REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 275 OF 1999

KABUTE NJUGUNA …………………PLAINTIFF

VERSUS

MWANGI KABUTE ……………….DEFENDANT

JUDGMENT

This appeal arises from the ruling of the Senior Resident Magistrate (E.O. Awino) in Thika Succession Cause No. 27 of 1994 dated 17th June, 1999.

The deceased Mugure Njuguna died on 20th December 1990 intestate, leaving behind two (2) parcels of land otherwise known as Loc. 16/Gatura/724 and Loc. 16/Mbugiti/144.

He also left behind 3 (three) sons, namely Muchiri Njuguna, Kabute Njuguna and Mworono Njuguna. There was also one married daughter, whose name was not disclosed and a daughter in-law known as Mary Wanjiru Njuguna.

After his death the appellant in this appeal and the respondent applied for Letters of Administration to the deceased estate with consent of Mwororo Njuguna, Muchiri Njuguna and Mary Wanjiru Njuguna.

Letters of Administration were issued to the two as petitioners on 27th October 1994 or 29th August 1997.

It must be noted that in the affidavit in support of the petition (P&A 5) the respondent’s name was listed as a beneficiary but after the letters had been confirmed, the appellant turned round to say the respondent was not entitled to a share of the deceased estate.

A protest case was heard by the Senior Resident Magistrate on 11th May 1999 and a ruling made on 17th June 1999 in favour of the respondent who was awarded 1.5 acres out of Loc.16/Gatura/724 and this is why this appeal has been lodged.

The appeal listed 8 (eight) grounds of appeal which were argued in this court on 23rd April, 2002.

According to counsel for the appellant, the evidence of the respondent did not prove his claim on a balance of probabilities as the agreement of sale relied upon was not produced by the maker and that though the plaintiff relied on a sale agreement to claim a portion of the deceased land there was no consent of the Land Control Board to this agreement as required by law.

Counsel for the respondent opposed the appeal and submitted that the magistrate did not err in awarding a portion of the deceased land to the respondent because the appellant had already allowed the respondent to stay and cultivate that portion.

That the appellant and his other brothers had participated in marking out the boundary for the respondent's portion during the deceased lifetime.

Counsel submitted that that the appellant did not object to the respondent being his co-petitioner (ex grantee) of the land and that Section 6 of the Land Control Act should not apply to this case.

I have heard and recorded the submissions of counsel for both parties in this appeal. The appeal has caused me considerable anxiety. Why? Section 6(1)(a) of the Land Control Act Chapter 302 Laws of Kenya provides as follows:-

> ***"the sale, transfer, lease, mortgage, exchange partition or other disposal of or dealing with any agricultural land which is situated within a Land Control area - - - - is void for all purposes unless the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."***

And by Section 8 of the Act,

> ***"An application for consent in respect of a controlled transaction shall be made in the prescribed form to the a ppropriate Land Control Board within 6 months of the making of the agreement for the controlled transaction by any party thereto."***

There is however, a proviso to Section 8 aforesaid for the High Court to extend the period of 6 months notwithstanding that such period may have expired on such conditions, if any, as it may deem fit.

When the protester testified before the learned magistrate he relied on an agreement of sale made between him and the deceased Mugure Njuguna dated 24th April, 1990.

And when the magistrate wrote her judgment she (he) also relied on this agreement.

Counsel for the appellant contents that this agreement is void for all purposes for lack of consent of the Land Control Board of the contracted area in which the land is situated. He is also backed in this by the Section of the Land Control Act already quoted about.

Much as that is the law, how was the magistrate to treat the situation where the appellant had accepted and entered the respondent's name on the application for letters of administration as his co-petitioner with consent of his brothers and sister in-law!

Infact such letters had already been issued and confirmed with the same respondent listed as a beneficiary (buyer).

On what basis and how would the appellant turn round and deny the respondent his rightful entitlement to a portion of the deceased land?

The learned magistrate was in great difficulty as to what to do in such situation, and while I agree that the respondent could not legally be listed as a beneficiary to the deceased estate, this is a proper case where I feel the doctrine of estoppel should step in to prevent the appellant from going back to what had already been accomplished by his own conclusive admission of the respondent as a member of his family.

I am even surprised the appellant went out on this malicious crusade against the respondent without the support of his brothers and/or sister, sister in-law. This, to me, is a misuse of the process of the law.

I dismiss this appeal but direct each party to pay his own costs of this appeal and the court below.

Delivered this 8th day of May, 2002.

D.K.S. AGANYANYA

JUDGE