REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

P&A APPEAL NO. 4 OF 2013

[FORMERLY NYERI HIGH COURT P&A APPEAL NO. 9 OF 2010]

RE ESTATE OF KAGIRI KAIRU (DECEASED)

KAGIRI KAIRU.....APPELLANT

VERSUS

JOHN KAGIRI CHEGE.....RESPONDENT

[An appeal from the original judgment of J. Gathuku, Resident Magistrate, in Murang'a Succession Cause No. 120 of 1992 delivered on 8th November 2010]

JUDGMENT

1. The appellant is aggrieved by the judgment of the lower court dated 8th November 2010.

2. The deceased died *intestate* in the year 1975. He left one property known as *Loc.8/Kionjoine/149* [hereafter *the suit land*]. The land measures approximately 14 acres.

3. The appellant and respondent are *grandsons* of the deceased. The respondent applied in the lower court for grant of letters of administration *intestate* to the estate of the deceased. The appellant *protested*.

4. The learned trial magistrate found that the appellant was not a *direct* beneficiary; and, that his claims on the suit land should flow from his father.

5. The learned trial magistrate held further that the allegations by the appellant that he paid *consideration* to the beneficiaries for part of the land could not be entertained in the proceedings. In the result, the land was to be shared *equally* between three beneficiaries: Chege Kagiri, Munjiru Mwangi (representing Mwangi Kagiri) and Rahab Wanjiru (on behalf of Njoroge Kagiri).

6. The appellant filed a *memorandum of appeal* on 7th December 2010. There are *seven* grounds. They can be condensed into *four*. First, that the learned trial magistrate erred by distributing land to a beneficiary who had forfeited her claim in favour of the appellant. Secondly, that the learned trial magistrate failed to distinguish between an assignment of a beneficial interest and a sale. Thirdly, that he failed to consider that the appellant had been in possession of the disputed land for well over 30 years; and, fourthly, that the lower court lacked pecuniary jurisdiction to deal with the estate.

7. The appeal is opposed by the respondent.

8. At the hearing, learned counsel for the appellant, *Ms Waithira Mwangi*, relied on *written submissions* filed on 14th November 2017. Those submissions were drawn by another firm, *Gathoga Wairegi Advocates*. Learned counsel for the respondent raised up cudgels on the matter because the *memorandum of appeal* and the *record of appeal* were prepared by *Waithira Mwangi Advocates*.

9. The *supplementary record of appeal* on the other hand is drawn and filed by *Gathoga Wairegi Advocates.* There is no corresponding change of advocates. I am of the view that *written submissions* are not *pleadings*; they are merely for the *guidance* of the court. I *decline* the invitation to strike out the appellant's written submissions.

10. Learned counsel for the appellant concentrated on three grounds of appeal: that the value of the estate far exceeded the jurisdiction of the lower court; that the appellant had cultivated or planted tea bushes on the disputed portion for many years during the life time of the deceased; and, lastly, that he had paid valuable consideration to the beneficiaries.

11. The learned counsel for the respondent, *Mr. Mwangi Ben*, also relied on the submissions filed on 13th November 2017. In a nutshell, he submitted that neither a valuation was filed nor did any party contest the jurisdiction of the lower court. Secondly, the appellant did not discharge the burden of proof that he purchased the suit land. Thirdly, it was not disputed that the appellant was a grandson of the deceased. Accordingly, he was far removed from the direct line of inheritance. I was implored to dismiss the appeal.

12. This a first appeal to the High Court. It is thus an appeal on both *facts* and the *law*. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

13. The respondent testified in the lower court that he is a grandson of the deceased. The deceased died in 1975. He was survived by four sons and one daughter: Kairu Kagiri; Njoroge Kagiri; Chege Kagiri; and, Wanjiru Kagiri. Two of those sons, Njoroge and Mwangi, have since died. He said that the appellant's father was given an adjacent property known as Loc.8/Kionjoine/150. He was unaware of the circumstances under which the latter was registered.

14. The father to the administrator (respondent) was Chege Kagiri. The respondent said he had no personal claim over the suit land. He opined that the appellant should not get a share because he already had Loc.8/Kionjoine/150. He proposed that the suit land be divided into the three equal shares aforesaid.

15. Regarding the claim by the appellant and Peris Munjiru, he testified as follows-

> *"There is someone known as Kairu Kagiri. He is a protestor in this matter. I don't know why he is following his grandfather''s land yet he can seek property from his own father. There is also Peris Munjiru who says she has no interest in [No.]149. If her share is to go to Kagiri Kairu there is no problem. Kairu resides at land No. 149. He is an old man and may not travel to this court". [Underlining added]*

16. Upon cross examination, the respondent conceded he was only aged six years at the time the suit land was registered. He denied that he entered the suit land upon filing of the succession cause. He said he had the consent of the surviving sons of the deceased to lodge the petition.

17. That narrative was largely reiterated by Chege Kagiri (PW2). Like I stated, he is the father to the respondent. He denied that he sold his land to the appellant. He also denied reaching an agreement before the area chief granting a portion to the appellant. He denied that the appellant assisted him to purchase land in Gitaru. He however conceded that the appellant was in occupation of a section of the suit land.

18. PW3 was Rahab Wanjiru, the widow of Njoroge Kagiri. She denied that her husband sold 3 acres to the appellant. She proposed that the suit land be distributed between her, Chege Kagiri, and Mwangi Kagiri. In her view, the appellant did not deserve the land because his father had been given the adjoining land.

19. PW3 denied that the area chief resolved the dispute in favour of the appellant. But she conceded that Mwangi *"sold off his portion. He sold to Kagiri Kairu"*. She however added that she *"did not agree that [her] husband sold off his inheritance to Kagiri Kairu and used the money to buy land in the Rift Valley."*

20. The appellant testified that since 1964, he had cultivated 11 acres of the suit land. The other 4 acres are held by Chege Kagiri. He said he initially bought 4 acres from Mwangi Kagiri for Kshs 1,000 each. He bought another acre from him during the pendency of the suit in the lower court. The appellant also paid Kshs 8,787 to an advocate, *Kembi Gitura*, to settle a debt on behalf of Chege Kagiri in 1974. In return, Chege was to surrender 1 acre to him. He sold another acre to him in 1970. In 1978, he sold to him another acre for Kshs 30,000.

21. The appellant testified that in 1974, Njoroge Kagiri sold him 3 acres at Kshs 6,800. The balance was to be paid upon transfer. The appellant claimed he was cultivating the portion.

22. The appellant stated that a dispute arose in the 1990s. It went before the area chief who resolved that Mwangi gives the appellant 4 acres; Chege to give him 3 acres; and, Rahab Wanjiru to surrender 3 acres. The appellant claimed 11 acres. He proposed that Rahab gets 2 acres and Chege Kagiri 2 acres. He was of the view that Mwangi should not inherit anything.

23. Upon cross examination, he conceded that as a grandson, he was removed from the direct line of inheritance. But he asserted a purchaser's interest. He said that at the time of the sale, his uncles had no title to transfer. The appellant did not produce any sale agreement between him and Mwangi, Njoroge or Chege. He also did not have a receipt for the payment made to *Kembi Gitura Advocate*. He said he took possession after the payments and handed the receipts to Chege Kagiri.

24. The appellant's other witness was the area chief, Francis Mwangi. He confirmed that the appellant lodged a dispute on 13th February 1992 against Rahab Wanjiru, Mwangi Kairu and Chege Kairu. He reached the conclusion that the appellant had purchased 10 acres. He produced the minutes of the meeting. They were not signed. He conceded that by that time, the deceased had passed on.

25. The last witness for the appellant was Peter Chege, a retired senior chief. He advised the parties to file a succession cause. He said that Rahab Wanjiru wanted to refund the purchase price to the appellant. Chege on the other hand acknowledged that he sold 2 acres, and not 3 acres, to the appellant. He said the appellant was in possession of the bigger portion of the land. He conceded that no agreement for sale was signed.

26. I have re-appraised the evidence and considered the rival submissions.

27. I will deal first with the jurisdiction of the lower court. As the law stood, the lower court's jurisdiction was limited to estates not exceeding the gross value of Kshs 100,000. There was evidence from the appellant as follows-

> *"In 1978, [Chege] sold to [me] another acre for Kshs 30,000. In 1974, Njoroge Kagiri sold [me] 3 acres at Kshs 6,800. I would pay the balance on transfer being effected."*

28. The suit land measures approximately *15 acres*. Applying the modest value of Kshs 30,000 per acre in 1978, the gross value of the estate would seem to have exceeded the jurisdiction of the Resident Magistrates Court at the *date* of the hearing.

29. But I agree with learned counsel for the respondent that no *valuation* was filed. Neither party objected to jurisdiction. In addition Form P&A 5 filed on 23rd April 1992 pleaded the *value* of the estate at *Kshs 90,000*. Granted those circumstances, I am unable to fault the learned trial magistrate for proceeding to hear the dispute.

30. I concur with the learned trial magistrate that the appellant, as a *grandson* of the deceased, ranked lower in *priority* to his paternal uncles and aunt. But the appellant was *not* seeking to inherit the suit land from his grandfather. He was asserting a purchaser's interest. The key question is whether that fact was proved.

31. The cardinal precept of the law of evidence is that he who alleges must prove. See section 107 of the Evidence Act. See generally *Onalo v Ludeki and another* [2008] 3 KLR (E.P) 614. The material evidence from the appellant was as follows: That he initially bought 4 acres from Mwangi Kagiri for Kshs 1,000 each. He bought another acre from him during the pendency of the suit in the lower court. He also paid Kshs 8,787 to an advocate, *Kembi Gitura*, to settle a debt on behalf of Chege Kagiri in 1974. In return, Chege was to surrender 1 acre to him. He sold another acre to him in 1970. In 1978, he sold to him another acre for Kshs 30,000. In 1974, Njoroge Kagiri sold him 3 acres at Kshs 6,800. The balance was to be paid upon transfer.

32. Learned counsel for the appellant contended that the three vendors assigned their beneficial interest to the appellant; and, that the learned trial magistrate failed to distinguish between the assignment of a beneficial interest and a sale. At the time of the alleged sale, the suit land was in the name of the deceased. From a legal standpoint, the vendors could not sell what they did not own. But they could *assign* the beneficial interest or *renounce* their rights. Paraphrased, they were selling their future inheritance or renouncing their birthright.

33. The trouble is that the assignment was over an interest in *land*. It was not broken down into writing. The transaction is disputed. The appellant freely conceded that he did *not* have a sale agreement between him and Mwangi, Njoroge or Chege. He also did not have a receipt for the payment made to *Kembi Gitura Advocate*.

34. The minutes of proceedings before the area chief, Francis Mwangi, on or about 13th February 1992 against Rahab Wanjiru, Mwangi Kairu and Chege Kairu are unsigned. The outcomes are contested. The suit land was registered in the name of the deceased. The deceased was long dead by the time the matter reached the chief. The conclusion by the chief that the appellant had purchased 10 acres is thus without legal force.

35. The only cogent evidence is that the appellant had possessed the disputed portions for nearly 30 years. He was in possession during the *lifetime* of the deceased. He had planted tea bushes on the land. Rahab Wanjiru conceded that Mwangi *"sold off his portion…to Kagiri Kairu"*.

36. The deceased died in 1975. The dispute formented in the 1990s. I find the about-turn by the appellant's uncles and successors a cunning afterthought.

37. But from the totality of circumstantial and direct evidence, I find that the appellant (Kagiri Kairu) proved on a balance of probabilities that he is entitled to *5 acres* of the suit land from Mwangi Kagiri. That fact was admitted by Rahab Wanjiru (PW3) and the respondent (PW1). As I will discuss shortly, Peris Munjiru did not lay a claim to that portion of land. She renounced her rights to it.

38. The assignment of the beneficial interests from Chege Kagiri and Njoroge Kagiri to the appellant *may* not have been proved. But the conscience of Chege and Njoroge and their successors must continue to haunt them for their *dishonesty* towards the nephew.

39. I am alive that the appellant's father was registered as the owner of the adjoining land, *Loc.8/Kionjoine/150*. At the time of the suit, the registered owner was *alive*. The respondent was *unaware* of the circumstances under which the latter was registered. The respondent was only born in 1958. He was aged *six years* at the time of land consolidation or registration. I am thus unable to hold that the appellant's inheritance should come from the adjoining land. Furthermore, what was *primarily* in issue before the learned trial magistrate was the suit land, *Loc.8/Kionjoine/149*.

40. I will revisit the award to Munjiru Mwangi. There was evidence before the learned trial magistrate that *Peris Munjiru* had forfeited her interest in favour of the appellant. The respondent testified on that point as follows-

> *"There is also Peris Munjiru who says she has no interest in [No.]149. If her share is to go to Kagiri Kairu there is no problem"*

41. Peris Munjiru did not testify in the matter. Like I stated earlier, she did not lay any claim to the suit land. With respect to the learned trial magistrate, there was *no* evidential basis to grant Peris Munjiru land. I find that Mwangi Kagiri had *assigned* all his beneficial interest in the suit land to the appellant and is no longer entitled to a share. I would accordingly set aside the award by the lower court to Munjiru Mwangi. Like I held earlier, the *5 acres* shall be distributed to the *appellant* (Kagiri Kairu)

42. The remainder of the land shall be distributed in *equal* shares to *Chege Kagiri* and *Rahab Wanjiru* (representing the interests of Njoroge Kagiri). But they will not have their cake and eat it. I order that the two shall compensate the appellant for any tea bushes planted on those portions by the appellant within *six months* of this decree. If the parties fail to agree, the value shall be determined by a valuer to be appointed by the court at the cost of *Chege Kagiri* and *Rahab Wanjiru.* The valuation shall be *final*.

43. In the end, I *set aside* the decision and decree of the lower court dated 8th November 2010. I substitute it with an order granting the appellant (Kagiri Kairu) *5 acres* of the suit land. The remainder of the land shall be distributed in *equal* shares to *Chege Kagiri* and *Rahab Wanjiru* (representing the interests of Njoroge Kagiri) subject to payment for the tea bushes in the preceding paragraph.

44. The grant shall now be confirmed in terms of paragraphs 41, 42 and 43 of this judgment.

45. Costs follow the event and are at the *discretion* of the court. Considering that this is a *succession cause* involving close family members; and, in the interests of justice, each party shall bear its own *costs*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of July 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Mwaniki for Ms. Waithira for the appellant instructed by Waithera Mwangi & Company Advocates.

Mr. Kirubi for the respondent instructed by Kirubi, Mwangi Ben & Company Advocates.

Ms. Dorcas and Mr. Kiberenge, Court Clerks.