JOSEPH KABACHIA MUGO ..... APPELLANT

VERSUS

PETER MWANGI MUGO ..... 1ST RESPONDENT

ZAWERIO KIMANI MUGO ..... 2ND RESPONDENT

EVARLYNE KIRANGARI MUGO ..... 3RD RESPONDENT

(Appeal from original Judgment and Ruling of the Senior Principal Magistrate's Court at Murang'a in Succession Cause No. 263 of 1998 dated 9th April 2003 by Wanjiku F. F. – S.P.M.)

J U D G M E N T

This appeal arises from the judgment and order of the Senior Principal Magistrate's Court at Murang'a (**Wanjiku F. F. presiding**) delivered on 9th April 2003 in succession cause number 263 of 1998 between **Joseph Kabachia Mugo** as the petitioner and **Peter Mwangi Mugo** together with **Evelyne Kirangari Mugo** as Objectors. The succession cause was in relation to the estate of **Stanley Mugo Kinuthia** alias **Mugo Kinuthia** who passed on intestate on 17th November 1997.

Prior to his death the deceased had been blessed with 3 sons namely **Joseph Kabachia Mugo**, **Zaverio Kimani Mugo** and **Peter Mwangi Mugo**. He also had a daughter by the name of **Evelyn Kirangari Mugo**. He was also survived by his wife, **Immaculate Wambui Mugo**. The only asset the deceased left behind was land parcel **Loc. 8/Kandegenye/62** measuring 6.8 acres.

In or about 9th November 1998, **Joseph Kabachia Mugo**, hereinafter referred to as "*the appellant*" petitioned for the grant of letters of administration intestate for the estate of the deceased. The same were duly issued to him on 22nd June 2001. Subsequent thereto, he applied for the confirmation of the grant. He proposed therein that the suit premises aforesaid be shared equally between himself and his brothers and sister aforesaid. This suggestion prompted **Peter Mwangi Mugo**, the 1st respondent to file an affidavit of protest. The 2nd and 3rd respondents however did not file such protest or indeed any other affidavit. In the protest, the 1st respondent was basically saying that the deceased had in his lifetime given to the appellant as a gift intervivos land parcel **Loc. 8/Kandegenye/57** measuring 3.4 acres. Accordingly he was not entitled to a share of the suit premises. The same should instead go to the respondents equally.

The application for confirmation of grant and the affidavit of protest were then heard contemporaneously by the learned Senior Principal Magistrate by way of oral evidence. The magistrate having weighed and evaluated the evidence tendered by the respective parties concluded thus: "**..... The court finds on a balance of probability it is he 1st Objector who is telling the truth that the deceased herein who is the father gave the land the petitioner lives in to him and told him to leave to go and build there which he did. If he had actually bought that land he would not have stopped using the land herein, but now the evidence on record is that since moving to where he lives he has never used the land herein. The court finds therefore that the 1st objector has proved his case to the standard**

required ..... The grant therefore to be confirmed per paragraph 7 of his protest dated 2nd August 2002; that land parcel No. Loc. 8/Kandegenye/62 be shared equally between Peter Mwangi Thuo, Zakaria Kimani Mugo and Evelyne Kirangari Mugo .....”

That Ruling did not go down well with the appellant. Accordingly, he lodged the instant appeal. He set out through **Messrs Kirubi**, **Mwangi Ben & Co. Advocates** 3 grounds of appeal to wit:-

“**(a) The learned Magistrate erred in law and fact by disinheriting one of the sons of the deceased without any evidence that he had received gifts intervivos from his deceased father.**

(b) The learned magistrate erred in law and fact in making a judgment contrary to the provisions of the succession Act on how a deceased person’s estate should be shared when he leaves behind surviving children and a spouse.

(c) The learned magistrate erred in law and fact in delivering a judgment which was against the weight of the evidence offered by the parties”.

When the appeal came up for directions before me, parties agreed that the same be argued by way of written submissions. Subsequent thereto however only the appellant filed his submissions. The appeal was put off twice to enable the respondents to file their written submissions. However this was not to be for no apparent reason(s). Eventually I decided to act on the only written submissions on record, the appellant’s.

I must say from the onset that the evidence tendered and as recorded by the learned magistrate was very scant and shallow such that the same was of very little assistance to court if at all in arriving at a considered and informed ruling. As correctly submitted by **Mr. Kirubi**, learned counsel for the appellant, the oral evidence adduced by both the appellant and his witnesses on one hand and the 1st and 2nd respondents on the other had was so scant and shallow to an extent that the same would not have assisted the trial magistrate in making or delivering a well reasoned judgment and at the end of the day the magistrate delivered an equally very scanty and shallow judgment. The appellant’s evidence was a mere 4½ lines whereas the 2nd respondent consisted of just about 1 ½ lines. This is not the kind of evidence any reasonable tribunal can be called upon to make an informed ruling from.

The case for the appellant as I understand it from the pleadings is that he wanted land parcel No. **Loc. 8/Kandegenye/62** shared equally between himself and the respondents. The 1st respondent in his affidavit of protest however wanted the suit premises to be shared equally among the respondents to the exclusion of the appellant. The reason being that the appellant had his own land parcel No. **Loc. 8/Kandegenye/57** which according to him “**originally belonged to the parties grandfather and the appellant got registered in his name through a succession cause with full consent of the deceased here. That the deceased gave the said land to the petitioner (appellant) with the undertaking that he will not claim any share of the land parcel No. Loc. 8/Kandegenye/62”**. From the scanty evidence on record the appellant denied ever getting any land from his father and said that the land belonged to his grandfather and he redeemed it from people who had previously bought it.

PW2 **Philis Muthoni Githinji** was the wife to **Justice Githinji** since then dead. It was from this Githinji that the appellant allegedly redeemed the land. She confirmed that fact. The 2nd respondent’s evidence on the other hand advanced the case for the appellant as well. He testified that the suit premises be shared equally between the 4 children of the deceased. The 3rd respondent, the deceased’s daughter never testified nor their mother **Immaculate Wambui Mugo**. From the foregoing I am unable to discern the basis upon which the magistrate chose to believe the evidence of the 1st respondent at the expense of the appellant as well as 2nd respondent. The law is settled. “**He who alleges must prove”**. It was the first respondent who alleged that the appellant had acquired land from the deceased, and hence he had the burden of proving the same. It is noteworth that the 1st respondent did not produce any documentary evidence to show that at one time land parcel No. **Loc. 8/Kandegenye/57** belonged to the deceased and was transferred to the appellant in his lifetime. The 1st respondent also did not call any witness to support

his claim. If the 2nd respondent was aware or knew that the appellant had been given land by the deceased with a promise that he will not claim any portion of the suit premises, why didn't he then support the 1st respondent's case? Further why was the parties mother not called to testify on this very pertinent issue? Would she have given evidence adverse to the 1st respondent's case? That possibility looms large.

In the absence of any other evidence from the 1st respondent either documentary or otherwise I do not understand the basis upon which the trial court proceeded to believe the evidence of 1st respondent by holding that:

"**The court finds on a balance of probability it is the 1st objector who is telling the truth that the deceased herein who is the father gave the land the petitioner lives in to him and told him to leave to go and build there which he did (sic)"**

It was the duty of the 1st respondent to bring forth, evidence tending to show that land parcel No. **Loc. 8/Kandegenye/57** was given to the appellant by the deceased. What was so difficult for the 1st respondent to apply to be furnished with a green card from the land's office to show the origin of this land? Could the green card have revealed a different version other than the 1st respondent's? May be?

The issue before the trial court was simple and straight forward. How was the suit premises that formed the only asset of the deceased's estate at the time of his death in 1997 to be shared between his 3 sons, a daughter and a widow? At the time of the deceased's death, the asset of the estate as already stated was only one property; land parcel No. **Loc. 8/Kandegenye/62**. The other parcel mentioned by the 1st respondent **Loc. 8/Kandegenye/57** was not registered in his name. No evidence was tendered by the 1st respondent to show that the said parcel of land had at any one given time ever belonged to the deceased. Parties are bound by their pleadings and evidence they adduce in court.

According to the interpretation section of cap 160 Section 3(1) "**the estate of a deceased person means the free property of the deceased person"**. Free property on the other hand is interpreted to mean "**as the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."**

As already stated hereinabove, no document was produced by the 1st respondent to show that land parcel No. **Loc. 8/Kandegenye/57** was ever registered or belonged to the deceased. In the absence of such evidence, it cannot be correctly said that this land formed part of the deceased's estate as it was never a free property of the deceased which he could have legally been competent freely to dispose off during his lifetime. If the 1st respondent wanted to show that land parcel No. **Loc. 8/Kandegenye/57** was a gift intervivos from his deceased father, then he hopelessly failed to do so. A gift intervivos is a gift of property which the deceased gives or donates to a living person during his lifetime. In the circumstances of this case, however, the situation is different. The land parcel **No. 57** has never belonged to the deceased. In fact it is on record that the land was registered in the appellant's grandfathers and was given to the appellant through a succession cause. Another interesting aspect of this case is the 1st respondent's so called affidavit of protest against confirmation of grant filed in court on 18th December 2001. In paragraph 4 of the said affidavit the 1st respondent deponed thus:

"**The land in question parcel No. Loc. 8/Kandegenye/62 was left to all the children of the deceased i.e. daughters and sons as well."**

This is an affidavit sworn before the magistrate at Murang'a law courts. If the 1st respondent knew as a fact that indeed the land belonged to all the children of the deceased, why did he make a dramatic about turn and sought to exclude the appellant completely from benefiting from the estate of his deceased father yet he was a son of the deceased too? I do not think that this is a person who could have been believed by the trial court. He was blowing hot and cold at the same time. These are two conflicting pieces of

evidence and the court should not have countenanced the same.

The deceased having died in 1997 when the Law of Succession Act had been operationalised, the distribution of his estate was therefore subject to the provisions of the said Act. Sections 35 and 38 thereof are relevant and provide the guidelines. These are the guidelines the trial magistrate ought to have followed in the absence of any other evidence to the contrary i.e. oral or written will, gift intervivos etc. The learned trial magistrate therefore erred in purporting to include another parcel of land in the estate of the deceased when she ought not to have done so.

For all the foregoing reasons I would allow the appeal with costs. The judgment of the learned magistrate is set aside. In substitution thereof I direct that the land parcel No. **Loc. 8/Kandegenye/62** be distributed equally between the appellant and the 3 respondents with the deceased's widow **Immacualte Wambui Mugo** (if alive) having a life interest.

Dated and delivered at Nyeri this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE