IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 154 OF 2011

IN THE MATTER OF THE ESTATE OF ELIJAH M'IMANYARA NTHAI – DECEASED

M'INOTI NTHAI.....APPELLANT

VERSUS

NAOMI KAREGI M'IMANYARA.....RESPONDENT

(Appeal from the decision of the High Court of Kenya at Meru (Kasango J.) dated 22nd October, 2010

in

HC. Succ. Cause No. 50 of 1996)

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JUDGMENT OF THE COURT

[**1]** This appeal is a clear illustration of how land disputes are so emotive, not only do they consume the emotions, energy and resources of the parties involved, parties involved rarely take time to understand and reflect on the nature of their claims, and the law governing such claims so as to follow the right procedures that are provided for by the law. They rarely also reflect on the eventual economic value of the outcome of such litigation. In the case of ***Dr. Leonard Kimeu Mwathi -vs- Rukaria M'Twerandu M'Iriungi, C.A. No. 28 of 2011 Nyeri***, this Court pointed out as follows:

"The Law of Succession Act was envisaged as a complete regime of law complete with its own procedure for purposes of administering the estate of a deceased person and the distribution of the estate to the beneficiaries. If there is any claim of civil nature against a deceased's estate, a claimant is supposed to file a civil suit against the administrators of the deceased's estate. Involvement of claimants of civil obligations or others in matters of the administration of a deceased's estate renders them protracted and difficult to resolve within the regime of the Law of Succession".

[2] The appeal before us involves a dispute over a parcel of land known as ***ABOTHUGUCHI/KATHERI/734*** measuring approximately 1 ½ acres (suit land). The dispute over the suit land is between a brother and the sister in law. Originally, the suit land was registered to M'Imanyara Nthai who died intestate on 27th June, 1995 aged 75 years. Upon his death, his widow Naomi Karegi M'Imanyara (Respondent), applied for letters of administration in respect of her husband's estate.

According to the affidavit in support of the petition by way of cross application for grant that was sworn by M' Inoti Nthai, the appellant, the deceased was survived by the respondent and 3 adult daughters. The deceased left only one asset being the suit land which the appellant stated was valued Kshs.100,000/=.

[3] The appellant objected to the grant being made to the respondent, the reason why he waited from 1965 when land was registered in the deceased's name up to about 1995 after the death of his brother, in our view is a question worthy of consideration. The objection by the appellant was on the grounds that the petition was filed secretly by the respondent; he was not informed and his interest in one half share of the suit land was not disclosed. The appellant's claim in the deceased's estate was one half share of the suit land which he claimed the deceased donated or bequeathed upon him before he died.

[4] The parties gave evidence before the High Court. In his evidence, the appellant alluded to a kind of an oral Will by which he alleged that on 3rd July, 1994, the deceased who was his brother donated to him one half of the suit land. By way of a kind of an alternative prayer, the appellant contended that the suit land was family land that was given to the deceased by their clan, it was ancestral land; which originally belonged to their father and the deceased held it in trust for the appellant; the appellant did not benefit from the ancestral land after he moved to Kibirichia 15 Kms away from the suit land in 1950. He settled in Kibirichia where his grown up sons acquired land which he was occupying prior to being given a portion of the suit land by the deceased. The appellant further claimed that after the deceased donated one half of the suit land, he built a house and moved in with his wife. He left the land in Kibirichia for his sons.

[5] Gideon Kibiti M'Mbogori, Silas Kiruki M'Nkanatha and Japhet M'Rutere M'mungania supported the appellant's evidence that they were present on 3rd July, 1994, when the deceased divided his land into two and gave the appellant one half.

[6] The respondent also gave evidence and denied that the appellant was given the deceased's land at all. She contended that she, and her daughters and grandchildren were in occupation of the suit land. However, since her late husband died, the appellant started invading her land and creating a nuisance for her. The appellant also caused the police to arrest the respondent and she was charged with the offence of assault in ***Criminal Case No. 1082 of 1995*** but was acquitted. The respondent also relied on the evidence of Geofrey Riungu a nephew of the deceased and her own daughter, Florence Kirumba. The two witnesses told the court that the appellant used to live in Kibirichia but after the demise of the late Elijah M'Imanyara Nthai, he started demanding a portion of the deceased's parcel of land claiming that the deceased was not survived by sons.

[7] Upon considering the evidence, ***Kasango, J***., in a well-reasoned and carefully written judgment delivered on 22nd October, 2010, dismissed the objection. This is what the Judge stated in part of the judgment:

> ***"The objector's claim is two (sic) thronged. Firstly, that the deceased left behind an oral will where he gave him half of his property. Section 8 of the Law of Succession Act recognizes that a will may be oral or written. In the case of oral will Section 9(1) is applicable. It provides:***
>
> > ***"9(1) No oral will shall be varied unless: -***
> >
> > ***(a) ….....***
> >
> > ***(b) the testator died within a period of 3 months from the date of making the will".***
>
> ***In this case, the objector and his witnesses said the oral will was made on 3rd July, 1994. The deceased died more than three months after that period. He died on 27th June, 1995. Because of the passage of time from the date of the so called oral will and the date of the death of the deceased, the provisions of Section 9(1) (b) the Judge stated that the oral will was invalid and unenforceable. The other reason that the objector based his claim to the deceased's half portion***

of land, is that it was family land which was registered in his own (sic) name of the deceased. The objector's case is that on 3rd July, 1994, the deceased divided the land giving the objector half and retaining half for himself. The evidence to prove that contention was offered by the objector and his witnesses. This is an issue entirely denied by the petitioner and her witnesses. From the analysis of the evidence of the objector and his witnesses it can clearly be seen that their evidence was not credible. The objector and his witnesses discredited themselves to very vital material facts. This led me to find that the court cannot rely on their evidence on that issue. I believe the evidence of the petitioner and her witnesses".

[8] It is the foregoing that provoked this appeal based on six grounds of appeal to wit:-

1. ***The learned Judge erred in law and in fact in that she failed to appreciate that the suit land was a family land, held by the deceased in trust for, inter alia, the appellant and therefore the applicant was entitled to share thereon.***

2. ***The learned Judge erred in law and in fact in that she did not consider the appellant's evidence sufficiently.***

3. ***The learned Judge erred in law and in fact in that she failed to fully appreciate the facts and the law placed before her.***

4. ***The decision of the learned Judge is against the weight of the evidence and therefore bad in law.***

5. ***The decision of the learned Judge is against the provisions of the Law of Succession Act Cap 160 Laws of Kenya.***

6. ***The learned Judge erred in fact and in law in that she misdirected herself by dwelling extraneous issues that were not in dispute and as a result, she came to a wrong conclusion.***

[9] During the hearing of this appeal, Mr. Rimita, learned counsel for the appellant argued all the above grounds together. Counsel submitted that the evidence was clear, that the deceased and the appellant were brothers. Their father had two wives and five sons. The appellant and the deceased were from the same mother. The suit land was allocated to the deceased to hold in trust for his mother's house. The other brothers got their share and that is why they were not involved in this matter. The appellant was claiming a portion of the suit land which was his rightful share of the ancestral land. According to counsel for the appellant, the land was registered in favour of the deceased on the understanding that he would share it with the appellant if the appellant did not succeed in getting himself another portion of land at Kibirichia which was within a settlement scheme. The appellant did not get an allocation of any land hence, his quest to get a share of the ancestral land. The deceased recognized the appellant's entitlement before his death; he showed the appellant a portion of the land within the suit land in the presence of many people, including the three people who gave evidence.

[10] Mr. Rimita submitted that the appellant moved into the suit land in 1994, and built a house although this was denied by the respondent who introduced other issues of gender discrimination in order to earn sympathy. The respondent did not deny the suit land was ancestral land, and the allegation that she was being looked down upon, because she had only sired daughters was not an issue before the learned Judge; this is an allegation that changed the situation, and the Judge was wrong in applying the provisions of ***Article 27*** of the ***Constitution***; the appellant's claim was that of a beneficiary of the deceased's estate regarding the suit land.

[11] Mr. Rimita relied on the case of ***Mukangu v Mbui, KLR (E & L)622***. In the Mukangu case, the dispute was between a father and son over a parcel of land that was registered in the name of the father under the ***Repealed Registration of Lands Act***. The son resided on the plot where he build his home and planted coffee. The father filed a case against the son in the Magistrate's Court seeking to evict the son claiming that the son was a nuisance. The son denied the claims and pleaded the father held the land in

trust for the whole family. The Magistrate's Court dismissed the case by the father, holding that there was no cause of action as there was no basis for the father to evict the son. The High Court agreed with the trial magistrate and on second appeal, this Court held *inter alia*:

"However, since the same registration recognizes trust in general forms without specifically excluding trusts originating from customary land and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Act with the relevant instrument of an acquisition either describing him or not describing him by the fiduciary capacity, that registration signifies recognition by the Registered Land Act, of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Act because according to the proviso to Section 28, such registration does not "relieve a proprietor from any duty or obligation to which he is subject as a trustee.

A trust arose from the possession and occupation of the land by Gerald which had the protection of Sections 28 and 30(g) of the Act".

Counsel also referred to the case of ***Njuguna v Njuguna, [2008] 1 KLR (G & F)*** page 889 where this Court held *inter alia*:

"Under Kikuyu Customary Law, the eldest son inherits land as a Muramati to hold it in trust for himself and the other heirs".

[12] In opposing this appeal, Mr. Kirima, learned counsel for the resopondent relied on his written submissions and he also made oral highlights during the hearing of the appeal. He supported the judgment of Kasango, J., arguing that the Judge was dealing with a simple matter of the administration of a deceased's estate; the Judge issued the grant of letters of administration to the respondent as the widow of the deceased and confirmed it according to the Law of Succession. Mr. Kirima submitted that the appellant should have filed a substantive suit if he was claiming land held in trust. The court was being invited to consider an existing trust yet the appellant did not file an Originating Summons for a claim of trust; also the evidence in support of the claim was full of contradictions; it was clear that the appellant was given a parcel of land in Kibirichia where he settled from 1950. Counsel urged us to dismiss this grant for lacking in merit.

[13] This is a first appeal, that being so, we have a duty to re-evaluate the evidence adduced before the trial court and arrive at our own independent conclusion. See (***Selle v Associated Motor Boat Company, Ltd. (1968) E A 123***.

"…….. this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…" See **Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425.**

[14] We have carefully considered the evidence on record and the rival submissions; we identify two issues which are cross cutting all the grounds of appeal for our consideration. Firstly, did the appellant prove his claim that the deceased held the suit land in trust for him? Secondly, did the appellant prove his claim as a beneficiary of the deceased's estate? As pointed out elsewhere in this judgment, if the appellant's claim was based on trust he ought to have filed an independent suit. This could have been by way of a separate suit against the respondent as the administrator of the deceased's estate or vide the provisions of ***Rule 41(3)*** of the Probate and Administration Rules that require a party who is claiming an unidentified share of a deceased's estate as a beneficiary to file an Originating Summons under ***Order 37*** of the ***Civil Procedure Rules***.

[15] The appellant filed objection proceedings and the court proceeded to determine both issues of trust and beneficial interests within the petition for the grant of letters of administration in a succession cause. The learned Judge considered the evidence by the appellant and his witnesses which she found lacking in consistency and credibility.

It is indisputable that the deceased and appellant were brothers by the same mother. Their father had two wives and 5 sons. The deceased was born on about 1924 while the appellant was born about 1930. The deceased settled on the suit property with his wife and daughters until 1995 when he died. The appellant moved to Kibirichia about 15 Kms from the suit land from 1950. The suit land was registered in the name of the deceased in about 1965.

[16] These issues were disputed whether the suit land was given to the deceased by the clan or it belonged to the deceased's father and, therefore, the deceased was registered as trustee "*muramati*" for his brother. Whether the appellant's parcel of land at Kibirichia was given to him by the clan and hence all brothers of the deceased were settled by the clan in their respective parcels of land; or it was bought by the appellant's sons. Whether the appellant was looking down upon the respondent as a widow because the deceased was not survived by sons.

[17] The learned Judge reviewed the evidence and highlighted the verbatim portions of evidence where the appellant contradicted himself in respect of proceedings that were recorded by ***Sitati, J.***, at one time as could be seen from the marginal notes the Judge remarked the appellant was a "*a liar and evasive*". The Judge further found the appellant's evidence and that of his witnesses was full of material contradictions; in the sum total, the Judge found the appellant and his witnesses' all lacking in credibility.

[18] We have re-evaluated the evidence by the witnesses, while bearing in mind that we did not see the witnesses testify and that we cannot substitute the trial Judges findings of fact with our own conclusions unless there was a misdirection that led to an erroneous conclusion. See the case of **Peter v Sunday Post Limited [1958] EA at 429**:

"It is a strong thing for an appellate court to differ from the findings, on question of fact, of the Judge who tried the case, and who had the advantage of seeing the witnesses".

We find no justifiable reasons for departing from the conclusions of the trial Judge that were informed by the evidence on record. We on our part cannot reconcile why the appellant moved to Kibirichia in 1950, where he established a home and decided to stake his claim over family land after his brother's death that is almost after 37 years. Why for instance did he not pursue the claim during the deceased lifetime? This factor alone lends credence to the submission by the respondent that she was being looked down as a widow and because the deceased was not survived by male children.

[19] Having come to the foregoing conclusion, the other issue is whether the appellant proved his claim as a beneficiary of the deceased's estate. The deceased was survived by a wife and children. Therefore, under the provisions of ***Section 66*** of the ***Law of Succession***, the respondent had the priority to be issued with the letters of administration. The appellant was not able to prove beneficial interests of the suit land, as he was not in occupation of the same; the deceased was not supporting the appellant, nor was he able to prove that the deceased left an oral Will bequeathing upon him one half share of the suit land. The Judge aptly considered the provisions of ***Section 9(1)*** of the ***Law of Succession*** and was satisfied that the so called oral will which the appellant was propounding to support the claim for one half share of the suit land could not stand the test of the law. This is because the appellant alleged the oral will was made on 3rd July, 1994 and the deceased died on 27th June, 1995. An oral Will is valid for 3 months from the date of making and if the testator dies within 3 months.

[20] We have also studied the authorities cited by Mr. Rimita, and in our view, they are distinguishable. The facts in this case are different, they relate to objection proceedings under the Law of Succession. Secondly, unlike in the case of Mukangu vs Mbui, the appellant was not in occupation and possession of the suit land which in itself presupposes beneficial interest. If for instance the appellant occupied the suit land from his childhood, or even the better part of his adulthood, built his home, brought up his children there or derived a livelihood from the suit premises during the lifetime of the deceased, the outcome regarding a claim of beneficial ownership would have been different. The appellant did not adduce any evidence to show that he depended on the deceased. The trial Judge who had the opportunity of taking evidence was satisfied that the appellant had his own parcel of land at Kibirichia but merely attempted to take advantage of the respondent's vulnerability as a widow.

[21] Mr. Rimita faulted the Judge for invoking the provisions of ***Articles 27*** and ***50*** of the ***Constitution*** that outlaws discrimination on the basis of gender. We do not entirely agree with Mr. Rimita as the issue was argued by the respondent in her affidavit and arose from the counsel's cross-examination. Similarly, counsel for the respondent raised the same issue before us in his written submissions. Going by the dicta in the case of:

ODD JOBS V MUBIA, 1970 EA page 476:

"(1) A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court's decision".

It was imperative, therefore, for the Judge to remind the parties of the provisions of the Constitution that outlaws discrimination on the basis of gender or custom.

In the result, we find no merit in this appeal which is dismissed with costs to the respondent both in this court and the High Court.

Dated and delivered at Nyeri this 26th day of February, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

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