



REBECCA WAMAITHA GITHAE APPELLANT

VERSUS

PETER MWANGI GITHAE 1ST RESPONDENT

BENSON NGONJO GITHAE 2ND RESPONDENT

JOSEPH NJOROGE GITHAE 3RD RESPONDENT

(Appeal from the Judgment of the Senior Principal Magistrate's Court at Murang'a in Succession Cause No. 89 of 1996 dated 15th December 2000 by L. Nyambura – R.M.)

J U D G M E N T

This appeal arises from the judgment of **L. Nyambura R.M.** in the Senior Principal Magistrate's Court at Murang'a in succession cause number 89 of 1996. In those proceedings, the appellant was the petitioner whereas the respondents were the protesters. The succession cause was in relation to the estate of one, **Rachael Njoki Githae** hereinafter referred to as "*the deceased*". She was the mother of the respondents and a co-wife of the appellant. The deceased and the appellant were wives to one, **Githae Njoroge** deceased as well. Before he passed on, **Githae Njoroge** caused plot number **Loc. 11/Maragi/1193/38** hereafter referred to as "*the suit premises*" to be registered in the names of his two wives aforesaid.

The deceased passed away on 13th January 1980. The appellant thereafter in or about 9th April 1999 petitioned for letters of Administration Intestate in respect of her estate. The respondents did not approve the appellant's action aforesaid. Accordingly they objected to the appellant's petition on the grounds that the deceased was their mother who had died intestate. The appellant was deceased's co-wife and their step mother. The respondents were therefore the rightful and lawful heirs to their deceased mother's estate and ranked in priority over the appellant in seeking the letters of administration. On 30th November 1999 however and by consent of the parties the court issued to the appellant and the 1st respondent a joint grant of letters of administration intestate.

Later on the appellant applied for the confirmation of grant. She proposed that the suit premises be registered in her name as the sole proprietor. The application elicited strong protest from the 1st respondent on his own behalf and on behalf of the other respondents. He filed an affidavit of protest in which he claimed that their deceased father had already distributed his estate between his two wives and whatever was registered in their mother's name belonged to them as their children. Therefore the suit premises ought to be shared as follows:-

- **Appellant – ½ share**
- **1st Respondent ½ share as trustee for himself and the co-respondents.**

The cause was subsequent heard by way of viva voce evidence. The case for the appellant from the

recorded evidence is that since the suit premises were jointly registered in her name and that of the deceased, she had the right to inherit her co-wife's share in the suit premises thus acquiring the whole suit premises. This position was informed by the legal position that upon death of a joint proprietor, the interest of the deceased proprietor devolves to the surviving co-proprietor. That the interest in joint proprietorship is fixed and not severable. On this basis it was her case that the whole suit premises were owned by the two of them jointly with no fixed shares and since the deceased had passed on, her interest in the suit premises reverted to her by operation of the law.

However the case for the respondents is that as the children of the deceased, they are entitled in law and in custom to inherit their mother's share in the suit premises. That position was informed by the fact that the proprietorship of the suit premises was not joint as claimed by the appellant but common. That the appellant and the deceased were registered as proprietors of the suit premises in common. This being the case, the interest of the deceased in the suit premises devolved to the heirs to her estate upon her death.

A brief history of the suit premises is perhaps important at this juncture. That history was given by the clerk to Murang'a County Council when he testified. It was to the effect that the suit premises together with another one known as **Loc. 11/Maragi/1193/15** originally belonged to one **Githae Njoroge** who was the husband of both the deceased and the appellant. The aforesaid husband before he passed on authorised the transfer of **Loc. 11/Maragi/ 1193/15** to the 1st respondent whereas the suit premises were transferred as well to both the deceased and appellant. He could not however tell whether that transfer and the subsequent registration was joint or in common from the records.

The evidence on record further shows that thereafter the appellant and deceased used to collect rental income therefrom and share it equally among themselves. This went on smoothly until the deceased passed on. Thereafter the appellant continued to collect rent and apply it solely for her own use until she petitioned for the grant of letters of administration intestate.

So what kind of interest was conferred to the appellant and the deceased by this registration? The learned magistrate in a very well considered judgment found for the respondents holding:-

*“From the evidence of the witnesses, it is clear that **Rachael and Rebecca** used to share the proceeds from Plot No. **1193/38A** equally and thus each one had equal undivided shares. Since no evidence was brought to support the allegations that the registration amounted to Joint proprietorship, the court will hold that **Rachael and Rebecca** were proprietors of Plot No. **1193/38A** in common. Having found that the proprietorship was in common, how then should the Estate of deceased **Rachael Njoki Githae** be distributed? **Rachael and Rebecca** held the plot in equal shares. The share of **Rachael Njoki** should be distributed as provided by Section 38 of the succession Act. That where an intestate leaves behind a surviving child or children, the net estate shall go to the child or children. The share of **Rachael Njoki** should be shared equally among all her surviving children.*

*The court therefore in a nutshell sustains the objection holds that the estate of the deceased **Rachael Njoki Githae** should be shared by his surviving children and that plot No. **Loc.11/1193/38A** should be shared and registered as per paragraph 10 of the objection and as follows:-*

- **Rebecca Wamaita Githae** – ½ share
- **Peter Mwangi Githae** ½ share as trustee for himself and the two objectors.

Consequently the court upholds the objection and rejects the petitioner's proposal”.

That holding spurred this appeal. In the memorandum of appeal drawn and filed by **Messrs Waiganjo Gichuki & Co. Advocates**, the appellant faulted the learned magistrate on four grounds to wit:

1. The learned Resident Magistrate erred in not finding that the appellant and the deceased owned plot No. Loc. 11/Maragi/1193/38A jointly and not in common since the appellant's contention to that effect was not challenged either in evidence or in submissions.

2. Having accepted that the respondents had already acquired for their mothers' house (i.e. the deceased's house) plot No. Loc. 11/Maragi/1193/15 she ought to have found that it was inequitable for the same respondents to receive any part of plot No. Loc. 11/Maragi/1193/38A which was reserved for the house of the appellant, the husband of the deceased and of the appellant having been a polygamist with 3 houses.

3. The fact that the appellant has utilised plot No. Loc. 11/Maragi/1193/38A since 1980 alone without interference from the respondents ought to have led the court to the conclusion that the said plot was in equity, held either jointly by the appellant and the deceased, or by the appellant and the deceased in trust for the appellant.

4. The decision of the learned Resident Magistrate is against the weight of the evidence.

When the appeal came up for hearing before me on 20th July 2009 parties agreed to argue the same by way of written submissions. The same were subsequently filed and exchanged. I have carefully read and considered them.

The issue in this appeal just like in the trial court is what was the nature of ownership that came along with the registration of the suit premises in the names of the appellant as well as the deceased by their deceased husband? Was that proprietorship joint or common. On the evidence on record, one cannot fault the decision of the learned magistrate on the issue. The appellant sought to selectively rely on pieces of evidence here and there to support her contention that the proprietorship was joint. For instance she thought that by the 1st respondent stating in his evidence that “..... **Rebecca knew all along that the plot was registered in their joint names my mother died in 1980 and the two mothers were collecting rent jointly. When my mother died, Rebecca Wamaitha was collecting the rent alone. She collects about 8000/= to date..... from 1980 Rebecca has been collecting rent for the plot in question....**” that was evidence of joint proprietorship. To my mind the mere fact that the two were collecting rent and sharing it equally among themselves did not necessarily mean that they were joint proprietors of the suit premises. If anything it irresistibly pointed to proprietorship in common. It is trite law that whoever alleges a fact must prove it. It was the appellant who alleged that the suit premises were registered in their names by their deceased husband as joint proprietors. It behoved her therefore to bring forth credible evidence to support that contention. I have seen a letter dated 31st January 1996 from the clerk to Municipal Council of Murang'a which is to the effect that the suit premises are registered under the names of **Rachael Njoki Githae** and **Rebecca Wamaitha Githae**. That letter does not categorically state that the said registration was joint or common. The said clerk fared no better in his oral evidence in court. He did not state the nature of the registration. The appellant would want this court to accept that their deceased husband in registering them joint owners of the suit premises, he meant joint proprietorship. It is the appellant's case that that intention is manifested by the fact that the 1st respondent got plot **Loc. 11/Maragi/1193/15** registered in his name in 1976 presumably for and on behalf of the deceased's house. If that be the case, why again would the deceased husband have taken the trouble to have the suit premises registered in the joint names of the appellant and deceased. Having provided for the deceased house as aforesaid, one, would imagine that he would have caused the suit premises to be solely registered in the name of the appellant and not vice versa.

There is evidence that the two wives used to share the rent proceeds from the suit premises equally and thus on the balance of probability each one had an equal undivided share in the plot. Much as the appellant had continued to collect rent solely following the death of the deceased, that perse did not mean that the ownership was joint. Indeed the respondents have explained away why they had left her to do so. They were away in Nairobi working and did not see the immediate need to deny their step mother the rent which at the time they had no use for.

The records of the suit premises as already stated does not show whether the registration was joint or common. The court must therefore look elsewhere to determine the nature of holding or proprietorship bearing also in mind that the deceased, the appellant and their deceased husband were all illiterate rural folks. It could not have been the intention of their deceased husband that upon the death of the deceased her share would revert to her co-wife, the appellant. The facts on the ground in my view irresistibly point

to ownership in common. That being the case then the appellant cannot and does not automatically take the deceased's share. Her share must go to her offsprings, the respondents.

Section 38 of the Law of Succession Act is categorical that the net intestate estate shall devolve upon the surviving child or be equally divided among the surviving children of the deceased. That is what precisely the learned magistrate held. She cannot be faulted in any way. There is no provision in law or at all that an intestate's property should devolve to a co-wife.

The appeal as a whole lacks merit and is accordingly dismissed with costs to the respondent.

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

M. S. A. MAKHANDIA

JUDGE