



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NUMBER 14 OF 2019

BETWEEN

ZAKAYO MAINA NDUATI.....APPELLANT

AND

NAOMI WANJIKU NDUATI.....RESPONDENT

(Being an appeal from the judgment of Hon. A. M. Maina (Mrs.))

delivered on 10th December at the Chief Magistrate's Court Thika CMCC

Succession Cause No. 85 of 2003 – In the matter of the Estate of Nduati Mungai

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appeal herein was brought to this court vide the Memorandum of Appeal dated 8th January 2019 and filed in court on 18th January 2019. The appellant set out the following grounds of appeal:-

- i. The learned magistrate erred in law in failing to consider that the respondent had disposed off two valued plots and a motor vehicle which should then have been computed as a part of her share of the deceased estate.**
- ii. The learned magistrate erred in law and fact in failing to appreciate that land parcel Makuyu/Makuyu Block 1/863 joining a part of the deceased's estate was being utilized by the appellant and respondent in equal shares and ought to have devolved to them in like manner.**
- iii. The learned magistrate erred in distributing the assets without regard to their financial worth and thereby placed an [undue] advantage on the respondent.**
- iv. The learned magistrate failed to strictly apply section[?] of the Law of Succession Act and divide the deceased's estate equally between appellant and respondent.**

2. For the above reasons, the appellant beseeches this honourable court to set aside the judgment of the lower court and in lieu thereof to itself distribute land parcel MAKUYU/MAKUYU BLOCK 1/863 equally between the respondent and the appellant.

3. As this is a first appeal, it behooves this court to reconsider and re-analyze the evidence on record with a view to reaching its own decision in the matter. It is however not lost to this court that unless the learned trial magistrate misapprehended the law or the evidence on record, this court would not overturn the learned trial court's judgment.

Background

4. The deceased herein, Nduati Mungai was aged 58 years when he departed from this world on 5th June 2000. He is said to have died from sudden death. At the time of death, the deceased had two children: Zakayo Maina Nduati, adult son and Naomi Wanjiku Nduati, unmarried daughter. These details are contained in Form P&A 5 of the bundle of documents filed in court and as per the Makuyu Chief's letter dated 28th April 2003.

5. The deceased left behind the following properties:-

- a) Makuyu/Makuyu Block 1/258-0.814ha
- b) Makuyu/Makuyu Block 1/3239-0.0348ha
- c) Makuyu/Makuyu Block 1/2752-0.0405ha
- d) Makuyu/Makuyu Block 1/4360-0.070ha
- e) Makuyu/Makuyu Block 1/861-0.826ha
- f) Makuyu/Makuyu Block 1/863-0.889ha
- g) Makuyu/Makuyu Block 1/677-0.324ha
- h) Makuyu/Kariaini/409-1.33ha
- i) Thika Municipality – Block – 17/676-0.1250ha
- j) Account no. 948-010-947

6. All the above properties were said to be valued at Kenya Shillings two hundred thousand only.

7. From the file this matter started by way of a citation by the respondent herein when it appeared to her that the appellant, as son to the deceased was slow in applying for the grant of Letters of administration Intestate to the estate of the deceased. The appellant finally filed the papers and on 6th July 2005, he was issued with Form P&A 41 which gave him the power and authority to administer the estate of the deceased. Before then, the appellant and the respondent each had their day in court.

8. By the Summons for Revocation of Grant dated 29th May 2018, the respondent herein sought to have the Grant of Letters of Administration issued to the appellant on 6th July 2005 revoked and/or annulled. The reason for the order sought was that the appellant had failed to comply with an express order of the court requiring him to file an application for confirmation of the said grant of administration within 30 days from the 6th October 2017. The respondent also alleged that the appellant had in total disregard of the said orders failed to apply for confirmation of the said Grant of Letters of Administration. The summons was supported by an affidavit sworn by the respondent herein on 29th May 2018. It was the respondent's contention that the delay in having the grant of Letters of Administration intestate confirmed was caused by the appellants lack of interest in playing his role as an administrator of the deceased's estate.

9. After all the issues of complaint by the respondent had passed under the bridge, the appellant filed summons dated 4th July 2018 for Confirmation of Grant of Letters of Administration issued to him on 4th July 2005. In the affidavit in support of the summons, the appellant indicated that the respondent was a married daughter of the deceased. The appellant set out the proposed mode of distribution.

10. The respondent filed an Affidavit of Protest dated 20th August 2018 in which she made her counter proposal on distribution. According to the appellant, land parcel Makuyu/Makuyu Block1/863 measuring 0.889Ha was to be shared equally between the appellant and the respondent. According to the respondent, the said plot was to go to her exclusively. It is this plot that has sparked the appeal because the learned trial magistrate gave the said plot exclusively to the respondent.

11. The appellant filed a Further Affidavit dated 22nd November 2018 in Support of the Summons for Confirmation of Grant in which he indicated that the only properties over which he and the respondent had not agreed on distribution were Makuyu/Makuyu Block1/863 which he proposed should be shared equally between them because that is how the plot had been utilized for a long time. He also alleged that during the pendency of the suit the respondent sold off two plots which were equal in value to plot Makuyu/Makuyu Block 1/4360 which he had agreed to take. He also conceded that he himself had sold **“three small plots which have the same size as one of the plots aforesaid and are of a much lower value.”** The appellant also deponed that he was collecting rent of Kshs.4,500/- from one plot which belonged to the deceased, though not registered in the name of the deceased. The appellant wanted to get a share of plot number Makuyu/Makuyu Block 1/863.

Submissions

12. The appeal herein proceeded by way of written submissions. The appellant's submissions filed on 10th September 2019 are of even date. The appellant contends that plots Makuyu/Makuyu Block 1/677 and Makuyu/Makuyu Block 1/863 which are of very high value and are located at Kenol Sagana Highway were both given to the respondent and that such distribution is not fair. He also contends that the trial court should have taken into account the value of the plot already disposed of by the respondent in making the final distribution. The appellant

placed reliance on the persuasive authority in *Re the Matter of the Estate of Gatama Waweru Muraya (Deceased)[2006] eKLR*. The appellant also relied on **section 38 of the Law of Succession Act Cap 160 Laws of Kenya**. The section provides:-

“Where an intestate has left a surviving child or children but no spouse, the net estate shall....devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”

13. The respondent’s submissions, which were filed on 25th November 2019 are dated 22nd November 2019. The respondent’s point of contention is that while the appellant lives on Makuyu/Makuyu/861, the respondent resides on the “**contentious**” plot Makuyu/Makuyu/863. The respondent further contends that Makuyu/Makuyu/861 has frontage to the tarmac which is not the case for Makuyu/Makuyu/863. Regarding plot Makuyu/Makuyu Block 1/677, the respondent submits that this particular plot was given to her upon negotiation with the appellant and that its value should therefore not arise as an issue in these proceedings. The respondent also submits that she is not the sole beneficiary of the said plot since the plot is co-owned with one James Ndung’u Ndabu. I note that the appellant has not contested these submissions. The respondent adds that after all is said and done, the appellant owns a prime property in Thika Municipality being Thika Municipality/Block 17/676.

14. Another point raised by the respondent in her submissions is whether the appellant disposed off part of the deceased’s estate. She denies selling the deceased’s motor vehicle registration number KAL 250L which was allegedly forcefully taken by the deceased’s brother. The respondent submitted the appellant sold 3 plots in addition to withdrawing money from the deceased’s account. These averments are admitted by the appellant though he referred to the 3 plots as very small and of little value. In her view the plots disposed off by the appellant and the respondent respectively are of equal value though neither appellant nor respondent has availed any valuation report to back up their averments.

15. In urging this honourable court to dismiss the appellant’s appeal, the respondent relies on the case of *Stephen Gitonga Muriithi versus Faith Ngira Muriithi [2015] eKLR* where the court held, *inter alia*, that:-

“Section 38 (of the Law of Succession Act) enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married, and comfortable in their marriage or unmarried.....”

16. The respondent thus contends that the only fact to be considered in this case is that she is a child of the deceased, just as much as the appellant is and that in that regard, the two of them are equal before law.

Issues for Determination, Analysis and Conclusion

17. The issues for determination are whether the appellant and respondent are entitled to equal treatment as children of the deceased and whether the learned trial magistrate observed this principle of equality as provided by **section 38 of the Law of Succession Act**.

18. As a starting point I will go back to the judgment of the learned trial magistrate in which he noted that of all the properties left behind by the deceased, the distribution of only 3 such properties was not agreed:-

a. Makuyu/Makuyu Block 1/863

b. Makuyu/Makuyu Block 1/861

c. Makuyu/Kariaini/409

19. The learned trial magistrate referred to and relied on **section 38 of the Law of Succession Act** and concluded that the deceased’s property ought to be shared/divided equally between the appellant and the respondent. It was also in evidence and the learned trial magistrate referred to it in her judgment that parties were agreed that the appellant is settled on land parcel Makuyu/Makuyu Block 1/861 while the respondent is settled on plot number Makuyu/Makuyu Block 1/863. Each of the parties received the respective parcels on which they are settled. They were however to share plot number Makuyu/Kariaini/409 equally between them.

20. Now, having carefully analyzed the affidavit evidence and the rival submissions both during the trial and before this court, I am satisfied that the learned trial magistrate fairly and equitably distributed the deceased’s estate between the appellant and the respondent. Although the learned trial court did not make mention of the various plots sold by both the appellant and the respondent, I am satisfied that what each of them sold off settles the equation of taking into account that which each party had disposed off before distribution. I also find and hold that plot number Makuyu/Makuyu Block 1/861 fronts the main tarmac road at Makuyu, contrary to what the appellant wanted the court to believe.

21. It is therefore my finding that there is no justification for this court to interfere with the findings of the learned trial magistrate. The appellant should be grateful that the deceased left plenty for him (appellant) and the respondent to share and later pass on to their own children. The appeal is accordingly dismissed.

22. As for costs, each party shall bear its own 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 21ST day of May, 2020

.....

CHRISTINE W. MEOLI

JUDGE