REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 95 of 2002

GITHINJI KANYI……. APPELLANT
VERSUS
SHIPRAH WAIRIMU MUGAMBI……. RESPONDENT
JUDGMENT

This appeal arises from succession proceedings in the Principal magistrate's court at Muranga in relation to the estate of one, David Mugambi Kanyi, "deceased". The deceased died on 30th April, 1986. He was survived by Githinji Kanyi, a brother and the appellant, Shiphrah Wairimu Mugambi, a widow and respondent herein. Julius Kago Kanyi, brother and Irungu Kanyi, a brother as well. In the fullness of time, the appellant petitioned the court for a grant of letters of administration intestate. On or about 23rd February, 1988 the respondent through Messrs Karuga Wandai & CO Advocates objected to the making of the grant of representation to the estate of the deceased to the appellant simultaneous with the filing of the objection, the respondent also filed answer to the petition and petition by way of cross application. The position of the respondent was that as a widow of the deceased, she ought together with her children petitioned for the grant and not the appellant who was a mere brother. As all this was going on and unknown to the respondent, the grant had actually been made to the appellant on 22nd September, 1988.

On or about 14th December, 1988, the respondent filed an application to set aside the temporary made to the appellant as aforesaid. However before that application could be heard and determined, the appellant filed an application for confirmation of grant. He proposed that the estate of the deceased consisting of land parcel Loc. 14/Kanune/462, "The suit premises be shared equally between himself, his two brothers and the respondent in the following ratio;-

- Appellant – 1.25 acres
- Respondent – 3.95 acres
- Julius Kango Kanyi – 1.25 acres
- Irungu Kanyi – 1.25 acres

It would appear that the respondent filed a protest. However a copy of the same is not on record. The two applications came for hearing. However on 24th September, 1992 and by consent of the parties, the dispute was referred to arbitration by the D.O. Kangema. This was duly done and on the 17th December, 1992 the award by the D.O. dated 23rd November, 1992 was read to the parties. However the same was vague ambiguous and uncertain on the mode of distribution of the estate. With the consent of the parties that award was set aside. The parties again agreed to refer the dispute to fresh arbitration. The fresh award was subsequently filed and read to the parties on 21st April, 1994. On 13th May, 1994, the respondent filed an application to set aside the award on the grounds of misconduct. On 2nd December, 1994 parties recorded a consent in these terms:-

"…… By consent D.O.'s award herein be set aside and succession case be heard viva voce to determine the mode of inheritance……."

The cause was thereafter heard initially by Nyaga Njagi SRM who took the evidence of the appellant. Along the way and in an under circumstances however the cause was taken over by F.F. Wanjiku PM who heard the remaining witnesses, crafted and delivered the judgment. Ideally it should not have been a judgment but a ruling since the issue before court was an application for confirmation of grant and a protest.

The appellant's case was that the deceased was his brother. He was registered as the proprietor of the suit premises on his own behalf and on behalf of his brothers as a family land. The suit premises measure 7.7 acres. The deceased however purchased 2.7 acres of the suit premises with his own resources. Accordingly it is only 5 acres which is family land which should be shared as he had set out in his affidavit in support of the application for confirmation of grant. He testified that he was living on the suit premises and occupied 1½ acres thereof. His other two brothers occupied another parcel of land owned by the deceased. That their deceased father died before land demarcation and consolidation. The deceased was then registered as the proprietor of the suit premises in trust for himself and his brothers.

The case for the respondent was that she was the wife of the deceased and the suit premises were deceased's solely. The deceased had bought several portions of land and during land demarcation they were consolidated to form the 7.7 acres. The appellant had earlier asked the deceased to give him a portion of the suit premises to build in 1963 and he was given. Together with her deceased husband, they had agreed to give the appellant ½ an acre and she was still willing to do so. The deceased had his brother, Irungu 0.6 acres in another piece of land and that is where he lives. The learned magistrate having considered the

evidence tendered by both sides reached the verdict that, "……. The land in dispute is not family and, except a small undefined portion because if it was family land the deceased would not have refused Irungu to build there and Irungu himself told the court that the deceased refused him to build there. Also if it was a family land the petitioner would not be using such a small portion while the wife of the deceased used a very big portion of that land. Also if it was family land the father of PW III would have lived there before he bought the land where his family lives, or at least he would be using a portion of the family land. The court is satisfied that the deceased bought the land in issue but he adowed the petitioner a portion to settle while he also gave his other brother a portion of his other land after he bought……."

This holding triggered this appeal. Through Messrs Muchiri wa Gathoni & Company, the appellant faulted the learned magistrate's holding on the 5 grounds to wit;-

" 1. The learned Principal Magistrate erred in law and in fact in holding that the land in dispute is not a family land.

2. The learned Principal Magistrate erred in law and in fact in that she did not appreciate the fact that the deceased had NOT bought any land and therefore the estate is a family land which should be shared equally.

3. The learned Principal Magistrate erred in law and in fact in that she acted out of her jurisdiction in that the value of the estate exceeds her jurisdiction.

4. The learned Principal Magistrate erred in law and in fact in awarding the appellant 0.6 acres whereas he has been in the suit land for more than 36 years and has substantially developed approximately 1.85 acres.

5. The learned Principal Magistrate erred in law and in fact in that she did not appreciate that the issues to whether the deceased has bought any land was not properly canvassed."

When the appeal came up for hearing Mr. Muchiri for the appellant and Mr. Gacheru for the respondent agreed to canvass the same by way of written submissions. Subsequent thereto the submissions were filed and exchanged.

However, the determination of this appeal will hinge on ground 3 of the memorandum of appeal. This is the ground that impugns the learned magistrate for proceeding to hear and determine when she had no jurisdiction as the value of the estate exceeded her jurisdiction. These proceedings commenced in the Principal magistrate's court at Muranga. Section 48(1) of the Law of succession Act confers jurisdiction on the magistrate's court to entertain and determine any dispute under the act save for application for revocation or annulment of grant. However such jurisdiction by the magistrate is limited to an estate whose value does not exceed one hundred thousand shillings.

It is trite that a party is bound by his own pleadings. In the affidavit in support of the petition for letters of administration intestate, the appellant indicated that the value of the estate of the deceased was Kshs.140,000/-. Githimba Macharia and Alexander Nelson Kanyi Njaga, in their affidavits of justification of proposed sureties also confirm that estate is valued at Kshs.140,000/-. This fact was not at all discounted by the respondent. That being the case, it would appear that pursuant to section 48 aforesaid, the Principal magistrate's court had no jurisdiction to entertain the proceedings since the value of the estate was in excess of the permitted Kshs.100,000/-.

I note that though the appellant raised the issue as a ground of appeal, he did not address the same in his written submissions. However, the respondent dealt with the same in this manner, that the appellant filed affidavit and put the value of the subject matter at Kshs.140,000/-. He was the petitioner and got a grant of letters of administration intestate. He subjected the court to conduct the petition knowing very well that the value was in excess of jurisdiction conferred upon the magistrate's court. He cannot now go round arguing that the court had no jurisdiction when he knowingly subjected himself to that value. In other words it is the contention of the respondent that having knowingly subjected himself to the jurisdiction of the magistrates court, he is estopped from challenging the jurisdiction.

I have said before and I will say it now, estopped cannot be used to confer jurisdiction where there is none. Nor cannot be used to oust jurisdiction. Estoppel cannot be used to override clear provisions of law, an act of parliament nor can it be used to override or subject the law. In the circumstances of this case the value of the deceased's estate was put at Kshs.140,000/- well beyond the jurisdiction of the magistrate's court in succession matters. That being the case, the proceedings were as a consequence annulity and I so hold. The appeal is accordingly allowed and the judgment of the lower court is set aside. In substitution thereof I order the dismissal of the entire succession cause for want of jurisdiction. Because the parties involved are close relatives, I will make no order as to costs in this appeal as well as in the cause in the subordinate court.

Dated at Nyeri this 22nd day of March 2010.

M.S.A. MAKHANDIA
JUDGE

Delivered on 22nd day of March, 2010,
By:

J.K. SERGON
JUDGE