



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PROBATE & ADMINISTRATION APPEAL NO. 5 OF 2009

IN THE MATTER OF THE ESTATE OF MUTHIGURO KIGANDA - DECEASED

GLADYS NJERI MUHURA.....APPELLANT

VERSUS

LISPHA WAGATURI MUTHIGURO.....RESPONDENT

(Being appeal arising from the judgment of J. Gathuku Resident Magistrate, in Senior Principal Magistrate's Succession Cause No. 7 of 2007 delivered on 26th March 2009 Murang'a)

JUDGMENT

On 27th July 2007, a Grant of Letters of Administration in respect of the Estate of Muthiguro Kiganda, deceased, was given to Lispha Wagaturi Muthigiro, the Respondent herein. She took out the Summons for confirmation of Grant dated 28th January 2008 in which she sought for the grant to be confirmed with parcel No. **LOC. 8/KARI-KARURU/232** being solely transmitted to her. Gladys Njeri Muhura, the Appellant herein, opposed the respondent's summons by filing the affidavit of protest she swore on 14th February 2008. The dispute was heard by Honourable J. Gathuku, learned Resident Magistrate. In the end, the learned Resident magistrate dismissed the protest and proceeded to confirm the grant as prayed in the Summons. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds of appeal in her Memorandum of Appeal:

- 1. That the Honourable Resident Magistrate erred in law in his finding that there was no trust established or in place in favour of the appellant merely on the ground that Muhura the appellant's husband had not commenced proceedings for a declaration of trust. The magistrate overlooked the fact that, the appellant and her family have been living on the suit land Loc. 8/Kari-Karuru/232 since 1947 and no proceedings were ever commenced for their eviction.***
- 2. That the Learned Resident Magistrate in coming to a conclusion that there was no trust completely overlooked proceedings in Murang'a PM LDT Case number 19 of 2008 in which the respondent stated that because her husband had bought some undisclosed portions, her portion of the suit land would be larger.***
- 3. The Learned Resident Magistrate erred in law in finding that because the trust in favour of the appellant was non-existent for the reason that it was not registered at the lands office in the register of land parcel Loc.8/Kari-Karuru/232 whereby there is no such requirement for the nature of the trust envisaged in such proceedings.***

4. *The Learned Resident magistrate erred in law in finding that the trust could not exist because the appellant was not a legal representative of the late Muhura.*
5. *The learned Resident magistrate wrongly rejected the explanation why the late Muhura was not jointly registered over the suit land with the late Muthiguro Kiganda simply because the mother to both of them (Muhura and Muthiguro) was on the same date 24th September 1957 registered over land parcel Loc. 8/Kari-Karuru/170. The court wrongly failed to take judicial notice that it was not permissible for one beneficiary to be registered over 2 parcels of land in the same registration scheme hence the necessity of registering Muthiguro over the other parcel as a family land.*
6. *The Learned Resident Magistrate misdirected himself on the evidence when he found that the fact that Muhura was in detention at the time of registration of the suitland in the name of Muthiguro did not explain Muhura's failure to be jointly registered with Muthiguro.*
7. *The Learned Resident Magistrate did not give sufficient weight to the evidence in favour of the appellant and hence failed to arrive at the correct conclusion which is that the land in the name of Muthiguro and the other one in the name of Watate were family land and that each of the two sons of Watate i.e. Muhura and Muthiguro were equally entitled to the same.*
8. *The Learned Resident Magistrate should have rightly made an inference that the suitland was family land as that would be the only basis why the respondent would be ready to surrender her interest in the land parcel Loc. 8/Kari-Karuru/170 in the name of her mother in-law as it was otherwise not on the basis of charity or benevolence.*

When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions.

Before considering the merits or otherwise of the appeal, let me set out in brief the matter which was before the trial court. I have already stated by way of introduction that a temporary grant of letters of administration was given to Lispha Wagaturi Muthiguro, the Respondent herein. She applied for the grant to be confirmed. Gladys Njeri Muhura, the appellant herein, filed an affidavit of protest to oppose the confirmation of grant. In the summons for Confirmation of Grant, the respondent had proposed to have the only asset of the Estate i.e. **LOC. 8/KARI-KARURU/232** to be transmitted to her. In her affidavit of Protest, the appellant alleged that Muthiguro Kiganda, deceased, held the land in trust for his late brother, Muhura Kiganda and by extension the Appellant. Both the Appellant and the Respondent each testified and summoned the evidence of one witness. The learned Resident Magistrate considered the evidence and in the end he dismissed the Appellant's protest and proceeded to confirm the grant. That decision provoked the Appellant to file this appeal.

Having given the brief history of the case that was before the trial court, let me now deal with the appeal. Though the appellant has listed about 8 grounds in her Memorandum of Appeal, I am of the view that one main ground commends itself for my consideration. It is a question whether or not there were competent proceedings before the trial court. It is not denied that the issue in dispute was the determination of a trust. Under *rule 41 (3)* of the Probate and Administration Rules, such a dispute can only be determined under *Order XXXVI rule 1* of the Civil Procedure Rules (old) now *Order 37 rule 1* of the Civil Procedure Rules (New). It would appear the Learned Resident Magistrate proceeded to determine that question without taking into consideration of the aforesaid procedure. Had the Learned Resident Magistrate taken into account that procedure, he would not have determined the dispute the way he did. On this ground alone, I will allow the appeal. The orders dismissing the protest and confirming the grant are set aside. The protest and the summons for Confirmation of Grant are restored. The application for confirmation of grant dated 28th January 2008 is stayed pending the hearing and determination of the issue of trust raised in the affidavit of protest. The Protestor is directed to file the necessary proceedings envisaged under *rule 41 (3)* of the Probate and Administration Rules within a period of 90 days. Costs of the Appeal to abide the outcome of the aforesaid proceedings.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON

JUDGE

In open court in the presence of Miss Mwai holding brief Mbutia for the Appellant. No appearance for Njoroge for the Appellant.