Thuranira v Lauri (Civil Appeal 23 of 2019) [2023] KECA 1619 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KECA 1619 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 23 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

JULY 21, 2023

BETWEEN

JOSEPH THURANIRA ..... APPELLANT

AND

DAVID BIRITHIA LAURI ..... RESPONDENT

(Being an appeal against the decree and judgment of the High Court at Meru (A. Mabeya, J.) dated 29th November 2018 in Civil Appeal No. 30 of 2018)

JUDGMENT

1. The deceased M'Mucheke M'Anaiba alias Dauti M'Mucheke M. Anaiba died intestate on November 26, 2015. He left a widow Sabina Kauki M'Mucheke and five children: David Birithia Lauri (the respondent), Patrick Kang'uura Mucheke, Esther Laala, Njabani Florah Mucheke and Joseph Thuranira (the appellant). He was the registered owner of parcels Ithima/Antuambui/2448 measuring about 1.7 acres, Ithima/Antuambui/3671 measuring about 1 acre and Ithima/Antuambui/495 measuring about 10.5 acres.

2. Following the death of the deceased, the appellant petitioned the Chief Magistrate's Court at Maua in Succession Cause No. 1 of 2017 for the grant of letters of administration intestate. The respondent filed objection, and the two were on August 23, 2017 appointed as the joint administrators of the estate of the deceased.

3. There was a dispute regarding the distribution of the estate. The respondent's case was that the deceased had in 1983 gifted him parcel Ithima/Antuambui/2448, and therefore the parcel did not form part of the estate. He stated that, following the gift, he had in 1986 built his home on the parcel and had extensively developed it. The deceased had obtained the consent of the Land Control Board to transfer the parcel to him, and has lodged registration documents with the Lands Registry, but that the appellant had stopped the registration.

4. According to the appellant, all the three parcels belonged to the deceased and were available for distribution. He denied that the deceased had gifted parcel Ithima/Antuambui/2448 to the respondent.

5. The trial court considered the evidence of the parties and their witnesses, and visited the parcels of land to, among other things, establish where each beneficiary was living. Relying on section 31 of the *Law of Succession Act* (Cap. 160) (the Act), the court found that the deceased had gifted the land parcel Ithima/Antuambui/2448 to the respondent, and therefore the parcel did not form part of the estate to be distributed to the beneficiaries. The whole parcel was ordered to go to the respondent. Ithima/Antuambui/3671 was shared equally between the appellant and Patrick Kang'uura M'Mucheke, and Ithima/Antuambui/495 was distributed as follows:-

    a. the respondent – 0.18 Ha;

    b. the appellant – 0.25 Ha;

    c. Patrick Kanguura M'Mucheke – 0.25 Ha;

    d. Esther Laala – 0.88 Ha;

    e. the widow – 0.88 Ha (life interest on where the matrimonial home is); and

    f. Njabani Flora Mucheke – 0.88 Ha.

6. The appellant was aggrieved by the judgment distributing the deceased's estate, and appealed to the High Court at Meru. The learned A. Mabeya, J. heard the appeal which he dismissed, and confirmed the findings by the trial court.

7. This is a second appeal by the appellant who was aggrieved by the entire judgment and decree of the High Court. His grounds of appeal were as follows:-

    1. The learned judge erred in law and in facts in failing to find that the distribution of the deceased estate comprised in L.R No. Ithima/Antuambui/2448 by the subordinate court was against the provisions of the Succession Act and the *Constitution*.

    2. The learned judge erred in law and in facts in misconstruing and relying on the untested evidence to deny the appellant and other beneficiaries of the deceased part of the deceased estate comprised in L.R No. Ithima/Antuambui/2448.

    3. That the learned judge erred in law in failing to find out in his judgment that there were other beneficiaries of the deceased estate other than the appellant and the respondent and thus take care of their interests in the estate.

    4. The learned judge erred in law and in facts in outing a lot of weight on none issues and as a result arrived on the wrong finding.

    5. The learned judge erred in law and in facts in deciding the entire appeal against the weight of law and evidence."

8. We are alive to the jurisdiction of this Court on a second appeal. In *Kenya Breweries Limited –v- Godfrey Odoyo* [2010]eKLR, this Court held as follows:-

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have

considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

9. In the case of *Stephen Muriungi and Another –v- Republic* [1982-58) IKAR 360, Chesoni, Acting JA, (as he then was) said the following at page 366:

> " We would agree with the view expressed in the English case of *Martin vs Glywed Distributors Ltd (t/a MBS Fastenings 1983)* ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

10. This appeal came before us on May 23, 2023. Learned counsel for the appellant and learned counsel for the respondent had both filed two sets of written submissions. Mr. Mutembei, learned counsel for the appellant, attended the hearing and elected to rely on his written submission. Counsel for the respondent did not attend, but we have considered his submissions.

11. The gist of the submission by the appellant's counsel was to the effect that the respondent had failed to provide sufficient evidence to prove that Ithima/Antuambui/2448 ("the suit property") had been gifted to him by the deceased, and therefore that both the trial court and the High Court had been wrong in their findings. Secondly, that under section 35, 38 and 40 of the *Law of Succession Act*, the two courts below ought to have found that the suit property was to be distributed equally among all the beneficiaries of the estate of the deceased.

12. According to the submissions of learned counsel for the respondent, the High Court had considered the entire evidence before the trial court to come to the conclusion that the suit property had been gifted by the deceased to the respondent; that the respondent had taken possession and developed the land extensively; and that the deceased had taken steps to transfer the parcel to the respondent before the transfer was stopped by the appellant. On the question of the distribution of the rest of the estate, counsel submitted, the High Court had properly accepted the trial court's distribution which, among others, was based on where each beneficiary had settled and developed. This Court was urged to find that the judgment by the High Court was based on the consideration of all the evidence, was well reasoned, and was based on relevant law.

13. We consider that the substantial complaint by the appellant was in respect of the finding by the High Court in regard to the suit property. The factual findings by the trial court, which the High Court agreed with, were that the respondent had assisted the deceased to recover the suit land which had been grabbed by third parties. Because of this, and in the presence of a clan elder and relative Mwirabua Baikilanya, the deceased in 1983 gave the suit property to the respondent. The respondent settled on the parcel in 1986 and extensively developed it. In 2014 the deceased went to the Ntonyiri Land Control Board and, in the presence of the clan elder, obtained consent to transfer the suit property to the respondent. On March 3, 2014 the deceased signed a transfer to the respondent. When the deceased took the documents to the Lands Office, he found a caution which the appellant had lodged against the title. This is why by the time of the deceased's death, the transfer had not been effected.

14. The trial court had relied on section 31 of the *Act* to find for the respondent. The High Court agreed with the trial court. Section 31 provides as follows:-

> " A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-
>
> a. the person making the gift is at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and
>
> b. a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and
>
> c. there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or other evidence of title thereto; and
>
> d. a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and
>
> e. The person making that gift dies from any cause without having survived that illness or danger; and
>
> f. the intended beneficiary survives the person who made the gift to him Provide that-
>
> 1. no gift made in contemplation of death shall be valid if the death is caused by suicide;
>
> 2. the person making the gift may, at any time before his death, lawfully request its return. The person making the gift may, at any time before his death, lawfully request its return."

15. On his part, the learned Judge cited *Halsbury's Laws of England*, 4th Edition, Volume 20(1) at Paragraph 67, in which the authors comment on incomplete gifts was as follows:-

> " Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

16. In agreeing with the trial court, the learned judge stated as follows:-

> " 20. In the present case, the deceased not only obtained the letter of consent from the local Land Control Board, he also signed the transfer in favour of the respondent. The respondent produced sufficient evidence that supported his claim that the deceased intended to transfer the land to him and that he had

extensively developed the said land. In this regard, the trial court was right in its decision as the provisions of section 31 of the Act had been complied with."

17. First, we have found no reason to disagree with the findings of fact by the two courts below, that in 1983 the deceased gave the suit land to the respondent as a gift. In 1986 he allowed the respondent to settle on the land. The respondent had since extensively developed the land. In 2014 the deceased obtained the consent of the Land Control Board to transfer the suit property to the respondent, and subsequently signed a transfer to him. He lodged the documents at the Lands Office, where he unfortunately found a caution against the title. The appellant had lodged the caution.

18. In The *Registered Trustees Anglican Church of Kenya Mbeere Diocese –v- The Rev. David Waweru Njoroge*, Civil Appeal No. 108 of 2002 at Nyeri, this Court was dealing with a case where in September 1999, the respondent applied to the Land Control Board to transfer a parcel of land to the Church Commissioners for Kenya as a gift. The consent was given on October 6, 1999, and on October 28, 2000 the respondent executed a transfer of the suit land in favour of The Church Commissioners for Kenya as a gift. The transfer was lodged at the Embu Land's Registry for registration but it was found that a son of the respondent had lodged a caution.

    The respondent had changed his mind because he had been demoted and his licence to officiate as minister in the ACK Mbeere Division had been withdrawn. He wrote to the ACK purporting to withdraw the gift. His suit to the High Court succeeded, and it was ordered that all the documents relating to the land be returned to him, the appellant be evicted and there be a permanent injunction.

19. On appeal to this Court, the decision by the High Court was reversed. This Court relied on a number of English decisions and observed as follows:-

> "It is true as Mr Njagi submitted that the transfer of land registered under *RLA* is not completed until registration by the Land Registrar, section 85(2) of the *RLA* so provides. Indeed, as provided by section 27 *RLA*, it is the registration of a person as proprietor which vests in the person absolute ownership of the land.
>
> However, an unregistered transfer can operate as a contract between the parties (section 38(2) *RLA*) with the result that beneficial interest in the property as opposed to legal title is passed to the transferee. The *Macedo's case* (*supra*) can be distinguished from this case. In that case, there was mere execution of transfer which the donor did not hand over to the donee and which he instructed his solicitors not to register. In the instant case, something more than in *Mascall's case* (*supra*) has been donee. The application for registration of the transfer was executed and the transfer and the accompanying documents lodged at the District Lands Registry for registration. In this case, therefore, the respondent has done all in his power to divest himself of and transfer to the church trustees all his legal and equitable interest in the land. There is nothing that remains to be done by the appellant to complete the transaction. The registration of the land is not within the power of the appellant and the transferee does not need any assistance from the court. The transferee of course has a right to take any appropriate action against third parties, including the son of the appellant who has lodged a caution, to facilitate the registration of the transfer. Although the land is still registered in the name of the respondent, he is in the circumstances of the case, a bare trustee for the transferee having transferred the whole of his beneficial interest in the land. The documents relating to the land which the appellant was ordered to return to the respondent were lodged at the Land Registry and accepted by the land Registrar. They are in the custody of the Land Registrar by virtue of section 112(1) of the *RLA*. The order for return of the documents directed at the appellant is, thus, ineffectual.

It follows from the foregoing, that the gift of the land in this case was completely constituted and cannot be recalled or revoked in law."

20. We find that in the instant case, by parity of reasoning, when the deceased handed over the suit property to the respondent, went and obtained the consent of the Land Control Board, signed the transfer to the respondent, and took these documents to the Lands Registry to have the transfer registered, he did everything within his power to divest himself, and transfer to the respondent, all his legal and equitable interest in the suit property. The Land Registrar would have registered the transaction were it not for the caution that the appellant lodged against the title.

21. If follows, therefore, that the gift of the suit property by the deceased to the respondent was completely constituted, and the claim by the appellant that the suit property still belonged to the deceased, and therefore available for distribution to all the beneficiaries, was not legally tenable.

22. The second complaint by the appellant was that, on the evidence and the law, the first appellate court was wrong to accept the distribution of the deceased's estate in the manner it did. We observe that there was no dispute regarding the beneficiaries of the estate of the deceased. After it was correctly found that the suit property had been gifted by the deceased to the respondent, what was available for distribution were parcels Ithima/Antuambui/495 and Ithama/Antuambui/3671. The learned Judge considered the circumstances surrounding the mode of distribution adopted by the trial court. This is how he proceeded:-

> " 23. I have looked at the distribution of the estate by the trial court. The court applied the principle of equality which is found in the entire Part V of the *Act*. It should be recognized that, unless all the beneficiaries of a deceased person agree to a particular mode of distribution, by signing a consent thereto, a court of law is not bound by any proposition by either the majority of the beneficiaries or otherwise. The court is bound to distribute such intestate estate in accordance with the provisions of Part V of the *Act*. I likewise find that ground to be unmeritorious and the same is rejected."

23. We agree with the learned judge regarding the distribution of the estate of a deceased person who has died intestate, and left one family. The distribution has to consider that in principle each beneficiary has an equal claim to the estate. However, like in this case, the parties had already settled their homes on the respective portions. The trial court had visited the parcels that the deceased had left and ascertained where each beneficiary had settled. The settlement had to be taken into consideration. It is also true that where the court was dealing with two separate titles, which were not equal in size, how to attain equality was not always going to be easy. In other words, the principle of equality was going to be tempered with the principle of equity. This is why the learned judge was of considered view that, after the trial court has taken into consideration the provisions of Part V of the *Act* and the wishes of the respective beneficiaries, it had to exercise its judicial discretion in arriving at a mode of distribution. The learned Judge agreed with the mode of distribution that the trial court had adopted.

24. On our part, we have no reason at all to disagree with the learned Judge regarding how the estate was distributed to the respective beneficiaries of the deceased.

25. Accordingly, we find no merit in the appellant's appeal, and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JULY, 2023

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR