



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 69 OF 2017

JOSPHAT NJAGI NJERU.....APPELLANT

VERSUS

JOSECK IRERI MARK.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant successfully filed summons for revocation of the grant dated 12/04/2016 that had facilitated the distribution of land parcel **No. Kyeni/Mufu/549** to the respondent in exclusion of other beneficiaries. The court revoked the grant and ordered that the appellant and his sister Evangeline Warue Njuguna do share the estate of the deceased equally. The respondent had been identified as a beneficiary but was said to have shown disinterest in the estate.

2. Being dissatisfied by the trial court's decision, the appellant filed this appeal by way of memorandum of appeal dated 4/11/2017 on 17 grounds that can be summarised as follows: -

That the learned magistrate erred in law and fact and disregarded the evidence before him in finding that the deceased had not made an oral will; that the learned magistrate misdirected himself when in his ruling purported that Evangeline Warue was beneficiary of the estate of Muranyaki Kariungi Nyaga and as such entitled to a share of the suit property; that the learned magistrate erred misdirected himself when he failed to issue a cancellation order of the title deed over Kyeni/Mufu/549 that had been issued to the respondent; and that the learned magistrate erred when he assumed that Evangeline Warue was represented by the law firm of Njeru Ithiga & Co. Advocates in court whereas there was no notice of appointment tendered in court.

3. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submissions

4. The appellant submitted that the deceased had bequeathed his property to the appellant on the 12/03/1975 vide a oral will before he died on the 26/05/1975 before two competent witnesses and as such the trial magistrate was wrong in disregarding the oral will as the same was perfectly valid.

5. The appellant further submitted that the firm of Njeru Ithiga & Co. Advocates was on record for the respondent and had expressed disinterest in the estate property but continued to appear in the case in the interests of Evangeline Warue with no instructions to do so and as such the trial court ought to not have allowed the advocate to do so.

6. The appellant further submitted that Evangeline Warue never showed any interests in the estate property and further she did not attend court or make any statement to prove or disprove this fact and as such the ruling of the trial magistrate was not credible. The appellant further submitted that the witnesses relied on by the respondent were not credible. The appellant further submitted that the trial court erred when he failed to appreciate that Evangeline Warue ought to have not filed a replying affidavit when she was in fact not a party to the proceedings.

7. The appellant further submitted that the trial court failed to order cancellation of the title deed over the estate property despite revoking the grant and that this was a mistake as the court ought to have made fresh letters of administration be issued in the name of the respondent.

C. Respondent's Submission

8. The respondent submitted that the appellant failed to satisfy the provisions of section 9 of the Law of Succession Act and Rule 13 of the Probate and Administration Rules regarding the date of the making of an oral will and further what the maker of the said will should do for it to be valid.

9. It was further submitted that Evangeline Warue is a blood sister of the appellant and respondent and as such the learned magistrate was right in holding so. The respondent further submitted that having denounced his interest in the suit land, it was only fair that the land be shared between the remaining siblings, the appellant and Evangeline Warue. Further, the respondent submitted that the grounds faulting the trial court for not cancelling the title deed and registration of the estate land to the respondent were beyond the jurisdiction of this court.

10. The respondent further submitted that the representation of Evangeline Warue was never an issue before the trial court and as such cannot be adjudicated upon in this appeal.

D. Analysis & Determination

11. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

12. I have carefully perused the record of appeal, the grounds thereof and the parties' submissions. This appeal rests on the determination of whether the trial magistrate erred in his findings on the following: -

a) *That the deceased had made no oral will.*

b) *That Evangeline Warue was a beneficiary of the estate of Muranyaki Kariungi Nyaga and as such entitled to a share of the suit property.*

c) *That Evangeline Warue was represented by the law firm of Njeru Ithiga & Co. Advocates in court.*

d) *Failure to issue a cancellation order of the title deed over Kyeni/Mufu/549 that had been issued to the respondent.*

13. The appellant moved the trial court to revoke the grant issued to the respondent that shared the deceased's estate wholly to the respondent and have the estate property solely distributed to him. It is the appellant's case that the deceased had bequeathed his property to the him on the 12/03/1975 through an oral will before he died on the 26/05/1975 before two competent witnesses.

14. This court must have regard to the provisions of **Section 5(1) of the Law of Succession Act** which stipulate that *any person who is of sound mind and is not a minor may dispose of all or any of his free property by will*. See **In Re Estate of G.K.K (Deceased) 2013 eKLR**.

15. The relevant Section of the Law is **Section 9 of the Law of Succession Act** which provides that:

(1) No oral will shall be valid unless:

(a) It is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making the will.

16. **Rule 13 of the Probate and Administration Rules** which provides for the application of proof of an oral will as:

“(1) An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to—

(a) the making and date of the will;

(b) the terms of the will;

(c) the names and addresses of any executors appointed;

(d) the names and addresses of all the alleged witnesses before whom the will was made;

(e) whether at the respective dates both of the making of the will and of his death the deceased was a member of the armed forces or merchant marine engaged on the same period of active service;

(f) whether the deceased at any time executed or caused to be executed a written will.

(2) Subject to the provisions of sub rule (1) the provisions of these Rules relating to applications for probate of written wills or of letters of administration with such wills annexed shall apply in relation to applications for the proof of oral wills.”

17. While contemplating the requirements of a valid oral will, Musyoka J in **Re Estate of Evanson Mbugua Thong'ote (Deceased)**

Succession Cause 2519 of 1998 [2016] eKLR stated that “An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will.” The Honourable judge continued “... The other consideration is that the utterance ought to be made in the presence of two or more persons”

18. The witnesses who claimed to have witnessed the oral will of the deceased allegedly made on 12/03/1975, did not give evidence of any utterance of the deceased in the alleged will. All that was said is that the deceased said he had given the land to his grandson, the appellant.

19. If the court was to believe the appellant, it is on record that the deceased did not die immediately after making the oral will. He died on 26/05/1975 which was over three months after the oral will was allegedly made. During this period, the deceased had the opportunity to follow the due process to transfer the land to his grandson during his lifetime, if he intended to do so. There was no attempt to move the concerned legal institutions to effect such a transfer. The appellant gave no reason for the failure to take that important action.

20. It is my considered view that the magistrate’s decision that the evidence did not establish existence of any oral will was not a misdirection but was based on the evidence on record.

21. The fact that the deceased sent the appellant to collect the title of the land Kyeni/Mufu/549 from the land registry which the appellant kept in safe custody does not give him a right of inheritance of the deceased’s own children.

22. I have perused the judgment of the learned magistrate which states that in the course of the proceedings for revocation of grant, the appellant relinquished his interest in the estate. The first time such indication was given was on 23/02/2017. For this reason, the magistrate even after identifying the beneficiaries as three including the appellant, bequeathed the estate to the respondent and his sister Evangeline Warue in equal shares leaving out the appellant.

23. The magistrate relied on the statement made by M/s Njeru Ithiga for the respondent in court and it reads: -

“By consent the respondent Joseck Ireri Mark who is legal owner of Kyeni/Mufu/549 measuring three acres do transfer the same to Josphat Njagi Njeru and Evageline Warue Njuguna in equal shares. The transferees to bear the cost of survey and other attendant costs.”

24. The appellant said the magistrate erred by holding that Evangeline was represented by Mr. Njeru Ithiga in the application for revocation of grant. I have perused the proceedings and ruling of the magistrate and has not come across such a finding by the magistrate. In the relevant quorums of the court, Mr. Ithiga appeared for the respondent Joseck Ireri Mark and not for Evangeline. On the date, the consent was dictated to the court by Mr. Ithiga, all the parties were present in court. The appellant did not oppose or deny that he had discussed and agreed on the consent with the respondent which had the effect of relinquishing the interests of the respondent.

25. Consequently, the magistrate cannot be said to have erred in his finding that the respondent had relinquished his interest.

26. I have also considered the evaluation of the evidence by the trial court as regards Section 76 of the Law of Succession Act under which provision the summons for revocation of grant was based. In my view the magistrate, rightly found the appellant guilty of non-disclosure of facts material to the case which led him to set aside the orders for confirmation of grant. The record supports the magistrate’s finding that the respondent had not consulted or obtained the consent of other beneficiaries when he filed and pursued the succession proceedings to conclusion and made himself the sole beneficiary of the deceased’s land.

27. It is trite law that every beneficiary entitled to the estate must be given his/her rightful share whether he appears in court or not. Evangeline was entitled to a share in the deceased’s estate unless she renounced her interest before the court. It is further noted that the representation of Evangeline Warue was never an issue before the trial court.

28. Finally, whether the trial court erred by failing to cancel the title deed on Kyeni/Mufu/549 from the record, the title deed of the suit property is still in the name of the deceased. In the event that there was a change which was not brought to the attention of the court, the parties concerned are at liberty to apply for cancellation of the said title.

29. I have closely examined the grounds of appeal and I am of the considered opinion that none of them has been established. It is my finding that the decision of the magistrate was based on the evidence before him which was fully evaluated.

30. I find no merit in this appeal and I dismiss it with no order as to costs.

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kimanzi for Ithiga for Respondent

Appellant present