REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

PROBATE & ADMIN. APPEAL 3 OF 2008

TABITHA NYAMBURA NJOROGE ..... APPELLANT

VERSUS

JOHN KAIME KAMAU ..... RESPONDENT

J U D G M E N T

This appeal relates to the estate of the late **Kamau Kiritu** who passed away on 15th February 1989 hereinafter referred to as "*the deceased*". As at the time of his death his estate consisted of land parcel numbers **Loc. 9/Ichichi/291** and **Loc.8/Gatara/355** hereinafter referred to as "*the suit premises*". The deceased left behind a widow, **Miriam Wanjiku Kamau** who has since passed on as well, two sons, **John Kaime**, hereinafter referred to as "*the respondent*", **Bethuel Njoroge Kamau**, who too has passed on and a daughter, **Peris Wambui Muraguri**, married. The deceased too had two brothers, **Bethuel Njoroge**, the husband to **Tabitha Nyambura Njoroge**, hereinafter referred to as "*the appellant*" and **Kiritu Kamau**. The two brothers aforesaid too are long dead.

On 25th November 1999, the appellant took out a petition for letters of Administration intestate on behalf of the estate of the deceased. Apparently on the 14th May 1999, the appellant been granted leave by court to commence the succession cause without a death certificate for reasons which are not apparent or clear from the record. Pursuant to that leave the appellant commenced these succession cause in the Principal Magistrate's Court at Murang'a. In filing the petition the petitioner proclaimed herself as the wife of the deceased. She did so in the petition, the affidavit in support thereof and also in her subsequent application for confirmation of grant. This proclamation was of course false and misleading and she knew it. The truth of the matter is that she was a sister in law and not a wife of the deceased. The petition it would appear was objected to for on 10th November 2000 the magistrate's court made an order that "**..... Letters of administration issued to both the Petitioner and Objector. Same to be confirmed after 6 months.....**" The objector was of course **Miriam Wanjiku Kamau**, the real and only wife of the deceased. As already stated **Miriam Wanjiku Kamau** was the mother of the respondent but has since passed on and the respondent having been granted limited grant of letters of administration was substituted in her place in this appeal.

On 15th February 2001, the appellant filed an application for confirmation of grant before the expiry of the mandatory six months. She deponed in support of the application thereof that the persons beneficially entitled to the estate were:-

(a) Herself – as wife

(b) Miriam Wanjiku Kamau – wife

(c) Stephen Mburu Njoroge – son

(d) John Kaime Kamau – son

(e) Joseph Macharia Njuhi – purchaser

(f) Stephen kamau Mwangi – purchaser

She proposed that **Loc. 9/Ichichi/291** be distributed as follows:-

(a) Stephen Kamau Mwangi–purchaser– 2 acres

(b) Miriam Wanjiku Kamau – 2 acres

(c) Johnson Mwangi Kamau – 2 acres

As for **Loc 8/Gatara/355** she proposed that it be shared out as follows:-

(a) Joseph Macharia Njuhi–Purchaser–3.6 acres

(b) Miriam Wanjiku Kamau – 3.6 acres

She deponed that the main reason as to why she wished to have the grant confirmed immediately was that she was an old and sickly woman and that she would wish to have the purchasers in respect of the suit premises get their portions of the suit premises.

Upon being served with the application, the respondent reacted by filing an affidavit of protest. In a nutshell, it is the case of the respondent that the appellant was not a wife of the deceased. That the deceased was only survived by herself as the wife, the respondent, **Bethuel Njoroge Kamau** (deceased) and **Peris Wambui Muraguri**, married daughter. That both the appellant and her husband had all along lived at Kandani, Saba Saba and had no claim over the deceased estate. That the alleged purchasers were not sons or relatives of the deceased and cannot therefore inherit the estate of the deceased and that in any event if the purchasers bought portions of the suit premises, they did so not from the deceased, the respondent and or any of their children but from the petitioner. It was in any case a criminal offence for the appellant and the alleged purchasers to have entered into a sale agreement in respect of portions of the suit premises registered in the names of the deceased person. In view of the above, the respondent proposed that the suit premises be registered in the name of the respondent as a trustee for himself and the family of the deceased.

As there was deadlock on the mode of distribution between the appellant and respondent, the subordinate court on 16th March 2001 directed that the cause do proceed to hearing by way of oral evidence.

In support of her case, the appellant lined up three witnesses. It was her case that she was a sister in law to the deceased and that during land demarcation and consolidation, the suit premises were registered in the deceased's name as the eldest son of the family. She went on to claim that during the said land consolidation her husband was residing in Rift Valley whereas she was at Saba Saba. Her husband died around about independence period. She said during the lifetime of the deceased, she did not ask for her share of the suit premises as there was peace and tranquility between the two families. Her claim to the suit premises was thus anchored on the premise that it was ancestral land.

As for PW2, **Johnson Mwangi Kamau**, his claim to two acres of the suit premises was on the ground that he was a nephew to the deceased and that they had talked and agreed with the deceased that he gets two acres out of the suit premises.

PWIII **Sammy Kiritu Nganga** testified that the appellant should get equal share of the suit premises as the family of the deceased. He was related to the deceased because his grand father and deceased's father were step brothers. He claimed that the deceased consolidated the suit premises from fragements of other parcels of land. The deceased never redeemed any parcel of land. That the appellant and her deceased husband were not at home during demarcation as they were in Rift Valley. He claimed further that the appellant reported the dispute to the Assistant chief. Arbitration ensued but he was absent.

The respondent called two witnesses. His case is that he was the only son of the deceased. His only brother passed on but left behind four sons. He wished therefore to have the suit premises shared equally between himself and his brother's children. According to him, the appellant was married to his father's brother called **Njoroge** who died in 1962. By then he was living in Juja with the appellant. When he died he was buried in Juja. The deceased never lived on the suit premises nor developed it. They had children but none came to reside on the suit premises. The appellant cannot inherit a portion of the suit premises because the suit premises were not ancestral land. The deceased redeemed the same from **Njoroge Mugo** and **Gichigi Babu** after their father had sold it. He also knew **Johnson Mwangi**. He had been educated by the deceased as he was a son of a brother of his grandfather's brother. However he has his own land on which he resides.

His witness was **Elias Mbutu Kamau**. He testified that the deceased had only one wife and two children alive. The deceased was a step brother to his father. He denied knowledge of the appellant. He alleged that her husband **Njoroge** never stayed at home. He used to live at Juja. He testified further that the appellant had no right to inherit the suit premises as they were redeemed by the deceased.

The trial magistrate having carefully evaluated the evidence tendered found for the respondent in these terms:- "**..... The court has considered the evidence on record and the court finds that there is no evidence that the lands subject of this case were family land or that the deceased was registered with these land as trustee of himself and the family of his late brother Njoroge. There is no evidence adduced by those who were present during land demarcation and consolidation to show that the deceased consolidated his family land. In any case if this was family land Njoroge the husband of the petitioner should have been buried there. In any case the deceased died in 1999 and petitioner had never gone to ask land from him. There is also no reasons why petitioner after consolidation and demarcation she never stayed in those lands. The other claimants land (sic) is baseless as he has his own land and there is no reason why PWII should be claiming the land of the deceased. Then to say that he had talked with the deceased that he would get 2 acres or the fact that he used to cultivate that land or any of them does not make him as heir of the deceased.**

The court finds that the deceased redeemed his lands from Njoroge Muya and Gichigi Babu as that was the evidence of the Objector and his witnesses. PWII also said that the deceased bought 1 acre from a lady called Muthii which shows that when the Objector says that his father redeemed land it is not imagination....."

The appellant was aggrieved by the findings of the learned magistrate and accordingly lodged the instant appeal. In a 7 point memorandum of appeal filed through **Messrs J.N. Mbuthia & Co. Advocates**, the appellant faults the judgment of the learned magistrate on the grounds that:-

1. The court erred in fact and in law in finding that the parcels of land in issue in the Succession Cause were not Family Land yet the deceased in the Succession Cause and the Appellant's husband were Brothers with the deceased being elders.

2. The learned Magistrate erred in fact in giving under weight (sic) to the fact that the appellant's husband was not buried on the suit premises despite evidence at the time of the said death bodies were not being transported to the ancestral lands for burial.

3. The learned magistrate was swayed in her judgment by an immaterial fact of failure by the appellant to occupy the parcels of land whereas she had freely opted to purchase other land and live there.

4. The learned magistrate's total reliance on the evidence of the respondent on the issue of the redemption of the appellant was biased and presumptive since the persons the land was redeemed from were not summoned or their absence explained.

5. The learned magistrate unreasonably failed to take into consideration the evidence of the appellant that her husband gave out 80/= for the redemption of land yet that evidence was not challenged.

6. The court exhibited extreme bias against the appellant by stating that her claim was only motivated by greed because she had sold of the land to third parties. This aversion so coloured the court's judgment that the court failed to objectively evaluate the appellant's evidence and hence came to a wrong conclusion that the appellant was not entitled to at least half of the Estate.

7. The learned magistrate evidence (sic) was against the weight of the evidence as adduced hence misdirected in both law and fact.

It should be noted that the appeal was initially filed in the High Court of Kenya at Nairobi and directions as to its hearing given thereat. However on 5th March 2008 when the appeal was scheduled for hearing before **Gacheche J** a consent order was recorded transferring the said appeal to this court for hearing and final determination.

This is how this appeal reached me for hearing on 31st July 2008. On this occasion **Mr. Mbuthia**, learned counsel for the appellant and **Mr. Kimani**, learned counsel for the respondent, agreed to have the appeal argued by way of written submissions. Subsequent thereto the parties filed their respective written submissions which I have carefully read and considered including the authorities cited.

This is a first appeal and so this court is obliged to reconsider the evidence, assess it and make appropriate conclusions on such evidence, but always remembering that I have neither seen nor heard the witness. See **Peters v/s Sunday Post Ltd. (1958) E.A. 424, Selle & Anor v/s Associated Motor Boat Co. Ltd & Anor. (1968) E.A. 123** and **Ephantus Mwangi & Anor. v/s Duncan Mwangi Wambugu (1982-88) 1 KAR 278**. I must bear these injunctions in mind as I deal with this appeal.

It is common ground that at one time the suit premises belonged to the father of the deceased and father in law to the appellant. By then it was ancestral land. It is also common ground that the said premises were at some point disposed off by the deceased father. It is also common ground that the said suit premises were later reclaimed and or redeemed from the purchasers. The issue then is who between the two brothers i.e. **Kamau Kiritu** and **Njoroge Kiritu** redeemed them. The appellant in her testimony on this issue stated that her husband **Njoroge** gave her money in the sum of Kshs.80/= to redeem the suit premises through the respondent's husband. Her other two witnesses claimed that the suit premises were however never redeemed as claimed. As for the respondent, he testified on the issue that the deceased redeemed the suit premises from **Njoroge Mugo** and **Gichigi Babu**. The deceased also paid whatever that was required to be contributed by the community during land consolidation and demarcation. The suit premises according to the respondent were redeemed at Kshs.600/=. In this regard he was supported by his witness, **Elias Mbutu Kamau**. He testified that the deceased redeemed the suit premises which had been sold by his father. He redeemed with goats. He went on to state that all their fathers redeemed the lands on their own. The redemption was before demarcation.

The evidence on record shows that during land consolidation and demarcation, the appellant's deceased husband was in Rift Valley. This is as per the evidence of the appellant herself. The appellant herself was then based at Saba Saba. She claimed that she was never informed about the on going consolidation. She conceded however under cross-examination that the suit premises were in fact redeemed by the deceased but that the deceased got the money from her husband. That her deceased husband gave her Kshs.80/= for onward transmission to the deceased to redeem the suit premises. Between the evidence of the appellant and respondent, on the question of redemption I choose to believe the evidence of the respondent and his witness. The appellant did not volunteer this information in her evidence in chief but only came out through cross-examination and re-examination. Apart from her, none of her witnesses

backed her on the story. Her witnesses claimed that there was no such redemption. She did not even know from whom the suit premises were redeemed. Further there is evidence that during land consolidation and demarcation, the appellant and her husband were not in the neighbourhood. Whereas the appellant was residing at Saba Saba, her husband was in Rift Valley. During the process of land consolidation and demarcation some money was being contributed for the exercise. There is no evidence that the appellant ever made such contribution. It is also instructive that much as the appellant claims a portion of the suit premises, they went ahead and bought their own land at Saba Saba where they settled. Neither the appellant, her husband nor their offsprings have been to the suit premises since.

The appellant testified that she used to cultivate the suit premises. However she did not state when this was. Perhaps this would be before they relocated to Saba Saba. However she admitted in cross-examination that when her husband died he was buried in a public cemetery in Thika. The question that begs for an answer is why did the appellant not bury her husband in any of the two parcels of land if indeed she believed her husband had any interest therein. She did not even bother to request the deceased to bury her husband on any of the suit premises. I do not just as the learned magistrate, buy her answer that in those days they never used to take bodies to their homes for burial. There is much more than meets the eye with regard to this incident. It would even appear from the evidence that none of her deceased husband's relatives were aware of his death and burial. As correctly submitted by **Mr. Kimani,** the only reason why the appellant's husband was buried in a public cemetery was because the appellant knew that the suit premises belonged solely and absolutely to the deceased. The evidence on record also points to the fact that the appellant and her deceased husband bought a plot at Saba Saba where they settled. It beats logic that a person would leave a substantial portion of land and buy a plot and settle thereat with his entire family and never bother at all to visit the suit premises, if for anything else to keep his/her claim to the same alive. The appellant further admitted that she was not in possession or occupation of the suit premises after consolidation and demarcation. She also admitted that during the deceased's lifetime, she never made any claim for her husband's share of the suit premises nor did she take any action to reclaim the same.

Since it is common ground that the suit premises were redeemed after being sold by the deceased father, they ceased therefore to be ancestral land. Accordingly neither the appellant nor respondent can hinge their entitlement to the same on that basis. The appellant has submitted that the absence of a claim by the appellant's husband in his lifetime does not negate her claim herein. Simply put, the evidence of the appellant alludes to a trust which she claims did not expire with death of the deceased. The suit premises having been redeemed, they ceased to be ancestral land. Accordingly it cannot be said that they were registered in the name of the deceased for himself and also in trust for the other members of the family. I have already discounted just as the trial court did the evidence of the appellant having passed to the deceased Kshs.80/= from her husband as his contribution towards the redemption of the suit premises. In any event, there is evidence on record that Kshs.80/= would only have redeemed an acre or so of the land. The suit premises are in excess of one acre.

On my own overall assessment of the evidence of the appellant, I would classify her as untruthful witness. In her petition for letters of administration, she described herself as a wife of the deceased. Again in her affidavit in support of the petition aforesaid, she deponed that the deceased had left two wives, herself and the respondent. Again in her affidavit dated 23rd October 2000 in support of her application for the letters of administration to be issued, she described the deceased as her husband. Yet again in her affidavit in support of the application for confirmation of grant, the appellant still described herself as wife of the deceased. She knew all along that she was peddling lies. She was a wife of the deceased's brother. Accordingly, she was a sister in law to the deceased and not a wife. Having realised her mischief, the appellant belatedly swore an affidavit dated 2001 in which she proclaimed that "**..... I had made an error in describing myself as a wife of the deceased. I made the error because of the kikuyu custom of calling a brother to the husband a "husband"**. This further affidavit should have been expunged from the record as it was filed without leave of court. In my view this sudden change of heart was not due to her discovery of the error or mistake. It was a tactical, desperate and deliberate attempt to hoodwink the trial court into believing in her cause. The trial court however was alert and saw through her manoeuvres. There is no practice in kikuyu custom that I am aware of that a woman can refer to her husband's brother as a husband as well. The trial court was right in rejecting her testimony. It was not

believable nor credible. She was economic with the truth.

In conclusion I would hold just as the trial court did that the suit premises were redeemed by the deceased and were thus not ancestral land. The appellant and her family had never set foot on the suit premises since consolidation and demarcation, that upon the death of the appellant's husband, he was buried in Thika public cemetery. If indeed he had any claim to the suit premises, his remains should have been returned and buried in his portion of the suit premises. During land consolidation and demarcation, the appellant and her husband were alive. Whereas the appellant was at Saba Saba, her husband was at Juja. They never came to stake their claim to the suit premises. And even after the death of the appellant's husband, the appellant did not move to the suit premises but to Kandani where she settled and remains to date. Finally at no time did the appellant and her deceased husband ever make a demand of a portion of the suit premises in the lifetime of the deceased. In the circumstances the inescapable conclusion is that the appellant was aware that she had no stake in the suit premises. The trial court was thus right in dismissing her petition and allowing the protest.

The fate of this appeal therefore is that it is dismissed with costs.

Dated and delivered at Nyeri on this 20th day of November 2008

M. S. A. MAKHANDIA

JUDGE