REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Milimani Law Courts)

CIVIL CAUSE 2 OF 2005

1. STEPHEN KINYURU KARANJA……..……...APPELLANTS

2. FRANCIS KARANJA MWIHIA

VERSUS

1. SAMMY MARARO NJUGUNA

2. DAVID MWAURA MARARO

3. JANE WAMBUI MARARO

4. STEPHEN KINYURU "B"

5. BENARD KIRIA KARANJA

6. ELIJAH KARANJA KARANJA ……..RSPONDENTS

JUDGEMENT

This is an appeal filed by Ndungu Mwaura & Company advocates on behalf of the appellants Stephen Kinyuru Karanja and Francis Karanja. The Appellants were the petitioners in the subordinate court, while the respondent were the objectors. The appeal is against the ruling of Miss Margret Rungare, Senior Resident Magistrate in Githunguri Succession Cause No. 12 of 1995, delivered on 5/3/1998. The appeal is on seven grounds, that –

1. The learned Senior Resident Magistrate erred in law in entertaining an objection from the objectors after the statutory period had expired.

2. The learned Senior Resident magistrate erred in law and fact in considering evidence of objection as to how the suit premises was to be subdivided.

3. The learned Senior Resident Magistrate erred in law and fact in failing to appreciate the 1st petitioner's evidence as to why he was entitled to inherit the suit premises.

4. The learned Senior Resident magistrate erred in law and fact in failing to appreciate that the 1st petitioner had fulfilled conditions set out by his deceased father and thus inherit the suit premises.

5. The learned Senior Resident magistrate erred in law and fact in awarding 1 acre out of parcel of land number Gatamaiyu/Kagwe/221 to DW1 Elijah Karanja Karanja.

6. The learned Senior Resident Magistrate erred in law and fact in awarding the 1st petitioner and his brothers offsprings 4.20 acres out of Gatamaiyu/Kagwe/221.

7. The learned magistrate's ruling was against the weight of the evidence.

At the hearing of the appeal on 6/3/2006, Mr. Ndungu appeared for the appellants, while most of the respondents were present in person that is Sammy Mararo, Stephen Kinyuru Karanja "B" Elijah Karanja, and Joseph Njoroge Nguma. I was informed that David Mwaura Mararo was deceased.

Mr. Ndungu for the appellants submitted that the deceased had two pieces of land, which he distributed. One of the parcels of land is where the 1st appellant came from, while the other land was at Mwihaki, where there was a house, and the respondents got 11 acres. The 1st appellant was left with the land parcel Gatamaiyu/Kagwe/221, which was the Subject of the appeal. He did not inherit anything from his mother's house. There was no written will.

He submitted that the 1st appellant obtained letters of administration and the respondents filed protests. In his view, it was wrong for the learned magistrate to have entertained the protest and made a decision on same, as the said protest was filed without leave of the court. The learned magistrate also erred in considering only the evidence of the objectors, in her ruling. In his view, the respondents had got their respective shares.

He submitted that, as this was a succession matter, only the 1st appellant, who was a son of the deceased was entitled to the inheritance. The magistrate therefore erred in awarding benefits to the 6th respondent, as no reason was given for such grant. He further submitted, under ground 5 of appeal, that the grant of letters of administration to the 1st petitioner and the other offsprings was misleading and was not enforceable in law. It was hard to comprehend what was meant by the award of 5.2 acres.

Sammy Mararo Njuguna, a respondent, submitted that his grand mother was Jane Mararo and not Jane Wambui. He submitted that, all they wanted was fair distribution of the estate, as they did not get anything from the 13 acres of land. Stephen Kinyuru "B" on his part submitted that what counsel for the appellant submitted was not true. He submitted that he was a step brother of the 1st appellant. That the deceased distributed his land during his lifetime, but retained the land in dispute for his own use. The 1st appellant sold 4 acres of land which he had been given by the deceased. That is why he was not given additional land. In his view, the lower court ruling was justified as wanjeri's house was to get 5.2 acres and Mwihaki's house was to get 4 acres.

Elijah Karanja Karanja, on the other hand, submitted that he was a grand son of the deceased. His mother had died during the emergency and he lived with the deceased. The deceased gave him 3.3 acres during his lifetime. He contended that the 1st appellant had been given 4 acres of land and sold them.

This being a first appeal, this court is bound to evaluate the evidence and come to its own conclusions and inferences, taking into account that it does not have the advantage of seeing the witnesses testify.

Briefly the facts are that the deceased, Karanja Njuguna, was a polygamist. He had two wives. Each of the wives had children, and there were, of course, some grand children before he died. He died in

1962. He had some parcel's of land that he distributed to the children and grand children of each of the two wives. The house of the first wife was given 13.40 acres, while that of the 2nd wife was given 11 acres. No dispute appears to arise from this distribution of land.

However, the deceased used to live on the land Gatamaiyu/Kagwe/221 measuring 9.20 acres. He lived and died on that land. At the time of death, this land was still in his name. The distribution of this land was the subject in Kiambu Succession Cause No. 12 of 1995. Before confirmation, of grant, the objectors, who are now the respondents in this appeal, filed objections to the proposal that the 1st petitioner, who is now the 1st appellant should get all the land, that is the 9.20 acres. The 1st appellant wanted to get all this land because, according to him, his late father orally left the land to him, as he was the one who took care of him upto his death. The matter was referred to elders for arbitration of elders, who made proposals for subdivision of the land between the two houses. The 1st appellant did not agree to the proposals of the elders, as he wanted to get the whole of the 9.20 acres. The issue therefore had to be resolved by the court.

The learned magistrate therefore heard evidence on the dispute in the proposed mode of distribution of the land. She found that the deceased did not leave a will. The land was therefore in testate property. She ordered that of the 9.20 acres, 5.20 acres should go to the house of Wanjeri, who was the mother of the 1st appellant, and 4 acres should go to the house of Mwihaki. Of the land that would go to the house of Wanjeri, Elijah Karanja would get 1 acre, while the 1st appellant and other offspring in that house, would get 4.20 acres.

The 1st appellant was aggrieved by the decision of the learned magistrate and thus this appeal was filed by both the petitioners, who are now the appellants in this appeal.

I have considered the appeal and submissions made before me. The appeal raises three issues. The first issue is whether the learned magistrate erred in entertaining objections of the objectors after the statutory period had expired. The second issue is whether the deceased gave the land by a verbal will to the 1st appellant. The third issue is whether the learned magistrate erred in subdividing the land.

On the first issue, the magistrate is said to have erred in entertaining the objections after the statutory period had lapsed. Section 67 of the Law of Succession Act (Cap. 160) provides that no grant, other than a limited grant for collection and preservation of assets, shall be made unless a notice of at least 30 days is issued. Section 68 requires that any objection to the grant of representation shall be lodged in court within the period of the notice, or such longer period as the court may allow.

In my view, these provisions of law, only relate to objection to the grant of representation to the proposed administrators. They do not cover objections to entitlements to inherit or benefit from the estate. My view is fortified by the provisal to section 71 of the Law of Secession Act, which states –

"Provided that in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; when confirmed the grant shall specify all the persons and their respective shares".

The above provisions of law, in my view, mean that anybody who claims to have a beneficial interest cannot be shut out simply because the notice of representation has lapsed. The objectors claimed to be entitled to benefit from the assets of the estate before confirmation, and therefore the learned magistrate was perfectly entitled entertain the objections before confirming the grant.

The second issue is whether there was an oral will by the deceased on the subject land. The evidence of the existence of the oral will is the evidence of only the 1st appellant. He was to be the beneficiary of the said will.

The formalities and requirements for proof of oral wills is covered under section 9 and 10 of the Law of Succession Act. The relevant part of section 9 with regard to the formality/validity of an oral will

provides –

9 (1) No oral will shall be valid unless –

(a) it is made before two or more witnesses, and

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

There is no evidence that was tendered before the

Magistrate that there were two or any witnesses to the purported oral will, that the said land would be inherited by the 1st appellant. There is also no evidence that the deceased died within a period of three months from the time of making the purported oral will. It was for the 1st appellant to give evidence to prove the oral will on the balance of probabilities . Having evaluated the evidence on record, I find that the 1st appellants did not give such evidence to prove the oral will. In my view, the learned magistrate was justified in finding that the subject land was intestate property. That means she found that there was no valid will or disposition of the property during the deceased's lifetime. It is my finding that the deceased did not make an oral will as alleged by the 1st appellant. I agree with the findings of the learned magistrate.

The third issue is whether the learned magistrate was right in distributing the land the way she did. The legal provisions for distribution of an intestate estate, in case of a deceased who had more than one wife, is provided for under section 40 of the Law of Succession Act. The distribution is to be to each house according to the number of children. The learned magistrate distributed the 9.20 acres of land among the two houses. The house hold of Wanjeri in which the 1st appellant is a son got 5.20 acres. The house of Mwihaki got 4 acres. From the house of Wanjeri, Elijah Karanja Karanja, who was said to have been chased away from the land and his house demolished by the 1st appellant, was to get 1 acre, and the rest of the land to be for the 1st appellant and his brothers offsprings.

The 1st petitioner's contention is that he should get the whole of the subject piece of land, and disentitle all the rest. I am of the view that, from the facts before the learned magistrate, she did all she could to comply with the provisions of Section 40 of the Law of Succession Act, taking into account that the deceased had already distributed some other pieces of land to the beneficiaries before he died. I see no better mode of distribution of the subject land. For that reason, I am of the view that she was correct in the mode of distribution that she applied, and I will not interfere with the same.

Though the 1st appellant objects to Elijah Karanja Karanja getting anything from the estate because he is not a son of deceased, that is a misapprehension of the law. The said Elijah Karanja Karanja is a grand son of the deceased. He falls within the definition of dependants under section 29 of the Law of Succession Act. I find no reason why he could not benefit from the estate of the deceased.

For the above reasons, I find that this appeal has no merits and I have to dismiss it.

Consequently, I dismiss the appeal. However, as this is a family matter, I order that parties will bear their own costs of the appeal.

Dated and delivered at Nairobi this 31st day of May 2006.

George Dulu

Ag. Judge

In the presence of -