REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Probate & Admin. Appeal 8 of 2004

[IN THE MATTER OF THE ESTATE OF MK……. (DCD)]

AND

KMK ….....…….. PETITIONER

(Being an appeal from the Judgment and decree of Hon. L. Nyambura Senior Resident Magistrate in Kigumo's Succession Cause No. 46 of 2003 delivered on 28th October 2004)

JUDGMENT

KM K petitioned for Letters of administration intestate in respect of the estate of MK at Kigumo magistrate's court in September 2003. In that petition he named those who survived the deceased as JC M, RWN and himself. Grant was issued jointly in the name of K and R . Rwhen Kamau had applied for confirmation raised a protest. In the application for confirmation R was not given a share of the deceased's property [PARTICULARS WITHHELD]. That property was of 2 acres. K in the application for confirmation proposed that it be distributed with him getting 1 acre and C getting the other acre. The lower court proceeded to hear the objection. In its judgment the lower court found that although R had been married she was divorced and was residing on the suit property for 15 years. The court also found that K, C and R were all children of the deceased. Further that K and Chad been given another property by the deceased during his life time. The judgment of the court was that R was to get 1 acre and C and K were to share the other acre equally. This appeal is filed by K. His appeal is in respect of that judgment. He has brought the following grounds:-

1. That the learned trial magistrate erred in law and in fact in finding that the respondent was entitled to an acre out of L.R. Location [PARTICULARS WITHHELD] whilst she was not entitled to any portion thereof.

2. That the learned trial magistrate erred in law and in fact in ignoring the material evidence sought to be tendered by the appellant – Deceased's last written will made on 7/2/2000.

3. That the learned trial magistrate erred in law and in fact in entertaining the respondent while she had not filed affidavit in protest as required by the law.

4. That the learned trial magistrate erred in law and in fact in disregarding the deceased's wishes as echoed by the appellant that the estate would have gone to the appellant – 1 acre and J C – 1 acre.

5. That the learned trial magistrate erred in law and in fact in applying wrong principles of law and misdirecting herself in awarding the respondent one (1) acre.

6. That the learned trial magistrate erred in law and in fact in not exercising her discretion judiciously.

7. That the learned trial magistrate erred in law and in fact in finding that the respondent lived on the suit land while there was no evidence recorded that she lived and/or utilized the land or any part thereof.

The evidence that was received in the lower court from K and his witnesses was that the deceased had before his death left a will which was not produced before the court. It also not clear whether it was oral or written will. That will subdivide the suit property equally between K and C. According to those witnesses the deceased had refused to leave any land for R. K in evidence stated that the deceased made his will in the year 2001. Two of his witnesses talked of the will having been made in the year 2000. It was however clear from these witnesses that the deceased had given both K and C other properties during his life time. The reason K and his witnesses gave for the deceased's refusal to give Rland was because she was married. In the evidence of both witnesses for K and R it became clear that R had resided on the suit property for a considerable period. R and her witnesses stated that although she was married no dowry had been paid. They said that she subsequently was divorced and returned to the suit property where she had resided for 15 years. I will begin by considering ground 1, 2, 4, 6 and 7 together. The issue that comes out of those grounds is whether the learned magistrate erred in finding R was not entitled to 1 acre and in making that decision whether the magistrate ignored the evidence before court. In considering this issue and the others that are raised by the other grounds I do need to remind myself that this is the first appellant court. The case that should guide me as I consider this judgment is ***RUHEMBA V SKANKA JENSEN (U) LTD (2002) 1 E.A.*** where it was held:-

"***A first appellate court had a duty to reappraise the entire evidence on record and to make its own finding of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court's decision could be supported."***

The evidence that came out was that Rwas also a child of the deceased. She had lived on the suit property for many years. The allegation that the deceased left a will was not supported by the evidence. It is pertinent to note that K who petitioned for letters of administration

stated that the deceased died intestate. He cannot be allowed therefore to change his mind at the appeal stage. The evidence from Kand his witnesses did not also tally on the date of the will. The deceased died on 3rd September 2001. If the allegation was that he had left an oral will section 9 of the Law of Succession Act provides that the will is only valid if the deceased dies within three months of making such an oral will. The evidence was not conclusive that this precondition was fulfilled. I am satisfied from the evidence before court that the lower court did not err in its finding that R was entitled to inherit the deceased land. Those grounds therefore fail. In respect of ground 3 which was that the protest raised by R was entertained without her having filed an affidavit of protest finds its answer in rule 41(1) of the Probate and administration rules. That rule provides;

"***At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protestor and any other person interested, whether such persons appear personally or by advocate or by a representative."*** (Underlining mine for emphasis)

The court under that rule is entitled at the hearing of confirmation of ground to hear any party who is interested in the estate. R was interested in the estate and moreover she was listed by K as having survived the deceased. I therefore find that the learned magistrate did not err and the ground 3 is rejected. On ground 5 the appellant failed to elaborate how the magistrate applied wrong principle of law. I am therefore handicapped in dealing with these grounds. It too is rejected. The appellant in written submissions raised issues which were not captured in the memorandum of appeal. Such issues were that the deceased's wife was present before the lower and that she accordingly was also entitled to a life interest over the suit property. Also the issue of other daughters of the deceased who unlike R were not interested in getting a portion of the deceased's land. The simple answer to those issues is firstly that those persons were not party to the lower court action or this appeal. Those issues also are not supported by the grounds of appeal. The end result is that this appeal is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 10th day of February 2009.

MARY KASANGO

JUDGE