REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 195 of 2002

GITHINJI GITARI NYAMU …….…….. APPELLANT

Versus

MARTHA WANJIRU NYAMU …… RESPONDENT

(Being an appeal from the judgment of NYAGA NJAGI Principal Magistrate

in Principal Magistrate's Succession Cause No. 69 of 1999 at Kerugoya)

JUDGMENT

GITHINJI GITARI NYAMU petitioned at Resident Magistrate Kerugoya for Letters of Administration in the estate of **PETER GITARI NYAMU**. The estate properties are **KIINE/RUKANGA/1562** and **KIINE/GACHARO/937.**

The grant was issued by the court. On the petitioner seeking a confirmation of that grant the respondent in this appeal filed an affidavit of protest. The lower court granted judgment in favour of the respondent to this appeal and that judgment provoked the petitioner to file the present appeal. Evidence adduced in the lower court on behalf of the respondent was that the deceased had three wives, one being the respondent, Margaret Wanjiru Gitari and the mother of the petitioner in the lower court. The petitioner's mother was the first wife. Before the deceased died he had transferred the property KIINE/GACHARURU/238 which was four acres to the petitioner. The deceased also purchased KIINE/RUKANGA/1562 which was eight acres and settled on that land with the respondent. He also settled the second wife Margaret Wanjiru Gitari on KIINE/ GACHARO/937 which was four acres. The petitioner who is also the appellant in this appeal had in 1960 been allocated by the clan parcel No.kiine/gacharo/172. He sold that property in 1965. The appellant's evidence in the lower court went contrary to what he had sought in his application for confirmation. In his evidence he sought that the property where the respondent had been settled namely Parcel No. 1562 be divided into three portions amongst the deceased three wives. At one time in evidence he seemed to suggest that it be subdivided equally between him and the Respondent each getting 4 acres. The appellant said that he had constructed a house on that parcel of land. He said that he was entitled to his mother's portion of that land. On being asked in respect of the land where the second wife Margaret Wanjiru Gitari had been settled namely parcel No. 937 he said that she should retain that land. His witnesses in the lower court stated that when the deceased got sick he called people and told them that parcel No. 1562 should be divided amongst the three houses where each family would get four acres. The witnesses said that later after that utterance the deceased died. It was from that evidence that the lower court gave its judgment. In its considered judgment the court ordered that parcel no. 1562 be registered in the respondents name absolutely. The court also ordered that parcel no. 937 be registered in the name of Margaret Wanjiru Gitari absolutely. In reaching that judgment the lower court found that the appellant had been allocated land by the clan which he sold in 1965. The court also found that the appellant had been allocated parcel No. 238 by his father during his lifetime. The appellant in submitting in support of this appeal abandoned four grounds and proceeded to argue ground No. 3. That ground is in the following terms:

"***The learned trial magistrate erred in law and principle by taking into consideration extraneous issues which led him to make an erroneous judgment*"**

The appellant argued his appeal on two propositions. Firstly, that the deceased left an oral will. **Section 9** of the Law of Succession Act provides as follows in part:-

"***9. (1) No oral will shall be valid unless-***

(a) it is made before two or more competent witnesses;

and

(b) the testator dies within a period of three months from the date of making the will;

There was no evidence before the lower court that the deceased made his will three months before death. The appellants advocate attempted to read more into the witnesses who gave evidence in the lower court than was apparent. The witnesses stated that the deceased called a meeting when he got ill. One of the witnesses said that after that meeting he died. The other witness said that after that meeting later he died. There is nothing in that evidence to show that the deceased died within the period required under the above section. It is clear that to one person later could mean one month or years. For that reason I am of the view that the appellant has not proved that the deceased left an oral will. The other argument raised by the appellant in support of the appeal is that the court should have applied ***Section 40(1***) of the Law of Succession. It was submitted that the residue of the deceased property namely parcel Nos. 937 and 1562 be divided amongst the deceased children in each house and the wives be added as units. The evidence that was adduced in the lower court shows that the appellant who represents the first wife was given by the deceased during his life time parcel No. 238. That parcel has four acres. The green card relating to that property which was exhibited in the lower court clearly shows that that property was transferred to the appellant by the deceased. The respondent who was the third wife was left by the deceased residing on parcel no. 1562 which is eight acres. The second wife Margaret Wanjiru Gitari was left residing on parcel no. 937 which is four acres. I have considered the provisions of section 40(1) and I have also considered the authority relied upon by the appellant namely **ANDREW MANUNZYU MUSYOKA (DECEASED**) **HCCC NO. 303 OF 1998 MACHAKOS**. Section 40(1) of the Law of Succession provides as follows:-

"***40(1) where an intestate has married more than once under any system of law permitting polygamy, his personal and householf effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children."***

There is nothing in that section which provides that distribution should be on an equal basis. I say so because what seems to be the motivating factor to this appeal is that the appellant feels the respondent has an unfair amount of land since her parcel is eight acres. The evidence that came from the lower court trial was that the deceased left each home on a particular parcel of land. The appellant has argued that the parcel of land where he was left residing namely No. 238 is registered in his name and was therefore not property to be considered in this estate because it did not fall within the definition of free property. Indeed it is correct that in considering a succession cause the court can only distribute property belonging to the deceased. However in making that distribution the court can be guided by section 42 of the law of succession. That section provides that property given by the deceased during his life time may be taken into account in determining the share accruing to an heir. The appellant got that parcel of land 238 from the deceased during his life time. That is the land where the appellant and his family are settled. Although the appellant argued that that property does not fall within the definition under section 2 I find that section 42 allows the court to take into account what he got from the deceased in his life time. Taking into account the property given to the appellant by deceased in his life time shows the appellant is well catered for. The lower court therefore was not in error to have considered that property. The fact that the lower court considered the property given to the appellant by the clan in 1960 is not reason enough to interfere with its final finding. I therefore, for the reasons stated here, uphold the lower court finding and find that the appeal has no merit. I therefore do hereby dismiss this appeal with costs to the respondent.

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2008

MARY KASANGO

JUDGE