



IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 22 OF 2013

IN THE MATTER OF THE ESTATE OF NJERU MURANGIRI (DECEASED)

LYDIA WAMUGO NJERU.....APPELLANT

VERSUS

SICILY GICHUKU NJERU.....RESPONDENT

J U D G M E N T

1. The Appellant (LYDIA WAMUGO NJERU) is a co-wife to the respondent (SICILY GICHUKU NJERU).
2. Their husband NJERU MURANGIRI to whom the estate in dispute relates died on 23/9/2011.
3. The appellant filed a succession cause in Runyenjes Senior Resident Magistrate's Court. The Respondent protested to the confirmation. The protest was heard and the learned trial Magistrate distributed the estate as per the decree filed herein.
4. The appellant was not contented with the distribution and filed this appeal citing very many repetitive grounds. My summary of the grounds is as follows:-
 - (a) That the distribution was not fair as the Respondent and her children had been sorted out by the deceased.
 - (b) That the Court's distribution has lifted her and her children from the land they occupy.
 - (c) The matter should be heard *de novo* or there be a redistribution.
5. When the appeal came for hearing both parties made oral submissions. The appellant submitted on her grounds and insisted that her house should get an equal share to the 1st house (of the Respondent).
6. In reply the respondent submitted that its their husband who distributed the lands in question and she does not understand why she was in Court. She however confirmed to the Court that the appellant stays on land parcel No. Kagaari/Kanja/2726.
7. This being a 1st appeal, this Court has a duty to re- evaluate the evidence on record and arrive at its own conclusion (***Refer SUMURIA & ANOTHER VS ALLIED INDUSTRIES LTD [2007] 2 KLR 1***)
8. The evidence that was presented to the lower Court was that the deceased had two wives. The 1st wife who is the Respondent has 6 children (2 sons and 4 daughters). The 2nd wife is the appellant who has 9 children (6 sons and 3 daughters).
9. **The following facts were not disputed:-**
 - (i) The deceased owned three parcels of land namely:-

- Kagaari/Kanja/2726 - 2 ½ acres
- Kagaari/Kanja/4358 - 6 ½ acres
- Kagaari/Kanja/8445 - ¼ acre

(ii) Kagaari/Kanja/8445 had been sold to John Mugendi Naftary.

(iii) During his lifetime the deceased had out of Kagaari/Kanja/4358 distributed land to the following:-

- (a) Onesmus Ireri - 1 ½ acre
- (b) Kariuki Njeru - 1 ½ acre
- (c) Sicily Gichugu (Respondent) - 1 acre

All these three (3) beneficiaries are from the 1st house.

(iv) The appellant and her family were settled on Kagaari/Kanja/2726.

10. The land that remained for distribution was Kagaari/Kanja/2726 (2.42 acres) plus 1.190 acres out of Kagaari/Kanja/4358. The learned trial Magistrate made this as his finding and I agree with him on this.

11. The bone of contention is how the learned trial Magistrate distributed this remaining land. The witness who testified clearly stated that the appellant was settled on Kagaari/Kanja/2726, while the petitioner was settled on Kagaari/Kanja/4358. This is also confirmed by the manner the deceased singled out the Respondent and her two sons who he gave land out of Kagaari/Kanja/4358.

12. And if indeed the appellant has settled on Kagaari/Kanja/2726 why would somebody want to lift her from there to plant her somewhere else?

13. Section 40(1) of the Law of Succession Act provides;

“Where an intestate has married more than once under any system of law permitting polygamy his personal and household effect and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.

14. It has been established that the deceased had two wives hence two houses. Further the 1st house has six (6) children while the 2nd house has nine (9) children.

15. Section 40(1) Law of Succession Act says the estate shall ***in the first instance be divided among the houses according to the number of children in each house with the surviving wife as an additional unit.***

16. It therefore follows that the 1st house has **7 units** while the 2nd house has **10 units**.

17. The learned trial Magistrate decided to distribute an equal share of land to all the units except three (3) in the first house. One thing he overlooked is the fact that the 3 persons in the first house already had received a total of 4 acres from the deceased. Why would that house again receive other shares from the remaining 4 acres?

18. Equitable distribution would require that the 2nd house which has more units should get a bigger share. Given that the total acreage for the two parcels was approximately 8.375 acres and the deceased had already shared out 4 acres to his 1st wife and her two sons it clearly means that the one acre share the Respondent got is for herself and her daughters. They already have titles to the 4 acres.

19. It therefore follows that the two parcels of land i.e. LR No. Kagaari/Kanja/2726 (2.42 acres) and L.R. No. Kagaari/Kanja/4358 (1.190 acres) measuring a total of 4.3 acres will be inherited by the

2nd house. As earlier indicated the 1st house had already received 4 acres to which they have titles.

20.I therefore allow the appeal on two grounds;

(I) The learned trial Magistrate distributed an estate whose value exceeded shs.100,000/= which contravenes section 48 of the Law of Succession Act.

(II) The distribution did not consider that the 1st house had already been provided for by the deceased and said house had lesser units than the 2nd house.

21.I therefore set aside the Judgment of the lower Court. And substitute it with a Judgment distributing the deceased's estate as follows;

LAND PARCEL NO. KAGAARI/KANJA/2726

1. MARTIN MURATHI NJERU - 0.55 ACRES
2. PHENUS MURIITHI NJERU - 0.55 ACRES
3. BEDAN MURIMI NJERU - 0.55 ACRES
4. TIMOTHY MACHARIA NJERU - 0.55 ACRES
5. LYDIA WAMUGO NJERU - 0.25 ACRES

LAND PARCEL NO. KAGAARI/KANJA/4358

1. JOSEPH GITONGA NJERU - 0.55 ACRES
2. ROY MUGAMBI NJERU - 0.55 ACRES
3. LYDIA WAMUGO NJERU - 0.8 ACRES (to hold in trust for Herself and her daughters)

LAND PARCEL NO. KAGAARI/KANJA/8445 – ½ acre

JOHN MUGENDI NAFTARY (Purchaser) - WHOLLY

22.Since the parties are family members there shall be no order as to costs.

Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT EMBU THIS 2ND DAY OF JULY 2014.

H.I. ONG'UDI

JUDGE

In the presence of:A-

Both parties

Njue CC