



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL 112 OF 2003

EUNICE WAINOI MURIITHI APPELLANT

VERSUS

MARY MIRIGO KARIMI RESPONDENT

(Appeal from the original judgment and Order of the Principal Magistrate's Court at Kerugoya in Succession Cause No. 2 of 2000 dated 5th June 2003 by L. W. Gitari –P.M.)

J U D G M E N T

The appellant's and Respondent's husbands were brothers. They were known as **Muriithi Mukangu** and **Daniel Karimi Mukangu** respectively. **Muriithi Mukangu** was the husband of the appellant whereas **Daniel Karimi Mukangu** was the husband of the Respondent.

The appellant's husband passed away on 16th March 1988 whereas the respondent's husband did so on 29th January 1988. In the fullness of time, the appellant petitioned for letters of administration in respect of her husband's estate and indicated therein that the only asset of the estate was land parcel **Inoi/Mbeti/58** hereinafter referred to as "*the suit premises*". On 17th March 2000 a limited grant was issued to her. On 24th August 2000, the appellant filed an application for confirmation of grant. She proposed that the suit premises be shared equally between herself and her nine sons.

That application was met with an affidavit of protest from the respondent. The respondent claimed that she was a widow of **Daniel Karimi Mukangu** who died on 29th January 1988 and was a brother of the deceased. That during land consolidation the deceased was allocated the suit premises to hold in trust for himself and her deceased husband in equal shares. That her late husband had planted on the said suit premises 2115 tea bushes and 109 coffee trees. That her husband predeceased the deceased but left her picking the tea and coffee. She had however since then been evicted from the suit premises by the appellant. As a consequence she filed a claim with the Kirinyaga land Disputes Tribunal which returned a verdict in her favour to the tune of 1.5 acres. She therefore proposed that the suit premises be shared as follows:-

- **Appellant** - **3.5 acres**
- **Herself** - **1.5 acres**

This then was the dispute which came up for hearing in the Principal Magistrate's Court at Kerugoya. Apart from herself, the Respondent further called other 3 witnesses. Their evidence was reharsh of the affidavit of protest already set out herein above.

On her part, the appellant too testified and called 2 other witnesses. The sum total of that evidence was that the suit premises solely belonged to the deceased. The appellant could not part with it or a portion thereof in favour of the respondent because the Protester's husband had his own land in Nanyuki. That the deceased acquired the suit premises with his own resources. During land consolidation and demarcation, the clan required some payments to be made before a person would be allocated land. The deceased met those requirements and was thus allocated the suit premises. However the respondent's husband failed to make the contributions and was thus denied land. The deceased nonetheless allowed him to occupy a portion of the suit premises as a licensee.

The learned magistrate having carefully evaluated the evidence tendered as aforesaid as well as submissions by respective counsel found for the respondent holding that:

"I find that the protester has proved that the deceased had acknowledged that the deceased was entitled to the land in dispute. The deceased was older than the protester's husband. I take judicial notice that during land consolidation and demarcation the eldest sons in the family were registered to hold the land in trust on behalf of other members of the family. I find that it has not been proved that the protester's husband was only a licensee. The protester's husband and his family were dependants of the deceased and continued to be on the land even after the deceased's death. The protester has locus standi as she lived on the land as a dependant of the deceased. I find that the protester has proved that the deceased acknowledged the trust by allowing the protester's husband to live on the land in all his life time and use it to the extent of planting tea and coffee – cash crops. I find that the protester is entitled to a share of the deceased's estate. I therefore allow the claim in the protest and order that the protester be awarded 1½ acres out of the estate of the deceased. I make no orders as to costs."

That holding provoked this appeal. In a 6 point memorandum of appeal filed through **Messrs Munene Muriuki & Co. Advocates**, the appellant faulted the learned magistrate on the following grounds:-

"1. The learned Principal Magistrate erred in law

and in fact by confirming a trust which trust did

not exist as between the deceased and the

Respondent's deceased husband.

2. The learned Principal magistrate erred in law and in fact by her finding on the existence of the trust by the mere fact that the Respondent's deceased husband was buried in the subject matter of the succession cause and that he had planted coffee and tea bushes in the said parcel.

3. The learned Principal Magistrate erred in law and in fact by finding that the respondent has proved her case on a balance of probabilities which doctrine is not available in succession causes.

4. The learned Principal Magistrate erred in law and in fact by finding that the Respondent has locus standi to prosecute this cause even without obtaining letters of administration in respect of her late husband's estate.

5. The learned Magistrate's decision is not supported by the totality of the evidence adduced and is unjust in all the circumstances of this case.

6. The decision and findings of the learned Principal Magistrate were against the weight of the evidence.

When the appeal came up for hearing before me on 17th March 2009, **Mr. Kathungu** and **Ms Wanjiru**, learned counsel for the appellant and respondent respectively consented to having the appeal argued by way of written submissions. The submissions were subsequently filed and exchanged. I have carefully read and considered them.

This being a first appeal, I am obliged to reconsider the evidence, re-evaluate it and make my own conclusions, but as I do so it must be remembered that I have neither seen nor heard the witnesses – **Peters v/s Sunday Post Ltd (1958) E.A. 424, Selle & Another v/s Associated Motor Boat Co. Ltd & Others (1968) E.A. 123** and **Ephantus Mwangi & Another v/s Duncan Mwangi Wambugu (1982 – 88) KAR 278**.

I must therefore bear in mind the foregoing as I deal with the grounds of appeal raised by the appellant in her memorandum of appeal.

It has always been my view that the question of trust is best handled in other civil forums than in succession matters. In succession causes, the court is ill-prepared or finds itself in a rather awkward position to best handle the matter. In cases of trust there must be concrete and credible evidence tendered by a person setting up such claim before such trust can be inferred and or declared. And once such trust is established, then the court must be asked to dissolve it before the suit premises the subject of the trust can be shared between the claimants. However my experience has shown that whenever a question of trust is raised in succession causes, whoever does so never seeks a declaration of the existence of a trust and pray for its dissolution. All that such claimant states, as is in this cause is that the deceased was registered as the proprietor of the suit premises in trust for himself and the claimant's family. Thereafter he claims a portion of the suit premises based on such trust. I do not think that, that is the way to go. There must first be a prayer for a declaration of a trust first followed by another prayer for its dissolution before the claimant can be said to be entitled to a portion of the suit premises on that basis.

Be that as it may, the evidence on record seem to suggest that the appellant acquired the suit premises after meeting the requirements set by the clan during land consolidation and demarcation to the effect that a clan member would make certain payments before he could be apportioned land. The evidence suggests that a clan member was required to contribute some money and or fines towards land consolidation and demarcation before he could be considered for land. The deceased made those contributions and got the suit premises. The respondent's husband did not and that perhaps explains why he missed out. The respondent was married in 1961 long after land demarcation and consolidation. Accordingly she had no first hand information as to how the deceased came by the suit premises. What she stated in evidence with regard to the same was purely hearsay therefore. PW2 confirmed that the deceased got the land because he made contributions demanded by the clan. However the respondent's husband could not get land according to him because land was given to one member of the family and also because he was young. This however cannot possibly be true because this very witness confirmed that though he was young at the time he was nonetheless given land. Further he also stated that he got the land besides his two brothers **Mutwota** and **Peter Munene** who also was given land by the clan. He also conceded that these families **Muriithi Mukangu, Nyaga Ngare, Peter Mwai** and **Gicheru** got more than one parcel of land each. However there is also the evidence of PW3 which seem to suggest that the respondent's husband was in fact an adult at the time and was even working. Finally what is intriguing on this issue is the fact that the respondent's husband had 2 wives. The respondent was the 2nd wife. Why is the 1st wife who is alive not featuring at all in this dispute. Is it possible that perhaps, she knows the circumstances under which the deceased acquired the suit premises hence her lack of enthusiasm in the matter.

Parties are bound by their pleadings. The basis for the respondent's claim to a portion of the suit premises was trust. However in coming to his decision, the learned magistrate considered the fact that the respondent was a direct dependant of the deceased as well based on the fact that her husband had been given by the deceased a portion of the suit premises where they had planted 2300 tea bushes, had occupied the same since 1971, the fact that her husband had been buried thereon, deceased never chased them away from the suit premises and that the deceased died leaving the respondent working and residing on the suit premises. This is all fine. However the respondent had not pleaded in her affidavit of protest in the alternative that she was entitled to a portion of the suit premises on account of dependency nor had

she made an application for that purpose as required.

As correctly submitted by **Mr. Munene**, the mere fact that one is buried on another person's land cannot confer title or any other right to the estate of such a person. It is trite law that there is no property in a dead body. It would be a wrong and dangerous path to take that merely because burial of the remains of a person or his utilisation of someone else's land in his lifetime should ipso facto entitle his estate to a share of that other person's estate.

In any event, even if the learned magistrate properly invoked the dependency principle, I still think that it was not available to her since in the first place there was no such an application before her in terms of section 26 of the Law of Succession Act.

How about locus standi of the respondent to mount a claim based on trust on behalf of her husband. The stand taken by the appellant is that the respondent had no locus standi as she had not obtained letters of administration for her husband's estate. For the respondent, her position is that she had the necessary locus standi as she was a direct dependant to the deceased. She continued being on the land even after the death of her husband and the deceased never chased her away. The respondent's submission going by her affidavit and evidence tendered in court cannot possibly be correct. There is no doubt at all that her claim to a portion of the suit premises was anchored on the basis that the deceased was registered as the proprietor of the suit premises for himself and on behalf of the respondent's husband family. She did not say that she was claiming the suit premises in her own right as a dependant of the deceased. She could not have been in any event a direct dependant of the deceased. Section 29(b) defines who can pass for a dependant. The respondent in her own right falls short of that definition.

The upshot of the foregoing is that the learned magistrate erred in finding that family trust had been established and also finding in favour of the respondent on account of dependancy. The appeal is allowed. The judgment and decree of the subordinate court dated 15th August 2003 is hereby set aside. In substitution therefore I order that the respondent's affidavit of protest be dismissed and the grant be confirmed in terms of the application for confirmation of grant dated 23rd August 2000 and filed in court on 24th August 2000. There shall be no order as to costs in this appeal as well as in the subordinate court.

Dated and delivered at Nyeri this 31st day of July 2009

M. S. A. MAKHANDIA

JUDGE