



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 45 OF 2012**

**MUNDIGI KIBUTI.....APPELLANT**

**VERSUS**

**ALICE RUKUNYI MBITI.....RESPONDENT**

**JUDGMENT**

The appellant has appealed against the judgment of the court of the Senior Principal Magistrate at Siakago delivered on 9<sup>th</sup> March, 2012 which confirmed the grant in favour of the respondent following objection proceedings that were filed by the appellant as the protestor.

The respondent has supported the judgment of the trial court.

This is the first appeal. As a first appeal court, according to *Peters V. Sunday Post Ltd. (1958) EA. 424*, I am required to re-assess the evidence that was produced in the trial court and arrive at my own independent conclusions. In doing so, I am required at the same time to generally defer to findings of fact as found by the trial court. The reason for this approach is that the trial court had the advantage of hearing and seeing the live testimony of the witnesses, which is not enjoyed by this court.

The confirmed grant was made after evidence had been given in the trial court by the protestor (PW 1). PW 1 testified that the respondent was the daughter of his uncle, Mbiti Gikuyu (the deceased). According to PW1 the deceased left behind land parcel Nos. Embu/Kithunthiri/105 and 1055. His further evidence was that the father of the deceased belonged to the same Murugu clan as the appellant.

He went further to testify that the same parcels of land were allocated to the deceased during the adjudication process. Furthermore, he also testified that the deceased held the parcels of land in trust on behalf of the murugu clan. Instead of being a registered as a trustee, the deceased went ahead and had the parcels of land registered in his name as the owner. The reason for the said registration according to PW 1 was that the surveyor found the deceased on the said parcels of land. Finally, it was his evidence that the deceased failed to state that the parcels of land belonged to the clan.

The appellant called Njiiru Ngengi Magara (PW2). PW 2 testified that the deceased and the appellant came from the same clan. It was his evidence that the suit parcels of land were family land which should be shared. He supported the evidence of the appellant that the father of the respondent was a member of PW1's clan. He also supported the evidence of the appellant that the deceased caused the said parcels of land to be registered in his name knowing very well that these parcels of land belonged to the clan. PW2 testified that he did not know when the parcels of land were registered in the name of the respondent's father.

The respondent( DW 1) gave evidence during the protest proceedings. It was her evidence that she filed

a succession cause in respect of his deceased father's estate, which comprised land parcel nos. 105, 1055 and 123. Her further evidence was that the land was being shared out on the basis of the clans. Furthermore, she testified that her late father was given the three parcels of land like any member of the said clan. She also testified that when his father was given the said parcels of land, no one came to lay claim to them.

The respondent called Ayiko Ileri Gatumu (DW2) as her witness. DW 2 testified that the respondent is the daughter of the deceased. He further testified that the deceased did not have any other child. It was also his evidence that every clan member was given land during the adjudication process. According to him, the appellant had several parcels of land which he sold. He confirmed that the parcels of land did not belong to the clan.

The appellant raised eleven grounds in his memorandum of appeal to this court. In ground 1 he faulted the trial court in finding that the said parcels of land did not belong to the clan, of which the deceased was a member. This ground of appeal is in substance similar to grounds 2, 3, 4, 5, 6 and 7. All these grounds combined do challenge the findings of fact by the trial court as to whether there was merit in the protest filed by the appellant, in which he stated that the said parcels of land belonged to the Murugu clan and that the father of the respondent was holding those parcels of land as a trustee of the clan.

As a first appeal court I have re-assessed the entire evidence produced during trial and I find that the father of the respondent/applicant was registered as the owner of the said parcels of land following the completion of the adjudication process. This is clear from the evidence of Ayiko Ileri Gatumu (DW 2). According to DW 2 every member of the clan was allocated land during that process of adjudication.

Following the adjudication process the father of the respondent/applicant was registered as the sole proprietor of the three parcels of land under Chapter 300 Laws of Kenya. The trial court believed the evidence of the respondent and her witness that the suit parcels of land belonged to the estate of her deceased father. That court was better placed in assessing the demeanour of the witnesses. On my own re-assessment of the evidence of both parties I find that the trial court rightly believed the evidence of the respondent and her witness. It also rightly disbelieved the evidence of the protestor and his witness. For these reasons, the appellant's grounds of appeal starting from ground 1 to 7 are without merit and are hereby dismissed. The reason being that these grounds challenged the findings of fact as found by the trial court.

In ground 8, the appellant has faulted the judgment of the trial court, because it was delivered on a different date from the date given to both the appellant and the respondent. According to the record of proceedings, the trial court initially indicated at the close of the evidentiary hearing that the judgment was to be delivered on 9<sup>th</sup> February, 2012. However, the judgement was not delivered on 9<sup>th</sup> February 2012. Instead it was delivered on 9<sup>th</sup> March, 2012 in the presence of both the appellant and the respondent. I do not find that there was any failure of justice in delivering the judgment on 9<sup>th</sup> March, 2012, because both the appellant and the respondent were present, when the judgement was delivered. In the circumstances, this ground of appeal is without merit and is hereby dismissed.

Grounds No. 9, 10 and 11 are tied up with the findings fact as found by the trial court, which findings were based on the credibility of all the witnesses. I find that the respondent and her witness were rightly believed and those of the appellant and his witness were rightly disbelieved. I do not find any error of law or fact in the conclusion reached by the trial court that the respondent was the sole beneficiary of her deceased father's parcels of land. This is also supported by the letter of the Administrative Chief, who stated that the respondent was the only surviving child of the estate of the deceased. This evidence was not challenged by the appellant during trial.

The upshot of the foregoing is that the appellant's appeal is hereby dismissed in its entirety.

The respondent has succeeded in this appeal. In terms of **section 27 of the Civil Procedure Act (Cap 21) Laws of Kenya**, a successful party is entitled to his costs. And for this reason the respondent is hereby awarded the costs of this appeal.

**JUDGEMENT DELIVERED, DATED and SIGNED at EMBU this 11<sup>th</sup> day of May 2016.**

In the presence of the Respondent and absence of Appellant.

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**11.05.16**