



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 45 OF 2017

IN THE MATTER OF THE ESTATE OF JOHN KARITA MBAGARA

DOMINIC MURITU KARITA.....APPELLANT

VERSUS

FRANCIS KARIUKI KARITA

PATRICK MBAGARA KARITA.....RESPONDENTS

(Being an appeal from the Judgment of Hon A. Lorot H.R. Senior Principal Magistrate

in Thika Chief Magistrate's court Succession No. 16 of 2009)

J U D G M E N T

1. This appeal emanates from the judgment of **Lorot**, Senior Principal Magistrate in **Thika Succession Cause No. 16 of 2009** in respect of the estate of **John Karita Mbagara**. The common facts are that the latter deceased person died intestate on 4th August 2008. He was a polygamous man of three wives, namely, **Magdalena Njeri Karita**, (deceased) **Susan Ngendo Karita** and **Veronica Wagio Karita**. He sired 23 children with the said wives. Many of them survived him.

2. The Petition in the lower court was presented by the intestate's sons, namely, **Dominic Muritu Karita** (now Appellant), **Francis Kariuki Karitu** and **Patrick Mbagara Karita (now Respondents)**. At the time, the sole asset listed was a land parcel **No. LR CHANIA/KAIRI/883** which was registered in the name of the deceased. The parcel measures 5.32 ha. A grant was issued in the names of the Petitioners on 26th January 2010. It would appear that subsequent to that date a dispute broke out in the family concerning the distribution of the above asset and whether a land parcel **No. LR CHANIA/KAIRI/601** formed part of the estate of the deceased.

3. By an application filed on 16/2/11 two of the co-administrators sought to restrain their co-administrator **Dominic Muritu Karita** who had apparently presented the dispute to the chief Kairi Location the latter who, by a letter to the court dated 15th October 2010 purported to determine the disputed issues. On the advice of the court, the applicants filed a further similar application on 17/2/11 which included the prayer for confirmation of grant and proposing distribution of the sole asset namely **CHANIA/KAIRI/883** between the three houses as follows:

- a. 1st House – Magdalene Njeri Karita – 1.0 acres on the basis that the house had already benefited from a gift inter vivos namely 5.5 acres of CHANIA/KAIRI/601
- b. 2nd House – Susan Ngendo Karita – 6.1 acres
- c. 3rd House – Veronica Wagio Karita – 6.1 acres

4. The Petitioner **Dominic Muritu Karita** responded by filing an affidavit of protest in which he proposed that each house receives 4.4 acres of land parcel **LR CHANIA/KAIRI/883**. He asserted that the Land parcel **CHANIA/KAIRI/601** had belonged to his brother **Patrick Mbagara Karita** and was not a part of the estate of the deceased.

5. During the subsequent hearing, the Petitioner **Francis Kariuki Karita**, son of the deceased's 3rd wife **Veronica Wagio Karita** gave evidence alongside the deceased's second wife **Susan Ngendo Karita**. Their case in brief, was that the deceased had during his life time

acquired two land parcels **CHANIA/KAIRI/883** (undisputed asset) and **CHANIA/KAIRI 601** (disputed asset) the latter which they asserted was given to the first house and was held in trust by a son of the first house, namely **Patrick Mbagara Karita**, for the benefit of his mother's house. That the disputed asset was distributed among the members of the first house in the life time of the deceased, and that some, including Patrick Karita Mbagara subsequently sold off their portions.

6. Further that one acre of the undisputed parcel was assigned to the first house and the balance divided into two equal parts between the 2nd and 3rd houses who occupied the said portions; that the 1st house occupied exclusively the disputed asset and cultivated the one acre of the undisputed asset.

7. The evidence of Dominic Muritu Karita the protestor now Appellant was that his father died possessed of only one property, the undisputed asset which he said ought to be shared equally between the 3 houses. He asserted that the disputed asset was purchased by his brother **Patrick Mbagara Karita** and did not belong to the deceased; that the said proprietor had in 1984 subdivided the parcel and sold some of it to himself, his siblings and other relatives. He said each male sibling in his mother's house bought an acre of the disputed asset from **Patrick Mbagara Karita**, that he acquired for himself the subdivision 921 (one acre) and a further one acre (subdivision 920) purchased jointly with **John Ndungu Kabagi**, his witness.

8. In his judgment, the learned trial magistrate framed three issues for determination, namely:

- a. whether or not the disputed landed asset formed part of the estate of the deceased and was gifted *inter vivos*.
- b. whether or not a trust was created over the said disputed parcel.
- c. how the undisputed asset was to be distributed?

9. The learned magistrate having answered the first two issues in the affirmative, and finding that the first house had received *inter vivos* the 4.349 acres which comprised the disputed asset, proceeded to distribute the undisputed asset as follows:

- a. First house - 1.477 acres
- b. Second house - 5.826 acres
- c. Third house - 5.826 acres

10. This decision prompted the present appeal by the Administrator/Protestor in the lower court, **Dominic Muritu Karita** raising seven grounds of appeal. Grounds 1, 5 and 6 attack the evidence which formed the basis of the trial court's finding, as weak and the resulting decision as contrary to the law and arrived at without a proper analysis of the evidence and the law. In grounds 2 and 3 the Appellant faults the finding and declaration of a trust over the disputed asset as erroneous in law and fact. The 4th ground attacks the finding that the disputed land parcel formed part of the estate of the deceased. Ground 7 is a complaint that the trial magistrate erred in law and in fact by distributing the undisputed asset of the estate on the basis of an unproved trust.

11. At the hearing of the appeal counsel for the Appellant canvassed the 7 grounds of appeal under three heads. On the first issue, it was submitted that the deceased's free property as defined in Section 3 of the Law of Succession Act was property that he was legally competent to dispose in his lifetime. Emphasising that the title in the disputed asset was in the name of the eldest son of the deceased by his first wife, the Appellant asserted that the said proprietor had during the lifetime of the deceased subdivided the same and sold some of the subdivisions to his brothers including the Appellant and a third party **John Ndung'u Kabagi**. All negating any ownership by the deceased.

12. Restating the foregoing and the evidence of the Petitioners at the trial, counsel argued that there was no basis in law on evidence to support a finding in respect of a trust over the disputed land. It was further urged that the applicable law in respect of a polygamous intestate was Section 40(1) of the Law of Succession Act and not customary law as the trial court had stated in the judgment.

13. For their part, the Co-Petitioners/Respondents supported the decision of the lower court. Counsel argued that the court in distributing the free property of a deceased intestate was entitled to consider gifts made to beneficiaries in the lifetime of the intestate and that the disputed asset constituted such gift to the first house. Referring to records tendered at the trial, counsel submitted that both the disputed and undisputed assets were purchased by the deceased with contribution from all houses. He pointed to the paucity of the Appellants evidence, and especially the fact that the Protestor did not call the alleged absolute proprietor of the disputed asset to tender evidence on how he acquired the property. Referring to submissions made at the trial, counsel stated that a kikuyu customary trust need not be express. Counsel emphasised the fact that majority of the family members save the Protestor consented to the distribution proposed in the summons for confirmation.

14. The court has considered the evidence in the lower court and submissions on this appeal. As stated time without number, the duty of the first appellate court is to review the evidence at the trial and to draw its own conclusions, but always bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify. See **Peters v Sunday Post Ltd. (1958) EA 424**; **Sele & Another v Associated Motor Boat Co. Ltd and Others [1968] EA 123**; **Williams Diamonds Ltd v Brown (1970) EA 1**.

15. In **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982 – 1988) 1 KAR 278**, the Court of Appeal held that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension if the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the

findings he did.”

16. Two key related issues arising from this appeal are whether the trial court erred in finding the existence of a trust in respect of the disputed property arising from a gift *inter vivos* to the first family, and ultimately whether the resultant distribution of the undisputed property was proper.

17. Concerning the first issue, the evidence of the Petitioners was that the disputed asset was registered in the name of the eldest son of the deceased with his first wife in 1957, being a gift/share held in trust for the first house. Although the Protestor asserted that the said son and also his brother **Patrick Mbagara Karita** purchased the property in 1957, two pieces of evidence appear to contradict that. The first were the rudimentary agreements for the purchase of the disputed asset by the deceased in 1954 produced as exhibits at the trial, and secondly the fact that prior to the death of the intestate, **Patrick Mbagara Karita** subdivided the disputed portions into four equal parcels each measuring one acre, which he then transferred to his brothers, including the Protestor. Allegations that transfers were made pursuant to sale agreements with the brothers were not firmed up by concrete evidence in the form of agreements. No did the said brothers tender evidence at the trial as witnesses. It would be a curious sequence of serendipity that all the four brothers of the first house agreed on the sale of one acre each from one of them at the same time.

18. Moreover, the alleged proprietor/vendor **Patrick Mbagara Karita** did not participate in the hearing. He would have shed light on his acquisition of the property in 1957. As the trial magistrate noted, there was no convincing reason for the Protestor's failure to call him as a witness. On the other hand, there is firm evidence that the first house had never lived on or used the undisputed asset, beyond the one acre admittedly reserved for them by the deceased. The 2nd and 3rd houses admittedly always occupied and cultivated their assigned portions on the rest of the undisputed asset.

19. In these circumstances the admitted actions by **Patrick Mbagara Karita** were more consistent with the actions of a fiduciary distributing the assets held by him in trust, than of an absolute proprietor dealing with his property as he wished. The fact that the distribution was done during the lifetime of the deceased merely confirms that the deceased had fully settled the disputed asset for the benefit of his first house. In that sense, it is correct to state that at the time of his death, the intestate did not own the disputed asset as free property.

20. The Appellant's argument that a constructive trust could not be created in respect of land registered in the name of a first registered proprietor does not hold water. In the case of **Macharia Mwangi Maina and 87 others Vs Davidson Mwangi Kagiri [2014] e KLR** the Court of Appeal having considered the protection of the rights of the proprietor under Section 28 of the Registered Land Act (now repealed) and overriding interests recognized under Section 30 of the said Act observed *inter alia* that

“In Mwangi and Another v Mwangi (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126(1) of the Registered Land Act is merely persuasive and not mandatory. In Mutunga v Nyati (1984) KLR 425 and Kanyi v Muthiora [1984] KLR 712 it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of common law of England as modified by equity Lord Denning in Hussey v Palmer [1972] 3 ALL ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it.” (emphasis added)

21. Much earlier, in **Edward Samuel Limuli v Marika Sabayi HCCC 222 of 1978; [1978] e KLR**, Cotran J had declared that:

“It is now generally accepted by the courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration, and there is nothing to prevent the giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents.”

22. Reviewing the evidence adduced before the lower court, I have no difficulty in finding that **Patrick Mbagara Karita** first son of the 1st house, was registered as the proprietor of the disputed asset in a fiduciary capacity, on behalf of the first house, and his subsequent equal distribution of the asset to the members of the first house was consistent with his fiduciary responsibility. It is no wonder that the Protestor was shy to call the said trustee as a witness. The protestor and other members of the first house were beneficiaries of the said trust and since they had received their gift/share *inter vivos*, the trial court was entitled to consider the same by dint of Section 42 of the Law of succession Act in distributing the undisputed asset.

23. To my mind, in this case, the question was not so much as whether the disputed asset was part of the estate of the deceased, which evidently it was not, after transfer to the members of the first house. Rather, whether the settling of the said asset to the benefit of the 1st family by the deceased ought to have been considered in the distribution of the undisputed asset.

24. The 1st house having benefited from the settling of the disputed asset to their benefit, could not also share equally with the other houses the undisputed asset, as that would lead to inequitable sharing. It is telling that of all the members in the 1st house, only the Protestor appears to lay claim over the undisputed asset of the estate of the deceased, beyond the admitted acre reserved for the said family.

25. For the foregoing reasons the court is satisfied that the findings of the trial court were well founded and that the consequent distribution of the undisputed asset cannot be faulted, save to state that the proper applicable law in respect of the intestate herein was Section 40(1) of the Law of Succession Act and not Kikuyu customary law as asserted in the judgment. Nor was it necessary in the circumstances of the case for the trial magistrate to merge the total acreage of the two assets for purposes of distribution between the houses. Nevertheless since the eventual distribution ratio achieved equity between the three houses, no miscarriage of justice resulted from this fact or from the trial court's reference to Kikuyu customary practice rather than Section 40(1) of the Law of Succession Act. Indeed the first house benefitted

from an additional on 0.477 acres.

26. The court finds no merit in the grounds of appeal and will dismiss the appeal in its entirety.

In view of the nature of this dispute parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 19TH DAY OF SEPTEMBER 2019.

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C. MEOLI

JUDGE

In the presence of:

Mr. F. W Njanja holding brief for Miss Waithera Mwangi for Appellant

Respondents – Absent

Court clerk – Kevin