REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 19 of 2001

MWANGI MUCHOYA……..……..……..APPELLANT

Versus

BEATRICE WANGARI WANDERI)

STEPHEN MUCHOYA KAMAU).…..…….RESPONDENTS

GRACE WANJIRU MUCHOYA)

(Appeal from original Judgment of the Principal Magistrate Courts at Murang'a in

P.M.SUCC No.276 OF 1994 by A.M. KING'OO (Miss) - RM)

J U D G M E N T

On 18th August, 1988, Peninah Njugu Muchoya hereinafter referred to as "*the deceased"* passed on leaving behind Mwangi Muchoya, a son, hereinafter referred to as "*the appellant",* Beatrice Wangari Wanderi, Hellen Wanjiru Kamau both daughters in law and Grace Wanjiru Muchoya, a daughter hereinafter referred to as "*the 1st, 2nd and 3rd respondents"* surviving her.

On 12th September, 1994, the appellant petitioned the Senior Resident Magistrate's court at Murang'a for the grant of letters of administration intestate with regard to the deceased's estate. He indicated therein that the deceased's estate consisted of the following assets:

- LOC.8/MATHARITE/957
- LOC.8/MATHARITE/958
- LOC.8/MATHARITE/959
- LOC.8/MATHARITE/960 and
- LOC.8/MATHARITE/961

Objections to the grant being issued to the appellant were raised by the 1st and 2nd respondents. However on 23rd May, 1995 the grant of letters of administration was duly issued to the appellant jointly with the respondents aforesaid. On 18th December, 1995, the respondents applied for the confirmation of the

grant. They proposed that Loc.8/Matharite/958 only be shared between them and Grace Wanjiru Muchoya, with each getting 1.00 acres each.

That application was met with an affidavit of protest filed by the appellant. In particular he disputed the mode of distribution proposed by the respondents. His counter proposal was as follows:-

(a) Loc.8/Matharite/957 to be registered in the names of 2nd respondent

(b) Loc.8/Matharite/958 to be registered in the name of 3rd respondent

(c) Loc.8/Matharite/959 to be registered in the name of 3rd respondent

(d) Loc.8/Matharite/960 to be registered in the name of appellant

(e) Loc.8/Matharite/961 to be registered in the name of 1st appellant.

During the pendency of the cause, the 2nd respondent passed on. She did so on 12th January, 1997. Her eldest son Stephen Muchoya Kamau applied and was allowed to substitute his deceased mother aforesaid. He is now the 2nd respondent in this appeal.

Both the application for confirmation of grant and the protest came up for hearing before A.M. King'oo, RM. From the evidence on record it is common ground that the deceased whose estate these proceedings relate to was the mother of the appellant and 3rd respondent, a mother in law to the 1st respondent and a grandmother to the 2nd respondent. Her estate initially comprised of land parcel number Loc.8/Matharite/498 which in her lifetime she subdivided into five portions; Loc.8/Matharite/957 on which she settled the 2nd respondent's mother, Loc.8/Matharite/958 which she left for herself, Loc.8/Matharite/959 on which she settled the 3rd respondent. Loc.8/Matharite/960 on which she settled the appellant and finally Loc.8/Matharite/961 on which she settled the 1st respondent. It is also common ground that the deceased passed on before the title deeds in respect of the aforesaid partitions and transfers had come out. However she departed leaving each beneficiary settled in their respective portions aforesaid. The only pieces or parcels of land the disputants herein are unable to agree as to how it should be subdivided are land parcel Loc.8/Matharite/497 and Loc.8/Matharite/958. It is common ground that land parcel Loc.8/Matharite/497 came to be registered in the name of the appellant after he successfully prosecuted succession cause number 130 of 1976. To the respondents, the appellant was litigating in that cause on their behalf. However as for the appellant, the battle was between him and Wanjiku Wanderi the wife of Wanderi Munyaga a step brother. The said wife had deserted the appellant's deceased step brother aforesaid but was claiming the said parcel of land in the succession proceedings. Yet the deceased had obtained the same from Muchoya. It is also common ground that the appellant subsequently subdivided the said parcel of land and gave both the 1st and 2nd respondents each portions measuring 3 acres. So much for the evidence in a bridged form tendered by the respective parties to this cause.

The learned magistrate having carefully considered the evidence rendered herself thus;

"….I have carefully looked all (sic) evidence here plus submissions. I find that the two parcels of land should be shared equally as proposed above by the objectors. Petitioner never bought any land. I have perused succession proceedings in succession cause No.130 of 1976 plus the judgment. I see no justification in petitioner getting more land than others. Accordingly deceased estate shall be shared as follows:-

(1) Beatrice Wangari to get 961

(2) Hellen Wanjiru to get 957

(3) Grace Wanjiru to get 959 and 958 Mwangi Muchoya to get 1.915 from 960

(4) The remaining 1.5 acres in 960 to be shared by Hellen, Grace and Beatrice each to get 0.5 acres from 960…."

This decision did not go down well with the appellant. Through H.K. Ndirangu Esq, Advocate, he lodged the instant appeal. He advanced 5 grounds of appeal in his memorandum of appeal to wit;

1. "The learned trial magistrate erred in law and fact in deciding that land parcel No.LOC.8/MATHARITE/960 should be divided so that the respondents gets 0.5 acres each, when no evidence was adduced seeking sub-division of the said LOC.8/MATHARITE/ 960.

2. The learned trial magistrate erred in law and fact in failing to come to the conclusion that the evidence of the parties clearly showed how the deceased had made clear her intention by subdividing the land LOC.8/MATHARITE/498 into LOC.8/MATHARITE/957, 958, 960 and 961, and had settled each of the petitioner and respondents before her death.

3. The learned trial magistrate erred in law and fact in failing to come to the inevitable conclusion that the subdivision of LOC.8/MATHARITE/497, was concluded long ago, and the same had no effect and/or bearing on the Murang'a Succession Cause Number 276/1994.

4. The learned trial magistrate erred in law and fact by going beyond the evidence (sic) Beatrice Wangari Wanderi & Helina Wanjiru Kamau had given in Succ.130/1976, which was produced as an exhibit in Succession Cause No.276/94 and therefore came to the wrong conclusion it he Succession Cause.

5. The learned trial Magistrate erred in law and fact in deciding the cause against the weight of the evidence and failed to come to the conclusion that land parcel number LOC.8/MATHARITE/960 should be registered in the name of the petitioner solely."

When the appeal came up for hearing before me on 8th June, 2009, Mr. Ndirangu and Mbuthia learned counsel appearing for the appellant and respondents respectively agreed to argue the appeal by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully considered them.

This is a first appeal and so this court is obliged to reconsider the evidence assess it and make appropriate conclusions but always remembering that it had neither seen nor heard the witnesses – see Peters V Sunday Post Ltd (1958) EA. 424, Selle & Another V Associated Moter Boat Co. Ltd & Another V Duncan Mwangi Wambugu (1982 – 88) 1 KAR 278.

As I understand it, the appellant's case with regard to Loc.8/Matharite/997 is that the deceased was his mother. This parcel of land belonged to his step brother who was deceased. He took out letters of administration in succession cause number 130 of 1976 with regard to that estate. One Wanjiku Wanderi was claiming the estate of the deceased step brother on account of being his widow though she had long deserted the deceased. The court in that succession cause found that she was not such a widow and therefore not entitled to inherit the estate of the deceased's stepbrother. The suit premises were subsequently transferred to him by way of transmission. According to the appellant he concedes that in prosecuting the cause he was acting on behalf of the family. He thereafter caused the suit premises to be subdivided. He assigned both 1st and 2nd respondents 3.3 acres each. He also gave his deceased mother 1.67 acres out of the same suit premises. He however retained the remainder. His deceased mother in appreciation of his assistance to her in her lifetime later surrendered her aforesaid portion to the appellant. That is why he ended up getting a total of 5 acres. This was in respect of land parcel Loc.8/Matharite/497. As for the other parcel of land Loc.8/Matharite/498, the deceased had already subdivided it in her lifetime and given it to the respective beneficiaries. She left for herself though Loc.8/Matharite/958 which ought to be shared out among the surviving beneficiaries. To the appellant the scheme of partion initiated by the deceased should remain that way since none of the beneficiaries

were complaining.

As for the respondents, the deceased never surrendered to the appellant her entitlement in land parcel Loc.8/Matharite/497 as claimed. Infact the deceased complained about the wrongful acquisition of her said 2 acres by the appellant. The appellant refused to surrender the same to the deceased as it was already registered in his name. As far as they were concerned the transfer and subsequent registration of the 2 acres out of the said parcel of land into the name of the appellant was fraudulent. If the 2 acres had not been set aside for the deceased they could have shared the same equally amongst themselves. The appellant was not supposed to get more. Otherwise they had no issues with the partition of the other parcel of land.

With respect to the land parcel Loc.8/Matharite/497 I can say from the onset that it did not form part of the estate of the deceased to be available for distribution in these proceedings. The parcel of land initially belonged to Wanderi Munyago a stepson to the deceased. Following succession proceedings following his death in Kiharu land succession cause number 130 of 1976, the appellant was registered as an absolute proprietor of the same by way of transmission. It matters not that he later subdivided the same and gave out to the 1st and 2nd respondents and his mother respectively portions of 3 and 2 acres or thereabouts respectively. It matters not that in his evidence he stated that he prosecuted the succession cause aforesaid on behalf of the family and or that he held the suit premises in trust for the family. According to the Law of Succession Act, "*Estate"* is defined as the free property of a deceased person. And "*Free Property"* is defined "in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest had not been terminated by his death…" Applying these definitions to the circumstances of this case it is quit clear that Loc.8/Matharite/497 did not qualify to be part of the estate of the deceased. It had not been registered in the name of the deceased. The deceased in her lifetime could not have therefore freely and competently disposed it off. There is evidence that the appellant had subsequently subdivided the same and transferred two portions out of it to the 1st and 2nd respondents. They presumably had titles. That being case, that act compounded the respondents' case further. It is even instructive that in the said succession cause the 1st and 2nd respondents gave evidence and stated categorically that the appellant should get 5 acres and that they should in return get 3 acres each. They cannot now be heard to claim that the subsequent subdivision by the appellant was fraudulent, not accordance with what they had agreed. Since the said property did not in law belong to the estate of the deceased, the learned magistrate in my view erred in treating it as such.

Before the death of the deceased, she had subdivided her parcel of land Loc.8/Matharite/498 and settled the beneficiaries in their respective portions. The third respondent confirms that much in her written submissions. Indeed she states;

"…Our mother had subdivided this land and given each his or her portion…… The only thing that our mother died before she transferred but each person was left in his or her portion as above. The court should have confirmed that because that was the wish of our late mother. The decision to give 0.5 acres of Mwangi Muchoya's land to myself was not proper. In fact to bring in the previous land parcel number Loc.8/Matharite/497 and say Mwangi got more land is not proper because the court had given him the whole land unconditionally from the estate of Wanderi Munyaga. It is Mwangi who decided to give Beatrice Wangari Wanderi 3.33 acres without his being prompted to do so. This was a different estate. We should not therefore get any portion of Loc.8/Matharite/960. The whole should be left to the appellant Mwangi Muchoya..…"

By stating so, the 3rd respondent is clearly siding with the appellant in this appeal. However who can fault her reasoning. Indeed it would appear therefore that the court's decision to subdivide the said parcel of land belonging to the appellant had no basis at all and if anything, it went against the wishes of the deceased and indeed even the respondents' own application for confirmation of grant. Further it must be obvious to any discerning person that there was no credible evidence that persuaded the trial court to come to the conclusion that the appellant was entitled to get 1.915 acres out of the disputed suit premises and the respondents 0.5 acres each. Finally, the 1st and 2nd respondent gave evidence in succession cause

number 130 of 1976 and therein indicated what their share should be in Loc.8/Matharite/497. It is beyond them now to seek to repudiate that evidence in this succession cause. No submissions were made led by either of the parties as to how Loc.8/Matharite/958 should be shared. That being the case it will be futile to fault the findings of the learned magistrate on the same.

In the end I have come to the conclusion that the lower courts reasoning based on the evidence of some aspects of this cause was not sound and the decision arrived at not well supported. Accordingly I would allow the appeal to the extend that the entire Loc.8/Matharite/960 goes to the appellant, and the rest of the distribution remains as per the judgment of the learned magistrate. As persons involved in this appeal are members of the same family, I make no order as to costs.

Dated and delivered at Nyeri this 8th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE