



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CIVIL DIVISION
CIVIL APPEAL NUMBER 8 OF 2019

BETWEEN

JOHN MUTUNGA.....APPELLANT

AND

PETER KARONGO NJUGUNA.....1ST RESPONDENT

ROBERT KIMANI MUNGAI.....2ND RESPONDENT

MARY MWIHAKI KAMAU.....3RD RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate

Hon. A. M. Maina, dated 10th December, 2018 in Thika

CMC Succession Case no. 262 of 2009)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. In the judgment dated 10th December 2018, the SPM, Hon. A. M. Maina dismissed the appellant's claim to half acre of land out of the estate of the deceased. In dismissing the appellant's claim the learned trial magistrate stated that the said claim was an afterthought that was untrue and unsupported by the evidence on record.
2. Being aggrieved by the said judgment the appellant filed this appeal and set out the following grounds of appeal:-
 - 1) That trial magistrate erred in law and fact by holding that the appellant is not a beneficiary of the estate of the deceased yet the appellant was listed as a beneficiary in the petition, consent to the making of grant and pleadings filed by the petitioner.
 - 2) The trial magistrate erred in law and fact in holding that the appellant's claim is an afterthought contrary to the evidence on record.
 - 3) The trial magistrate erred in law and in fact in disregarding the evidence tendered by the appellant.
 - 4) The trial magistrate erred in law and in fact in failing to award the appellant ½ acre out of the deceased's estate yet she positively found out that the appellant has been in occupation of land parcel no. KIAMBU/MUNYU/848 from time immemorial and or from time of purchase.
 - 5) The trial magistrate erred in law and fact in failing to exercise her discretion under Rule 73 of the probate and

administration rules and Article 159 of the constitution of Kenya, 2010 and settle the parties dispute once instead of referring to other fora.

6) **The trial magistrate erred in law and fact in disregarding the principle that stipulates that parties are bound by their pleadings and in effect disregarded the petition and other pleadings filed by the petitioner.**

3. The appellant wants his appeal allowed and the impugned judgment set aside to the extent that it dismissed the appellant's claim and or protest. He also prays that his protest in the lower court be allowed so that he is awarded land parcel number KIAMBU/MUNYU/848 which he claims is his rightful share from the deceased's estate. The appellant also wants the first respondent herein, PETER KARONGO NJUGUNA to bear the costs of this appeal.

4. This is a first appeal, and in the circumstances this court is required to reconsider the whole of the evidence on record and to evaluate it afresh with a view of reaching its own conclusions in the matter, only remembering and bearing in mind the fact that it has no opportunity of seeing and hearing the witnesses who testified during the trial. Generally, see *Peters – versus – Sunday Post Ltd [1957] EA 424* and *Selle & another versus Associated Motor Boat Co. [1968] EA 123*.

Background

5. From the papers on the file the deceased herein died on 28th December 1996 at the age of 87 years. From the information in Form P&A 5, filed in court on 24th June 2009, the deceased was survived by the following persons:-

- a) Peter Karongo Njuguna – 27 years
- b) John Mutunga Solomon Ngatara – 61 years
- c) Samuel Maina Ngugi – 42 years

6. There was no indication as to how the three persons named above were related to the deceased. Under paragraph 6 of the said form P&A 5, the assets of the deceased were:-

- a) KIAMBU/MUNYU/846
- b) KIAMBU/MUNYU/848

7. During his lifetime, the deceased sold portions of his land to the appellant as well as the 2nd and 3rd respondents.

8. After the deceased died, the 1st respondent petitioned for Grant of Letters of Administration Intestate vide his petition dated 22nd April 2009. The grant was issued to him on 10th February 2011. On 5th July 2012, the petitioner filed summons for Confirmation of Grant. The petitioner proposed to distribute the deceased's property as follows:-

- a) KIAMBU/MUNYU/846, to be registered in the name of Peter Karongo Njuguna
- b) KIAMBU/MUNYU/848 to be shared as follows:-
 - i. Peter Karongo Njuguna – 2.0Acres
 - ii. Wilson Kiarie Kimani – 1.0 Acres

9. The above proposed distribution gave rise to protests by the appellant as well as the 2nd and 3rd respondents.

10. In his affidavit of protest dated 24th March 2015, the appellant deponed that in the year 1988, he purchased a portion of land measuring 2.5acres from the deceased, and that from then on, he occupied and ploughed the said parcel of land. It was also appellant's contention that the application for consent from the Land Control Board indicated that the portion to be transferred to him was 2.5. acres out of plot no. 470/B (713) at a consideration of Kshs.60,000/-. Though the consent was silent with regard to the size of the land to be transferred to the appellant.

11. The appellant went further and deponed at paragraph 7 of his affidavit that **"I have realized that the acreage I occupy on the ground does not correspond with the approximate area indicated in the title deed. The title deed indicates 0.81Ha instead of 1.0Ha which is 2.5 acres....."** It was the appellant's contention that the surveyor who subdivided land parcel KIAMBU/MUNYU/712 excised a portion measuring 0.18Ha from his (appellant's) portion of land which is now known as MUNYU/KIAMBU/848. The appellant stated that he was thus entitled to 0.5acres out of the deceased's estate which is land parcel number KIAMBU/MUNYU/848.

The Appellant's Evidence

12. The appellant testified as the third protestor and reiterated the averments in his affidavit of protest. He stated that after he purchased 2.5acres out of LP No. KIAMBU/MUNYU/713 he took possession of the same in 1992, put up his homestead on it and settled down. He

stated that before he and the deceased sealed the land deal, the deceased invited elders who confirmed the acreage and fixed boundaries. The elders were Chege Ndura (DW4) and Wamwea (DW3). The appellant testified that he occupied the land from the top part to the bottom part after fencing in 1989.

13. The appellant also testified that before the transfer, he and the deceased sought and obtained consent of the Land Control Board to have the 2.5acres transferred to him. He was however surprised that when the title deed was issued, the land size shown thereon was less than the actual acreage on the ground. The appellant got his title deed before 2011, while the deceased died in 1996. The appellant testified that after he sold part of the 2.5acres, he got a second title in 2011. He also stated that he pursued issuance of the title deed by himself. The appellant produced a number of documents and photographs in support of his case. The documents did not include the original sale agreement which the appellant said had long been misplaced.

The 1st Respondent's Case

14. During his testimony, the first respondent said nothing about the appellant's claim for 0.5acre from the deceased's estate.

Submissions

15. The parties filed and exchanged their respective written submissions on 9th September 2019. I have read through the rival submissions together with the relevant authorities. The first respondent submitted, and quite rightly so, that the mere fact of having the name of the appellant as a beneficiary did not in itself confer a right upon the appellant to benefit from the deceased's estate. The appellant had to prove his claim. More on this in the analysis and determination.

Analysis and Determination

16. In her judgment, the learned trial magistrate said the following regarding the appellant's claim:

“The 3rd protestor's title deed was issued on 9.3.2011, yet he raised his objection more than 4 years later. The title deed showed the approximate area very clearly as 0.81ha. The 3rd protestor never followed up the issue with the land surveyor immediately after the issue[ance] of the title deed. It was his evidence that on the ground, the boundary runs from the top to the bottom. I find that while that may be the case, that is not the actual boundary and the actual one is per the mutation form and title deed annexed to his documents. The mutation form has several parts, with different dates. It is worth noting that all those dates were before the deceased's death and all the transaction were carried out in the 3rd protestor's full knowledge.

Having considered the above mentioned, I find that the 3rd protestor is not a beneficiary to the deceased's estate. The deceased transferred land to him (3rd protestor) before his death. He has a title to the portion that he bought. If he had an issue with the acreage or registration, he should have addressed it with the land registrar or in a civil suit, but not in this cause. I find that his claim is an afterthought which is untrue and unsupported. I dismiss the same.”

17. I have myself reconsidered the evidence and evaluated it afresh. In light of the above, I am in total agreement with the learned trial magistrate's findings. In addition, it is not the role of a probate court to decide whether it was the appellant or the deceased who owned the disputed 0.5acre portion of land allegedly belonging to the appellant. The probate court was to distribute the undisputed portions of the deceased's estate and no more. If eventually the appellant proves before the Environment and Land Court that the disputed 0.5acre portion of land belongs to him, then and only then can be return to the probate court for distribution of the same to him. In any event, the appellant slept for a whole 4 years before springing the claim against the estate of the deceased. Further, the appellant stated that he sold a portion of the land originally bought from the deceased. It may be that the acreage he is claiming from the deceased's estate is what he sold to the third party.

Conclusion

18. Having made the above findings. I have reached the conclusion that the appellant's appeal lacks merit. The same be and is hereby dismissed with costs to the 1st respondent.

19. Orders accordingly.

Judgement written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this 11th day of June, 2020

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CHRISTINE W.MEOLI

JUDGE