



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.13 OF 2020

IN THE MATTER OF THE ESTATE OF M'MUGWIKI ITONGA -DECEASED

M'MURITHI M'MUGWIKA.....APPELLANT

AND

MATHU MUGWIKA.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. Hannah Ndung'u (CM) in Meru Succ Cause No. 229 OF 2016 dated 16.01.2020)

JUDGMENT

1. The Appellant being the petitioner in the trial court, applied for confirmation of grant of the deceased's estate in **LR. NO. NYAKI/MULATHANKARI/694 (Suit land)** exclusively to himself on the ground that he had purchased the asset and caused it to be registered in his late father's name.
2. On 29th June, 2017, the Respondent filed an affidavit of protest on the grounds among others that he was in total occupation of the suit land and that Petitioner was not entitled to that estate.
3. The trial court directed the parties to file witness statements and submissions which they dutifully filed and I have analysed the the parties 'respective cases as hereunder.

Petitioner's case

4. Petitioner contended that he bought the suit land and caused it to be registered in his late father's name. It was his evidence that his late brother M'Ikiugu M'Mugwika (deceased) was given land at GIAKI and that his family is settled there. He stated the Respondent settled at CIOTHIRIA area and his other brother ELIJAH KIGUNDA got another of their father's land at THUURA area. He proposed that the Respondent and other brother ELIJAH KIGUNDA jointly share the land in THUURA and the suit land be distributed to him. His witness supported his case that he had purchased the suit land.

Protestor's case

5. It was Protestor's case that the family settled in a 12-acre land in CIOTHIRIA area but Petitioner expelled them from the said land after the death of their father and Respondent settled on the land in CIOTHIRIA. He urged that the suit land be distributed solely to him since Petitioner having retained the 12 acres at CIOTHIRIA and their other brother ELIJAH KIGUNDA had taken over deceased's other asset in **LR. NYAKI/THUURA/921**.
6. Deceased's brother Muchai M'Itonga denied the Petitioner's contention that he bought the suit land and registered it in the name of the deceased. He faulted the Petitioner for expelling his siblings from the land in CIOTHIRIA and holding it to their exclusion. Deceased's daughters Jeniffer Makena Kathurima and Kanyua Kauro similarly accused the Petitioner of expelling his siblings from the land in CIOTHIRAI. They renounced their right to the estate and urged that the suit land be distributed to the Respondent who had not benefitted from deceased's estate. Elijah Kigunda, a son of the deceased similarly accused the Petitioner of expelling them from the land in CIOTHIRAI. He confirmed he had settled on deceased's land **LR. NYAKI/THUURA/921** and equally urged that the suit land be distributed to the Respondent who had not benefitted from deceased's estate.

7. In a judgment dated 16th January, 2020, the trial court ruled that the Petitioner had benefitted from the land in CIOTHIRIA and had not proved that he had bought the suit land. The court this distributed **LR. NYAKI/THUURA/921** to Elijah Kigunda and **LR. NO.**

NYAKI/MULATHANKARI/694 to the Protestor.

8. Being dissatisfied with the trial court's judgment, Appellant has appealed mainly on the ground that he had proved that the suit land was his.

Analysis and Determination

9. I have considered the appeal in the light of the evidence on record and submission on behalf of the parties.

10. Concerning **LR. NO. NYAKI/MULATHANKARI/694**, Appellant argued that he bought the said land with his 3 siblings and deceased's brother disputing that fact. The issue is whether Appellant proved his claim on the balance of probabilities. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

11. The question as to what amounts to proof on a balance of probabilities was discussed by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

12. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

13. From the evidence on record, I find that the Respondent and his witnesses cast doubt on the Petitioner's evidence and that the trial court rightly found that the Appellant had not proved on a balance of probability that he had bought the suit land.

14. Although the parties did not tender any documentary evidence, Elijah Kigunda conceded that **LR. NYAKI/THUURA/921** where he has settled belonged to the deceased.

15. I therefore find that the trial magistrate's verdict that **LR. NO. NYAKI/MULATHANKARI/694** and **LR. NYAKI/THUURA/921** formed part of deceased's estate was well founded.

16. Throughout the trial, the Appellant did not dispute the Respondent's case which was well corroborated by his siblings that Appellant expelled his siblings from the 12-acre land in CIOTHIRIA which has been identified as **NYAKI/GIAKI/331** and is holding it to their exclusion.

17. Consequently, I am persuaded that the trial magistrate appropriately ruled that unlike his siblings, the Appellant had already benefitted from deceased's estate and was therefore not entitled to a share of the residue of the estate.

18. From the foregoing analysis, I have come to the conclusion that this appeal has no merit and the same is dismissed with costs to the Respondent

DATED THIS 09TH DAY OF DECEMBER, 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

For Appellant - Mr. Anampiu for Gikunda Anampiu & Co. Advocates

For Respondent - Mr. Munene for Okubasu, Munene & Kazungu LLP Advs