



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 21 OF 2008**

**ALVAN NYAGA .....DEFENDANT/APPLICANT**

**VERSUS**

**EUNICE MUTHONI NYAGA .....PLAINTIFF/RESPONDENT**

**J U D G E M E N T**

The Appellant herein was the petitioner in Runyenjes Succession Cause No. 8 of 2006. The Respondent herein filed an affidavit of protest on the mode of distribution of the estate of the deceased saying that she had been left out in the P & A form yet she had purchased 0.20 hectares of land from the deceased. The protest was heard by way of viva voce evidence. The gist of the protestor's evidence was to the effect that she had purchased 0.20 hectares of land (also described as ½ acre) of Land Parcel No. KAGAARI/KANJA/5781. She said she had paid KShs.170,000/= as part of the purchase price of KShs.190,000/=. She produced the receipts and acknowledgements duly signed by the deceased. The deceased had made an application for consent to sub-divide his land on 6.12.04. The consent for the sub-division was given on 11.2.05.

I have looked at the application for consent and the letter of consent itself. None of them bear the name of the Respondent herein. The application to sub-divide does not indicate the names of any proposed purchaser, transferor or allottee whatsoever. The letter of consent itself clearly indicates that the sub-division was from **ERASTUS NJAGI IRERI** (deceased) to SELF. It does not therefore, have the name of the protestor/ Respondent. Although she may have had the documents in her custody, the same had no bearing on her whatsoever.

After hearing the parties herein, the learned trial magistrate was convinced that the deceased had indeed sold the ½ acre to the protestor. He therefore, ordered that ½ acre from the plot in question be transferred to the Respondent herein.

Being aggrieved by the said judgment, the Appellant filed this Appeal. He has proffered five (5) grounds of Appeal. Grounds 2 and 3 made no sense at all but the three (3) relevant grounds read as hereunder:

1. *The learned Resident Magistrate erred in law in awarding ½ acre portion from parcel of land No. KAGAARI/KANJA/5781 to the Respondent.*
4. *That the learned magistrate erred in not finding the alleged consent of Land Board (sic) was for sub-division but not for transfer.*
5. *The judgment of the learned trial magistrate is against the weight of the evidence.*

He urges the court to set aside the judgment of the learned trial magistrate.

Both counsel filed written submissions. I have considered the same very carefully along with the evidence adduced by the trial court. For the Appellant, it was submitted that there was no written agreement of sale between the deceased and the Respondent; that the consent produced as exhibit was one for sub-division and not for sale; and that the land parcel he is said to have been selling was not indicated. It was also submitted that there was actually no consent to transfer land to the Respondent.

Counsel for the Respondent on the other hand challenged the memorandum of Appeal and said that it was bad in law. As stated earlier on in this judgment, two (2) of the grounds of appeal make no sense, but at least the court could pick out three (3) substantive grounds. I will not therefore strike out the Memorandum of Appeal on that basis.

The Respondent is relying on the letter of consent dated 11<sup>th</sup> February, 2005 and the receipts that were produced as evidence of payment.

In my considered view however, the absence of a written agreement of sale of land in this case was crucial. I say so because there was no evidence that the oral agreement if any was accompanied by actual possession. The receipts and the other exhibits adduced before the trial court do not clearly state the land that was being sold to the Respondent. Indeed, they were not even in the language of the court and I am even unable to conclusively decipher their meaning and content. They have not advanced the Respondent's case one inch.

Further to that, the consent to sub-divide did not have the name of the Respondent or any other intended purchaser. The Respondent cannot therefore, rely on it to support her claim. The said letter of consent was of no evidential value to the Respondent at all.

There is therefore nothing to show to the satisfaction of this court that the deceased had the intent to sell any land to the Respondent and that the only reason why the same was not transferred to her was because of the deceased's untimely death as claimed by the Respondent.

The finding by the learned trial magistrate that "*the deceased appeared before the Land Control Board to agree on sub-division of the parcel KAGAARI/KANJA/5781 to enable the 1<sup>st</sup> protestor get her portion*" is not borne out by the evidence on record. In absence of the Respondent's name as an intended purchaser in the letter of consent to sub-divide, such a finding by the magistrate was made in error.

I agree with Counsel for the Appellant therefore that the learned magistrate's judgment was against the weight of the evidence. The Appellant has a good Appeal. The same therefore succeeds. I allow it and set aside the judgment of the learned trial magistrate.

I order that the parcel of land given to the Respondent herein reverts to the Appellant to distribute in the manner he deems fit.

I nonetheless, order that each party bears its own costs.

**W. KARANJA**

**JUDGE**

Signed by the above-named but delivered and dated by the undersigned at Embu this 29<sup>th</sup> day of March, 2011.

**M. WARSAME**

**JUDGE**