



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 84 OF 2010

EDITH IRIMA MBANDITHIOAPPELLANT

VERSUS

JAMES NGARI NJERU RESPONDENT

J U D G M E N T

An Appeal from the Judgment of HON. S.N. MOKUA - PM sitting at SIAKAGO in SUCC. CAUSE NO. 33 OF 2008 delivered on 29TH JULY 2010).

1. The appeal herein arises out of a Judgment delivered on 29th July 2010 by the Principal Magistrate at Siakago in Succession Cause No.33/08. The Appellant challenges the distribution by the Court on the following summarized grounds;

- i. The learned trial Magistrate erred in failing to award Nthawa/Gitiburi/2128 wholly to the Appellant.
- ii. The learned trial Magistrate failed to consider the evidence adduced by the Appellant that Nthawa/Gitiburi/2128 was given to the Appellant by the deceased prior to his death and that the Appellant was in exclusive possession of the whole parcel of land solely.
- iii. That the learned trial Magistrate erred in ordering the parcel of land No.NTHAWA/GITIBURI/2128 to be shared equally between the Appellant and Respondent.
- iv. The learned trial Magistrate failed to consider that the Petitioner had been given certain parcels of land by the deceased as his shares in the deceased's estate which was later sold for his personal gain.

2. This being a first appeal this Court is enjoined to reconsider and reevaluate the evidence on record afresh and arrive at its own conclusion. See;

- i. ***SELLE & ANOTHER –V- ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968]E.A. 123***
- ii. ***KAMAU –V- MUNGAI & ANOTHER [2006]1 KLR 150***

3. A summary of the facts in the lower Court is as follows;

The deceased **Njeru Itumbi** died intestate on 21st June 1990. The Petitioner (Respondent) James Ngari Njeru petitioned for a grant of letters of administration. In his supporting affidavit he named the following as beneficiaries of the deceased;

- i. James Ngari

- ii. Edith Irima
- iii. Elizabeth Wanja
- iv. Isaac Murimi

The property of the deceased was listed as follows;

- i. Nthawa/Siakago/317
- ii. Nthawa/Siakago/395
- iii. Nthawa/Gitiburi/2128

4. The Appellant filed an objection on the following grounds;

- i. The deceased prior to his death had bequeathed parcel No. Nthawa/Gitiburi/2128.
- ii. That the deceased had prior to his death allocated other lands to the Petitioner (Respondent).
- iii. That Eliza Wanja is married and is not entitled to an inheritance.
- iv. That she was the only beneficiary to the estate yet she had not been involved in the petition.
- v. Isaac Murimi was not a child of the deceased.

5. During the hearing of the objectors case she insisted that she had been settled on parcel No. 2128 by her deceased father. Her three witnesses gave similar evidence. It was the Petitioner's (Respondent's) case that their father showed each of them where to settle. The Petitioner stated that the parcel of land allocated to the objector (Appellant) was No. 2127 and that she did not live on parcel No. 2128.

6. The Court in delivering its Judgment found that the deceased had parcels Numbers Nthawa/Siakago/317 and 395 plus Nthawa/ Gitiburi/2128 for distribution. The Court also found that no documents were produced to confirm the ownership of Nthawa/Siakago/2127 and the sale of part of Nthawa/ Gitiburi/2128. The Court ordered that the three parcels i.e. Nthawa/Siakago/317 and 395, plus Nthawa/Gitiburi/2128 be distributed equally between the Petitioner and Objector. This is the decision which is the subject of this appeal.

7. When the appeal came before me for hearing the Appellant made oral submissions, reiterating her grounds of appeal. The Respondent in his written submissions stated that he was given land No. 2129 while the Appellant was given No. 2127 where both of them live. He still maintained that the deceased sold 2½ acres out of parcel No. 2128 to Isaac Murimi.

8. It is not disputed that parcels No. Nthawa/Siakago/317 and 395 form part of the deceased's estate and are due for distribution. The only issue for determination is whether parcel Nthawa/ Gitiburi/2128 forms part of the deceased's estate. And whether Isaac Murimi is entitled to 2½ acres from the said estate.

9. This Court ordered the Appellant to avail copies of the green cards of the lands in issue which she faithfully did. A quick perusal of these cards confirms that the original owner of the lands was the deceased and the first persons he transferred the lands to was either the Appellant or the Respondent. They are shown as follows;

- i. Nthawa/Siakago/317 is still in the deceased's names and measures **0.11 Hectares**.
- ii. Nthawa/Siakago/395 – is still in the names of the deceased and measures **0.12 Hectares**.
- iii. Nthawa/Siakago/2128 is still in the deceased's names and measures **1.82 Hectares**.
- iv. Nthawa/Siakago/668 measuring 0.5 Hectares was in the deceased's names and transferred to JAMES NGARI NJERU on 9/10/1986. It has since then changed hands.
- v. Nthawa/Gitiburi/2127 measuring **1.82 Hectares** was in the deceased's names and transferred to EDITH IRIMA MBANDITHIO on 16th November 1988.
- vi. Nthawa/Siakago/332 measuring **0.42 Hectares** was in the deceased's names and transferred to JAMES NGARI NJERU on 28th January 1994, who has also transferred it to many others.
- vii. Nthawa/Gitiburi/2129 measuring 1.76 Hectares was in the deceased's names and transferred to JAMES NGARI NJERU who has sold it to another.

10. The evidence of both the Appellant and Respondent and their witnesses in the Court below is that the deceased had two wives. And that the deceased settled the Appellant and Respondent on the parcels for their respective mothers. The documentary evidence before the Court shows that the Appellant was registered in parcel No.2127 while the Respondent was registered in parcel No.2129.

11. Following the above revelation, this Court directed the District Land Surveyor to visit the respective parcels of land to verify who was in actual occupation. The report filed in Court by the said Land Surveyor reveals the following;

- i. The Appellant occupies parcel No.Nthawa/Gitiburi/2128
- ii. The Respondent occupies parcel No.Nthawa/Gitiburi/2129
- iii. Augustino Kinyua occupies parcel No.Nthawa/Gitiburi/2127 which is registered in the name of the Appellant.

The Report therefore confirms the Appellant's assertion that she lives on parcel No.2128. The Respondent had stated that the Appellant occupies Parcel No.2127 which is false.

12. From the documentary evidence and the evidence before the lower Court, it is clear that parcel **No.2127** was given to the Appellant, while parcel **No.2129** was given to the Respondent. The Appellant though settled on parcel No.2128 does not have the title to the land. The title has remained in the name of the deceased, as per the search and copy of the register (green card). It is therefore my view that Nthawa/Gitiburi/2128 forms part of the deceased's estate and falls for distribution. Does it therefore mean that the Appellant has to inherit the said parcel to the exclusion of the Respondent? If the two (Appellant and Respondent) have to share this land equally, each would get 0.91 Hectares. However before this Court makes a determination on that, it is important to note that the Respondent had been given other parcels of land to the exclusion of the Appellant.

13. They are as follows;

- Nthawa/Siakago/668 (0.5 Ha.) and
- Nthawa/Siakago/332 (0.4 Ha.)

whose total acreage is 0.9 Ha.

When determining the Respondent's share in parcel No.2128 it is important to take note of the above. My finding is that half his share has been covered by what he received in terms of parcels No.668 and 332 above to which the Appellant was also entitled in half share.

14. When No.**2128, 668, 332** are put together their acreage comes to **2.72 hectares**, which when divided into two portions comes to **1.36 hectares** which would be the entitlement of each. It is however noted that the Respondent had already benefitted from **0.9 hectares** from parcel No.668 and 332. So he is only entitled to the difference which is 1.36 Hectares – 0.9 Hectares=0.46 Hectares. My finding is that for there to be equitable distribution, land number 2128 will be shared out as follows;

Edith Irima - 1.35 Hectares

James Ngari Njeru - 0.46 Hectares

15. The Respondent in his submissions proposes that Isaac Murimi should be given a portion of parcel of No.2128 as his father had purchased 2½ acres from it. He who alleges a fact must prove it. I do note that nothing was availed to Court to prove that Isaac Murimi's father or Isaac himself had purchased a portion of parcel No.2128. Furthermore the said Isaac Murimi never filed any objection to the distribution of the deceased's estate to claim a share in parcel No.2128. It has not been shown that the said Isaac Murimi has *locus standi* to claim on behalf of his late father's estate. He will therefore not get a share therein.

16. The Appellant produced a copy of an agreement showing that the Respondent has sold part of parcel No.395 and she wanted him to have that one. The acreage in parcel No.317 and 395 is almost similar and there would be no injustice if each of the beneficiaries got his/her own parcel.

17. I have come to the same conclusion as the lower Court that;

- a. The beneficiaries in the deceased's estate are the Appellant and Respondent.
- b. The deceased's estate comprised of the three (3) parcels of land as indicated by the lower Court. I however set aside the distribution by the said Court and substitute it with an order distributing the estate as follows;
 - a. Nthawa/Siakago/395 to go to JAMES NGARI NJERU (wholly)
 - b. Nthawa/Siakago/317 to go to EDITH IRIMA MBANDITHIO (wholly)
 - c. Nthawa/Gitiburi/2128 to be shared as follows;
 - i. EDITH IRIMI MBANDITHIO to inherit 1.35 Hectares
 - ii. JAMES NGARI NJERU to inherit 0.46 Hectares.

The appeal is therefore allowed in the above terms only. Each party to bear his/her own costs.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Appellant

Respondent

Mutero/Kirong – C/c