



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL APPEAL NO. 81 OF 2017**

**JOHN NJOROGE NDEGWA.....APPELLANT**

**=VRS=**

**HELLEN WANJIRU MAINA.....RESPONDENT**

**{Being an appeal against the Judgement delivered by Hon. B. J. Bartoo – RM**

**Thika on the 27<sup>th</sup> day of April 2017 in the original Thika Chief Magistrate’s Court**

**Succession Cause No. 528 of 2013}**

**JUDGEMENT**

1. The deceased to whose estate these proceedings relate is Irene Njeri Ndegwa who died intestate on 13<sup>th</sup> November 2006 domiciled in Gacharage Sub-location in Murang’a County.
2. Letters of administration into the estate were issued to her son John Njoroge Samwel Ndegwa (the appellant) and daughter in-law Hellen Wanjiru Maina (the respondent) on 14<sup>th</sup> October 2013.
3. The two administrators could not however agree on the mode of distribution of what seems to be the only property of the deceased LR LOC 3/Gacharage/779 measuring about 1.52Ha. The appellant proposed that the property be distributed equally between himself and the respondent but she opposed that and contended that as the appellant had already received his own parcel of land, then she is the sole beneficiary.
4. The trial Magistrate heard the protest and in a judgement delivered on 27<sup>th</sup> April 2017, came to the conclusion that Hellen Wanjiru Maina (the respondent) was the sole beneficiary of LR LOC 3/Gacharage/779. Being aggrieved John Njoroge Samwel Ndegwa, the protestor in the proceedings, preferred this appeal.
5. The appeal filed through **Waithira Mwangi & Co. Advocates** is premised on grounds that: -
  - “1. That the learned magistrates misdirected herself in arriving at a decision that the suit land was supposed to be inherited by petitioner when there was no basis for such conclusion.
  2. The learned magistrate misdirected herself in failing to consider S.38 of the Law of Succession Act.
  3. The learned magistrate misdirected herself in failing to consider that parties had occupied ½ portion in the suit land for a period in excess of forty (40) years and developed their respective portions.
  4. The learned magistrate misdirected herself in failing to consider that appellant held land parcel Loc 3/Mukuria/52 in trust for members of his mother’s house.
  5. The learned magistrate misdirected herself in arriving at a decision that was contrary to evidence adduced.”
6. Directions were given that the appeal be canvassed by way of written submissions and parties duly complied.

7. This being the first appellate court I am duty-bound to reconsider the evidence, analyse it and make my own independent findings but bearing in mind that I did not see or hear the witnesses and make due allowance for that – (see **Selle & Another v Associated Motor Boat Company Ltd & others [1968] EA 123**).

8. From evidence adduced in the lower court the subject property initially belonged to one Samuel Ndegwa Ndumbo the husband of Irene Njeri Ndegwa, the deceased. It was alleged that the said Samuel Ndegwa Ndumbo died in 1966. On 19<sup>th</sup> March 1964 the said Samuel Ndegwa Ndumbo convened a meeting in which he made his wishes regarding his property known. The wishes were reduced into writing in a document which in this appeal we shall refer to as his will. The will concerned two parcels of land which he described based on where they were situated. From the first parcel he gave a portion measuring 3 acres with one 100 coffee trees to his son James Wanjenga who this court learnt was his son by his estranged wife; then a portion measuring 2 acres with fifty-five coffee trees to John Njoroge (the appellant herein), his son with Irene Njeri (the deceased herein) and the remaining 2 acres to one Irungu who from the evidence adduced was his son with Wairimu, the deceased's co-wife. He bequeathed the second parcel of land to his wives Irene Njeri (the deceased in this case) and one Wairimu. According to the will all the bequests were to take effect from 19<sup>th</sup> March 1964. The record indicates that Irene Njeri Ndegwa (the deceased in this appeal) obtained a title deed for her portion of the land on 10<sup>th</sup> August 1987 effectively becoming the registered proprietor thereof. On or about 17<sup>th</sup> August 2000 she sought and obtained consent of the Land Control Board to transfer that land to one of her sons Dominic Maina Samwel Ndegwa (the husband of the respondent) and further executed a transfer of the land in his favour. The transfer was however not registered because the appellant registered a caution against the land claiming a **"licence interest"**. The record further indicates that thereafter the appellant filed a dispute in regard to the purported transfer at the Kandara Land Disputes Tribunal but the Tribunal found in favour of his mother and brother Dominic Maina Ndegwa. The award is dated 16<sup>th</sup> February 2001. The award was subsequently confirmed as a judgement by a Magistrate sitting in Thika. Unfortunately, however, Irene Njeri Ndegwa and the appellant's brother Dominic Maina Ndegwa died without the transfer being registered hence necessitating this succession cause.

9. Writing to the court concerning the estate of Irene Njeri Ndegwa on 28<sup>th</sup> May 2013 the Chief of Kibage Location noted that those who survived the deceased included one Josephine Wambui Ndegwa, a married daughter. It is instructive however that the said Josephine Wambui Ndegwa did not lay any claim to a share of the estate and the dispute is between the appellant and his brother's wife solely.

10. The appellant's contention in the court below as well as in this appeal is that when this land was given to his mother, the deceased by her husband, it was so that she could hold it in trust for herself and her children and that what she obtained was a life interest only and as such she had no right to transfer it to one son to the exclusion of the other. He contended that he was entitled to an equal share of the land. While conceding that he too was given a piece of land by his father he stated that he too was to hold his land in trust for the family and the respondent can get a half share of that land too. His Counsel urged this court to find that the lower court failed to determine and consider **Sections 35, 37 and 38 of the Law of Succession Act** and the issue of family trust. She urged this court to set aside the judgement of the lower court and order the land parcels LOC 3/Gacharage/779 and LOC 3/MUKURIA/52 divided equally between the petitioner and the respondent. Counsel relied on two cases: -

**1. In Re estate of Mungai Munyaka (deceased) [2017] eKLR.**

**2. Alice Wairimu Macharia v Kirigo Phillip Macharia [2019] eKLR.**

11. The respondent on the other hand contends that Irene Njeri Ndegwa held the land in trust for Dominic Maina Ndegwa her husband. She submitted that the appellant was bequeathed LOC 3/Mukuria/52 and that the same does not form part of the estate of the deceased. She described the appellant as one greedy for land and urged this court to dismiss his appeal with costs.

12. The issue that calls for determination in this appeal **is whether the two parcels of land bequeathed to the deceased and the appellant by Samwel Ndegwa Ndumbo, also deceased, were gifts intervivos which vested in them absolute proprietorship or whether the deceased and the appellant were merely trustees for those in their house.**

13. To determine the above issue one must of necessity examine the last wishes of Samwel Ndegwa Ndumbo. Samwel Ndegwa Ndumbo, deceased is said to have died sometimes in 1966. This was long before enactment of the **Law of Succession Act. Section 2 (2)** of that Act states:-

**"(2). The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."**

14. The estate of Samuel Ndegwa Ndumbo was clearly therefore not subject to the **Law of Succession Act** but to **Kikuyu Customary Law** there being no written law at the time. We get insight into the Kikuyu Customary Law applicable at the time from the case of **Karanja Kariuki v Kariuki [1983] KLR 209** where the Court of Appeal held: -

**"1. Under Kikuyu Customary law, a father has to distribute his land among his heirs during his lifetime. He may make a will in old age or on his death bed and the only formalities required are that he must say before the elders of his family (mbari) and the clan (muhiriga) and close friends only, who the administrator (muramati) of his estate will be and to whom (among his heirs) each item of such estate will go.**

....."

15. This is exactly what Samwel Ndegwa Ndumbo did on 19<sup>th</sup> March 1964. He even went the extra mile and reduced his wishes into writing and for all intents and purposes that was his will. Looking closely at that will and juxtaposing it with the evidence and submissions of the

parties both here and in the court below the deceased went against the grain and gifted the land to the younger sons in the houses and to his wives. The only other person he bequeathed land to directly was his son by an estranged wife. I say he went against the grain because as stated in **Karanja Kariuki v Kariuki (supra)** there was **“a well-entrenched principle of customary law among the Kikuyu that the eldest son normally inherits land upon the death of his father. This rule is indefeasible except in a case of disability arising from infirmity of the body or mind or from any other cause or by relinquishment by the eldest son himself.”**

16. One comes to the conclusion that only the younger sons were gifted land, from the appellant’s own testimony that he was younger than Dominic Maina, the respondent’s husband. In the house of Wairimu too, the person who their father gifted land was Ishmael Irungu Ndegwa but not his elder brother Francis Wanjenga even though in that house their youngest brother Njihia did not also get a direct bequest. In the Land Disputes Tribunal one of the witnesses called by the appellant testified that they tried to persuade their father to change his mind but he did not budge.

17. It is my finding from the evidence that given that land was not given to the eldest sons, the land gifted to the younger sons including the appellant, were gifts *inter vivos* to them exclusively. My finding is that they became absolute proprietors to the exclusion of all others. Indeed, following the death of his father, the appellant obtained a title deed vesting in him absolute ownership. He did not at that time ask that the land be registered in his name and that of his brother Dominic Maina, the respondent’s wife. He cannot therefore now be heard to say that he was a trustee for his house. His father’s will made under Kikuyu Customary Law was valid and the same was binding upon the parties and not even the actions of their mother upon his death could legally alter that.

18. **What about the land gifted to their mother? Was she to hold only a life interest or was she an absolute proprietor who could do whatever she pleased with it?** In the case of **Kanyi v Muthiora [1984] KLR 713** where a similar issue arose although it pitted a widow and her unmarried step daughter the Court of Appeal held *inter alia*: -

**“4. .... In this case a constructive trust arose when the land of the respondent’s father was registered in the appellant’s name in favour of the children of the deceased.**

**5. A proprietor by first registration or any subsequent registration is not relieved by anything in section 28 from any duty or obligation to which he is subject as a trustee.**

**6. The respondent had rights against the appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be noted on the register and the appellants proprietorship was subject to it, section 30 (g).**

**10. .... The registration of the land in the name of the appellant under the Registered Land Act (cap 300) did not extinguish the respondent’s rights under Kikuyu customary law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee.**

**11. The trustee referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under customary law, if the Act had intended to exclude customary law rights it would have been clearly stated.”**

19. The above statement of the law has recently been reaffirmed by the Supreme Court of Kenya in **Isack M’inanga Kiebia v Isaaya Theuri M’lnturi & another Petition No. 10 of 2015 [2018] eKLR** and it is therefore good law. It therefore follows that even though the deceased in this case acquired the land from her husband and was registered as the absolute proprietor of LOC 3/Gacharage/779 and obtained the title to the land, **she did so in trust for her house** more so given that her eldest son had not been given land by his father. Indeed, there was evidence in the court below that in the case of Wairimu who had been given the other half of this land, her share was inherited by her sons James and Njihia who themselves had not received any bequests of land from their father. My finding therefore is that the deceased held the four acres of land in trust first and foremost for her elder son Dominic Ndegwa who was not himself given land by his father.

20. **What of the appellant in this case?** The appellant and his step-brother Ishmael Irungu Ndegwa alluded to a meeting where the deceased in this case is said to have expressed wishes for her land and that given to the appellant to be shared equally between her two sons. They referred to minutes taken at that meeting a translation of which was produced at the hearing as Exhibit 1A & 1B. However, as I have already stated **her husband having made a valid will she had no power to overturn it and so she did not have capacity to distribute the land he had gifted to the appellant and which in any event was not her free property and hence not part of her estate.** As for LOC 3/Gacharage/779, **the deceased in this case having died after the enactment of the Law of Succession Act, her estate was subject to the Law of Succession Act.** She could only make a will in accordance with **Section 11 of the Act.** The documents produced as the Protessor’s EXB 1A and 1B do not conform to the requirements of **Section 11** and cannot be a will. Moreover, as this court has already stated, **she was but a trustee for her house** in respect of LOC 3/Gacharage/779 the same having been bequeathed to her by her husband in accordance with the Kikuyu Customary Law applying at the time.

21. The appellant gave evidence that he is in occupation and possession of the land a fact conceded to by the respondent. In the case of **Kanyi v Muthiora (supra)** and more recently in the Supreme Court case of **Isack M’inanga Kiebia v Isaaya Theuri M’lnturi & another (supra)**, it was held that such a party has rights stemming from possession and occupation as the same amounts to an overriding interest not required to be noted on the register. So whereas the appellant had himself received land from his father, his possession and occupation of the land registered in his mother’s name gave him a right which amounted to an overriding interest. It is my finding therefore **that he too is entitled to a share of LR LOC 3/Gacharage/779.** Be that as it may, **Section 42 of the Law of Succession Act** states: -

**“42. Previous benefits to be brought into account.**

Where—

**(a) An intestate has, during his lifetime, or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**(b) .....**

**That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”**

22. It follows therefore that the appellant having unlike his brother received two acres of land from his father in his father’s lifetime is not entitled to an equal share as his brother in LOC 3/Gacharage/779 and my finding is that the most equitable mode of distribution would be to give him **only one acre of the land**. That will leave **the respondent with three acres of the land**. A certificate of confirmation of grant shall issue to that effect. It is so ordered.

**Signed and dated this 15<sup>th</sup> day of October 2019.**

**E. N. MAINA**

**JUDGE**

**Dated and delivered in Kiambu this 17<sup>th</sup> day of October 2019.**

**C. W. MEOLI**

**JUDGE**