



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION
CIVIL APPEAL NO. 661 OF 2000

PETER CHIRA & ANOTHERAPPELLANT

VERSUS

NELSON GATHOGORESPONDENT

J U D G M E N T

One Gachangi Waiganjo, hereinafter referred to as “the deceased” died on 21st July 1983 at Githiga sub-location. He had married 3 wives during his lifetime so he left 3 houses.

He also left a piece of land known as L.R. Number Githunguri/Githiga/18 measuring 9 acres, and a market plot at Mutuguta Trading Centre.

There was no problem with the plot because it was agreed that this one be shared by Nelson Gathogo and Morgan Waiganjo; from the 3rd and second houses, respectively.

There was, however, a dispute over the sharing of the land Githunguri/Githiga/18. According to the magistrate the first house had only one dependant, six (6) in the second and six (6) in the third houses.

Each house had one person who made a statement to the magistrate as to how the land should be shared out. I cannot call what each said as evidence because the statements were not made under oath.

Nelson Gathogo from the third house stated that he would like the land to be sub-divided according to the children of the deceased and that their father had not done so during his lifetime.

Peter Chira from the first house stated that he would like the land to be shared out as the deceased had planned. That he had decided that the three houses share the land equally where the last house had been given ½ acre extra and that when Letters of Administration were issued there were no objections to this mode of sharing and this is why there was a plan drawn in accordance with this mode of sharing and that the families were using their respective portions thus.

Peter Chira’s mode of sub-division would give each house 2.83, 2.83 and 3.33 acres. Morgan Waiganjo from the second house agreed with Peter Chira that the land be sub-divided into 3 equal part where each house would get 2.83 acres for the first and second house while the third house got 3.33 acres given the ½ acre added to that house.

He said this is how the family had agreed giving rise to the plan which had been produced by Peter Chira. Morgan said that infact the 3rd house had already distributed their portion according to the agreement and

plan.

When the magistrate set out to write his ruling, he remarked that if the suggestion by the first and the last house representatives was followed then the house with fewer dependants would be more advantaged and that there would be great inequality in the shares. Then he said Peter Chira's and Morgan Waiganjo's mode of sub-division was unacceptable as the law does not support it.

The magistrate then went on to share out the land in accordance with the proposal by Nelson Gathogo awarding the surviving wives of the deceased their own shares as added units.

Peter Chira and Morgan Waiganjo were not happy with this mode of distribution and have now appealed to this court, through a memorandum of appeal dated 6th and filed in court on 7th December, 2000 with six (6) grounds of appeal.

These grounds were that the Trial Magistrate erred in law and fact in failing to order the distribution of the assets of the deceased in accordance with his wishes; that she erred in failing to appreciate that all the windows of the deceased had a life interest; that she erred in failing to take the evidence of all the parties concerned including that of the respondent, that she made a mistake when she failed to appreciate that the deceased had actually sub divided his assets, and that she erred in failing to appreciate that all the parties were cultivating their respective portions as per the deceased wishes. The appeal was heard by this court on 16th July 2002 wherein counsel for both parties submitted on it. Counsel for the appellants complained that the magistrate distributed the deceased property only to some of the beneficiaries (11) but not all (13). That the deceased had already expressed his wish as to how he wanted his property distributed and referred to the replying affidavit to the application for confirmation of grant.

He submitted that both parties had agreed that the deceased had sub-divided his assets before he died and that this wish should have been respected. That it was wrong for the magistrate to share out some of the land to the deceased widows when they only have a life interest therein. Counsel prayed that this appeal be allowed with costs.

Counsel for the respondent opposed this appeal saying it was not possible to follow the wishes of the deceased because they were not in form of a written or oral will.

That since the magistrate was faced with two different versions of how the deceased wanted his land sub-divided, he reverted to Section 40 of the Law of Succession Act as the best mode of distribution. Counsel stated that there were no beneficiaries ignored in the magistrates distribution of the deceased assets because those daughters alleged to have been ignored Gladys Nduta and Margaret Wanjiku – were married and did not put up a claim on the deceased assets and that according to Kikuyu Customary Law, personal law in this type of case, married daughters do not inherit their deceased parent's estate in an intestacy. According to counsel, the magistrate did the best he could in the circumstances and that she was right in treating the widows as separate entities and that whatever was given to them did not cause prejudice to any of the parties.

He prayed for the appeal to be dismissed with costs. The replying affidavit which the respondent herein filed on 27th January 2000 in opposition to the application for confirmation of grant (see paragraph 6 thereof), stated that before the deceased died he had subdivided his land leaving 1.50 acres for himself which he said, should be registered to his youngest son Kiruthi Gachangi when he died and that the applicants had disregarded this fact despite the fact that they were present when the deceased made the said proposal (see paragraph 7 of the affidavit). Then he went on in paragraph 8 to make proposals as to how the land should be distributed; namely;

- (a) Kiruthi Gachangi 1.50 acres
- (b) Mary Wambui Gachangi 2.50 acres
- (c) Peter Chira Gachangi 2.50 acres

(d) Morgan Waiganjo) 2.50 acres

Wanjiku Gachaki) all in equal

Wanjiru Gachangi)

Joseph Kimemia Gachangi) shares

I note in this distribution he said nothing about Peter Waiganjo, Hannah Wanjiru, Alice Wanjiru, Gladys Nduta, Samuel Kirubi, Paul Githinji, John Mbugua, and even himself; Nelson Gathogo.

It is this same respondent who made a statement before the learned Resident Magistrate to the effect that he then wanted the deceased land to be distributed according to the children of the deceased.

I do not think this is the sort of witness whose statement the lower court should have gone along with. In my view, the deceased must have sub-divided his assets amongst his three houses before he died and this is why Nelson agreed with Morgan Waiganjo when the latter stated that the plot at Mutuguta Shopping Centre had been given to him and the said Morgan Waiganjo. Also this is why Nelson did not even contest Morgan's statement that his (Nelson's) mother's house had already shared out the portion given to her to the respective beneficiaries.

This change of position by Nelson Gathogo was greedy and aimed at causing confusion within the deceased family and the magistrate erred in taking Nelson's position.

And since the parties agreed that the deceased had already distributed his property amongst his houses according to his wish and that each of the houses was using its own portion, and that even Nelson's mother's portion had already been distributed amongst her children. Section 40 of the Law of Succession Act would not have applied and in my own view if the learned magistrate had considered all these facts and circumstances she would not have set about to distribute the deceased land afresh.

The distribution of the deceased land by himself amongst his houses during his lifetime as per his wish constituted an oral will and must be respected. Otherwise if that wish was to be disregarded then Nelson should have changed his position as well regarding the plot at Mutuguta Shopping Centre and proposed that it too should be shared amongst all the deceased children. Nelson cannot have his cake and eat it at the same time.

I allow this appeal and set aside the mode of distribution of the deceased's land by the lower court and direct that Letters of Administration intestate of the deceased estate be confirmed as per the original position where the land is distributed amongst the deceased 3 houses in equal shares and the plot at Mutuguta Shopping Centre to Waiganjo and Nelson Gathogo.

And in view of the fact that parties to this appeal are close relatives each should bear his/her own costs of the appeal.

These shall be the orders of this court.

Delivered this 30th day of July, 2002.

D.K.S. AGANYANYA

JUDGE