



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

P & A. APPEAL NO. 4 OF 2011

STANLEY KAMAU GATUNE.....APPELLANT

versus

JANE WANGUI CHEGERESPONDENT

(Appeal arising from the judgment of J. Gathuku Resident

Magistrate Murang'a in Succession Cause No. 226 of 1985)

JUDGMENT

1. JANE WANGUI CHEGE and JOEL KIRAGU GATUNE applied for grant of letters of Administration in respect of the estate of CHEGE JOHANA alias NATHAN CHEGE GATUNE and named the following surviving him:

- a. Jane Wangui Chege - Widow
- b. Johana Gatune Chege - Son
- c. Wangari Gatune Chege - daughter
- d. Bilha Mukami Chege - daughter
- e. Wanjiru Chege - daughter
- f. Wambui Chege - daughter
- g. James Maina Gatune - brother
- h. Joel Kiragu Gatune - brother
- i. Stanley Kamau Gatune - brother

and listed LR No. LOC 19/RWATHIA /916 as the only asset of the estate.

2. On 30th December 1986 the petitioners applied for confirmation of grant issued therein and on 17th October 2002 filed a rectified affidavit in support of summons for confirmation of grant and added a further property known as LR No. LOC19/RWATHIA KAYUT/165 and proposed the mode of distribution as follows:

- a. Loc19/Rwathia/916 to be shared equally amongst Jane Wangui Chege, Joel Kiragu Chege and Stanley Kamau Gatune.*
 - b. Loc19/Rwathia Kayut/165 to be registered in the name of Jane Wangui Chege.*
3. On 6th January 2006 STANLEY KAMAU GATUNE filed an affidavit of protest to the mode of distribution and stated that JOEL KIRAGU GATUNE had his own land known as LOC19/RWATHIA/12 and proposed distribution as follows:
 - a. LOC19/RWATHIA/916 to be shared equally between STANLEY KAMAU GATUNE and JANE WANGUI CHEGE in equal shares.*
 - b. LOC 19/RWATHIA/165 between STANLEY KAMAU GATUNE and JANE WANGUI CHEGE in equal shares.*
4. On 14th September 2007 the petitioners filed an agreement to share LOC 19/RWATHIA/916 into three equal share measuring 1.6 acres each between
 - a. JANE WANGUI CHEGE
 - B. JOEL KIRAGU CHEGE
 - C. STANLEY KAMAU GATUNE
5. On 19th November 2009 the protest proceeded for hearing wherein the protestor testified that the deceased was his elder brother and that the petitioner was also his brother but was staying at Naivasha. He stated that plot No. Loc19/Rwathia/916 was registered in the names of the deceased as a trustee on behalf of the family and that the grant should be confirmed as per the minutes of 18th March 2009 signed by all six beneficiaries.
6. The 2nd protestor witness Jane Wangui Chege testified that the petitioner was present when the agreement was made but he did not sign the same as he did not agree with them and under cross examination she confirmed that Loc19/Rwathia/916 had never been sub divided and further stated that the petitioner had built on Loc 9/Rwathia/2912. She confirmed that the land should be divided to Jane Wanjiru Chege, Stanley Kamau and Julius Borothi while 912 should go to James Maina and Joel Kiragu.
7. This evidence was further confirmed by P.W.3 JULIUS BOROTHI GATUNE who confirmed that Plot 916 should go to Joel Kiragu and James Maina while Plot No. 912 should go to Jane Chege Gatune, Julius Borothi and Stanley Kamau Gatune. P.W.4 Mathew Macharia Gatune also confirmed the protesters position.
8. The petitioner in his evidence stated that the deceased who was his brother left his plots namely 916 and 165 at Kayut which initially belonged to their father and that each should be amended according to his affidavit in support of the application for confirmation in line with the fathers will which was not signed. He further stated that Loc.19/Rwathia/912 belonged to their grandmother Wambui Kimotho who had divided the same to three and is therefore not part of their fathers estate.
9. Based upon this evidence the trial court identified the following as belonging to the estate of the deceased.
 - a. No. 298 Nyandarua Mikaro scheme
 - b. Loc 19/Rwathia/916
 - c. Loc 19/Rwathia/Kayut/165
10. The court proceeded to dismiss the issue of trust and held that the three property being solely held by the deceased should go to Jane Wangui the widow.

11. Being aggrieved by the said judgment the appellant filed this appeal and raised the following grounds of appeal.

1. **The learned Resident Magistrate erred in law and fact in hearing a succession case which was beyond the pecuniary jurisdiction of the court in contravention of the provisions of section 47 and 48 of law of succession Act chapter 160 laws of Kenya. The value of the properties in issue were beyond the threshold allowed by of Ksh. 100,000/-.**
2. **The learned Resident Magistrate erred in law and fact in not considering that the respondent and the appellant and his brothers' had signed/executed consent on how the properties should have shared thereby extinguishing/dissolving any trust that the deceased may have in the state.**
3. **The learned Resident Magistrate erred in law and fact in deciding that the protest did not prove any trust that the deceased had over the properties registered in his name.**
4. **The learned Resident Magistrate erred in law and fact in arriving at a conclusion that the appellant did not prove trusteeship on account of the properties registered in the names of his deceased brother.**
5. **The learned Resident Magistrate erred in law and fact in finding that the deceased was registered as a trustee for himself and his other brother.**
6. **The learned Resident Magistrate erred in law and fact in finding that the respondent should have inherit of properties not registered in the names of her deceased husband. i.e NYANDARUA MIKARO SCHEME/PLOT NO. 298.**
7. **The learned Resident Magistrate erred in law and fact in not finding that the grant should have been confirmed in term of the consent/minutes agreed upon by the beneficiaries.**
8. **The learned Resident Magistrate erred in law of the estate to herself.**
9. **The learned Resident Magistrate erred in law and fact in finding in arriving decision that was against the weight of evidence adduced.**

SUBMISSIONS

12. Directions were given that the appeal be heard by way of written submission and at the time of this judgment it is only the appellant who had filed her submissions which I must point out amount to adducing evidence after the close of the case.
13. It was however submitted by the appellant that the deceased being the elder brother was registered proprietor by the father while he was 16 years old so as to get land in the Rift Valley and that at no time did the Respondent claim the plots having signed the family agreement.
14. From the proceedings herein the only issue for determination is whether the trial court was right in awarding the identified property to the widow of the deceased.
15. There was evidence tendered before the trial court that by both the appellant and the respondent that they had agreed on how the identified property should be subdivided and therefore having identified the respondent as the wife of the deceased and in view of her evidence in support of the protest the trial court should have proceeded to sub divide the land as per the protest which was supported by the respondent.
16. It is therefore clear that in arriving and an award herein the trial magistrate was not supported by the evidence tendered.
17. I would therefore allow the appeal herein and substitute the judgment of the trial court with a judgment allowing the protest
18. The property identified herein will therefore be subdivided as follows:

PLOT NO. LO 19/RWATHIA/916 Jane Wangui Chege, Joel Kiragu

PLOT NO. LOC 19/RWATHIA KAYUT/165 Stanley Kamau, James Maina equally

PLOT NO. 298 MUKARO SCHEME - Julius Borothi, Mathew Macharia, John Munga equally.

19. This being a family dispute and the appeal not having been caused by the respondent each party shall meet their own costs.

Dated and delivered at Nyeri this 9th day of May 2014.

J. WAKIAGA

JUDGE

Joel Kiragu

Jane Wangui Chege - Respondent

Court: Judgment read in open court in the presence of the parties. Right of appeal

J. WAKIAGA

JUDGE

9/5/2014