IN THE COURT OF APPEAL

AT NYERI

(CORAM: G.B. M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 19 OF 2016

BETWEEN

PATRICK MUNENE MIGWI……...APPELLANT

AND

SIMON NYAMU MIGWI……..RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kerugoya (R.K. Limo, J.) dated 2nd March, 2016)

in

H.C. SUCC. Cause. No.290 of 2012)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of Limo, J. delivered on 2nd March, 2016. A brief background to the appeal is that **SIMON NYAMU MIGWI**, the respondent herein, applied for letters of administration in respect of the estate of **FRANCIS MIGWI MATU** alias **MIGWI MATU NDEGE** (the deceased) by instituting Embu High Court Succession Cause No. 370 of 2012. In the affidavit in support of the petition for letters of administration, the respondent named the following as surviving the deceased:

(i) **SIMON NYAMU MIGWI** - Son

(ii) **MARGARET WANJIKU MIGWI** - daughter (deceased)

(iii) **PATRICK MUNENE WANJIKU** - (Grandson)

(iv) **PURITY WAWIRA WANJIKU** - granddaughter

Subsequently, letters of administration were issued to the respondent on 30th November, 2012 in Kerugoya Succession Cause No. 290 of 2012 (formerly Embu H.C. Succ. No. 370 of 2012). On 12th February, 2013 the respondent filed summons for confirmation of the Grant. However, the confirmation was objected to as on 9th July, 2013 **PATRICK MUNENE MIGWI**, the appellant herein, filed an affidavit of protest in which he deponed as follows:

"1. That I'm the protestor herein hence competent to swear this affidavit.

2. That as correctly pointed out by the petitioner, the deceased left behind the following beneficiaries;

(a) Symon Nyamu Migwi – Son

(b) Patrick Munene Migwi – grandson

(c) Purity Wawira Wanjiku – granddaughter (sic)

3. That the petitioner has failed to disclose that he benefited and got land parcel number Kabare/Nyangati/4093 measuring about 3 acres which belonged to the deceased Migwi Matu Ndege. He then sub-divided the land into two parcels number Kabare/Nyangati/4379 measuring two acres Kabare/Nyangati/4378 measuring one acre. He later sold the two parcels of land to one Peterson Kinyua (Annexed and marked PMM-1A, 1B and 1C is a copy of the green card for land parcel number Kabare/Nyangati/4093, 4379 and 4378, respectively).

4. That the petitioner should not therefore get anything out of the remaining two parcels of land number Kabare/Nyangati/4094 and 4095.

5. That I therefore propose that the two parcels of land number Kabare/Nyangati/4094 measuring 2 acres and Kabare/Nyangati/4095 measuring about one acre ought to have been the share of my mother Margaret Wanjiku Migwi, but who is deceased. The two parcels of land should therefore be jointly registered in my name and that of my sister Purity Wawira Wanjiku.

6. That the deceased was my maternal grand-father, being the father to my late mother."

The respondent countered the averments in the appellant's affidavit of protest in an affidavit sworn by him on 17th October, 2013. The respondent admitted that the appellant was his nephew; ***"...that land parcels Nos. KABARE/NYANGATI/4379 and 4378 were sold during the lifetime of my father to offset the AFC loan;"*** that the appellant was entitled to land parcel **No. KABARE/NYANGATI/4095** comprising 1 acre whilst he was entitled to land parcel **No**.**KABARE/NYANGATI/4094** comprising 2 acres.

The contestation between the two proceeded to hearing on 29th October, 2015 before Limo, J. who recorded the evidence of **PW1, PATRICK MUNENE MIGWI** (the appellant) and that of **DW1, SIMON NYAMU MIGWI** (the respondent). Upon conclusion of the evidence, the learned Judge rendered his judgment on 2nd March, 2016 and found as follows;

"In view of the foregoing, I do find that the petitioner, the protestor and Purity Wawira Wanjiku are dependants to the deceased and are entitled to a share in the estate herein. The court has taken into account the fact that " ...*the respondent****"... had already benefitted from the estate but nevertheless in view of the fact that he is the only child to the deceased, he should at least get a share. The properties forming the estate shall therefore be distributed as follows:***

(a) KABARE/NYANGATI/4095 measuring approximately 1 acre shall devolve to SIMON NYAMU MIGWI the petitioner herein.

(b) KABARE/NYANGATI/4094 measuring approximately 2 acres shall be shared equally by Patrick Munene Migwi and Purity Wawira Wanjiku".

The appellant was dissatisfied with the said outcome and filed this appeal. In urging the appeal during the plenary hearing before us, Mr. Kagio, learned counsel for the appellant, urged us to find that the appellant's mother who died on 29th January 2012 had two children, the appellant and **PURITY WAWIRA WANJIKU**; that the appellant's mother was a sister to the respondent; that the respondent was given land parcel No. 4093 comprising 3 acres by the deceased as a gift *inter vivos* which he subdivided into 2 parcels namely **KABARE/NYANGATI/4378** and **KABARE/NYANGATI/4379** and which the respondent sold to one **PETERSON KINYUA.** According to counsel, the appellant and his sister should inherit the remaining 3 acres which was their mother's inheritance.

In response, the respondent contended that he sold the 3 acres given to him by the deceased to off-set a loan owed to Agricultural Finance Corporation. His proposal was that each one of them gets an acre of land from the remaining 3 acres.

We have considered the record, the affidavit of protest filed by the appellant, the respondent's affidavit in response to the appellant's affidavit of protest, the rival submissions and the law. As a first appellate Court we are entitled to reanalyze and reassess the evidence adduced at the trial court and thereafter draw our own conclusions therefrom, whilst bearing in mind that we did not have the benefit of seeing and hearing the witnesses as they testified; see **SUMARIA & ANOTHER VS. ALLED INDUSTRIES LTD [2007] KLR 1**. We also remind ourselves that this Court will not normally be in haste to interfere with a finding of fact by a trial court unless it is based on no evidence or unless it is based on a misapprehension of evidence or the trial judge is shown demonstrably to have acted on the wrong principle in reaching the findings he/she arrived at. See **EPHANTUS MWANGI & ANOTHER VS. DUNCAN MWANGI WAMBUGU [1982-99] 1 KAR 278.**

The facts of this case are fairly straightforward. The deceased died on 1st August 2005 leaving behind two children, the respondent and **MARGARET WANJIKU MIGWI (MARGARET)**. Unfortunately, **MARGARET** died on 29th January, 2012 leaving behind two children surviving her, the appellant and his sister, **PURITY WAWIRA WANJIKU.** It is also not in dispute that the deceased gave the respondent 3 acres of land as a gift *inter vivos* during his lifetime. It is further not disputed that the respondent sold the 3 acres to one **PETERSON KINYUA** as the respondent conceded as much. However, it was the respondent's argument that he sold the 3 acres to offset a loan owed to Agricultural Finance Corporation. The appellant challenged this assertion by producing as exhibit the green cards for the parcels of land comprised of the 3 acres gifted to the respondent. Suffice to state that there was no entry in the green card of the loan allegedly owed to Agricultural Finance Corporation. Further, the appellant did not disclose the amount allegedly borrowed, nor the purpose of the loan or the year the loan was taken. Again, it is unfathomable that the deceased gave the 3 acres to the respondent for the latter to sell so as to offset a loan owed to AFC. If indeed it was true that the deceased (or his family) owed a loan to AFC and they needed to sell the 3 acres to offset it, no purpose was served by gifting it to the respondent for the latter to sell. We therefore do not believe the respondent and we have come to the conclusion that the respondent was given 3 acres as a gift *inter vivos* by the deceased, which he subdivided into two portions namely **KABARE/NYANGATI/4379** and **KABARE/NYANGATI/4378** which he sold to **PETERSON KINYUA**.

Section 42 of the Law of Succession Act provides as follows:

"(42) Where –

(a) an intestate has, during his or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house".

Whilst Section 38 of the said Act provides as follows:

"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children".

As stated earlier the deceased left two children surviving him, namely the respondent and **MARGARET**. By dint of S.38 of the Law of Succession Act the two children of the deceased were entitled to an equal division of the deceased's property. The deceased owned a total of 6 acres of land comprised in titles numbers **KABARE/NYANGATI/4093** (3 acres), **KABARE /NYANGATI/4094** (2 acres) and **KABARE/NYANGATI/4095** (1acre). It is common ground that the deceased predeceased **MARGARET** who therefore inherited the remaining 3 acres of the deceased land, the respondent having been gifted with 3 acres during the lifetime of the deceased. S.42 of the Law of Succession Act is clear as regards gifts made during the lifetime of a deceased person. It provides that such a gift is taken into account in the distribution of the estate of a deceased person. Having found that **MARGRET** was entitled to 3 acres of the deceased's property, the 3 acres should therefore be divided equally between the appellant and his sister **PURITY WAWIRA WANJIKU**.

In our view, the learned trial Judge erred in distributing the 3 acres between the appellant, **PURITY WAWIRA WANJIKU** and the respondent without taking into consideration that the respondent had been gifted *inter vivos* by the deceased. The upshot of our analysis is that parcels **Nos. KABARE/NYANGATI/4095** and **KABARE/NYANGATI/4094** shall be equally divided between the appellant and his sister, **PURITY WAWIRA WANJIKU**. We find that the respondent is not entitled to any part of the land that formed the inheritance of **MARGARET**. Accordingly, we find merit in this appeal and it is hereby allowed. However, this being a family matter, we direct that each party shall bear his/her own costs. It is so ordered.

Dated and delivered at Nyeri this 19TH day of July, 2017.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR