



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
P & A APPEAL NO. 6 OF 2004

SUSAN WAMBUI NGONDA.....APPELLANT

VERSUS

STANLEY MURAGE MWANGI.....RESPONDENTS
JOSEPH MUTHIKE MWANGI

(Being appeal from the judgment of J. N. Onyiego, Senior Resident Magistrate in Kerugoya Principal Magistrate's Court Succession Cause NO. 111 of 2001 delivered on 7th October 2004)

JUDGMENT

Susan Wambui Ngonda, the appellant herein, had applied to be given letters of administration intestate in respect of the Estate of Ngunda Murage, deceased, before the Senior Principal Magistrate's Court, Kerugoya vide **Kerugoya S.P.M.C. SUCC. Cause No. 111 of 2001**. She was given the aforesaid letters on 28th August 2001. By the summons filed on 6th March 2002, the Appellant applied for the grant to be confirmed. Stanley Murage Ngunda, the 1st respondent herein, filed an affidavit of Protest to oppose the Summons for Confirmation of Grant. The Summons for Confirmation of Grant and the Protest were determined by reception of oral evidence.

The dispute was heard by Kiriba, the then Senior Resident Magistrate. In the summons for Confirmation of Grant, it would appear the Appellant merely identified the beneficiaries and the asset of the Estate but did not give the mode of distribution. The record shows she wanted to inherit the land alone. The only asset of the Estate is stated to be **L.R. NO. MUTIRA/KANGAI/194** measuring approximately 5.71 Hectares. In the affidavit of Protest, the 1st Respondent proposed that since the deceased was married to three wives, the land should be shared according to the houses in equal proportion. The Protestor's case was supported by the evidence of five witnesses. **Stanley Murage Ngunda** (P.W.1) told the trial Magistrate that the deceased had fixed a boundaries by planting grass to separate the portion occupied by each wife. P.W. 1 proposed that the land be distributed according to the wishes of the deceased. He opposed the land being solely given to the Appellant. P.W. 1 admitted that he had already been given land hence he had no claim over the aforesaid parcel of land. **Joseph Muthike Mwangi** (P.W.2), being the deceased's son, indicated that he already has his portion and that he only wanted his brothers to be given a share of the land. He produced a note book and photographs showing that the family met to discuss the distribution of the land. P.W.2 stated that the family met at the Chief's office and agreed on how the land would be shared. He said that his mother's house was to be given 6 acres while the other two houses were to each receive 4 acres. **Samuel Ngandi** (P.W.4), said that he was not present when the land in dispute was shared between the family members of the deceased. However, he stated that he was aware that each wife was shown her own portion during the deceased's life time. **Francis Kariuki** (P.W.5) corroborated the evidence of P.W.1 that the boundary separating the portion

occupied by each was made of grass. The Appellant's case before the trial Court was supported by the evidence of two witnesses. **Susana Wambui** (D.W.1), the appellant, told the trial Magistrate that the land in dispute should be shared in equal measure between the landless children of the deceased. She gave the names of twelve beneficiaries who should share the land. D.W.1 said P.W.1 and P.W.2 should not be considered in the sharing because they had already been given land by the deceased. It should be noted that the Appellant changed her position from what she had earlier suggested in her affidavit filed in support of the Summons for Confirmation of Grant. D.W.2 claimed that the land was passed on to her upon the deceased's death to distribute it to the deceased's children and not to the grandchildren. She confirmed that each wife had been shown the portion to occupy and till by the deceased. **Joseph Muriithi Ngunda** (D. W. 2), confirmed that the family met but denied that the issue regarding the distribution of the land was concluded. D. W. 2 was of the view that the deceased's land was never distributed at all. The Court sent one Bedan Njeru Kagai to visit the land and file a report. He told the trial Magistrate that the land was subdivided into three portions separating each family. He produced a sketch map showing how the three portions are on the ground. The learned Senior Resident Magistrate considered the evidence of both sides and came to the conclusion that the grant should be confirmed but did not decide on the issue of distribution. In fact he stated that the issue of distribution be resolved by the family and in default the same be mentioned in court. Nothing appears to have taken place in the matter until the year 2004 when the Respondents herein filed the summons for rectification of grant dated 15th June 2004. In the aforesaid Summons, the Respondents sought for three main orders:

(i) ***The rectification of the certificate of confirmation of grant issued on 25th February 2003 to correct the names of Stanley Murage Ngunda to read Stanley Murage Mwangi and that of Joseph Muthike Ngunda to read Joseph Muthike Mwangi.***

(ii) ***An order to authorize the Executive Officer to sign the necessary documents to facilitate subdivision and transfer of the deceased's land as per the certificate of the confirmed grant.***

(iii) ***Costs of the cause.***

The application was heard *ex parte* when the Appellant failed to file a reply nor attend court despite being served. By his ruling delivered on 6th August 2004, Hon. J. N. Onyiego, learned Senior Resident Magistrate, the application was allowed as prayed. When the Appellant learnt of the ruling, she filed the Summons dated 7th September 2004 in which she sought for the following orders *inter alia*:

(i) ***Stay of execution of the certificate of confirmation of grant dated 16th August 2004.***

(ii) ***An order for review by setting aside of the aforesaid certificate of confirmation of grant.***

(iii) ***The court to determine the distribution of the Estate.***

(iv) ***Costs.***

The Respondents filed a joint replying affidavit to oppose the Summons. The application was heard and dismissed by Hon. J. N. Onyiego, learned Senior Resident Magistrate on 17th October 2004. The Appellant was aggrieved by the decision hence this appeal.

On appeal, the Appellant put forward the following grounds:

1. ***That the learned magistrate erred in law and fact in failing to exercise his discretion judiciously.***
2. ***The learned Magistrate erred in law and in fact disregarding the fact that there was an error apparent on the face of the record.***
3. ***The learned Magistrate erred in law and fact in disregarding the fact that the certificate of***

confirmation of a grant dated 16th August 2004 purported to have been issued after grant was confirmed on 5th August 2004 whilst there was no confirmation of grant on the said date.

- 4. That the learned magistrate erred in law and fact in disregarding the fact that on 28th August 2002 when the court delivered a ruling and/or judgment it did not confirm the grant of representation.*
- 5. That the learned Magistrate erred in law and in fact in disregarding the fact that the court had never decided on the issue of distribution of land parcel registration Number MUTIRA/KANGAI/194 amongst the beneficiaries and as such there was an error apparent on the face of the certificate of confirmation of a grant dated 16th August 2004 which distributed the same.*
- 6. That the learned Magistrate erred in law and fact in disregarding the fact that the Appellant is greatly prejudiced by the certificate of confirmation of grant dated 16th August 2004.*

When the appeal came up for hearing, learned counsels from both sides recorded a consent order to have the appeal disposed of by written submissions. I have reconsidered the case that was before the subordinate court plus the written submissions. The first ground argued on appeal is to the effect that the subordinate court had no pecuniary jurisdiction to hear and determine the cause. The Respondents opposed this ground on the basis that there was no valuation report to show the value of the Estate. I have carefully perused the estimated value given to the parcel of land known as **L.R. MUTIRA/KANGAI/194**. It was fixed at Ksh.200,000/= . It is therefore obvious that the trial court did not have the pecuniary jurisdiction to hear and determine the succession dispute.

The other serious ground argued on appeal is that the trial Magistrate erred when he failed to appreciate that the issue touching on distribution of the Estate had not been determined nor agreed upon by the parties hence the certificate of confirmation of grant dated 16th August 2004 did not conform with the orders of 28th August 2002. It is apparent from the record that the distribution of the Estate was not determined. The trial Magistrate merely left it to the parties to agree and in default to go back to court for determination. This was not done. Instead the Respondents applied for the execution of the confirmed grant yet they knew the issue of distribution had not been determined. When the issue was brought to the attention of Hon. J. N. Onyiego, he did not deem it fit to determine despite having been beseeched to do so in exercise of his discretion under *rules 63 and 73 of the Probate and Administration Rules and Order XLIV rule 1 (a) of the Civil Procedure Rules.*

In the end, I am convinced the appeal should be allowed. The orders issued on 7th October 2004 are set aside and the certificate of confirmation of grant dated 16th August 2004 is reviewed and set aside. Since the subordinate court did not have the pecuniary jurisdiction to hear and determine the succession cause, all the proceedings and any decisions flowing from those proceedings are set aside and substituted with an order striking out the entire petition. Since the dispute involves members of the same family, I direct that each one of them to bear his or her own costs.

Dated and delivered at Nyeri this 18th day of March 2011.

J. K. SERGON
JUDGE

In open court in the presence of Muchira for the Respondent Miss Kahara for the Appellant.