



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL 71 OF 2011

PETER WANJOHI MACHARIA.....APPELLANT
SUSAN WAIRIMU WACHIRA
FLORENCE WANGU MWANGIINTERESTED PARTIES

VERSUS

GLADYS NJERI KARIUKI.....RESPONDENT

(Being an appeal from the Ruling of E.M. NYAGA Resident Magistrate Succession Cause No. 152 of 2010 at Kerugoya on 20th May, 2011)

J U D G M E N T

The Appellant was the Petitioner while the Respondent herein was the Protestor in the lower Court. The matter before the Resident Magistrate Kerugoya was in respect of the estate of one Macharia Kisiri alias Machari Githiri.

The learned trial Magistrate after review of his Ruling of 6/5/2011 distributed the estate in KIINE/KIANGAI/600 as follows:-

- <i>Florence Wangu Mwangi</i>	-	<i>1.24 acres</i>
- <i>Gladys Njeri Muriuki</i>	-	<i>1.24 acres</i>
- <i>Susan Wairimu Wachira</i>	-	<i>2.49 acres</i>
- <i>Peter Wanjohi Macharia</i>	-	<i>2.49 acres</i>

The Petitioner being dissatisfied with the Ruling on distribution has filed this appeal raising 3 grounds.

- 1. The Learned Resident Magistrate erred in Law and Fact when he sat on his own Appeal and changed his earlier Ruling.***
- 2. The Learned Resident Magistrate decided a Case without hearing and evidence from the parties particularly on the Protest.***
- 3. The Learned Resident Magistrate erred in Law and Fact when he allowed an Advocate to give evidence from the bar and made a decision on such evidence.***

Both Counsels agreed to dispose of the appeal by written submissions which they filed.

Mr. Ngangah has given a genesis of this Succession Cause. He says allocation was made by the deceased before he died. He defends the trial Magistrate's review of the earlier Ruling, as there was an error on the face of the record. And that the interested party was not complaining about the distribution and so the appellant had no right to complain. And that the Appellant having failed to oppose the application dated 11/4/2011 culminating in the Ruling of 20/5/2011 he should not raise new issues as an appeal.

Mr. Kiriithi for the appellant submitted that the Ruling of 6/5/2011 which was reviewed showed the correct position and ought not to have been reviewed but appealed against. He too gives some evidence on the on-goings in this succession cause. The Appellants were condemned unheard.

As a first Appellate Court I have the duty to re-evaluate and reconsider the evidence that was adduced in the Court below and come to my own conclusion. I am guided by the case of

1. WILLIAMSON DIAMONDS LTD & ANOTHER VS BROWN [1970] EA 1.

2. KAMAU VS MUNGAI & ANOTHER [2006] 1 KLR 150

From the record in the Court below the Appellant herein filed a succession cause No152/10 at Senior Principal Magistrate's Court at Kerugoya in respect of his father's estate comprising of Land Parcel No. KIINE/KIANGAI/600 measuring 2.99 hectares. He named himself with the 2 interested parties as beneficiaries.

The Respondent then came in as a Protestor. On 29/3/2011 she told the Court she would entirely rely on her affidavit. While the Appellant said he would call 2 witnesses who were not present in court. The Respondent told the Court she had 3 acres of land at Ngariamama.

Based on that revelation, the learned trial Magistrate distributed the estate equally between the Appellant and the 2 interested parties. On 11/5/2011 the Respondent through an advocate filed an application for review of the Ruling of 6/5/2011. On 20/5/2011 the Appellant, Respondent and Respondent's counsel were present in court. The Appellant told the Court the following:-

“The Petition is in respect of my father's property. The deceased Mwangi Wanjohi is my brother. He had 2 wives Florence Wangu and Gladys Njeri Mwaniki”.

Again based on this revelation, the learned trial Magistrate reviewed his earlier Ruling and gave a Ruling which is the subject of this appeal. I have considered this evidence and the submissions by both counsels.

I will first deal with grounds 2 of the Appeal

“The learned Resident Magistrate decided a case without hearing evidence from the parties particularly on the Protest”.

It is clear that there was a protest filed. The parties did not at any one time enter into any consent. The learned trial Magistrate was mandated to give directions on how the Protest was to proceed. On 29/3/2011 this was somehow indicated by the parties but the record is silent on the directions by the Court on how the Protest would proceed.

In actual fact, the Court did not determine the Protest as there was no hearing on this. The Appellant had indicated he had 2 witnesses to call. Were these witnesses ever called? NO. Was the Appellant ever given a chance to testify? NO. The rest that followed after an advocate came on record for the Respondent was just but drama. The interested parties/beneficiaries were never participating parties in this Cause.

From the submissions by both counsels they appear to be in possession of much about the facts concerning this case. Yet none of these facts was relayed to the Court to assist it arrive at a just decision based on merit. This could only have been done by the parties being given an opportunity to testify.

On ground 1 I find that there was no mistake on the face of the record. The affidavits and all documents concerning this estate were before the learned trial Magistrate. The fact that he made a Ruling that was not in line with those facts did not create a mistake. The dissatisfied party ought to have appealed against it.

What Mr. Nganga told the Court on 11/5/2011 made the Respondent get the stay of execution of the orders of 6/5/2011, but not the Ruling being appealed against.

Finally and not the least is the issue of jurisdiction. From the distribution done, the estate of the deceased comprised of land measuring 2.99 hectares/7.47 acres. This is not land that can be said to be valued at Shs.100,000/= . It is over Shs.1 million. Section 48 of the Law of Succession Act gives the Resident Magistrate's Court jurisdiction of Shs.100,000/= . It has not been repealed. It is therefore glaringly clear that the learned Resident Magistrate did not in the first instance have jurisdiction to deal with this estate.

For the above reasons, I allow the Appeal and set aside the Rulings of the learned trial Magistrate dated 5/6/2011 and 20/6/2011. The letters of grant issued to the Appellant are hereby revoked.

Kerugoya Senior Principal Magistrate's Succession Cause No. 152/2010 is hereby transferred to this Court for hearing and final determination. Once the file is transferred the parties shall appear before this Court for fresh letters of Grant to be issued to the Appellant.

Each party to bear his/her own costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 17TH DAY OF JULY 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

Mr. Waweru for Kariithi for Appellant

Mr. Nganga for Respondent

Njue CC