides for the filing of a certified copy or order being appealed from. The order/decree must not only be filed but it must be a certified copy.

In the case of **FAROOK VS SHERALI [1970] EA 241** it was held that where no certified copy of the order appealed from was attached to the memorandum of appeal, the appeal was not properly presented and could not be entertained. This has been the position in several cases decided by the court of Appeal e.g.

1. GODFFREY NGUMO NYAGA & ANOTHER VS KCB LTD. CIVIL APPEAL NO. 191/2000 ON 15/3/2001 UR

“The omission to include a certified copy of the order appealed from render the appeal incurably defective”.

2. ZEDEKIA OGADA VS ALBERT OGUTU CIVIL APPEAL NO. 207/1999 ON 20/11/2001

“The omission to incorporate a certified copy of the decree appealed against is fatal and renders the appeal incompetent.

The provisions of the law are clear on this. The said omission by the Appellant to include a certified copy of the decree/order being appealed against renders the appeal incompetent.

I therefore strike it out with costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 19TH DAY OF JULY 2012.

H.I. ONG’UDI

JUDGE

In the presence of:-

Mr. Maina Kagio for Kahigah for Respondent

Both parties present

Nancy CC