REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CIVIL APPEAL NO. 20 OF 2007

MARY MUTHONI WACHIRA…….APPELLANT

VERSUS

FRANCIS MWANGI MUTHARA……..……RESPONDENT

(Being an appeal from the judgment of G K Mwaura, Principal Magistrate in Succession Cause No. 186 of 1991 delivered on 10th August 2006)

JUDGMENT

1. The appeal herein raises several principal grounds, namely:-

a. That the trial court erred in concluding that Loc 15/Kangure/751 had been given *inter vivos* to the respondent;
b. That the trial court wrongly concluded that the deceased had died testate;
c. That the court did not consider the rights and fair distribution of the family land;
d. That the court failed to consider the exhibits produced by both sides; and
e. That the trial court laid unnecessary weight on the size of the disputed land.

2. The deceased person the subject of the proceedings in Murang'a PMCSC No. 186 of 1991 was Maria Wanja Njangiri alias Wakahu Muthara, who died on 18th March 1975. Representation to her estate was sought by the respondent in his alleged capacity as son of the deceased. The respondent alleged to be the sole survivor of the deceased. The deceased was said to have died possessed of a sole asset, Loc 15/Kangure/751. A grant was accordingly made to the respondent on 19th September 1991. The grant was confirmed on 19th December 1991, with the sole asset devolving upon the respondent.

3. The confirmation of the grant in Murang'a PMCSC No. 186 of 1991 provoked a summons for revocation of grant in Nairobi HCSC No. 2422 of 1995, which culminated in the setting aside of the orders that had confirmed the grant and the cancellation of the certificate of confirmation of grant. It was directed that the register for Loc 15/Kangure/751 be rectified by removing the name of the respondent and replacing it with that of the deceased. It was further directed that the application be heard afresh after the appellant had filed an affidavit of protest.

4. Directions were given on 3rd August 2004 that the confirmation application be determined on the basis of oral evidence. Both parties testified and called witnesses. It transpired that the deceased had several sons. During land demarcation each of the sons was allocated some land which was

subsequently registered in their names, that included the respondent and the appellant's husband. The deceased was allotted Loc 15/Kangure/751. During her lifetime, the respondent moved into the land and developed it in several respects. He alleged that the deceased had made a gift of the land to him *inter vivos* before she died. He called witnesses who alleged to have been witnesses to the gift. The appellant contested the gift. Her case was that the deceased always wanted the respondent to leave the land. In the end the court found that the evidence on record was consistent with the land in question having been given *inter vivos*, for the respondent had settled there for a long time before the deceased died.

5. The first issue that I have to wrestle with is whether the deceased had made an *inter vivos* gift of Loc 15/Kangure/751 to the respondent. The lower court was persuaded that was so as the deceased was said to have allowed the respondent to develop the property where he remained for a long time. I have carefully gone through the recorded evidence. I have noted that there is no documented evidence that the deceased had expressly given the property to the respondent. It is common ground however that the respondent did develop the property. It was emphasized that he lived on the property for a long time.

6. The respondent, in my view, moved into that property during the lifetime of the deceased, in his capacity as child of the deceased. Judicial notice ought to be taken of the fact that it is customary for parents to show their children where to settle or farm or graze their livestock. However, that of itself does not mean that such property then becomes that of the particular child by dint of being allowed to cultivate it or till it or graze animals on it.

7. The tenure under which the property was held was not customary law. The property was registered under the Registered Land Act, Cap 300, Laws of Kenya. Gifting of property under customary was not subjected to writing as African traditional societies were pre-literate, therefore such gifts were made orally. The bringing of property under a registration regime meant that any gifting of property was thereafter to be in writing. So that if the deceased intended to benefit the respondent during her lifetime she ought to have reduced the gift into writing or caused the transfer of title during her lifetime. Indeed, there would have been no need for the respondent to petition for a grant of letters of administration intestate if there had been a proper *inter vivos* gifting.

8. The absence of such transfer or written memorandum for such gift meant that there was no *inter vivos* gift of it to anyone. Consequently, the said property had not passed to the respondent during the deceased's lifetime, and therefore the same formed part of the estate of the deceased, available for distribution amongst all those who survived her.

9. Did the deceased die testate? I have not seen any finding in the judgment of the lower court which points to a conclusion that the deceased had died testate. The grant that was made to the respondent was of letters of administration intestate. There is therefore no basis for the ground that the court had erred in holding that the lower court had found that the deceased had died testate. There was reference to or mention of wishes of the deceased in the judgment, but there was no concrete evidence of any such wishes.

10. On the totality of the evidence, it is my finding that there is merit in the appeal herein. Consequently, I do hereby: -

a. **set aside the orders made in the judgment of the lower court of 10th August 2006;**

b. **the property in question shall be shared equally between the appellant and the respondent; and**

c. **there shall be no order as to costs.**

11. It is so ordered**.**

DATED, SIGNED and DELIVERED at NAIROBI this 1ST DAY OF JULY, 2016.

W. MUSYOKA

JUDGE