**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL 32 OF 2003**

**WARUINGI KAMAU ..... APPELLANT**

**VERSUS**

**KARUGA KAMAU ..... RESPONDENT**

***(Appeal from the original judgment of the Principal Magistrate's Court at Murang'a in Succession Cause No. 230 of 1991 dated 28th January 2000 by L. Nyambura – Ag. R.M.)***

**J U D G M E N T**

This is an appeal against the judgment delivered in the Principal Magistrate's Court at Murang'a by **A. M. King'oo**, Resident Magistrate (*as she then was*) in Succession Cause No. 230 of 2001. The deceased **Kamau Waruingi**, died on 22nd October 1984. He was the registered proprietor of land parcel No. **Loc.19/Kiawambogo/1120** hereinafter referred to as "*the suit premises*". He was by then survived by his wife **Gladys Wambui Kamau** and four sons, namely **Waruingi Kamau,** hereinafter referred to as "*the appellant*", **Karuga Kamau,** hereinafter referred to as "*the respondent*", **Karema Kamu** who passed on in 1986 without leaving behind any issue or wife and **Jackson Murichu Kamau**. He was also survived by a grand daughter, Margaret Wambui Kamau. Following the death of the deceased, the appellant petitioned for the grant of letters of administration intestate of the estate of he deceased. However the respondent objected to the said petition. On 13th February 1992, the learned magistrate ordered the issuance of the grant of letters of administration intestate in the joint names of the appellant and the respondent and directed further that the issue of shares of the estate in respect of each son be heard and determined during the hearing of the application for confirmation of grant.

On 24th August 1992, the appellant applied for the confirmation of grant. In the affidavit in support thereof, he deponed that the deceased was survived by the following, himself, the respondent, Jackson Murichu Kamau, their mother, Gladys Wambui Kamau, and Margaret Wambui Kamau, grand daughter. He proposed that the suit premises be shared as follows:-

Himself – 3.8 acres

Gladys Wambui Kamau )

Margaret Wambui Kamau) – 2.0 acres

This application was met by an affidavit of protest that was filed by the Respondent on 18th March 1994. He took the view that the identification and shares of all the persons beneficially entitled to the deceased's estate had not been properly ascertained and determined. On his part however he proposed that the suit promises be shared as follows:-

(a) The appellant – 1.9 acres

(b) Respondent – 1.9 acres

(c) Jackson Muricho – 1.9 acres

(d) Gladys Wambui – life interest

(e) Margaret Wambui 0.1 acres

What followed thereafter was stalemate. On 29th November 1995, **Mr. Morigori**, the learned Resident magistrate gave directions that the matter do proceed to hearing by way of oral evidence. As a result of this order the cause proceeded to hearing with the appellant calling six witnesses. On his part the respondent called two witnesses. A summary of the evidence tendered by the respective parties and their witnesses shows that the deceased had been the first registered proprietor of the suit premises since 29th May 1963 whereas the respondent herein had been the registered proprietor of land parcel No. **Loc. 19/ Kiawambogo/804** measuring 6.6 acres also a first registration. However whereas the appellant and their mother **Gladys Wambui Kamau** claim that he was only registered to hold the same in trust for the family of the deceased, the respondent says he was an absolute owner of the said parcel of land not subject to any trust obligations. Their mother **Gladys Wambui Kamau** aforesaid was, also on 29th May 1963 registered as proprietor of land parcel No. **Loc. 19/Kiawambogo/1121** measuring 4.2 acres. Hers was also a first registration.

From the evidence, the suit premises are occupied and or utilised by the following persons:-

1. Gladys Wambui

2. The Appellant

3. Margaret Wambui (an unmarried granddaughter of he deceased)

Whereas land parcel No. **Loc. 19/Kiawambogo/804** is occupied or utilised by the following persons:-

1. Gladys Wambui

2. The Respondent

3. Jackson Maricho Kamau

During the hearing of the cause in the lower court, the appellant and his witnesses wanted the suit premises inherited by the appellant and Gladys Wambui, the latter as trustee for the children of her deceased unmarried daughter Wangui who had survived her father. On the other hand, the respondent wanted the suit premises to be inherited by all the three sons (appellant, respondent and Muricho) and the children of the deceased daughter in equal shares. The learned Resident Magistrate ruled in favour of the respondent on the ground apparently, that the appellant had not redeemed the suit premises as claimed for his sole benefit.

The learned magistrate then proceeded to order that each of the three sons of the deceased and the children of their deceased unmarried sister should each get 1.4 acres out of the estate. Their mother to get a life interest in the estate. Each party was then ordered to bear their own costs of the cause. By making the said order the learned magistrate in invariably included land parcels **Loc. 19/Kiawambogo /1121**, **Loc. 19/Kiawambogo/804** and the suit premises as part of the estate of the deceased. That finding thus triggered this appeal.

In a memorandum of appeal filed through **Messrs Waiganjo Gichuki & Co. Advocates**, the appellant

faults the learned magistrate's judgment on the grounds that:-

**1. The learned Resident Magistrate erred in ignoring the evidence of PW1 Gladys Wambui who is the mother of the parties regarding the extent of the estate of the deceased and the ownership and background of the land parcel No. Loc. 19/Kiawambogo/1121, this led her to erroneously consider the said land as part of the estate and base her judgment on this erroneous finding.**

**2. The learned Resident Magistrate particularly erred in finding that the appellant (petitioner in the lower court) redeemed land parcel No. Loc. 19/Kiawambogo/1121 not for himself but for the entire family while the evidence of the mother of the parties and the surrounding circumstances show that he redeemed it for his own benefit and using his own resources.**

**3. The learned Resident Magistrate wholly ignored all the evidence adduced by all the parties and their witnesses regarding land parcel No. Loc. 19/Kiawambogo/804 registered in the name of the respondent and which is utilised by all the parties as it is family land; in the result the court made no findings on this land and this led the court into error regarding the distribution of the estate as land parcel No. Loc. 19/Kiawambogo/804 properly formed part of the estate of the deceased and was held in trust by the respondent.**

**4. The learned Resident Magistrate erred in her assessment of the case as she did not appreciate the issues in dispute and in this way arrived at a judgment which is contrary to the evidence on record; this caused injustice to the parties in that no findings were made on whether the respondent held land parcel No. Loc. 19/Kiawambogo/804 as a trustee for himself and PW2 and this also affected the distribution of the estate where land parcel No. Loc. 19/Kiawambogo/1120 ought only to have been inherited by the appellant and PW1.**

**5. The judgment of the lower court goes against the mode of occupation of the land and will cause unwarranted shifting of cash crops which had been planted in the lifetime of the deceased in accordance with the envisaged distribution of the family land; the second petitioner's witness as well as the respondent and PW1 will be forced to shift their coffee and tea as well as their houses and other developments.**

**6. The judgment of the Resident Magistrate is against the weight of the evidence on record including the exhibits produced at the trial**.

When the appeal came up for hearing before me on 29th July 2008, **Mr. Gichuki** learned counsel for the appellant and the respondent agreed to argue the appeal by way of written submissions. Subsequent thereto respective written submissions were filed and exchanged between the parties. I have carefully read and considered the said written submissions together with the authorities cited.

As a first appellate court, this court has jurisdiction to review the evidence tendered during the trial so as to determine whether the conclusion reached by the trial magistrate should stand. However in doing so this court cannot properly substitute its own findings for the trial court unless there is no evidence to support the findings or unless the findings are shown to be plainly wrong. Indeed it is wrong for an appellate court to differ from the findings on question of fact of the trial magistrate who tried the case and who had the opportunity and or advantage of seeing and hearing the witnesses. See generally **Peters v/s Sunday Post Limited (1958) E.A. 424**. I will bear these injunctions in mind as I consider the merits or lack of it of this appeal.

There was common ground that the only property available for distribution if at all was the suit premises. In his petition for letters of administration intestate the appellant indicated in the affidavit in support thereof that the full inventory of all the assets of the deceased at the date of his death consisted of only the suit premises. Further when the appellant filed an application for confirmation of grant, the only property he indicated that was available for distribution among the beneficiaries in his affidavit in support of the application was again the suit premises. And when the respondent filed his affidavit of protest, he never mentioned any other properties as forming part of the deceased estate and therefore available for

distribution. He too only zeroed on the suit premises. That being the case, it was not open to the parties and or their witnesses to introduce evidence touching on other properties as being part of the estate of the deceased and therefore available for distribution. It has been constantly stated that parties are bound by the pleadings. The pleadings herein bound the parties to deal with the estate of the deceased in so far as it related to the suit premises only and nothing more. To the extent therefore that the learned magistrate allowed the parties herein to go outside their pleadings and introduce evidence foreign to the pleadings and proceed to act on the said evidence in arriving at her decision, she fell into error.

As it is, the issue before court was simple and straightforward. How was the suit premises that formed the only asset of the deceased's estate at the time of his death to be shared between his sons, widow and grand daughter. The suit premises as already stated was the only property of the deceased known at the time of his death in 1984. At this time, the other parcels of land, **Loc. 19/Kiawambogo/1121** and **Loc. 19/Kiawambogo/804** were not registered in his name. Indeed **Loc. 19/Kiawambogo/ 1121** was registered in the appellant's name whereas Loc. **19/Kiawambogo/804** had since 24th December 1976 been registered in the name of the respondent. In respect of **1121** aforesaid it was registered in the names of the appellant on 24th December 1976 and a title deed thereof issued on 22nd December 1977. It had never belonged to the deceased at any given time or at all. Similarly land parcel **804** was registered in the name of the respondent on 29th May 1963 and title issued to the respondent on 3rd November 1979. It was a first registration. The record and indeed evidence tendered does not show that at any given time the same was ever owned by the deceased. As correctly submitted by the respondent, according to the interpretation section of the law of Succession Act, i.e. Section 3(1) thereof, the estate of a deceased person is defined as "*the free property of a deceased person"*. Free property on the other hand is defined in the same section 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 land parcel Nos. **1121** and **804** were registered in the names of the appellant and respondent respectively. Therefore they could not have formed part of the deceased's estate as they were never free property of the deceased which he could have legally been competent freely to dispose of during his lifetime. It matters not that they may have been registered in the names of the appellant and respondent in trust for the deceased and his family. On the face of it, the deceased would not have legally disposed them off without first seeking the respective consents of the appellant and respondent. Again if the parcels of land were subject of a family trust he would have first sought the dissolution of the alleged trust if at all. The deceased in other words would not easily have disposed the said properties without first seeking the consent of those in whose names they are registered. In any event, I do not think that this was the appropriate forum in which to ventilate and or canvass the concept of family trust. Family trust cannot be ventilated in

succession proceedings. Those issues are based left to be entertained in another forum, preferably our civil courts.

Further even if the court was alive to the concept of family trust, it did not make a specific finding on the issue in its judgment. Indeed even from a careful reading of the judgment and the decree extracted therefrom, it is not clear which parcels of land were available for distribution based on the concept of family trust alluded to in the evidence. Much as the concept of family trust was tossed around in the proceedings, the register of land in respect of the two parcels of land did not show such an entry indicating that those parcels of land were held in trust by the registered proprietors for other persons.

Could those concerned have moved their case further if they had hinged their case on gift intervivos? Perhaps! However that was not the case here! A gift intervivos is a

property which the deceased gives or donates to a living person during his lifetime. In the circumstances of this case however, it was never the case by those concerned that the subject parcels of land were gift intervivos to the appellant and respondent respectively by the deceased in his lifetime and which must be taken into account during distribution.

The deceased having died in 1984 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. The suit premises which measures 5.8 acres ought to have been shared equally between the three sons of the deceased and the granddaughter with the widow of the deceased retaining a life interest in the whole residue of the net estate.

It should be apparent from the foregoing that the learned magistrate only erred in purporting to include other parcels of land in the estate of the deceased when she ought not to have done so. Otherwise I have no quarrel with her proposal as to the distribution. To that limited extent therefore the appeal succeeds. For avoidance of doubt however I would set aside the judgment of the learned magistrate to the extent that it included other parcels of land that did not belong to the deceased in the distribution. In substitution thereof I direct that the suit premises, namely **Loc. 19/Kiawambogo/1120** only be available for distribution. It shall however be distributed equally amongst the appellant, Respondent, Jackson Muricho and the granddaughter (Margaret Wambui). The widow (Gladys Wambui Kamau) shall however retain a life interest in the residue of the estate .

As the parties involved in the dispute are siblings, I make no order as to costs.

***Dated and delivered at Nyeri this 28th day of November 2008***

**M. S. A. MAKHANDIA**

**JUDGE**