



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 4 OF 2009

MIRIAM NGAI NJERU.....APPELLANT

VERSUS

ROSE NJURA.....RESPONDENT

J U D G M E N T

The Appeal arises from the judgment of **Mr. D.O. Onyango SRM Runyenjes in Succession Cause No. 99 of 2007**. The Appellant herein was the petitioner and administratrix of the estate of the deceased one **JAMES KABENDERA RIMUNYA** Alias **JAMES KEBENDERA**.

The Respondent was the protestor in that cause. The protest was heard through viva voce evidence after which the learned trial magistrate rendered the judgment dated 10.12.08. He found that the protestor had proved that she had purchased the ½ acre of land she was claiming. He therefore ordered that the same be transferred to her. Being aggrieved by the said order, the petitioner filed this Appeal - initially in person but thereafter she engaged the services of Morris Njage & Co. Advocates who filed a supplementary record dated 12.5.2010. There are only 2 grounds of Appeal as hereunder:-

1. That the learned Senior Resident Magistrate erred in law and misdirected himself when he came to the conclusion that the Respondent was entitled to a share of the deceased estate as a purchaser for valuable consideration without considering that there was no documentary evidence produced to proof payment of the said consideration and or any agreement of sale.

2. That the learned Senior Resident Magistrate erred in law and fact when he said that the respondent was entitled to a share of the deceased estate as a purchaser for consideration without considering that the parcel of land was family land and no family member was unaware or privy to the alleged sale.

She urges the court to set aside the said judgment with costs and further order that the Respondent is not entitled to a share of the deceased's estate. Counsel for the Appellant filed his submissions dated 23.9.2010. On ground 1, he submitted that the learned trial magistrate erred in holding that the protestor had proved the purchase of 0.20 ha. He also submitted that the documents produced in support of the said sale related to plot **No. KYENI/MUFU/4318** while the deceased's land was parcel No. KYENI/MUFU/1160. On a point of law, he also submitted that the sale agreement if any was not produced before the trial court and so there was no valid sale.

On Ground 2, he submitted that the deceased had died 7 years after the alleged transaction and there was no explanation as to why the deal was not concluded. He said that the claim being one based on contract was time barred under Section 4(1) of the Limitation of Actions Act.

The Respondent appeared in person and said that she was relying on the evidence adduced before the trial court. She urged the court to dismiss the Appeal.

On Ground 1, on the issue of the parcel numbers, I would like to state that the documents produced before the trial court were self explanatory and crystal clear.

The original letter of consent to sub-divide the land in question into 2 portions of ½ acre and 3 ½ acres clearly show that the land parcel in question was No.1160.

The mutation form that followed the said consent and which were exhibited before the trial court refers clearly to Parcel No. KYENI/MUFU/1160 which following the physical sub-division and survey were given numbers 4318 and 4319. That mutation was done in 1996. There was therefore no confusion about the plot numbers whatsoever. As stated by the Respondent in her evidence before the trial court, they had gone through all the stages of the sale. The consent to sub-divide had been given and so was the consent

to transfer. They were only waiting for the Title Deeds to be processed but unfortunately the deceased died before then. The learned trial magistrate rightly observed in his judgment that the Appellant herein had separated from deceased for 5 years before he died and that would explain why she did not know how the Respondent had settled on that land. It is also instructive to note that the Respondent had settled on that plot since 1997. PW2, the area Assistant Chief who would be in the best position to know both parties herein very well said that he was aware of the sale and that the deceased had confirmed to him that he had been paid the entire purchase price and he was aware of the transaction which he said involved the deceased's 1st wife who predeceased him. He also confirmed that the Appellant had separated from the deceased for a long time and only reappeared a few months before his death. That would actually explain why the Respondent settled on that parcel and stayed there for 7 years uninterrupted before the deceased died.

I have considered all the evidence adduced before the trial court; the 2 grounds of Appeal along with the submissions by counsel for the Appellant. My firm view is that what was before the trial court was not a civil suit in which the validity of the sale contract was an issue. The provision of the law of contract Act were in my view not relevant at all. What the court was supposed to determine is whether the ½ acre in question formed part of the deceased's free estate which the petitioner was supposed to distribute. My finding is that the ½ Acre was not part of the deceased's estate which the petitioner was free to distribute at will. The deceased had sold it to the protestor; it had been sub-divided and had even been given a new number. The deceased had nothing to do with the failure to process the Title Deed. The appellant should have respected the deceased's wishes and let the Respondent be. If the deceased had any problems with the Respondent being on that land those 7 years, nothing could have been easier than for him to institute a suit against her to have her evicted from that plot. He did not do so and the Appellant who was not privy to the arrangement between the Respondent and the deceased cannot now come and blatantly dishonour the wishes of the deceased.

I find and hold that the learned trial magistrate rendered a fair and just judgment after considering all the relevant material that was placed before him. The Respondent is truly entitled to keep the ½ acre she had purchased from the deceased long before he died. I cannot fault the judgment of the learned trial magistrate. This Appeal lacks merit and I dismiss the same with costs to the Respondent.

**W. KARANJA
JUDGE**

Delivered, dated and signed at Embu this 9th day of November 2010

In presence of:- Mr. Njage for Appellant & both parties.