



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 103 OF 2019

RACHAEL WANJIRU GATHURU.....APPELLANT

VERSUS

1. PETER NDEERE TUMBO.....1ST RESPONDENT

2. ANNIE WAMBUI TUMBO.....2ND RESPONDENT

{Being an appeal against the Ruling of Hon. C. Kutwa - SPM Githunguri dated and delivered on the 19^h day of June 2019 in the original Githunguri Senior Principal Magistrate's Court Succession Cause No. 122 of 2017}

JUDGEMENT

The appellant and the respondents are the children and hence beneficiaries of the estate of Josephine Njeri Mbugua, deceased, whose estate the proceedings in Githunguri Senior Principal Magistrate's Courts Succession Cause No. 122 of 2017 relate. The respondents were appointed administrators of the estate while the appellant was a protestor. The protest was in regard to a parcel of land LR Komothai/Igi/110 which the administrators proposed to transmit absolutely to Charles Wairagi Mbugua, another of their siblings. From the record the land LR No. Komothai/Igi/110 among other assets originally belonged to the deceased's husband Benard Mbugua Tumbo also deceased. It is not disputed that upon his death this particular parcel of land devolved to Josephine Njeri Mbugua (deceased) and Charles Wairagi Mbugua. Upon the death of Josephine Njeri Mbugua the respondents sought to transmit the entire parcel of land to Charles Wairagi. The appellant who during the lifetime of the deceased but since the distribution of her late father's estate had become estranged from her husband and returned to live in her parents' home protested to that mode of distribution and contended that the deceased's share of the property should devolve to her given that she lives and carries out commercial farming on the land. Her argument was that since the title deed issued to the deceased and Charles Wairagi Mbugua did not indicate whether they were to hold the land as joint tenants or as tenants in common a presumption arose under **Section 91 (2) of the Land Registration Act** that they hold the same as tenants in common and as such the share of the deceased was free for distribution to her beneficiaries and more especially herself. The trial Magistrate was not persuaded by this argument and so dismissed the protest and ordered transmission of the entire land to Charles Wairagi Mbugua absolutely thereby triggering this appeal. The grounds of appeal are: -

"1. THAT the Learned Magistrate erred in fact and in law in failing to hold that as the title registered in the names of Josephine Njeri Mbugua (Deceased) and Charles Wairagi Mbugua does not indicate whether the said proprietors hold the same as a joint tenancy or a tenancy in common, a presumption arose by virtue of section 91 (2) of the Land Registration Act that they hold the same as tenants in common in equal shares.

2. THAT the Learned Magistrate erred in fact and in law in failing to appreciate the clear provisions of section 91 (2) which expressly provides that except as otherwise provided in any written law, where the instrument of transfer of any interest in land to two or more does not specify the nature of their right there shall be a presumption that they hold the interest as tenants in common in equal shares.

3. THAT the Learned Magistrate erred in law by relying on the case of Isabel Chelangat =vs= Samuel Tiro (2012) and the principle of survivorship restated by W. M. Musyoka (as he then was) in his book Law of Succession at page 3 which contravenes the new provisions of section 91 (2) that repealed joint tenancies by Act No. 28 of 2016.

4. THAT the Learned Magistrate erred in fact and law in failing to uphold the Appellant's submission that the Deceased and Charles Wairagi Mbugua have equal distinct shares and rights of ownership in the title number Komothai/Igi/110 and that the ½ share belonging to the Deceased ought to be distributed equally among all the beneficiaries.

5. THAT the Learned Magistrate erred in fact and law in failing to make a finding that the Deceased share in land no. Komothai/Igi/110 forms part of the estate of the Deceased.

6. THAT the Learned Magistrate erred in law by advancing a speculative theory that the evidence on record shows that the piece of land was given to Charles Wairagi during the distribution of their father's estate when in fact no such evidence was adduced.

7. THAT the Learned Magistrate erred in law by acting without jurisdiction when he proceeded to make a determination of ownership of land in a Succession Cause instead of referring the issue of ownership to the environment and Land Court for determination.”

The appeal was canvassed by way of written submissions. Counsel for the appellant reiterated his submissions in the lower court that LR Komothai/Igi/110 belonged to the deceased and Charles Wairagi Mbugua and that by virtue of **Section 91 (2) of the Land Registration Act** LR No. Komothai/Igi/110 belonged to Charles Wairagi Mbugua and the deceased as tenants in common and her half share was therefore her free property open for distribution to the appellant. Counsel cited several cases in support of the above submissions. Counsel urged this court to distribute the share of the deceased in LR No. Komothai/Igi/110 among all the children of the deceased and urged this court to specifically allocate the appellant a share of the part she resides in and the said share be registered in her name. Counsel also submitted that given the nature of the dispute concerning the property the trial Magistrate ought to have referred it to the Environment and Land Court as he himself did not have jurisdiction to hear and determine a land dispute.

The appeal is vehemently opposed. In opposing the appeal the respondents filed a replying affidavit in which they depose inter alia that the appellant has been staying on the land in issue not out of entitlement but out of gratuity from Charles Wairagi who is the beneficial owner of the property; that the appellant has no right to carry out farming activities on the suit land and is effectively a trespasser; that contrary to her allegation she only has a single cow on the land as the others belong to Charles Wairagi and further that it is not true that she is likely to be rendered destitute should she be denied the opportunity to continue living on the land. They depose that she has eight acres of land in her matrimonial home and three acres in Gachoire which she inherited from the estate of her late father. They contend that they became *functus officio* once the grant was confirmed and that as the grant has never been revoked this appeal does not lie. In the submissions Counsel for the respondents stated that the appellant in fact consented to the confirmation of grant and the mode of distribution only for selfish reasons to turn around and oppose the mode of distribution. Counsel submitted that the property in contention was the property of their late father and upon his death it was transmitted to their mother (the deceased in this appeal) and their youngest brother with the intention that upon her demise it would devolve upon him as culturally the youngest son inherits the homestead; that the appellant herself benefited from three acres of land from her father's estate whereas the property in contention is 5 acres and the other sons inherited 4 ½ acres and 5.94 acres respectively. Counsel submitted that moreover the deceased in this case got an extra one acre but Charles Wairagi did not. Counsel contended that the presumption of tenancy in common cannot apply in this case. He urged this court to instead find that there existed a constructive trust between the deceased and her youngest son. To buttress his submission Counsel relied on the case of **Hussey v Palmer [1972] 3 ALL ER 744** where the court defined a constructive trust as one imposed by law whenever justice and good conscience require it. Counsel also cited the definition of constructive trust in **Halsbury's Laws of England, 4th Edition volume 48**. Counsel urged that in light of the circumstances of this case, justice and good conscience require the imputation of a constructive trust in the subject property. Counsel further urged this court to find that the trial Magistrate had the requisite jurisdiction to hear and determine the dispute relating to this property.

I have carefully considered the appeal, the grounds thereof, the rival submissions of the Learned Advocates for the parties, the cases cited, the evidence presented before the trial court and the law. As correctly submitted by Counsel for the appellant the title deed issued to the deceased and Charles Wairagi Mbugua does not indicate the nature of their co-tenancy. In order to resolve the dispute between the appellant and the respondents who are her siblings and the administrators of their late mother's estate this court must first determine whether their mother and brother Charles Wairagi Mbugua were registered as proprietors of the subject land as joint tenants or as tenants in common. If they were joint proprietors, then the doctrine of survivorship would apply and the deceased's share/interest would automatically pass to Charles Wairagi which would not be the case if they were proprietors in common.

Section 91 (1) of the Land Registration Act recognizes both tenancies in providing that: -

“91. Meaning and incidents of co-tenancies

(1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.:

Section 91 (3) provides that: -

(3) An instrument made in favour of two or more persons and the registration giving effect to it shall show—

(a) whether those persons are joint tenants or tenants in common; and

(b) the share of each tenant, if they are tenants in common.

As correctly submitted by Counsel for the appellant where the nature of the co-tenancy is not stated **Section 91 (2)** raises a presumption of a tenancy in common. The subsection states: -

(2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.”

This is the section upon which Counsel for the appellant relies to contend that the co-tenancy in the deceased and Charles Wairagi Mbugua

was one of tenants in common and hence the deceased was entitled to half a share of the land and that upon her death the doctrine of survivorship provided in **Section 91 (4) of the Act** does not apply and her share must be treated as part of her estate.

The issue for determination therefore is whether the presumption in **Section 91 (2) of the Land Registration Act** cited by Counsel for the appellant applies to the property in question. It is instructive to note that this is land that devolved to the deceased and one of her children upon the death of her husband. It is also noteworthy that the property was registered in their names before the enactment of the presumption cited by Counsel for the appellant. Whereas that presumption was introduced into law by the **Land Laws (Amendment) Act No. 28 of 2016** which at **Section 29** deleted **Section 91 of the Land Registration Act** and in its place substituted the amendment, the two beneficiaries were registered as proprietors of the property on 19th January 2015 and were issued with a title deed the next day. By then the law as stated in **Section 91 (2) of the Land Registration Act No. 3 of 2012** was: -

“Except as otherwise provided in this Act, if two or more persons, not forming an association of persons under this Act or any other way which specifies the nature and content of the rights of the persons forming that association, own land together under a right specified by this section, they may be either joint tenants or tenants in common.”

That being the law in place at the time and given the relationship between the deceased and Charles Wairagi the trial Magistrate was entitled to conclude that the deceased and Charles Wairagi Mbugua were joint tenants. It then follows that the principle of survivorship operates in the case of this property. That principle is provided for at **Section 91 (4) (b) of the Land Registration Act** which states: -

“(4) If land is occupied jointly no tenant is entitled to any separate share in the land and, consequently –

(a)

(b) On the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly.....”

Upon the death of the deceased therefore, her interest in the land automatically vested in Charles Wairagi Mbugua and it was not available for distribution to anybody else including the appellant. As stated by the trial Magistrate if the deceased’s intention was that upon her demise her share of that land was to be distributed to her children other than Charles Wairagi Mbugua then she would have made all of them co-owners of that particular property. It is also evident that when the deceased distributed the estate of her late husband the appellant did not raise any objection and that she in fact herself benefited from a share of the estate. Given that this was the portion comprising the family home and given that Charles Wairagi Mbugua was her last born son, she more probably than not intended that upon her demise the entire portion would devolve to him in accordance with the Kikuyu custom where upon the demise of the parents the homestead is inherited by the last born son. This is made even more apparent by the fact that she was also the beneficiary of LR No. Gatamaiyu/Gachoire/1994 in which she was a sole proprietor. The appellant must have been aware that she was not entitled to a share of the property transmitted to her mother and brother when she willingly gave her consent to the summons for confirmation of the grant and the mode of distribution and I find it dishonest that she turned back and filed a protest while still acknowledging that she signed the consents. In the upshot **I find that Land LR No. Komothai/Igi/110 was not the free property of the deceased and is incapable of redistribution to any person(s) other than to Charles Wairagi Mbugua with whom they owned as joint tenants.**

Counsel for the appellant also raised the issue of jurisdiction and submitted that the trial Magistrate had no power to determine the dispute between the parties as it was one of ownership. I do not agree with him. The issue before the trial Magistrate arose from the objection raised by the appellant in regard to the distribution of this particular property. It was therefore a succession issue and the trial Magistrate was vested with jurisdiction to hear and determine the same under **Section 48 (1) of the Law of Succession Act** which states: -

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates’ Courts Act, 2015.”

Accordingly, I find no merit in this appeal and the same is dismissed with costs to the respondents. It is so ordered.

Judgement signed and dated at Nyamira this 24th day of February 2021.

E. N. MAINA

JUDGE

Judgement signed, dated and delivered Electronically at Kiambu via Microsoft Teams this 9th day of March 2021.

MARY KASANGO

JUDGE