

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 104 of 2001

BEATRICE MICHERE MUGO APPELLANT

VERSUS

JAMES MURIITHI GUCHURA..... RESPONDENT

JUDGMENT

The Respondent JAMES MURIITHI GUCHURA petitioned for grant in respect of the estate of Guchura Ngunju deceased. The estate of the late Ngunju comprised of KIINE/GACHARO/215, Plot No. 21 Kiangwachi and plot No. 15 Kagumo market. The deceased died on 28th August 1968. A protest was filed by the deceased's daughter in law namely Beatrice Michere Mugo. In evidence before the lower court the protestor stated that the deceased had three wives. The first wife gave birth to David Mwai and the petitioner. The second wife was the mother of Charles Mugo deceased who was the husband to the protestor. The third wife had a son called Johnson Mugo. The protestor/applicant stated that her husband died in 1997. She said that although the property KIINE/GACHARO/215 was registered in the deceased's name that it was in fact purchased by her, her late husband and her parents in law. Before the lower court she produced books which contained the agreement of that purchase. It should be noted that those books were not enclosed in the record of appeal and were neither in the lower court's file. The lower court's proceedings show that on 31st July 2001 the court ordered the exhibits in the court record to be released to their owner. The protestor/appellant in failing to annex those exhibits in this appeal renders the appeal untenable. The court is unable to confirm if indeed there was such an agreement and if so who were the parties to that agreement and the terms. On being cross examined the appellant was unable to state how much she contributed towards the purchase price. She also could not say when the plot was purchased but she stated that it was purchased for Kshs.7115/-. It is pertinent to note that the green card to that plot exhibited in this case shows that the consideration when the property was transferred to the deceased was Kshs.2800/-. The appellant's second witness PW 2 was her first born son. He stated that he was in occupation of that property and that he was left in occupation by his deceased grand parents. He stated that during the lifetime of the deceased the petitioner/Respondent was given 6 acres of land and a shop at Kagumo. The Respondent in evidence stated that the deceased died being the owner of plot No. 215. That the deceased purchased that land between 1960 and June 1966. The appellant was married to his brother in January 1966. The petitioner further stated that the deceased was a businessman running a shop whilst renting out another. That the petitioner's mother had 250 coffee bushes. It was the proceeds of the shop, the rent and the coffee sales that were used to purchase plot No. 215. He denied that the property was purchased with the assistance of the appellant or her late husband. The learned magistrate in his well considered judgment found that the protestor/Appellant failed to prove her case on a balance of probability. As stated herein before in this judgment the appellant did not annex documents to proof that there was an agreement of sale in respect of plot No. 215. The appellant was aggrieved by the finding of the learned magistrate and proceeded to file this appeal. The appellant has brought the following grounds of appeal:-

1. *The learned magistrate erred in law and in fact in failing to consider that the petitioner Muriithi Guchura had been given land parcel MUTIRA/KIRUNDA/151 measuring about 1.9 hectares by the deceased in 1959.*

2. *The learned trial magistrate erred in fact in disregarding the evidence adduced by the*

appellant to show that she and her late

husband contributed in buying

KIINE/GACHARO/215 and hence she was entitled to a bigger share.

3. *The learned trial magistrate erred in law and in*

fact in disregarding the fact that during the

life time of the deceased the Petitioner was not

given any part of the suit land and the whole

land was being used by Beatrice Michere since

the Petitioner had been given land parcel

MUTIRA/KIRUNDA/151.

In respect of ground of 1 and 3 I am in agreement with the respondent's submissions that the appellant was introducing new evidence at an appeal stage. Although PW 2 stated that the petitioner had been given 6 acres of land by the deceased during his life time that land was not identified in evidence. Accordingly for the appellant to introduce the property Mutira/Kirunda/151 it is wrong, having not brought the same before the lower court. In any case there is no clear evidence that the deceased did give the petitioner any land during his life time. Ground 1 and 3 are hereby rejected. Ground No. 2 is defeated because there was no clear evidence to show that the appellant participated in the purchase of plot No. 215. Also due to the fact that the alleged agreement of sale was not annexed ground 2 in this appeal fails. In the end the judgment of this court is that this appeal is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 14th day of October 2008.

MARY KASANGO

JUDGE