



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 99 of 2003

KAGURE BEN.....APPELLANT

VERSUS

KABURU MURIITHI.....RESPONDENT

(Appeal from original Judgment of the Senior Resident Magistrate's Court at Karatina in S.R.M.SUCC. NO.52 of 2001 by J.N. NYAGAH - SRM.)

J U D G M E N T

The appellant is a daughter-in-law of one, Muriithi Kaburu, who on 10th October, 1980 passed on. Hereinafter I will refer to him as “*the deceased*”. Upon his death, his son Kaburu Muriithi hereinafter referred to as “*the respondent*” petitioned the Resident Magistrate’s court, Karatina for a grant of letters of administration intestate which was duly issued. However when it came to the confirmation of the same, Kagure Ben, hereinafter referred to as “*the appellant*” objected and filed a protest. The application for confirmation of grant as well as the protest were thereafter set down for hearing before J.N. Nyagah, Senior Resident Magistrate.

From the evidence adduced, it would appear that the deceased’s estate consisted of land parcel numbers Muhito/Thiha/3 and Muhito/Thiha/36. The estate with regard to Muhito/Thiha/3 was distributed amicably between the parties. However that was not the case with regard to Muhito/Thiha/36 hereinafter referred to as “*the suit premises*”. The appellant claims an acre therein on the basis that the deceased had given her in his lifetime the said one acre. The respondent contests that assertion. According to the appellant, the deceased in his lifetime had openly declared that the suit premises had incorporated some portions of land bought by the appellant’s husband through him which he desired to surrender to her. In pursuit of that wish the deceased had summoned the area Chief who testified for the appellant as PW4, Assistant Chief PW3 and a clan member PW2 to witness the partition of the suit premises. The boundaries were then marked the ground in his presence giving the appellant an acre thereof on which she still resides to date. Just before he passed on the deceased again summoned the appellant and respondent and gave them papers directing them as to how his entire estate should be inherited. According to her, she was to get a portion of an acre in the suit premises and the remainder would go to the respondent and his brother equally.

For the respondent, his evidence was that he together with his brother Kambo Muriithi are the sons of the deceased from the 2nd house. Kigwi Muriithi and the husband of the appellant were deceased’s sons from the 1st house. Three years before the deceased passed on, he called the respondent and the appellant. He gave the appellant documents in relation to land parcel Muhito/Thiha/3 and the respondent

papers in respect of the suit premises. He instructed the appellant that he said land was to be shared equally between herself and her husband's brother, Kigwi Muriithi. As for the suit premises it was to be shared between the respondent and his brother Kambo Muriithi. That Kigwi was told to vacate the suit premises and he complied. He moved and settled on Muhito/Thiha/3. Though, the appellant was also asked to move out of the suit premises, she was unable to do so for want of resources to build a house on Muhito/Thiha/3. She continued to live on the suit premises though. When the deceased passed on, the appellant and her brother in law filed a succession cause through which land parcel Muhito/Thiha/3 was transmitted to them. However when the respondent filed the instant succession cause to dispose to himself and his brother, the suit premises, the appellant filed a protest and claimed an acre therein. It should be noted that apart from the respondent, he called no other witness in support of his position in the matter.

Having re-appraised and evaluated the evidence tendered both by the appellant and respondent, the learned Magistrate found for the respondent holding:

“It is clear from the evidence before the court that before the deceased died he gave the protestor documents to land parcel No.3. He gave document to land parcel No.36 to the 2nd petitioner. The protestor later shared out land parcel No.3 with Kigwi Muriithi as instructed by the deceased. I do not believe that the protestor had been given any land on portion No.36. The instructions by the deceased was for this land to be shared by Kaburu and his brother Kambo while the protestor shared land No.3 with Kigwi. The protestor's witnesses must have been lying that there was any land set aside for the protestor on land parcel No.36. If this was the case there would have been further instructions when the protestor was given documents to her parcel of land.

I find that land parcel No.Muhito/Thihu/36 should be inherited by Kaburu Muriithi and Kambo Muriithi. The protestor's claim on the same is dismissed with costs to the 2nd petitioner.”

Aggrieved by the decision, the appellant lodged the instant appeal. In her home drawn memorandum of appeal, the appellant put forth 6 grounds of appeal to wit:

“1. The learned Senior Resident Magistrate erred in failing to consider the evidence given by PW3 Josphat Muchiri Kabogo who was the Assistant Chief of the area and who was called by the deceased Muriithi Kaburu to preside over the sub-division of his land parcel No.MUHITO/THIHA/36.

2. The learned Senior Resident Magistrate erred in law and infact in failing to consider that the appellant's husband had given some money to his father Muriithi Kaburu to buy him (1) one acre of land (Ben Muriithi) which Muriithi did and consolidated together with his fragments to become land parcel No.MUHITO/THIHA/36.

3. The learned Senior Resident Magistrate erred in law and in fact in failing to consider that witnesses number 2 and 3 were called by the deceased to witness and preside over the sub-division of the said land parcel No.MUHITO/THIHA/36 to give the appellant her portion of (1) one acre.

4. The learned Senior Resident Magistrate erred in law and in fact in failing to consider that even the respondent No.1 herein above had included the appellant in his affidavit in support of application of confirmation of a grant shown on 17th June, 2002 at Karatina and filed in court on 18/6/2002 giving the appellant (1/2) half an acre from the said land MUHITO/THIHA/36.

5. The learned Senior Resident Magistrate erred in law and infact in accepting the evidence of the respondents as true and worth of any credit whereby the appellant was denied her (1) one acre portion from the said land.

6. The learned Senior Resident Magistrate erred in law and in fact in consolidating Succession Cause No.52 of 2001 and No.1 of 2001, whereas no.1 had already been finalized and the title deed issued for the land parcel No.MUHITO/THIHA/3.”

Later on, by further memorandum of appeal dated 1st October, 2003, the appellant attempted to introduce new grounds of appeal. However the further memorandum of appeal was rejected as it had been filed out of time and without leave of court.

Initially the appeal was against the respondent and his brother, Kambo Muriithi as the 2nd respondent. By a letter dated 15th August, 2006, however addressed to this court, the 2nd respondent sought the leave of this court to withdraw from the appeal. He followed it up with a consent letter dated 15th August, 2006 and filed in court the following day duly executed by himself and the appellant.

The terms of the consent letter were that:

- “1. That the 2nd respondent herein Kiambu Muriithi be and is hereby allowed to withdraw his objection proceedings in this suit/appeal No.99/2003.
2. That the appellant is the rightful heir of the portion she occupies in the disputed land i.e. Muhito/Thiha/36 as per the wishes of deceased.
3. That land No.Muhito/Thiha/36 which is the subject matter in these proceedings be registered in the names of the appellants and the respondents as the deceased had marked in his lifetime.
4. Each party to bear his/her own party and consequently there be no orders as to costs.”

However, it would appear from the record that the consent letter was not acted upon. It would appear too that on the basis of the said consent letter, Kiambu Muriithi lost interest in the appeal and never bothered to attend the court during the hearing.

When the appeal came up for hearing on 6th May, 2008, Mr. Macharia and Mr. Miano, learned advocates for the appellant and respondent respectively agreed to argue the appeal by way of written submissions. Such submissions were to be filed and exchanged by 20th June, 2008 when the appeal was due for mention with a view to giving a date for judgment. Come 20th June, 2008 and only the appellant had filed her written submissions. Mr. Kingori, learned advocate, who held brief for Mr. Miano on that occasion requested for more time to enable Mr. Miano file the respondents written submissions. I stood over the appeal to 27th June, 2008 to enable him to do so. On that occasion the appeal was inadvertently placed before Kasango, J and because none of the parties appeared, she marked the appeal SOG.

It was however not until 17th February, 2009, that Mr. Macharia took up the matter. In letter dated and filed in court on the aforesaid date he lamented that though he had filed his submissions and served the respondent with the same within the stipulated time, the respondent had to date not complied with the order requiring him to file his written submissions. In view of the foregoing he requested that the file be placed before me for further directions.

The appeal came for mention before me on 11th May, 2009. Though the respondent's lawyer had been served with a hearing notice going by the affidavit of service on record, neither the respondent and or his lawyer turned up. Satisfied that the respondent was not keen in having the appeal heard, I directed that I would write and deliver judgment on the basis of the materials already in the record.

Accordingly, I am crafting this judgment without having the input of the respondent. However he can only blame himself for my having to take this course. I am of course alive to the fact that the appeal I am considering is a first appeal and I must remind myself of the duties imposed on a court hearing a first appeal. I am aware that on first appeal, the parties to it are entitled to expect from the court its own independent assessment and re-evaluation of the recorded evidence and its own conclusion from that evidence – Peters V Sunday Post Limited (1958) EA.424.

As I see it the issue for determination in this appeal is whether in his lifetime, the deceased had given

the appellant an acre out of the suit premises on the basis that his son, the husband of the appellant had purchased some parcels of land through him which were later incorporated in the suit premises presumably during land consolidation and demarcation. In support of this contention, the appellant called a Chief, a Sub-chief and another witness. The trio had been summoned by the deceased to witness the demarcation of the suit premises into two portions, one to go to the appellant and the remainder to go to the respondent and his brother. I must say that these were independent witnesses. They had nothing to gain by ganging up so as to testify falsely against the respondent. There is no suggestion that there was bad blood between them and the respondent or one of them that would have compelled them into testifying against the respondent. Nor is there any evidence to suggest that they stood to gain anything by testifying in favour of the appellant. In any event their testimony was not seriously challenged by the respondent in cross-examination. Indeed I might as well add that their evidence was credible and consistent.

However, the learned Magistrate did not share my conclusions aforesaid. Indeed he found the evidence unacceptable and bordering on lies. However there was no basis for such holding. In the case of Peters (*supra*), the court held that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence, to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.....”

In this appeal I am far from convinced that there was evidence before Nyagah, SRM upon which he could hold as he did that the appellant and her witnesses were lying. Clearly he failed to appreciate the weight or bearing of the piece of evidence put before him and thus reached a wrong decision. It would be wholly justified therefore for me to hold that the learned Magistrate was plainly wrong in the determination he made with regard to credibility of witnesses. There was no reason for the witnesses to lie. In any event there was no evidence whatsoever to make such holding.

It is worthy noting that the respondent did not call any evidence to counter the evidence of the appellant and her witnesses about the instructions given by the deceased with regard to the suit premises. The appellant in my view therefore discharged her burden of proof on a balance of probabilities that the deceased had directed that the appellant be given an acre or so out of the suit premises. The respondent's claim to the contrary did not meet the threshold of the standard of proof aforesaid.

There is also evidence that the appellant has been in occupation of a portion of the suit premises since it was partitioned to her by the deceased in his lifetime. The maxim “*Possession is nine points of the law*” as correctly pointed out by Mr. Macharia comes true in the circumstances of this case. It confirms that what she said about the deceased is the truth. Otherwise why would she be in occupation. The respondent has countered that position by stating that the appellant would have moved to Muhito/Thiha/3 but for want of finances to put up house. However, I do not buy this line of argument. The appellant had sons who had Muhito/Thiha/3 subdivided, transferred and registered in their respective names. I do not see how they would have failed to live with their mother and assist her put up a house. Similarly, I do not see how, the respondent would not have forced the appellant out of the suit premises if indeed he believed that the appellant was not entitled to an acre in the suit premises.

For all the foregoing reasons, I would allow the appeal with no order as to costs as the parties herein are closely related. I would substitute the order dismissing the appellant's protest with an order allowing the protest with no order as to costs as well. The appellant shall however be entitled to an acre out of land parcel No. Muhito/Thiha/36 as partitioned on the ground by the deceased in his lifetime whilst the remainder shall go to the respondent and his brother Kambo Muriithi equally.

Dated and delivered at Nyeri this 3rd day of June, 2009.

M.S.A. MAKHANDIA

JUDGE