



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 122 OF 2019

(Being an appeal from the judgement of Hon.L.Ambasi (Mrs) CM delivered on 4th July 2019 in Meru Chief Magistrate's Court Succession Cause No.232 of 2016 consolidated with 250 of 2016)

IN THE MATTER OF THE ESTATE OF RUTH KARAMBU M'MUGAMBI (DECEASED)

AND

JANE KANYUA GITONGA (Suing as the

legal representative of

FREDRICK GITONGA MUGAMBI).....1ST APPELLANT

ERASTUS MBAABU M'MUGAMBI.....2ND APPELLANT

VERSUS

ISAAC MATHIU M'THIRARI.....RESPONDENT

JUDGEMENT

1. The Appellants being the Objectors in the trial court opposed the Respondent/Petitioner's application seeking to have the estate of the deceased distributed as per the will annexed to the petition.
2. On 12th of July 2019 advocates for the parties entered into a consent to the effect that the deceased had the capacity to make the will dated 13th October 2015, and that she had it properly executed as per the law and the said will was properly witnessed and attested to.
3. Mr Mutunga Advocate for the Objectors/Appellants confirmed the validity of the will save that they were disputing the contents of the will.
4. When the application for confirmation came up for hearing on 6th May 2019 parties agreed to file and exchange submissions. Based on the pleadings on record the trial Magistrate delivered the judgement that is now contested by the Appellants herein.
5. The judgement of the trial court delivered on 4th July 2019 was as follows:
 - a) *That the consent order dated 12th July 2018 remains in force*
 - b) *That the objection by the objector be and is hereby dismissed*
 - c) *That the grant be and is hereby confirmed as prayed in the summons filed on 13th August and the Estate of the Deceased be distributed as set out in her Will dated 13th October 2015*
 - d) *That each party to bear their own costs to the Respondents*
6. The Appellants grounds of appeal in the Memorandum of Appeal are:
 - a. That the learned chief magistrate erred in law and fact by failing to appreciate the facts and the law applicable in the deceased

estate hence arriving at a wrong judgement and decree.

b. The learned Chief Magistrate erred in law and fact by failing to appreciate that the deceased had been given a life interest by the Appellants and not her husband hence arriving at a wrong judgement.

c. The learned Chief Magistrate erred in law and fact by failing to appreciate the Appellant's sworn affidavit and written submissions hence arriving at a wrong judgement/decree.

d. Ground no.4 is similar to ground no.1 in substance.

e. That the honorable court erred in fact and in law by finding that the deceased had made a valid will hence arriving at a wrong judgement.

f. That the honorable court erred in law and fact by finding the consent entered by the parties was an admission of the content of the deceased will hence arriving at a wrong judgement. That the learned Magistrate erred in law and in fact by finding out that the deceased life interest originated from the objectors and not her husband.

g. That the Magistrate's court erred in fact and law by failing to appreciate that the parties contested the abilities of the deceased to will out their property under her will hence arriving at a wrong judgement.

h. That the honourable court erred in fact and law by failing to consider the origin of the deceased interest on the Appellant's suit land.

7. Based on the above grounds the Appellant prayed for:

a. That the Appellants appeal be allowed and the lower court judgement be set aside.

b. That the court do expunge/remove the Appellant's land on the deceased will.

c. A declaration that the deceased held a life interest over the Appellant's land

d. Cost of the appeal

8. Directions were taken on 28th January 2020 that this appeal be canvassed by way of written submissions.

9. The Appellants submitted that they agreed that the deceased had made a will since she had the capacity to and it was properly executed. However, they contested the contents of the will for the reasons that the deceased had only a life interest in the properties she sought to bequeath. She had no legal right to bequeath the shares she had on the land parcels since she was not an owner.

10. The Appellants were the ones who had given their mother life interest on their properties, **L. R No. Nyaki/Kithoka/1809 and 1810** and that the life interest was not obtained from the deceased husband as the trial Magistrate seemed to imply in her judgement. Thus, the trial court mistakenly adopted their consent to mean that the will was not contested.

11. It was argued by the Appellants that the court failed to appreciate the regime under which the deceased got her interest on the Applicants land. The court was faulted for failing to determine whether the deceased had title to the suit land. How the deceased obtained interest on the suit land from the Appellants, whether the Appellants gave the deceased life interest and the applicable law when the giver of the life interest survives the one given the interest. The Appellants further argued that the court was wrong in finding that the will was valid despite them questioning the contents of the will and the fact that the deceased having only life interest could not will that interest to 3rd parties. The Appellants further argued that the court did not make the parties to sign the consent and the records show that there was a dispute as to content of the will.

12. The Respondent submitted that there is a recorded consent between the parties where both parties agreed that the will was valid. The Appellants did not provide any grounds challenging its contents. In her will the deceased bequeathed the Suit Lands which the Respondent evidenced that they belong to the deceased. Hence, the contention that the deceased was only given life interest must fail.

13. The Respondent relied on the case of **Geoffrey M. Asanyo & 3 others v Attorney-General [2020] eKLR**, where the Supreme Court held:

“Adoption of a consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio. This Court having ruled that the Judgment of the Court of Appeal (dated 13 November 2015) was a nullity; and that Court having not formally adopted the consent by parties, was not yet functus officio.”

14. The Respondent submitted and urged the court to be slow in moving to interfere with the finding of fact by the trial court unless it was based on no evidence or based on misapprehension of the evidence or that it has been shown that the trial court acted on a wrong principle of

the law in reaching the finding. To this end the authorities of **Sumaria & another v Allied Industries Limited [2007] eKLR** and **Musera Jelita Makokha Mwechelesi & another [2007] eKLR** were relied upon.

15. As the first appellate court, this court is to evaluate, assess and analyze the extracts on the record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

16. Having considered the judgement of the trial court, the grounds of appeal, the submissions by the parties herein, the issues for determination are:

- a. Whether the judgement of the trial court was properly based on the consent recorded by the advocates on 12th July 2018.
- b. Whether the deceased had life interest or absolute interest on LR.No Nyaki/Kithoka/1809 and 1810.
- c. Whether the consent recorded on 12th July 2018 validated the will annexed to the petition herein.
- d. Whether the Appellants were capable of giving the deceased life interest under the Law of Succession Act.

17. A brief background to the dispute herein is that the deceased Ruth Karambu M'Mugambi filed a Reference in Land Disputes Tribunal case No.11 of 2000 against her sons Fredrick Gitonga Mugambi and Erastus Mbaabu Mugambi regarding Land Parcel No.Nyaki/Kithoka/327 which was later subdivided and resulted into LR.Nyaki/Kithoka/1809 and 1810.From the proceedings in the tribunal the deceased said that she bought the land in question and it was registered in the name of her son Erastus Mbaabu M'Mugambi.

18. She complained that the said son was now not regarding her as his mother and she wanted her land back so that she can subdivide it to her two sons. She wanted 2 acres each from the portions that were identified for the two sons so that she could cultivate and plant crops for herself and her unmarried daughter Alice Kathure.

19. Erastus Mbaabu M'Mugambi confirmed in those proceedings that the land was bought by his father and registered in his name. That in 1993 he subdivided the land into two portions for himself and his brother Fredrick Mugambi and when his mother started complaining she was shown a part of the land where she was staying at the time of the reference. He also confirmed that it his brother who went to bring Alice Kathure back home after the death of her husband. He confirmed that it his uncle who identified a portion of the land for the deceased.

20. Fredrick Gitonga Mugambi confirmed that Ruth Karambu his mother bought the parcel of land in 1965.It came out from the proceedings at the tribunal that prior to the reference the was an agreement that had been entered into in which Erastus Mbaabu was to give the deceased 3.50 acres whereas Fredrick Gitonga was to give his mother the deceased 3.00 acres and their sister was to get 1.50 acres. When they failed to fulfill the promise the deceased went back to the tribunal.

21. After listening to the many witnesses who testified at the tribunal, it was decided that the deceased should get life interest on the portion she is working on and that she should be given 2.0 acres from LR.Nyaki/Kithoka/1809 owned by Fredrick Gitonga M'Mugambi and 2.0 acres from LR.No Nyaki/Kithoka/ 1810 owned by Erastus Mbaabu M'Mugambi.

22. From the history given above it cannot be true as stated by Erastus Mbaabu M'Mugambi in his affidavit sworn on 11th May 2018 that he and his bother bought the suit land. Even his Late Brother Fredrick Gitonga confirmed that it is their mother Ruth Karambu who bought the land in 1965.

The finding of the tribunal which award was adopted by the court supports the contents of the will of the deceased that she was to have life interest on the portions she was using prior to the award being made and 2.0 acres each from the portions of Erastus Mbaabu and the Late Fredrick Gitonga. The award in LDT Reference No.11 of 2000 was then confirmed as a judgment of the court on 21/7/2005 and no appeal has ever been preferred.

23. The Land Disputes Tribunal's jurisdiction under Act No 18 of 1990(now repealed) provided for:

- a. Division of or determination of boundaries to land including land held in common
- b. A claim to occupy or work land or trespass

24. That mandate did not include making awards as to life interest in estates of deceased persons. The proceedings purported to give life interest to the deceased in the portions of land where she was using and 2 acres each from the Appellant's portions. Life interest cannot be conferred on a person against suit property of another living person. The jurisdiction to confer life interest is vested in the Magistrate's court and the High court under Sections 48 and 47 respectively of CAP 160 Laws of Kenya.

25. It is not in dispute that the suit land was bought by the deceased in 1965 and registered in the name of Erastus Mbaabu as a customary trustee. It would be a great injustice to make a finding that the actual owner of the suit land is conferred with only a life interest over her own land.

26. I do agree with the trial Magistrate's observation and my brother Justice Gikonyo's holding in **RE Estate of M'Kailibia M'Itaru alias Kailibia Itaru(deceased) [2017]eKLR** that the Court of Appeal decisions currently favours a distinct share of the estate given to a surviving spouse rather than subjecting the entire estate to life interest and that part of Section 35 of the Law of Succession Act is arbitrary

and discriminatory and in utter violation of the Constitution of Kenya 2010.

27. From the certificates of official search for parcels of land LR.No.Nyaki/Kithoka/1809 name and address of the proprietors are Ruth Karambu M'Mugambi 2/5 share and Fredrick Gitonga M'Mugambi 3/5 share and LR.No.Nyaki/Kithoka/1810 the name and address of the proprietors are Ruth Karambu M'Mugambi 1/3 share and Erastus Mbaabu M'Mugambi 2/3 share. The interests of the proprietors are very specific in the register and cannot be construed as life interest for the deceased Ruth Karambu. In the circumstances the deceased had the capacity to make a will and bequeath her share of the 2 parcels of land as shown in paragraph 6 of the last will and testament of Ruth Karambu M'Mugambi annexed to the affidavit of Isaac Mathiu M'Thirari sworn on 13th August 2018 as IMT1.

In consideration of the above analysis, I do find that the appeal herein has no merit and the same is dismissed with costs to the Respondent.

HON. A. ONGINJO

JUDGE

JUDGEMENT DATED AND DELIVERED AT MERU VIA EMAIL THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON. A. ONGINJO

JUDGE