IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, MWILU & ODEK, JJ.A.)

CIVIL APPEAL NO. 136 OF 2011

AYUB KITHARA MAGAMBO .....APPELLANT

VERSUS

JENEROSA NCHENGE MARANGU..... RESPONDENT

(Being an Appeal against the judgment of the High Court of Kenya at Meru (Kasango, J.) dated 22nd October, 2010

in

H.C. Succ. C. No. 309 of 1998)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and order of the High Court in ***Meru H.C. Succ. Cause No. 309 of 1998, (Kasango, J.),*** dated 22nd October, 2010. It is a first appeal, and that being so, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter. (See ***SELLE & ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD. & OTHERS, [1968] 1 E A 123***.

[2] The brief facts giving rise to the appeal relate to the distribution of the estate of the late Lawrence Nchenge Marangu (*deceased)* who died intestate on 25th November, 1993. According to the petition for the grant of Letters of Administration that was filed by the deceased's widow Jenerosa Nchenge Marangu *(respondent)*; the deceased was survived by herself, her two daughters and the appellant who is the brother of the deceased. The deceased's only asset that fell for distribution and which forms the basis of this appeal is ***Land Parcel No. ABOTHUGUCHI/ KAONGO/709***, *(hereinafter referred to as the suit premises).*

[3] The respondent the widow of the deceased was issued with a grant of letters of administration on 6th January, 2003 and it was confirmed on 29th November, 2004 by ***Onyancha J.*** On 31st May, 2005, the appellant filed an application in Court seeking for an order to preserve the estate of the deceased by restricting any registration in regard to ***Land Reference ABOTHUGUCHI/UPPER KAOGO/709.*** *He also sought for an order* to revoke the grant that was confirmed on 4th January, 2004. By the same application the appellant also sought for leave to file an objection to the petition for letters of administration out of time. Interim orders were issued restricting any registration over the suit premises.

That order was extended several times as the matter was handled by several Judges that is; **Onyancha, *Sitati, Lenaola, Emukule, JJ***. These Judges clearly left the Court station before finalizing the matter.

[4] At some point on 6th March, 2006, ***Lenaola, J***. gave directions that the application dated 31st May, 2005 be heard by way of *viva voce* evidence. At another point that application was dismissed for non-attendance, however, on 18th June, 2007, the same Judge recorded a consent order reinstating the application and extended the interim orders until the hearing. Thereafter, directions were given to the parties to file affidavit evidence and the matter was mentioned several times until the 3rd June, 2010, when Mr. Ogoti counsel for the respondent and Mr. Muchangi for the appellant appeared and addressed the court as follows:

Mr. Muchangi:

> ***" What we are saying is that the deceased who was older brother in his lifetime sold the suit property. So my client says he needs 5 acres and the petitioner should get 2 acres."***
>
> ***This is what the Court directed:***
>
> ***" I direct the issue of distribution be dealt with by affidavit evidence and submissions. The petitioner shall file her papers within 14 days. The objector on being served shall file within 14 days. Mention before court on 8th July, 2010 for purpose of giving judgment date".***

[5] *After considering the affidavit evidence and submissions, the learned Judge made the following observations and orders in pertinent part of the judgment:*

> ***" Ayub alleged that the deceased held the suit property in trust for himself and Ayub that issue has not been denied by the petitioner. The dispute is on the acreage which Ayub is entitled to. I will begin by commenting on the allegation that the deceased sold 3 acres of that land in his lifetime. I have looked at the documents annexed to the affidavit of Ayub dated 19th August, 2008. It is clear that the 2 acres and 1 acre were reduced from the suit property before the land was adjudicated. The date those acres were removed is not reflected in those documents. It is, however, clear that those acres were removed following two different objections that is objection No. 1024 and No. 1025. There is no basis that I can see for holding that those acres were sold by the deceased. It is also rather strange that Ayub first filed papers in this case on 2nd June, 2005, but waited until when he filed his affidavit dated 19th August, 2008, to raise the issue of sale. I am tempted to state that the allegation of sale is an afterthought. Moreover, Ayub in that affidavit stated that the fact that those sales took place could be confirmed by his uncle M'Itonga M'Muthuri. Surprisingly, despite the leave granted to each party on 3rd June, 2010, to file further affidavits in support of their claim, Ayub did not take advantage of that leave to have his said uncle swear an affidavit to confirm the sale of land by the deceased. Nor did Ayub respond to the petitioner's allegation that he granted her to have a smaller portion because she is a widow with only daughters. Since Ayub has failed to respond to that allegation which the petitioner first raised by her affidavit dated 17th February, 2006, I am inclined to accept that that is the basis of Ayub requesting to have a larger portion of the deceased's property. Such discrimination on the basis of sex is forbidden by Article 27(4) of the Constitution which provides that no one shall discriminate another on any ground including race, sex, pregnancy, marital status, health status and ethnic amongst others. Article 60(1) (f) also forbids***

discrimination on the basis of sex. It provides:

"60(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles:-

(a) ….....

(b) ….....

(c) ….....

(d) ….....

(e) ….....

(f) elimination of gender discrimination in law, customs and practices related to land and property in land."

The petitioner's contention that she has been put to an expense in filing this succession and in hiring the land surveyor has not received a response from Ayub. The suit property has indeed been surveyed and sub-divided into No. 1654 measuring 1.62 Ha. And No. 1655 measuring 1.58 Ha. Justice will best be served by ordering that those numbers be retained and the petitioner be awarded the larger portion whilst the objector gets the slightly smaller portion. I, therefore, grant the following orders in this judgment:

1. ***I order that the confirmed grant issued on 29th November, 2004, to Jenerosa Nchenge Marangu be and is hereby set aside.***

2. ***I order that the grant issued to Jenerosa Nchenge Marangu on 14th January, 2003, be confirmed to the effect that Land Parcel No. ABOTHUGUCHI/U-KAONGO/709 to be distributed as follows:***

    (a) Jenerosa Nchenge Marangu to get parcel marked as No. 1654 on the mutation form dated 17th October, 2005.

    (b) Ayub Kithara Marangu to get parcel No. 1655 on the mutation form dated 17th October, 2005.

3. ***There shall be no orders as to costs."***

[6] The appellant was aggrieved by that judgment thereby prompting him to file the present appeal that is predicated on the following grounds of appeal:

1. ***The learned trial Judge erred in law and fact in not addressing the issues raised in application dated 31/5/2005.***

2. ***The learned Judge erred in law and fact in not finding that the materials placed before her warranted the granting the orders sought to enable the court to determine the matter on merit after hearing both parties and their witnesses.***

3. ***The learned Judge erred in law and fact in not finding that in distributing the estate between the parties she ought to have taken into account that the deceased had disposed 3 acres or thereabout of subject matter and hence his estate should have gotten a relatively smaller share to that extent.***

4. ***The decision is and was unfair and inequitable in all the circumstances of the case.***

[7] During the hearing of this appeal, Mr. C. Kariuki, learned counsel for the appellant relied on his written submissions and made some oral highlights. According to Mr. Kariuki, the appellant was denied a hearing by way of *viva voce* evidence to prove the allegations that the deceased sold 3 acres of the suit land during his lifetime and the same should have been taken out of the respondent's share. The appellant intended to call three witnesses in support of his contention that the respondent's share should have been 2 acres. The second argument taken by Mr. Kariuki was that the learned Judge considered matters that were not before her. The appellant's contention was that the grant was made without his consent. However the learned Judge dealt with an issue of gender discrimination which was not before the court. Citing the case of ***Aga Wanjiru Mwaniki v Jane Wanjiru Mwaniki, [1997] eKLR***, counsel emphasized the principle that cases must be decided on the issues on record and if it is desired to raise other issues, they must be placed on the record by way of amendment.

[8] In opposing this appeal, Mr. Wamoche, learned counsel holding brief for Mr. Ogoti for the respondent submitted that the application for the revocation of grant where the appellant had sought to be heard by way of *viva voce* evidence was dismissed for non-attendance. When the application was finally reinstated, the appellant failed to seek for fresh directions that the matter be heard by way of *viva voc*e. When the matter was mentioned before Kasango, J. on 3rd June, 2010, both parties were represented in court. Counsel for the appellant did not request the court to be allowed to adduce oral evidence. Moreover, the appellant had the opportunity to adducing the same evidence of the alleged three witnesses by way of affidavits. Nothing stopped him from filing the affidavits of his three witnesses. Lastly, the court considered the affidavit evidence regarding the contentious issue that the deceased had sold 3 acres of land. The court arrived at a correct conclusion that the 3 acres were taken out of the suit land during the land adjudication through the objection proceedings and the appellant failed to prove there was a sale.

[9] The main complaints by the appellant in this appeal as we see them, is that the learned Judge failed to address the issues that the appellant had not given his consent to the petition for the grant of Letters of Administration; secondly, the appellant was not given a chance to adduce oral evidence regarding the allegation that his deceased brother sold 3 acres of the suit property that he held in trust and, therefore, the appellant was entitled to a share of five acres. Lastly, the judgment was challenged for addressing an issue of gender discrimination that was neither raised nor canvassed by any party.

[10] We must go back to the genesis of this dispute. As already stated, it relates to an estate of a deceased person and the distribution of his sole parcel of land being ***ABOTHOGUCHI/KAONGO/709*** measuring approximately 3.2 hectares. The appellant contends that his consent as a beneficial owner of part of the deceased's parcel of land was not sought. On the other hand, the respondent averred in her replying affidavit that she made various efforts to get the co-operation of the appellant such as having the Area Chief and District Officer arrange for a meeting between them but the appellant failed to attend.

[11] The question that we have to look at is whether the appellant's consent to the succession cause was so vital so as to render the grant illegal or fraudulent. It is indisputable that the respondent is the widow of the deceased. As per the provisions of ***Section 66*** of the ***Law of Succession Act***, the respondent being the surviving spouse had the priority of being granted the Letters of Administration of her husband's estate over the appellant who is a brother. The respondent averred that she applied for the grant in utmost good faith and included the appellant as a beneficiary of her husband's estate because he was occupying a portion of the deceased's parcel of land.

[12] After the respondent was issued with the confirmed grant of letters of administration, she caused the land to be sub-divided in such a way that the appellant retained the portion where he has developed and where he lives. The respondent said she increased her share with two points which was to compensate her for the costs of pursuing the grant and the survey fees. This is what the respondent stated in paragraphs 10 and 11 of her replying affidavit:

> ***"That what the objector is calling my taking of larger share is just the extra 2 points (sic)I have making my share to be 1.62 Ha and his being 1.58 Ha.***

That I was advised by the local administration to take (sic) these 2 points to compensate me for the expenses I incurred in filing this cause alone and payment of survey expenses after the objector refused to co-operate".

[13] Was there any justification for revoking the grant that was issued to the respondent? Under ***Section 76*** of the ***Law of Succession Act***, a grant of Letters of Administration can be revoked or annulled if the court decides on an application or of its own motion: -

"(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c. ***that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that allegation was made in ignorance or inadvertently.....".***

[14] Upon our own evaluation of the affidavit evidence that was before the learned Judge, the submissions and pleadings, we are satisfied that the respondent being the widow of the deceased ranked in priority to the appellant and thus according to the provisions of ***Rule 7*** of the ***Probate and Administration Rules***, it was not necessary for the respondent to obtain the written consent of the appellant. This is how the Rule is coached:

"***where a person <u>who is not a person in the order of preference</u> set out in Section 66 of the Act seeks a grant of administration intestate, he shall before the making of the grant furnish to the court with information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having prior preference to a grant by virtue of that section has : -***

(a) renounced his right generally to apply for a grant: or

(b) consented in writing to the making of the grant to the applicant or

c. ***been issued with a citation calling upon him either to renounce such right or to apply for a grant***". Emphases ours.

[15] Apart from the fact that the respondent ranked in priority to the appellant, a P&A Court is given inherent powers under ***Section 47*** of the ***Act***, Rules ***27 and 73*** of the ***Probate and Administration Rules*** to make any orders for the ends of justice or to prevent abuse of the court process. We agree with the learned trial Judge that there was no basis for revoking the grant based on the appellant's claim. The trial Judge was satisfied that the respondent applied for the grant in good faith, named the appellant as one of the beneficiaries out of that good faith and provided for him a share of the deceased's estate.

[16] Was the appellant denied a hearing by way of oral evidence? When the application where the appellant sought inter alia for the revocation of the grant came up for hearing before Kasango, J., on 3rd June, 2010, neither the appellant nor his counsel sought to call witnesses. It was within the discretion of the trial Judge under ***Rule 41*** of the **P&A *Rules*** to decide how to proceed and determine the issues which were before the court while taking into account the expediency of the matter and the ends of justice. The appellant's main contention was that the deceased held one half share of 10 acres of the suit premises in his trust. If the appellant was pursuing a claim under trust he ought to have filed proceedings under ***Order 37 (2)*** of the ***Civil Procedure Rules***.

[17] However, the respondent stated that she provided a share of the suit premises to the appellant out of good faith thus the Judge did not determine the issue of trust. Nonetheless, the affidavit evidence was considered regarding the claim that the deceased sold 3 acres of the land that was registered in his name and, therefore, the appellant should be entitled to a larger share. The learned Judge considered the

respondent's response as was stated in her replying affidavit dated 25th March, 2009 as follows:

> ***"1. That if at all the objector is genuine, he should have claimed his share during the life time of the late husband.***
>
> 2. ***That the objector is after getting (sic) a bigger share because I have two daughters and he thinks that I am not entitled to equal shares as him.***
>
> ***3. That the objector has given me problems all through when I started processing this succession".***

[18] From the excerpts of the judgment reproduced hereinabove, the Judge considered the evidence that was produced by the appellant in the affidavit. If the title that the appellant was claiming did not comprise the 3 acres which were allegedly sold before the land adjudication and before the respondent's husband was registered as the owner, did that constitute a valid claim? In our considered view, the appellant's claim that the deceased sold a portion of land was not sustainable in the circumstances of the proceedings in the nature of a succession cause. As aforestated, the appellant ought to have taken out proceedings according to the prescribed procedure under ***Rule 41 (3)*** of the ***Probate & Administration Rules***. In any event, the alleged three acres were not part of the deceased title, a matter the appellant should have pursued with the deceased during his lifetime.

[19] The last issue that was argued before us was that the Judge addressed herself to an irrelevant issue of gender discrimination. We do not think that was entirely the case, as the issue was raised by the respondent that the appellant was looking down upon her due to the fact that she was a widow and she was a mother of girls only. The Judge aptly addressed the issue and was right to point out the provisions of the Constitution that outlaw discrimination on the basis of gender, or marital status.

We have considered the written submissions and the oral submissions by both counsel and dealt with the various aspects of the appeal by both sides and for the reasons given; it is our view that the learned Judge was right in her judgment.

Accordingly, this appeal lacks merit and it is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 21st day of January, 2014.

M. K. KOOME

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JUDGE OF APPEAL

P. MWILU

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JUDGE OF APPEAL

J. OTIENO - ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy to the original.

DEPUTY REGISTRAR