REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA 12 OF 2015

(FORMERLY MERU HCA 151 OF 2011)

SARAH KANINI THIGUNKU……APPELLANT

VERSUS

ELIZAPHAN NJUKI THIGUNKU……RESPONDENT

(***An Appeal from Judgment of N.N. MURAGE –R.M made on 14/12/2011***

in

Chuka Principal Magistrate's Court Succession Cause No. 150 of 2008)

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J U D G M E N T

1. The Appellant,Sarah KaniniThigunku, is the widow of Thigunku Mwarari. The late Thigunku Mwarari had two houses; the house of the Appellant and the house of the late CiamurangoThigunku. During the lifetime of the late Thigunku Mwarari, he settled his two families as follows:-

i. the family of the Appellant on Magumoni/Mukuuni/219
ii. the family of the late CiamurangoThigunku on Magumoni/Mukuuni/134.

2. It is important to note that the said LR No. Magumoni/Mukuuni/219, did not belong to Thigunku Mwarari but to his brother one Ndeke Mwarari. Nevertheless, the said Thigunku Mwarari settled on that property with his second house, that is of the Appellant. Indeed upon his demise,his remains were interred on that property. As regards LR Magumoni/Mukuuni/134, Thigunku Mwarari caused the same to be registered in the name of one Mbungu Thigunku the youngest son of the late Ciamurango Thigunku. He was so registered for his benefit and in trust of his family. As it were, after Thigunku Mwarari passed on, the Appellant continued to live on Magumoni/Mukuuni/219 (hereinafter 'plot 219') where the remains of her husband had been interred whilst the first family continued to live on and develop Magumoni/Mukuuni/134 (hereinafter "plot134"). The problem arose after Mbungu Thigunku, (hereinafter "the deceased"), the stepson of the Appellant, died on 15th June, 2007.

3. Upon the demise of the deceased as aforesaid, the Appellant obtained a letter from the Assistant Chief of Karamani Sub-location dated 13th October, 2008 which alleged the following to be the

beneficiaries of the estate of the deceased and their capacities:-

a. Sarah KaniniThigunku- Mother
b. Isaack Murithi- Son
c. James GitongaThigunku- Son
d. E. Njuki Thigunku- Son
e. Ephraim Nyaga- Son

On 18th October,2008 she filed Chuka PM's Court Succession Cause No. 150 of 2008 petitioning for Letters of Administration in her capacity as the widow of the deceased. In form No. P &A 5 she set out the names contained in the aforesaid Assistant Chief's letter as the persons who survived the deceased and who were therefore the beneficiaries of the estate. The estate was shown to comprise plot 134 only. The grant was issued and confirmed accordingly.

4. On learning of the said proceedings, the Respondent moved to the High Court, Meru and had the grant revoked by consent and the resultant sub-division of plot 134 annulled. The Appellant and the Respondent were thereupon appointed joint administrators of the estate of the deceased. They however, failed to agree and the issue of distribution was tried by **Hon. Murage N.N** who by a Judgment made on 14th December, 2011, found that the Appellant was not entitled to anything from the estate of the deceased. The trial Court distributed the estate to the Respondent and his brother Ephraim Nyaga Thigunku.

5. Aggrieved by the said decision, the Appellant has now appealed to this Court raising six (6) grounds of Appeal which can be summarized

into three as follows:-

a. **that the trial Court erred in failing to evaluate the evidence of the Appellant thereby arriving at a wrong decision;**
b. **that the trial Court erred in awarding the estate to the Respondent and his brother despite finding that the Appellant and her children were beneficiaries of the estate of the deceased; and**
c. **that the trial Court erred in disregarding the fact that the Appellant's husband had two wives whose children were entitled to the estate of the deceased and that the judgment was against the weight of evidence.**

6. At the hearing of the Appeal, the parties filed written submissions which were ably hi-lighted by Learned Counsel who addressed the Court generally on the Appeal. Mr. Murithi for the Appellant submitted that the trial Court was in error in its judgment since the deceased inherited the property from his father, the husband to the Appellant and that under Section 29 (1) of the Law of Succession Act, a step parent, of which the Appellant was to the deceased, is adependant. That the Court erred in holding that the Appellant had received purchase money from two purchasers of the portion of the estate property. Counsel relied on the case of ***Regina Wanjira Kingara v. Mary Wanja King'au & Ano. [2014] e KLR*** for the proposition that since the property was registered in the name of the deceased in trust for the family members of ThigunkuMwarari, the Appellant was a dependant and is entitled to a share.

7. On his part, Mr. Ithiga for the Respondent submitted that plot No.134 was never part of the estate of the Appellants husband; that the Appellant had admitted having inherited from her husband; that the trial courts judgment was based on the fact that it is the deceased together with his two brothers (the Respondent and Another) who were living on plot 134. Counsel submitted that Section 29 of the Act was not applicable but rather Section 39 (i) of the Act.

8. This being a first Appeal, it behoves this court to evaluate afresh the evidence and come to its own independent findings and conclusions.. See ***Selle v. Associated Motor Boat Co. Ltd [1968] EA 123***. However, in re-evaluating the evidence, the Court must bear in mind that it did not have the

advantage of seeing the witnesses testify.

9. The first ground is that the trial court erred in failing to evaluate the evidence on record thereby arriving at a wrong decision. The record shows that the trial court did not at all attempt to evaluate the evidence. The court seem to have proceeded to conclusions without first evaluating the evidence. The question therefore to answer is whether in failing to evaluate the evidence as aforesaid, the trial Court arrived at a wrong decision. This shall be answered upon considering the other grounds.

10. The next ground was that the trial Court erred in awarding the estate to the Respondent and his brother despite finding that the Appellant and her children were beneficiaries to the estate of the deceased. The trial Court held that since Mbungu Thigunku was registered as trustee of plot No.134, the Appellant was a beneficiary to the deceased's estate. This Court has reviewed the evidence on record. It is clear from the record that the deceased was registered as owner of plot No.134 on 22/2/1966. The Appellant was married in or about 1964. Her husband Thigunku Mwarari is the one who caused plot No. 134 to be registered in Mbungu Thigunku's name. The trust was not expressly entered in the register. He, Thigunku Mwarari is also the one who caused plot No.219 to be registered in the name of Njuki Ndeke, a son of his brother, Ndeke Mwarari.

11. After marrying the Appellant in 1964, the late Thigunku Mwarari never settled her on that plot. He rather settled his first wife Ciamurango Thigunku together with her children on plot No.134. He lived with the Appellant and her Children on Plot No. 219 until he passed on. During the lifetime of Thigunku Mwarari his two wives and their children lived on two distinct lands. They utilized and cultivated those lands exclusively. Even after his demise, the two families lived separately and utilized the properties as they did during his lifetime. The question that arises iswhy did the Appellant live comfortably in plot No.219 with her husband and children during his lifetime without question? Why didn't the Appellant ask her husband of where her right to cultivate and occupation of land lied during his lifetime?The record is not clear as to when the husband died. It is also not clear why the Appellant did not claim her alleged share from plot No.134 while the deceased was still alive. She waited until after Mbungu Thigunku died before she sprang her surprise of a right over the property. The trial court found that the reason was on her greed. That she only wanted the share in plot 134 for her to dispose off the same. This was based on the evidence that; the Appellant never lived on plot No. 134 during the lifetime of her husband or at any time whatsoever; she never claimed a share or right thereof during the lifetime of her husband or that of Mbungu Thigunku; that upon her being appointed the administrator of the estate of the deceased, she immediately disposed off whatever share she and her children had apportioned to themselves. Based on her own conduct and that of the family since 1964, I see no reason to fault the trial court for arriving at its decision. This ground is rejected.
12. The other issue is the Appellants conduct in these proceedings. She obtained a letter from the chief which was wholly misleading as to her status. As a beneficiary she christened herself the mother of the deceased and the rest of her children as the deceased's sons. In form P &A 5, she named herself the widow of the deceased. This she never corrected or amended throughout the trial. The truth is that she was only a step mother to the deceased and her children step-sons. She cannot be believed.

13. The next ground is that the trial court erred in disregarding the fact that the Appellant's husband had two wives whose children were entitled to the estate and that the court's decision was against the weight of evidence. I have already held that when the Appellant's deceased was alive, he settled his two houses on two different properties. None of the families raised any issue about that decision whether right or wrong. Even after his demise, neither the Appellant nor her children argued or asked to be resettled in plot 134. They never claimed a share thereof. To the contrary, the Appellant moved away and settled peacefully at Mbogori. Neither her nor her children have ever settled on or cultivated plot 134. The trial court found as a fact that once the Appellant and her children Isaack Murithi Thigunku and James Gitonga Thigunku got the opportunity to lay claim on plot No.134, they purported to sell off the same. Their interest was only to sell the portions or whatever they thought they were entitled to therein to 3rd parties. In my view, the

Court having found that the Appellant had been settled and continued to live in plot No.219 throughout the lifetime of her husband and even beyond, that her family never laid any claim of either occupation or otherwise over plot 134 during the lifetime of her husband or even Mbungu Thigunku, in whose name plot 134 had been registered, the trial court was right in bequeathing plot 134 to those who had lived on that property throughout their life time.

14. It was argued for the Appellant that since she is a step-mother to the deceased, she is a dependant under Section 29 of the Law of Succession Act. On the other hand, it was argued on behalf of the Respondent that Section 29 was not applicable. That the applicable provision of law is Section 39 (1).

15. The relevant provision provides:

> ***"29.For the purposes of this Part, "dependant" means:-***

a. ***the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to death;***
b. ***such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***
c. ***where the deceased was a woman, her husband if he was being maintained prior to the date of her death."(Emphasis supplied).***

16. From the foregoing, it is clear that a dependant under Section 29 of the Act includes step-parents, half brothers and half sisters. It is not in dispute that the Appellant was a step mother to the deceased and her children were step brothers to him. For one to be a dependent however, under Section 29 aforesaid, it is clear that one must prove dependency. The use of the words "…… ***as being maintained by the deceased immediately prior to his death…."***in that Section, connotesthat one must prove that he was dependent on the deceased before his demise. From the record, there was no evidence to show that either the Appellant or any of her children were dependent on the late Mbungu Thigunku. A mere relationship does not automatically qualify one to be a dependant under Section 29 of the Act. Prove of dependency is imperative. In this regard, there having been no evidence that the Appellant and her children were dependent on the deceased**,** Section 29of the Act is accordingly not applicable**.** Likewise the Case of **Regina Wanjira Kigara .v.Mary Wanja King'au & Anor [2014] eKLR** relied on by the Appellant is not applicable**.**

17. On the other hand Section 39 (1) of the Act provides;

> ***"39 (1)where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority***

a. ***father, or if dead***
b. ***mother, or if dead***
c. ***brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.***
d. ***half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.***
e. ***the relatives who in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.***

18. From the foregoing, it is clear that for purposes of succession, dependency is ranked on priority by consanguinity. The law prioritizes ones parents, followed by brothers and sisters or with their children. It is only after that, that step brothers and sisters come in. In my view, applying this provision, the deceased could only be inherited by his biological brothers, the Respondent and

Ephraim Nyaga. In this regard, although the trial Court failed to evaluate the evidence as required by law, it nevertheless arrived at a correct decision.

19. In view of the foregoing this court finds that the Appeal is without merit and dismisses the same. This being a family matter, I will order that each party does shoulder his or her own costs.

Dated and delivered at Chuka this 11th day of February, 2016

A.MABEYA

JUDGE

11/2/2016

Coram: Mabeya –Judge

C.A- Murithi

Ms Muriuki HB for Mr.Ithiga for Respondent

Mr. Kijaru HB for Mr. Murithi for Appellant

Judgment is delivered in open court in presence of all the parties.

A.MABEYA

JUDGE

11/2/2016