



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 307 OF 2000

SUSAN NJERI KINYANJUIAPPELLANT

VERSUS

ELIZABETH WAMBUI KAMAURESPONDENT

J U D G M E N T

Kinyanjui Waburi, the deceased, died on 31st January 1998 leaving behind a piece of land known as Loc.5/Kangundu-ini/205 in Maragua District. This is the property at the center of a dispute between the appellant – objector in the lower court, and the respondent who was the deceased step mother.

The lower court record reveals that the deceased had married the appellant in 1956 and that when he suffered from a mental incapacity, the appellant left him in 1968.

That from that year until his death, the deceased was under the care of the respondent, but that when he died, the appellant came round and participated in the burial arrangements.

But when the respondent applied for letters of administration intestate to the deceased estate the appellant objected on the ground that as the deceased widow, her interest in the estate ranked in priority to that of the respondent and that she was the proper person to be granted letters of administration to the deceased estate.

This objection proceedings were heard by the court of the Senior Resident Magistrate at Thika on 12th February, 1999 and 29th September, 1999 and judgment was delivered on 12th November 1999 when the court dismissed the objection saying the objector had no interest in the suit land and that even if she had her interest could not rank in priority to that of the respondent. This is how this appeal came to be filed in this court on 23rd June 2000 in a memorandum of appeal which listed three (3) grounds of appeal.

The grounds were that the learned magistrate erred in law and fact in holding that the interest of the respondent with regard to the estate of the deceased ranked prior to that of the appellant, yet the appellant is the widow of the deceased, that she erred in basing her judgment/decision on Section 39(1) of the Law of Succession Act while evidence adduced in court by the appellant, the respondent and their witness showed that the appellant is the estranged widow of the deceased and that the judgment of the learned magistrate was contrary to the provisions of Section 66 of the Law of Succession Act. In this court on 16th October 2002 counsel for the parties appeared to either urge or oppose the appeal. Counsel for the appellant submitted that being a widow to the deceased the appellant's interest in his estate ran in priority to that of the respondent.

This was because the appellant had 10 children with the deceased and that though she had left him when

he became sick she came to attend and participate in his funeral arrangements and that she became the deceased widow when he died.

That the deceased left a widow and 10 children on his demise and as per Section 39 of the Law of Succession Act the magistrate erred in holding that the respondent's interest ranked in priority to that of the appellant. That this Section did not apply to this case. According to counsel the magistrates judgment was influenced by the fact that the appellant had left the deceased for a long time but added that she had left because the deceased had mental instability and that she had sometime been rescued from the deceased violence by the area chief – otherwise she remained his wife because the two had not divorced.

That though the appellant had left the deceased in 1968 she used to come and see him.

Counsel submitted that after the lower court found that the appellant was the deceased widow it should have allowed her cross petition and appointed her administrator of her late husband's estate. Counsel referred to the lower courts ruling on an application for injunction made by the appellant which recognized the appellant's interest in the suit land. He prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and submitted that the suit land was family land previously registered in the name of the deceased father – Kinyanjui who died before 1958 when land consolidation was taking place in Murang'a area. That it was the respondent who caused this land to be registered in the name of the deceased after he grew up under her care.

That the appellant admitted leaving the deceased in 1968 when he suffered from mental illness and only tried to come back after his death in 1968 and that in such circumstances the magistrate could not reach any other conclusion than the one she did. That at the time the appellant left the deceased she had 4 children – 3 daughters and 1 son. She went to settle somewhere in Makuyu where she lives to date.

That the deceased was left in the care of his step mother – the respondent, and that the two-lived on the suit land to the exclusion of any other person.

That the only son of the deceased died in 1996 when the appellant was away, and, after a burial dispute, he was buried on the suit land.

That the 3 daughters of the deceased were married during the life time of the deceased but that he and the respondent were not involved in these marriages.

That if she got other children after she left the deceased, this was unknown to the deceased, respondent or other clan members; hence she had no dependants during the hearing of the case subject to this appeal.

That she had never cultivated the suit land since she left it in 1968 and that she obtained an order of injunction to restrain the respondent from putting up a new house on this land was simply for maintaining the status quo until the hearing and final disposal of the Succession Cause.

That the learned magistrate heard the case and held the view that the appellant had no interest in the suit land since it was family land.

Counsel supported the magistrates ruling and prayed that the appeal be dismissed with costs. When the appellant testified in the lower court she said when the deceased fell sick the area chief removed her from the location and took her to Makuyu but did not give any reason why the chief took this action.

But during cross examination she said she had been a friend of the deceased for 5 years only up to 1969 the year the chief took her away to Kakuzi.

She, however, alleged though she was away she visited the deceased twice a month and that though he was sick he lived and used to cook on his own.

The respondent also testified and told of how she was married by the deceased father, Kinyanjui, after his first wife died and how she brought up the deceased and his sisters.

She also told of how she caused the deceased to be registered as proprietor of the suit land and/or how the appellant deserted the deceased in 1969 after the latter had fallen sick. She said the suit land was ancestral land not bought by the deceased and that she was entitled to it.

The respondent called 3 witnesses to support her claim. They all agreed that the appellant had left the deceased when he fell sick in 1969 and that she did not return until the date of his burial in 1998. It is true to say that though the appellant had been separated from the deceased for 30 years or more she technically remained his wife up to the time he died because all known customary or legal rights had not been performed to effect a divorce between the two during his life time either under Kikuyu Customs or through a court of law; *see Restatement of African Law – Marriage and Divorce by E. Cotran – page 19 – 20.*

Equally it is true to say that it is a repugnant law, custom or practice or against rules of natural justice for a man or woman to desert the other, particular when that other party has fallen sick, and remain away for 30 years or more only to resurface after that other party has died to claim his/her estate under the pretext that there was no divorce effected between them!

In this particular case influencing factors must have been that apart from the appellant having deserted the deceased for over 30 years, this was family land, the respondent tended to the deceased during his sickness up to the time of his death, apart from having brought him up after his mother passed away and Kinyanjui married her and that she was the one who gathered the fragments of land which were registered in the deceased name; now subject to this appeal.

Note also that this was understood to be ancestral land and that the respondent had lived thereon since her marriage to Kinyanjui, the father of the deceased.

It is also important to take cognizance of the fact that though the appellant was living at Kakuzi, she never visited the land for the purpose of cultivating it though she alleged in her evidence that it remained bushy.

All these factors must have influenced the mind of the learned Senior Resident Magistrate to come to the conclusion that the interest of the appellant on the suit land could not rank in priority to that of the respondent. That the appellant had won an earlier application for injunction to restrain the respondent from constructing a new house on the land was irrelevant to the real issues and could not reverse the magistrates mind to reach a different decision from the one she made.

I dismiss this appeal with costs.

Delivered and dated this 28th day of October, 2002.

D.K.S. AGANYANYA

JUDGE