



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL DIVISION**

**CIVIL APPEAL NUMBER 87 OF 2018**

**BETWEEN**

**JAMES KINYANJUI KINGORI.....APPELLANT**

**AND**

**LUCY WAIRIMU CHEGE.....RESPONDENT**

***(Being an appeal from the ruling of Hon. C. A Otieno Omondi (Principal Magistrate) in Thika CMCC Succession Cause no 421 of 2012 delivered on 23.7.2018)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. This appeal arises from the trial court's ruling dated 23<sup>rd</sup> July 2018 in respect of the summons dated 31<sup>st</sup> October 2014 in which the applicant (who was the administrator in the proceedings) sought to have the grant of letters of administration issued to him on 19<sup>th</sup> February 2014 confirmed. The applicant in the court below is the appellant in this appeal. The respondent herein objected to the confirmation of grant vide her affidavit of protest sworn on 15<sup>th</sup> December 2014. Following directions given by the court, the protest was heard by way of *viva voce* evidence. The dispute revolved around L.R No. CHANIA/MATAARA/1103 which was in the name of the deceased.

2. After hearing both parties in the matter, the learned trial court made a finding that the only property in dispute which had remained undistributed was CHANIA/MATAARA/1103 registered in the name of Nduati Thumbe (deceased) should go to Ishmael Mungai (who was now deceased) and was survived by his wife, Lucy Wairimu Chege, the protestor. The reason given by the trial court was that it would have been unjust to the protestor if the said parcel of land had been allocated to Margaret Wairimu Benson Kamau as per the summons for confirmation because Benson Kamau had already received his share from his father, the deceased.

**The Appeal**

3. Being aggrieved by the said ruling, the appellant brought this appeal which is premised on the following 4 grounds:-

**i. That the learned magistrate erred in law and fact by ordering that the objector be awarded the whole parcel of land [known as] CHANIA/MATAARA/1103 as the sole beneficiary thereby arriving at [an] unjust finding.**

**ii. That the learned trial magistrate erred in law and fact by failing to appreciate that land parcel CHANIA/MATAARA/1103, a property of Benson Kamau is not/has never been part of the estate of the late Nduati Thumbe therefore awarding the objector the entire parcel of land [known as] CHANIA/MATAARA/1103 as the sole beneficiary automatically disinherits/denies the family of the late Benson Kamau of his late father's property (inheritance) thereby arriving at a wrong decision.**

**iii. That the learned trial magistrate erred in law and fact by erroneously awarding the whole parcel of land [known as] CHANIA/MATAARA/1103 to the objector as the sole beneficiary instead of awarding her the 1.5 acres initially given to her by the area chief and the late Benson Kamau, thus arriving at a wrong decision.**

**iv. That the learned trial magistrate erred in law and fact by placing undue weight to frivolous and vexatious arguments by**

**the protestor while totally ignoring the argument of the petitioner thereby arriving at a wrong decision.**

4. The appellant therefore prays that his appeal be allowed with costs.

5. As this is a first appeal, this court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view to reaching its own conclusions in the matter, save to remember and make room for the fact that it does not have the opportunity of seeing and hearing the witnesses who testified during the trial. It is also worth remembering that unless this court finds that the findings of the learned trial magistrate are unsupported by the evidence or that the same were based on misapprehension of the law, it would not disturb the trial court's findings. Generally, see *Peters versus Sunday Post Limited [1958] EA 424*.

#### **The Respondent's (Protestor's) case**

6. The respondent, Lucy Wairimu Chege testified as PW1 and told the court that the deceased, Nduati Thumbi was her father-in-law while Benson Kamau was a brother to her husband. She also testified that her husband whom she married in 1985 died in 1999, leaving her with 2 children. She got 2 other children thereafter with one Ishmael and settled on land parcel 1103 which belonged to the deceased.

7. The respondent also testified that the deceased had earlier on subdivided his original parcel of land into 1102 which was allocated to Benson Kamau. The said parcel measured 8½ acres as per Pexhibit 1. Parcel number 1103 which remained in the name of the deceased measured 4.10 acres as per Pexhibit 2. The respondent further testified that her traditional marriage to Ishmael was confirmed by the slaughtering of 2 goats and 2 rams in addition to payment of Kshs.10,000/- and other gifts like blankets and sheets for her father. Thus, according to the respondent there was the Ngurario ceremony as per Pexhibit 3. The respondent produced other photographs showing that she and the appellant's family were one during all ceremonies for example death and marriage.

8. It was also the respondent's case that when Ishmael died she did not get to know of the death because she was away working as a tea picker, and that he was not buried on the parcel of land that belonged to him. Instead, he was buried in Limuru on the land of James Kinyanjui who testified as the first witness for the appellant. That the alleged inheritance of Ishmael, being 1.5 acres in Limuru actually belonged to James Kinyanjui. Her testimony was that the deceased's original land being CHANIA/MATAARA/605 was divided into two portions CHANIA/MATAARA/1102 given to the appellant and CHANIA/MATAARA/1103 which was meant for Ishmael, the respondent's husband. She also testified that at the time the deceased subdivided his original land into two portions, her husband was serving a jail term following conviction for a traffic offence. To drive the point further home, the respondent produced evidence that she and Ishmael had planted tea on parcel number 1103 but that the appellant's family, through Margaret and her children, wants her and her children out of the said parcel of land. In cross examination, the respondent reiterated her evidence in chief and denied that, her husband was a Moslem. In re-examination, the respondent testified that though she had been conferred to cultivate only 1½ acres out of the 4.10 acre of parcel number 1103, she was entitled to the whole of the 4.10 acres.

9. PW2 was Peter Kimani Chege, one of the respondent's younger brothers. He confirmed that Ishmael Mungai Kingori paid dowry for the respondent on 1<sup>st</sup> July 1995 and in 2001 respectively. PW2 stated that he was present at both ceremonies. During cross examination, PW2 confirmed that the respondent still lives on the land where her late husband Ishmael left her.

10. Joseph Kariuki Chege testified as PW3. He is another of the respondent's younger brothers. He corroborated the testimony given by PW2 regarding payment of dowry for the respondent. He added that the respondent's in-laws had continually harassed her. He also testified that from 1985 when the respondent married Ishmael, she had never left her matrimonial home at Gatunguru.

#### **The Appellant's Case**

11. The appellant's case was supported by three witnesses. W1 was James Kinyanjui Kingori who told the court that the deceased had 2 wives. Emily Njoki and Elizabeth Wanja respectively. W1 was a child of the first house which had 6 children.

- Benson Kamau (Deceased)
  
- Nelly Njeri
  
- Esther Wanjiku
  
- James Kinyanjui Kingori
  
- Elizabeth Waceke
  
- Ishmael Mungai (deceased)

while the children of the second house were

- Njeri
  
- Gabriel Mukora

- John Kamau
- Fred Mungai and
- Wambui

12. He also testified that when Benson Kamau took out the Grant of Letters of Administration Intestate to the deceased's estate, he did not include Margaret Kamau his wife who should be given the disputed parcel of land since according to W1, the said parcel of land was given to Benson Kamau by the deceased. W1 denied any knowledge of the respondent and alleged that Ishmael Kamau was never married. He also stated that though the respondent was only a tea picker on parcel 1103, the area chief gave her a portion of it because she had nowhere else to stay.

13. During cross examination, W1 testified that the deceased's original land being CHANIA/MATAARA/605 was subdivided into two portions, 1102 and 1103 with 1102 being registered in the name of Benson Kamau while 1103 was retained in the deceased's name. He also testified that the deceased had another parcel of land in Limuru where he (W1) lives and where he buried Ishmael Mungai. W1 also confirmed that during the subdivision, Ishmael was not at home as he had disappeared. W1 did not however produce any evidence to confirm that the whole of the original CHANIA/MATAARA/605 comprising the resultant titles 1102 and 1103 was given to Benson Kamau. He also confirmed that in the papers filed by Benson Kamau for Grant of Letters of Administration intestate, the respondent is listed as a beneficiary of the deceased's estate by virtue of being a daughter-in-law. He also confirmed that the respondent lives on 1103, and further that Ishmael had a right to inherit from his father. He further testified that he was the one who buried Ishmael and that the respondent did not attend Ishmael's funeral.

14. W2 was Gabriel Mukora Kingori, from the deceased's second house. He denied knowing the respondent. He also alleged that during the 3 years before his death, Ishmael was sick and he left Mataara where he used to live and went to live in Limuru with W1. He alleged that Ishmael had no wife. He also alleged that parcel 1103 should be given to the family of Benson Kamau.

15. It was also W2's testimony that, before the deceased died, he had instructed Benson Kamau to give Ishmael land when he (Ishmael) returned home since Ishmael was absent during the subdivision. He agreed however that according to the papers in court, the respondent was shown as a beneficiary. He also alleged that Ishmael had been given land which he sold but that Benson Kamau redeemed he same by refunding the money to the buyers. He corroborated W1's testimony that it is the chief who gave parcel 1103 to the respondent.

16. Margaret Wairimu Kamau testified as W3. She told the court she was the wife of Benson Kamau Kingori son of Nduati Thumbi (deceased). She told the court that Ishmael did not have a wife and that she did not know the respondent. It was her further evidence that the respondent went to the deceased's home a year after Ishmael died.

17. In cross examination, W3 testified that before he died and during subdivision the deceased instructed Benson Kamau to give land to Ishmael when the latter came out of prison. As to how the respondent came to be in possession of a portion of 1103, W3 stated that the same was given to the respondent by the chief. W3 also confirmed that when the deceased subdivided his original title CHANIA/MATAARA/605 into two portions, namely 1102 and 1103, he caused 1102 to be registered in the name of Benson Kama while 1103 remained in his (deceased's) name. She alleged that Ishmael sold his own portion but Benson Kamau redeemed it by refunding the purchase price although she had no documentary proof of the same.

#### **Issues for Determination and Submissions**

18. The issue for determination in this appeal is whether the finding of the learned trial court to give the whole land parcel CHANIA/MATAARA/1103 to the respondent was well founded. The parties filed their respective rival submissions on 6<sup>th</sup> September 2019 and 12 November 2019 respectively. I have read through the submissions as well as the appellant's supporting authorities.

#### **Analysis and Determination**

19. After carefully reading through the pleadings, the evidence, the submissions and the ruling of the learned trial court, I am satisfied that the trial court's findings were well grounded. There is evidence on record to show that land parcel CHANIA/MATAARA/605 was divided into two portions being 1102 and 1103 with the former being registered in the name of Benson Kamau, husband to W3. There is also evidence to show that Ishmael had some mental illness (though no medical document was produced to this effect). There is also evidence on record that when the deceased subdivided his land, Ishmael was not at home and that he left clear instructions to Benson Kamau to give Ishmael land when the latter returned home. According to the respondent and as supported by W3, Ishmael was in prison when the deceased subdivided his land and in my considered view, that was the reason for the deceased's instruction to Benson to give land to Ishmael when Ishmael came back home. There is also evidence showing that in both the chief's letter dated 17<sup>th</sup> July 2012 and in Form P&A5 filed in court on 22<sup>nd</sup> July 2012, the respondent was listed as a daughter in law to the deceased.

20. There is also evidence on record showing that land parcel 1103 remained in the name of the deceased, and this court thus finds it strange when W3, Margaret Benson and others allege that the said parcel of land was also given to Benson Kamau. In fact, this court finds that the appellant's case does not add up. I would as the trial court did reach the conclusion that the respondent who was lawfully and legally married to Ishmael under Gikuyu Customary Law survived Ishmael as a wife and was thus entitled to Ishmael's share in the deceased's estate comprised in land parcel CHANIA/MATAARA/1103.

21. In one of his grounds of appeal the appellant alleged that by awarding the whole of parcel 1103 to the respondent, the learned trial magistrate disinherited the family of the late Benson Kamau. This allegation cannot possibly be true because the family of Benson Kamau was given 8½ acres while the portion now going to the respondent is only 4.10 acres. The appellant contents that the trial court should have

awarded the respondent the 1.5 acres awarded to her by the area chief out of the 4.10 acres of parcel 1103. This argument by the appellant has no legal basis in the provisions of the Law of Succession Act. The chief has no legal authority to distribute the estate of a deceased person. In this case, W2 stated that the chief intervened because the respondent had nowhere else to go and from the respondent's evidence, Benson Kamau and his wife Margaret had chased her away from the subject parcel

**Conclusion**

22. From all the foregoing, I find and hold that this appeal lacks merit and the same is accordingly dismissed with no order as to costs.

23. It is so ordered.

**Judgment written and signed at Kapenguria.**

**RUTH N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned electronically at Kiambu on this 21<sup>st</sup> day of May 2020**

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**CHRISTINE W. MEOLI**

**JUDGE**