REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 330 of 1998

KAHUNGU GAKURU …….……
PLAINTIFF

VERSUS

KIGANJO GAKURU …….…….
…….DEFENDANT

JUDGMENT

This appeal arises from Succession Cause Number 266 of 1993 relating to parcel of land number Loc. 15/Gathukeini/718 measuring 1.2 acres. This land was registered in the name of Gakuru Karumba, deceased father of the parties to this appeal.

The petitioner Kiganjo Gakuru petitioned Muranga Resident Magistrate Court to be declared the sole proprietor of the suit land on the ground that before their deceased father died, he had given the objector parcel of land known as Loc 15/Gathu/727 measuring 3.5 acres and another known as Loc 15/Gathu Kairui/567 measuring 0.4 acre.

According to the petitioner, he had another piece of land he had bought and only got 2.6 acres from the deceased which included the disputed land.

The petitioner called 2 witnesses who supported his claim stating whereas the objector had more land inherited from the deceased, the petitioner had bought part of the land he owned from other people, hence the disputed land should be registered in his sole name.

The objector, now appellant herein, put his case thus: he wanted half share of the suit land because it belonged to their deceased father and that the petitioner had another parcel of land. He called 5 witnesses to support his claim stating that each of the claimants had been given some parcel of land by their late father and that the suit land was left for them to share equally, hence an order should be made to this effect.

Counsel for the parties made submissions before the learned Resident Magistrate either for or against the petition and the said magistrate wrote and delivered a judgment in which he awarded the whole parcel of land to the respondent, hence this appeal.

In granting the respondent the suit land the learned Resident Magistrate considered that the respondent had inherited 2 parcels of land from the deceased and that he had more acreage then the appellant while the appellant had in fact redeemed part of the land he owned from people who had bought it from the deceased.

He also considered that though the two parties occupied the disputed piece of land, one was there against the wishes of another.

The magistrate also considered that though initially the respondent had got a grant of letters of administration over the suit plot intestate, which the court had revoked, he did not lodge his protest documents, there by failing to indicate his interest in the suit land and that this in itself made his claim untenable.

On those grounds the appellant's objection was dismissed and the grant confirmed in favour of the respondent.

The appellant filed 5 grounds of the appeal his counsel argued before this court on 25/2/2002. He submitted that the learned Resident Magistrate was wrong in considering other parcels of land which were not the subject of the dispute and registered in the name of the appellant from the initial registration period; that he was wrong in blaming the appellant for not filing protest documents when he participated in the trial; that he was wrong in finding that the appellant's occupation of the suit land was contrary to the wishes of the respondent without evidence being tendered to confirm this and that the judgment was against the weight of evidence; that the status quo subsisting since 1964 should continue.

Counsel for the respondent supported the learned Resident Magistrate judgment stating that the law of succession was very clear about the place the deceased settled his children during his lifetime and that such lands should be taken into account when determining the shares of such sons.

That since the appellant had admitted that all the parcels he had had been inherited from his deceased father then the court was right in taking them into consideration in determining the case subject to this appeal.

Counsel supported the court's finding that the appellant should have filed documents of protest when directed by the court to do so to show his interest in the land in dispute, and that, though, the appellant was in possession of the suit plot, the respondent could not have evicted him from it before obtaining title thereto.

These are the submissions which I have heard and recorded from counsel for both parties. I have been asked to consider and make a decision thereon.

From the record of proceedings in the lower court, the deceased Gakuru Karumba died in 1964. But the parcel of land in dispute was registered in his name on 20/4/1966.

What does this portray? That during land adjudication he was still alive but that registration was done after his death.

It would also appear during his lifetime the deceased lived with the appellant and the respondent in the suit land and that after his death, the two continued to live on the same piece of land until 1993 when the respondent decided to file Succession Cause subject to this appeal at the court of the Resident Magistrate Muranga to solely inherit this land.

In fact he succeeded in getting letters of administration to that piece of land until the time such letters were revoked and the matter referred back to Muranga court for retrial.

It is the decision of the retrial which is now the subject of this appeal.

However, one notable feature of this case and appeal is that during the period 1966 to 1993, at no time had the respondent asked the appellant to vacate the suit land on grounds that it was his by whatever means.

Nor was any evidence adduced in the lower court to show that during his lifetime, the deceased had

bequeathed the same to the respondent.

Where then and why did the respondent form the view that the suit land was his? The only evidence from the respondent and his witnesses worth consideration, was that the appellant owned more acreage from their father than himself.

Whose mistake, if any, was it that the appellant should be given more land by their father? If there was such mistake, why did the respondent not ask the deceased during his life time why this was so, only to wait until 1993 to file a petition in court to claim the suit land on ground that he was the only son of the deceased? This must be the reason why a retrial was ordered?

And during the trial, the respondent never repeated that he was the only son of the deceased but that the appellant inherited more land from the deceased than himself. Subject to what I shall say herein after, this would not, in law, be a convincing ground for him to be awarded the suit land as sole proprietor.

It is upon the deceased who was giving his son's part of his estate to know why he was giving the respondent more of it than the appellant and if the latter cared, he should have found out about this during his said father's life time and not wait until after his death, more so 29 years after this, to raise the issue in the petition cause subject to this appeal.

As to protest documents being filed by the appellant Rule 40(6) and (8) of the Probate and Administration rules prescribe for this where any person wishes to object to the proposed confirmation of a grant, otherwise where a person files an application for revocation of grant which has already been confirmed, I would hope he/she has sufficiently shown or indicated his/her interest in the intestate estate of the deceased and to ask such applicant to file documents of protest would appear to be an added and unnecessary burden – on him or her (see Section 76 of the law of Succession Act).

Section 42 of the Law of Succession Act, however, provides as follows:-

42 where

(a) an intestate has, during his life time or by will, paid given or settled any property to or for the benefit of a child grandchild or a house; or

(b) property has been appointed or awarded to any child or grand child under the provisions of Section 26 or Section35,

that property shall be taken into account in determining the share of net intestate estate finally accruing to the child grand child or house."

The impression given by this provision, and how the learned magistrate understood it, is that pieces of lands given to the parties should be taken into account while sharing out such estate so that each of the beneficiaries ultimately gets equal shares of such intestate estate.

I am not quire sure this was the intention of the legislature for if it was so, I see no reason why the section quoted above could not expressly say so.

Why talk of child or grandchild and not children or grandchildren?

In any case, the appellant who was left on the suit land with the respondent by their grandfather when he died in 1964 and continued living there peacefully thereafter for some 29 years should be taken to have acquired a prescriptive right over the portion he has been occupying for such long time, noting in particular that the respondent was taking a back door method to beat the limitation period of 12 years within which he should have claimed this land as provided by Section 7 of the Law of Limitation Act – Chapter 22 Laws of Kenya.

I would allow this appeal, set aside the lower court order and direct that the status quo existing before 21/8/98 be maintained. But as the parties are brothers, each should bear his own costs of this appeal and the case below.

Delivered this 12th day of March, 2002.

D.K.S. AGANYANYA

JUDGE