



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL APPLICATION NO. 34 OF 2010

DANSON GITAU KARANJA.....APPELLANT

VERSUS

MUTUA GITAU KARANJA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. C. Kabucho, Resident Magistrate delivered on 13th July 2007 in the Senior Principal Magistrate's Court Succession Cause No. 92 of 2004 In the Matter of the Estate of Karanja Muturi alias Karanja Muturi Nyamaku)

JUDGMENT

1. This appeal is from the judgment of the learned Resident Magistrate at Kiambu who on 13th July 2007 distributed the estate of the deceased Karanja Muturi alias Karanja Muturi Nyamahu who died on 11th June 1983. It is the distribution that aggrieved the appellant.

2. There is no dispute that the deceased left the following children:-

- (a) Mutua Karanja (son) (respondent);
- (b) Mungai Karanja (son);
- (c) Margaret Njoki Karanja (daughter);
- (d) Waweru Karanja (son);
- (e) Danson Gitau Karanja (son) (appellant); and
- (f) Lydia Wacuka Karanja (daughter).

He had another son Muturi Karanja who had died leaving three children:- Karanja Muturi, James Karanja Muturi and Njeri Muturi. On 11th June 2004 the appellant and Lydia Wacuka Karanja petitioned the subordinate court at Kiambu for the grant of letters of administration intestate. The grant was issued on 8th December 2004. On 19th July 2005 they filed summons for the confirmation of the grant of letters of administration intestate. The deceased had left parcel L.R. Komothai/Kibichoi/117 measuring 1.6 acres and plot Komothai/Kibichoi/T.117 measuring 0.108 Hectares. They proposed that Lydia Wacuka Karanja

and Margaret Njoki Karanja do equally share the plot (Komothai/Kibichoi/T.117); and that the appellant gets 0.248Ha of Komothai/Kibichoi/117, leaving the deceased Muturi Karanja, Mutua Karanja, Mungai Karanja and Waweru Karanja to each get 0.104Ha of the parcel. The portion of the deceased Muturi Karanja was to be shared equally by his children.

3. The respondent opposed the proposed sharing in an affidavit of protest filed on 28th October 2005. He complained that the appellant had given himself a share bigger than the rest and yet the deceased had, before his death, indicated that Komothai/Kibichoi/177 be shared into six equal portions, five for his children and one for their deceased mother. Her mother had died after indicating that her portion be shared equally among her sons. He had no problem with the way the plot had been shared.

4. The subordinate court heard the application for confirmation by the calling of oral evidence. This was after the elders to whom the dispute had been referred had failed to resolve it. The respondent (PW 1) was the eldest in the family. He testified as did the appellant. According to the appellant the deceased divided the land to his family long before he died. He was the one who had given the appellant a larger portion. The appellant had used it for about 30 years. He stated that the deceased had left a written Will (D Exhibit 1) dated 24th April 1983, and that in it the shares of each child had been indicated. He was supported in his evidence by Lydia Wacuka Karanja (DW 2) and two witnesses, Daniel Kamau Nganga (DS 3) and former chief John Kamau Gakunga (DW 4).

5. This is a first appellate court whose responsibility is to independently re-evaluate the evidence of the lower court to be able to reach its own conclusion, while appreciating that it did not have the benefit of listening to the witnesses and therefore gauging their demeanour (**Kamau –v- Mungai & Another [2006] 1KLR 150**). There is no dispute that a party is bound by his own pleadings. When the appellant and his sister (Lydia Wacuka Karanja) filed the petition, they indicated that the deceased had died intestate. They asked to be granted letters of administration intestate in respect of the estate of the deceased. They were not allowed to depart from that and to begin to lead evidence to the effect that the deceased had left a Will. Even when they sought to show that the deceased had left a written Will, the same was found not to have been witnessed. It was therefore an invalid Will, and therefore the deceased was taken to have died intestate. (**Section 11(c) of the Law of Succession Act (Cap.160); In the Matter of the Estate of Humphrey Edward Githuku Kimuyu, Nairobi HC Succession Cause No. 2322 of 1995**). The claim that the deceased left an oral Will was therefore an afterthought. The trial court was correct in reaching its conclusion on the alleged Will.

6. It followed that the estate was to be distributed in accordance with **section 38** of the **Act**. I find that the equal distribution adopted by the lower court accorded with the law. The certificate of confirmation issued on 6th August 2007 is consequently affirmed, except that, now that Waweru Karanja died, his portion shall go to his widow Margaret Waithira Waweru to be held in trust for her and her children.

7. In conclusion, the appeal by the appellant is dismissed with costs.

DATED and DELIVERED at NAIROBI this 16TH day of MARCH 2017.

A.O. MUCHELULE

JUDGE