



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 38 of 1995

JACKSON KANYONI KABURUNGOAPPELLANT

VERSUS

WAICHINGA KABURUNGORESPONDENT

(From original ruling in Succ. Cause No.181/1991 in the Resident Magistrate's Court at Nyeri by L.W. Gitari – RM)

J U D G M E N T

This is an appeal from the ruling of **L.W. Gitari**, Deputy Registrar delivered on 12th May, 1993 in Succession Cause Number 181 of 1991, wherein the learned, Deputy Registrar, in the pertinent part, ordered that the estate of the late **Kaburungo Kanyoni Waichinga**, consisting of parcels of land numbers **Iriaini/Kiaguthu/569** and **Iriaini/Kiaguthu/570** be inherited as flows:

“...land parcel No.Iriaini/Kiaguthu/569 measuring 2.6 acres be inherited by Waichina Kaburungo absolutely. Land parcel No.Iriaini/Kiaguthu/570 measuring 1.0 acre be inherited by Jackson Kanyoni Kaburungo absolutely. Each to get a separate title deed.”

The appellant was aggrieved by the decision, hence this appeal. Six grounds of appeal have been proffered, namely;

“1) The learned trial Magistrate erred in law and fact by failing to consider that under the succession Act (Cap 160 laws of Kenya) where a deceased dies intestate the net intestate estate should be divided in equal shares among the surviving children.

2) The learned trial magistrate erred in law and fact by holding that the deceased wanted the respondent to inherit the bigger portion Iriaini/Kiaguthu/569 measuring 2.6 acres and the appellant Iriaini/Kiaguthu.570 measuring 1.0 acre without evidence to support the finding or evidence in support of oral will as required under the succession Act (Cap 160 Laws of Kenya).

3) The learned trial magistrate erred in law and fact by holding that the deceased had signed the transfer document giving the respondent parcel No.Iriaini/ Kiaguthu/369, otherwise the respondent and appellant would not have petitioned for the said parcels of land.

4) The learned trial magistrate erred in fact by holding that the deceased had made his wish clear before the land control board without supporting evidence.

5) The trial Magistrate erred in fact by holding that the appellant wanted to mislead the court

whereas the appellant was after getting his share of the deceased estate the deceased having died intestate.

6) The trial Magistrate erred in law by holding that the respondent had on a balance of probabilities proved the wish of the deceased in the absence of any prove of oral will as envisaged under the succession Act (Cap 160 laws of Kenya)."

The appellant and respondent in this appeal were the petitioners in the aforesaid succession cause. They are the sons of the deceased. The deceased passed on sometimes on 11th September, 1987. At the time of his death he owned land parcel numbers **Iriaini/Kiaguthu/569 and Iriaini/Kiaguthu/570**. Both the appellant and respondent jointly petitioned for the grant of letters of administration intestate in the Resident Magistrate's court at Nyeri being Succession cause number 181 of 1991. On the 22nd June, 1992 a temporary grant of letters of administration by a Resident Magistrate pursuant to *section 49* of the Law of succession Act was issued to the parties herein. By an application dated 18th January, 1993, the appellant alone sought for the confirmation of the grant. He deponed in the affidavit in support of the application that:

"The identification and shares of all persons beneficiary (sic) entitled to the share the deceased's estate namely parcel Iriaini/Kiaguthu/569 measuring of (sic) 1.05 ha and Iriaini/Kiaguthu/570 measuring of (sic) 1.0 acre has been determined and ascertained as follows:-

1. Jackson Kanyoni Kaburungo)

2. Waichinga Kaburungo) Equal shares

Each to get separate title deed on subdivision and money in the Mathira Co-op. Bank A/C No.2314 be shared equally....."

The respondent would hear none of the above proposal. Instead he claimed in the replying affidavit that:

".....Before the deceased died he had subdivided his land parcel Iriaini/Kiaguthu/178 into two portions; Iriaini/ Kiaguthu/569 and Iriaini/Kiaguthu/570. That the deceased.....stated before his death that I should inherit land parcel IriainiKiaguthu/569 which measures 2.6 acres while my co-petitioner should inherit land parcel Iriaini/Kiaguthu/570 measuring about 1.0acre. That therefore the intention of the deceased before his death are clear and an order that my co-petitioner and I are entitled to share equally in the estate of the deceased would be contrary to the deceased's wishes."

The matter was then placed before **L.W. Gitari**, then Senior Resident Magistrate in her capacity as the Deputy Registrar under the Law of succession Act. On the basis of those affidavits supported by oral evidence of the respective parties, the learned Deputy Registrar gave her ruling as aforesaid.

When this appeal came up for hearing, the appellant was represented by **Mr. Mburu** learned counsel. Whereas **Mr. Kariuki**; learned counsel appeared for the respondent. Respective counsel determined by consent that the appeal be heard on the basis of written submissions. Consequently the appellant and respondent tendered written submissions which I have carefully read and considered.

This being a first appeal, it is trite that it is my duty to re-evaluate the evidence and come to my own conclusion of course without overlooking the conclusions reached by the trial Deputy Registrar.

In reaching her decision, the learned Deputy Registrar delivered herself thus:

"....The respondent has proved on a balance of probabilities that the deceased wanted the respondent Waichinga Kaburungo to inherit land parcel Iriaini/Kiaguthu/569 and had signed the transfer form giving the respondent the parcel of the land as a gift...."

On the basis of the evidence on record both documentary and oral, that conclusion by the learned Deputy Registrar cannot be faulted in any way. It is clear that the deceased had subdivided his original land parcel **Iriaini/Kiaguthu/178** into two portions; **Iriaini/Kiaguthu/569 and 570**. He had sought and obtained land control board consent dated 30th may, 1985. he had also executed a transfer of land form dated 6th august 1985 to effectuate his desire to have land parcel **Iriaini/Kiaguthu/569** transferred and registered in the name of the respondent. It is instructive to note that the consideration for such transfer was gift for affection and love. The said transfer was signed before an advocate. It is the appellant's contention that all these documents were a forgery. However he tendered no evidence at all to support this contention. How possible was it for the appellant to have forged the letters of consent from the land control board. Again how could it have been possible for the respondent to have forged the transfer executed before an advocate. It was open to the appellant to call in aid members or any member of the land control board to come and disclaim the letter of consent. It was also open to him to call **I.E.K. Mukunya advocate** to come and say that he never witnessed the deceased execute the transfer. That way perhaps, the appellant would have proved that the documents were forgeries. He did not and the only conclusion a reasonable tribunal can come to is that they are genuine. Indeed if they were forgeries, how come the appellant has not complained to the police to date for appropriate criminal sanction to be undertaken against the respondent!

I agree with the submissions of the learned counsel for the appellant that the deceased had already gifted to the respondent land parcel **Iriaini/Kiaguthu/569** and the gift was complete even before his death. This is further manifested by the fact that the deceased left the respondent living on land parcel **Iriaini/Kiaguthu/569** while the respondent was living on land parcel **Iriaini/Kiaguthu/570**. It is instructive that though the respondent deposed as aforesaid, the appellant did not see any reason to counter such deposition.

It is on record that the appellant sued both the deceased and the respondent claiming that though the deceased was registered owner of the original land parcel **Iriaini/Kiaguthu/178** he held the same in trust for the deceased, the appellant and the respondent and therefore wanted that trust to be declared and determined so that each party gets an equal portion. Pursuant to this suit the appellant managed to obtain prohibitory order in respect of the two parcels of land **Iriaini/Kiaguthu/569** and **Iriaini/Kiaguthu/170** thus frustrating the registration of transfer of land parcel **Iriaini/Kiaguthu/569** in to the respondent's name during the life time of the deceased.

The deceased filed a defence to the appellant's suit afore said in which he categorically stated that he intended to give the respondent the 2.6 acres and the appellant 1 acre. The deceased justified the discriminatory manner of subdividing his estate on the basis that the appellant had refused to take care of him although he was aged 85 years, refused to visit him in hospital, and rebelled against him and finally he used to harass and annoy the deceased before his death. These reasons are not farfetched and have not been discounted by the appellant either. Neither did the appellant file a reply to the defence of the deceased joining issue with those averments. In filing the suit, the appellant was keenly aware of the deceased intentions with regard to his land. The suit was clearly intended to forestall the deceased intention to transfer to the respondent parcel **Iriaini/kiaguthu/569**. This act on the appellant buttresses further the respondent's contention that the deceased had made up his mind in his lifetime to transfer to him the aforesaid parcel of land.

I agree with counsel for the respondent that at the time the deceased initiated the process of subdividing his original land into two parcels so that he could transfer them to the appellant and respondent respectively by way of gift *inter vivos*, the deceased was aged 85 years and hospitalized having suffered severe burns. For all intents and purposes therefore these gifts of land parcel 569 to the respondent and 570 to the appellant was a gift in contemplation of death as envisioned in section 31 of the Law of succession Act. Though he initiated the process of subdivision in 1985 it was not until 11th September, 1987, that he passed on. From the death certificate the cause of death is indicated as severe burns *efulepsy*. In the premises it would appear that the deceased made the decision to subdivide his land and dish it out to the appellant and respondent respectively as he contemplated his death as he was aged and had suffered serious burns from which he eventually succumbed to. Accordingly *section 31* of the Law of Succession comes into play.

The appellant contends that the transfer in respect of **Iriaini/Kiaguthu/569** having not been registered, the suit premises effectively remains in the name of the deceased available to be shared equally by the appellant and the respondent. This submission holds no water. There is ample evidence on record to support the wish of the deceased that the respondent should get a larger share of the land than the appellant. Further even though the transfer of the parcel No.569 had not been effected I would imagine that the gift was complete as it was made in contemplation of death. In the case of **The registered trustees, Anglican Church of Kenya Mbeere Diocese V Te Rev. David Waweru Njoroge, C.A. No.108 of 2002** (unreported) the court of appeal stated as follows on gifts inter vivos:

“.....Generally speaking, the moment in time when a gift takes effect is dependent on nature of the gift, the statutory provisions governing the type of gift and steps taken by the donor to effectuate the gift.....”

There is no denying that in the instant case, the deceased had done all he could to effectuate his desires but encountered road blocks mounted along the way by the appellant. He passed on however before he could register the transfer. However the appellant cannot be allowed to get away with and or benefit from his own mischief. Accordingly the holding by the learned Magistrate reproduced at the commencement of this judgment cannot be faulted.

In the end I have come to the conclusion that the appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 31st day of January 2008.

M.S.A. MAKHANDIA

JUDGE