



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CIVIL APPEAL NO. 199 OF 2017

1. TERESIAH WAMBUI GAKUO

2. DENIS MWAURA GAKUO.....APPELLANTS

VERSUS

REGINA WANGUI MWAURA & OTHERS....RESPONDENTS

(Being an appeal against the judgment and decree of the Chief Magistrate's Court at Kiambu, **S.K. Arome, RM** in the Succession Cause No. 234 of 2015 dated 7th December, 2017)

JUDGMENT

1. This is the first appellate court of the judgment of Chief Magistrate's court Kiambu, Succession Cause No. 234 of 2015 delivered on 7th December, 2017. The duty of this Court as the first appellate court was considered in the case **JACKSON KARO KIVUVA VS. PENINA WANJIRU MUCHENE (2019) eKLR** as follows:-

“14. In GITOBU IMANYARA & 2 OTHERS V ATTORNEY GENERAL [2016] eKLR, the Court of Appeal stated that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

The background of this appeal is set out in the succession cause before the Kiambu Chief Magistrate's Court. That succession cause related to the estate of **STEPHEN GAKUU GITHUA, DECEASED**. He shall henceforth be referred to as the deceased. The deceased died intestate on 25th May, 2015. A petition of grant of letters of administration was filed in that cause by **TERESIA WAMBUI GAKUO (Teresia)** and **DENNIS MWAURA GAKUO (Dennis)**. Teresia was wife of the deceased while Dennis was son of the deceased. The estate of the deceased had the following assets:-

- KIAMBAA/KANUNGUA/55
- KIAMBAA/KANUNGA/2244

2. A grant of letters of administration intestate dated 1st October, 2015 was issued to both Teresia and Dennis. By an application dated 26th October, 2015, they both sought that grant to be confirmed. By that application, they set out how the estate's assets were to be distributed amongst the deceased's beneficiaries.

3. An affidavit of protest to that confirmation dated 2nd November, 2015 was filed by **REGINA WANGUI MWAURA (Regina)**.

4. The grounding of Regina's protest was that one of the deceased's assets namely, KIAMBAA/KANUNGA/55 (hereinafter the property) was held by the deceased, "as trustee pending subdivision of the land" between the deceased, **PETER NJUGUNA MWAURA (Peter)** and **JAMES NJUGUNA GITHUA (James)**.

5. Regina further deposed that the elders made a determination that the property was purchased through the contributions of the deceased, Peter and James. Regina attached to her affidavit of protest a document, which she referred to as the elder's decision, which seems to be in the Kikuyu language. She did not provide a translation of that document into either English or Swahili language. Regina also stated that the

petitioners hereof had failed to disclose that she and her sisters were in possession of the property. Regina stated that her brother's (Peter) portion of the property on his death devolved to their mother until their mother passed away in the year 2002. On her mother's death she was buried on the property. Regina attached a decision of the **KARURI-KIAMBAA LAND DISPUTE TRIBUNAL** dated 4th July, 2001. In that Ruling, the Tribunal stated:-

“After listening to the claimant's complaint and visiting the shamba, this tribunal has ruled that a government surveyor visits the shamba and rectify the boundaries in dispute. The tribunal also recommends that the registrar of lands issues separate title deeds to all parties concerned.”

6. Teresia, in response to Regina's affidavit of protest, filed a witness statement which she later adopted at the oral hearing of the protest.

7. Teresia through that statement said that the deceased and James were brothers. The deceased permitted James to live on the property in attempt to reform James from the abuse of alcohol. James, who has since passed away, was the husband of **Philomena Mugura (Mugure)**. On the other hand, Teresia stated that Peter was a distant relative to the deceased. That on the death of Peter's father, the deceased permitted Peter's mother **Agnes Gacigi Mwaura (Agnes)** to cultivate a portion of the property so that she would have a means of providing for her children. Some of the children of Agnes are Peter and Regina.

8. Teresia stated that it was only after the death of Peter that Agnes and her children began to show an interest in the property by claiming that Peter contributed towards the purchase of the property. Further, she stated that Peter did not lay claim over the property during his life time.

9. Regina responded to Teresia's statement by filing a further affidavit dated 16th June, 2016.

10. Regina attached an alleged agreement allegedly made on 4th June, 1964. That document is entitled “Joint Contributions”. Regina deponed that after the property was purchased, the deceased, Peter and James subdivided the property into three portions and marked the boundaries with live fence. That, without the knowledge of Peter and James, the deceased transferred the property into his name and was subsequently issued with a title deed. In reference to the decision of elders, Regina stated that that decision found the entitlement of the property as follows:-

a. Stephen Gakuo's (deceased) family 1.5 acres.

b. James Njuguna's family 1.2 acres.

c. Peter Njuguna's family 1.2 acres.

11. Regina deponed that the deceased was dissatisfied with that decision and therefore proceeded to file a case before the High Court being Nairobi HCCC No. 112 of 1988 which suit was subsequently withdrawn by the deceased.

12. The protest proceedings were by viva voce evidence.

13. Regina testified in line with her deposition in her affidavit and reiterated that the deceased was left with the documents of title of the property and without the knowledge or consent of Peter and James the deceased obtained title in his name of the property. She reiterated that:-

“Stephen Gakuo was a trustee of land No. KIAMBAA/KANUNGA/55 for Peter and James.”

14. She was cross examined on how she obtained the documents which she alleged showed that three, Peter, James and the deceased contributed the purchase of the property. She stated that she found the documents in a box that belonged to Peter after Peter's death.

15. Teresia also testified and began by adopting the statement she made. She denied that Peter and James contributed to the purchase price. She also denied that the property was subdivided into three portions.

16. The trial court, by the judgment dated 7th December, 2017 determined as follows:-

“All the witnesses' evidence is that the land is sub-divided into three portions and that each resides in his or her portion. Guided by the joint contribution dated 4th June, 1964 and the witnesses' evidence, I order the land be subdivided (sic) into three portions as follows:-

1. Stephen Gakuo contributed Kshs.1,986 to get 1.5 ha.

2. Peter Njuguna Kshs.1,300 to get 1.3 ha, and

3. James Njuguna Kshs.1,150.00 to get 1.1 ha.

Total 3.9 ha”

17. Teresia was aggrieved by that decision and therefore, filed this appeal. The appeal is opposed by Regina.

18. Teresia has raised 16 grounds of appeal. Those grounds can be clustered together and they call on this Court to determine two main issues, that is:-

a. Did the trial court have jurisdiction in hearing a succession cause to determine whether a trust existed?

b. If the answer to (a) above is in the affirmative, was a trust established by Regina?

19. On issue (a) above, it requires an examination of what Regina brought before the trial court. Regina argued that she, as the sister of Peter, was entitled to inherit Peter's portion of property. Regina's case was that the deceased obtained title of the property in 1975. It is on the basis of the property being registered in the name of the deceased and on the passing away of the deceased that his widow Teresia and his son Dennis, petitioned for grant of letters of administration intestate. It follows that, unless Regina's claim was that she was a beneficiary of the deceased's estate, which was indeed not her claim, her claim fails for what she sought was not a claim under the **Law of Succession Act, Cap 160**. This indeed is clear from the affidavit of protest filed by Regina. Regina's claim was that her late brother, Peter contributed towards the purchase of the property and she was entitled, as his sister to get his portion. No claim, however, was made by the estate of Peter. Regina therefore invited the trial court to determine, firstly, that the deceased held a portion of the property in trust for Peter and secondly, for determination that the portion held in trust for Peter, she, Regina, was entitled to inherit.

20. Was the trial court competent to determine the issue of trust under a Succession Cause? I dare say that the trial court could not make such a determination in a Succession Cause. The jurisprudence of our courts are clear on that that point. In this regard, I refer to the case of ***In re ESTATE OF SOLOMON MWANGI WAWERU (DECEASED) (2018) eKLR*** thus:-

"12. The duty of the Probate Court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See *MURIUKI MUSA HASSAN VS. ROSE KANYUA MUSA & 4 OTHERS*). In *ALEXANDER MBAKA VS. ROYFORD MURIUKI RAUNI & 7 OTHERS [2016] eKLR* the Court held that:-

'It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.'

13. Therefore, claims by third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased are determined through settlement or where inapplicable through suits against the administrator(s) of the estate and not through an objection like the one before court."

21. It is clear from the above case that Regina's rights to inherit from the deceased's estate had not crystallised, and that there ought to have been initially a determination of trust in another normal civil suit and if she succeeded to prove that alleged trust, she then could enforce that determination under the succession cause.

22. To clarify even much more, the need of Regina to have determined in another suit, her claim on trust is further discussed in the case of ***In re SOLOMON MWANGI WAWERU (DECEASED)*** (supra) as follows:-

"17. Musyoka J in the *RE THE ESTATE OF DORCAS WANJIKU* had this to say in respect of creditors to an estate;

'Creditors, as mentioned earlier, are neither heirs nor survivors nor beneficiaries or dependants. They ought not to be listed in the petition as survivors, except in the column of liabilities. Ideally creditors should wait for the heirs, beneficiaries, survivors and dependants to apply for grant, failing which they, the creditors, would then become entitled to have citations issued. Where grant is not sought after they have issued citations, they should then ask the court to allow them to petition for a grant to be made to them. Where the heirs, dependants, survivors and beneficiaries obtain the grant, the creditors should, after the appointment of the administrators, prove their claim to the administrators, and if the administrators fail to honour their claims then move the court appropriately. Where the claim is comprised in a valid decree of a competent court, the creditor will seek to enforce the decree against the administrators, preferably in a civil action filed in the civil court.'...

23. Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties..."

24. It is clear from the above that, the mandate of the probate court under the Law of Succession Act is limited. See the case of ***High Court Succession Cause No. 864 of 1996 (2015) eKLR*** as per *Musyoka, J.* the learned Judge in that case stated that the probate court's mandate does not extend to determining issues of ownership of property or declaration of trust. I am persuaded by that holding.

25. It follows that my determination of issue (a) identified above that the trial court erred to have determined the issue of the alleged trust raised by Regina.

26. On issue (b), I was called upon to determine whether indeed Regina established a trust. Although I have found the trial court exceeded its mandate by determining trust, I will proceed to consider whether trust was indeed established because the trial court by its decision did so determined.

27. Regina relied on an elder's decision dated 4th January, 1988.

28. That determination is in Kikuyu language. Regina did not provide a translation either in English or Swahili. The trial court did not state how it was able to follow the content of that exhibit. The **Constitution of Kenya** under Article 7 provides that the language of the Republic is Kiswahili and the official languages of the Republic are Kiswahili and English. The exhibit dated 4th January, 1988 is of no evidential value having been in Kikuyu language and the trial court erred to have allowed its production in evidence.

29. Regina also relies on the Land Dispute Tribunal decision dated 4th July, 2001.

30. The jurisdiction of the **Land Dispute Tribunals** was set out under **Section 3** of its Act (now repealed) which provided:-

“3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) The division of or the determination of boundaries to, land including land held in common;

(b) A claim to occupy or work land, or,

(c) Trespass to land, shall be heard and determined by a Tribunal established under section 4.”

31. My comment on the decision Regina seeks to rely on are two. Firstly, the Land Disputes Tribunal did not, and I emphasise, did not have jurisdiction to determine ownership of land. Section 3 reproduced above makes this abundantly clear. See the case of **ISAAC LISALITSA ALUMASA VS. PAUL LUTEYA LUVASIA (2019) eKLR** as follows:-

“In this case, the tribunal meandered beyond its boundaries. In M'MARETE V REPUBLIC & 3 OTHERS, Court of Appeal, Nyeri, Civil Appeal 259 OF 2000 [2004] EKLR the court held:-

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

32. My second comment is that the Tribunal's decisions had no power to be acted upon until their adoption before the Magistrate's court as an order of that court. In this case, there was no evidence produced on such adoption.

33. It follows that the elder's decision and the Land Dispute Tribunal decision was of no evidential value at the trial.

34. What is then left for consideration in evidence is the alleged contribution agreement dated 4th June, 1964.

35. That exhibit is a very poor copy. I can hardly read the most part of it. It is for that reason that I find it incredible that the trial magistrate was able to decipher it and come up with the figures that the court stated that the three parties contributed. Those figures were not spoken of by any witness and it follows that the trial court obtained them from the alleged contribution agreement.

36. I reject that document in its entirety. This is because it is alleged to have belonged to Peter and it is a wonder that Peter did not use it in his life time to lay claim over the property. The other reason I reject it, and I find it may not have been a genuine document, is because when Regina first approached the trial court with her affidavit of protest, she did not allude to that agreement. It was only after Teresia filed her statement opposing Regina's claim that Regina alleged there existed this agreement.

37. The other reason I find that Regina failed to prove her claim to the trust was because her evidence was based on a lot of conjecture that Peter contributed money for purchase of the property. She did not mention how much, towards the purchase of the suit land and if indeed there was such contribution from 1964 until his death in 1985, Peter did not inquire of the whereabouts of his title to that property. What is also clear is that Peter, in his life time, did not reside or use the property. Then, it follows Peter did not lay claim of the property and therefore, there did not exist a trust as alleged by Regina. Trust can be proved as held by the Court of Appeal in the case of **PETER NDUNGU NJENGA VS. SOPHIA WATIRI NDUNGU (2000) eKLR** :-

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied. See AYOUB VS. STANDARD BANK OF S.A [1963] E.A. 619 AT PP 622, 623.”

38. What I find convincing is that on the death of Regina's father, the deceased gave Regina's mother, Agnes, the right to cultivate part of the property in order to provide for her family, since she was widowed. Agnes had no right to claim ownership of that land.

DISPOSITION

39. It is in view of the above discussion that I find the appeal does succeed. I therefore grant the following orders:-

a. This appeal is allowed with costs to the appellant.

b. The judgment and decree/order made on 7th December, 2017 of **Chief Magistrate's court Kiambu, Succession Cause No. 234 of 2015** be and is hereby set aside, and it is substituted with an order dismissing the protest to confirmation of grant filed by **Regina Wangui Mwaura**.

c. This matter is hereby remitted back to the Chief Magistrate's Court Kiambu for the hearing on priority basis of the application for confirmation of grant dated 26th October, 2015.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Appellant: Mr. Muchiri H/B for Mr. Gachoka

For Respondent: Mr. Manyende

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE