



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 339 OF 2010

BETWEEN

SAMUEL MAINA MWANGI 1ST APPELLANT

SIMON MURIITHI KAGIRI 2ND APPELLANT

BERNARD WAMBUGU KAGIRI 3RD APPELLANT

AND

MUTHONI KAGIRI RESPONDENT

(An appeal from the ruling & order of the High Court of Kenya at Nyeri (Sergon, J.)

dated 11th June, 2010

in

H.C.Succ.C. No. 161 of 2000)

JUDGMENT OF THE COURT

1. **Muthoni Kagiri**, the respondent, in her capacity as a widow applied for letters of administration over the estate of Kagiri Gichine who died intestate on 20th May, 1995. The appellants, who are both the respondent and deceased's sons, filed both an objection against the respondent's application and a cross petition seeking for letters of administration over the estate.
2. Subsequently, the parties herein were appointed as administrators of the deceased's estate on 25th March, 2004 by the High Court. Vide a Summons for Confirmation of grant dated 14th July, 2009, the respondent applied for confirmation of the grant issued therein and proposed that Muhito/Gaturia/83, forming the deceased's estate, be registered in the joint name of herself and Njoki Kagiri, her unmarried daughter. The appellants protested against the mode of distribution proposed by the respondent. They contended that the suit property being the only property that comprised the deceased's estate, ought to be divided equally among the three appellants, being the sons of the deceased, and Njoki Kagiri being the deceased's unmarried daughter. The appellants argued that the respondent should only be granted a life interest over the suit property.
3. By consent of the parties herein directions were granted by the High Court that the matter would

be disposed of by way of affidavit evidence and written submissions. In support of her case, the respondent filed an affidavit sworn by herself as well as an affidavit sworn by one Josephat Muchiri Kabogo (Josephat).

4. It was the respondent's case that prior to the deceased's death he gave the 1st and 3rd appellants gift *inter vivos* of parcel number Muhito/ Gaturia/ 197; and Muhito/Gaturia/195 to the 2nd appellant. She contended that it was the deceased's wish that the appellants should occupy the above mentioned parcels exclusively, while she and Njoki Kagiri would occupy the suit property. Josephat who was from the same clan as the deceased and was a former assistant chief of the area corroborated the respondent's evidence. He deponed that the deceased had three parcels namely, Muhito/Gaturi/83, Muhito/Gaturi/195 and Muhito/Gaturi/197; that during adjudication he gave the 1st and 3rd appellants parcel number Muhito/Gaturi/197 and 2nd appellant parcel number Muhito/Gaturi/195; and that the deceased was left with Muhito/Gaturi/83, the suit property, where he lived with the respondent and her daughter. Josephat contended that during the adjudication the appellants had not reached the age of majority.
5. In opposition to the respondent's case, the 1st appellant on behalf of the other appellants, filed several affidavits. The 1st appellant deponed that the deceased never owned parcel numbers Muhito/Gaturi/195 and Muhito/Gaturi/197. The 1st appellant contended that he was registered as the 1st registered owner of Muhito/Gaturi/197 and that the 2nd appellant was also registered as the owner of Muhito/Gaturi/195 during the land adjudication process. He deponed that he changed the names that appeared on the title as Gichine s/o Kagiri to reflect his correct name on 14th December, 1994. According to him the deceased could never have given the appellants what never belonged to him. He maintained that the only land which comprised the deceased's estate was the suit property and that it ought to be distributed in accordance with **section 35(5) of the Law of Succession Act**, Chapter 160 of the Laws of Kenya.
6. After considering the affidavit evidence and the written submissions that were filed by the parties, the High Court (Sergon, J.) held that Muhito/Gaturi/195 and Muhito/Gaturi/197 were given to the appellants as gift *inter vivos* by the deceased and the gifts would be taken into account in distribution of the deceased's estate. The High Court also found that the respondent, who was the deceased's widow, was only entitled to a life interest over the suit property. The trial court directed that the suit property be distributed in accordance with **section 35 of the Law of Succession Act**.
7. Aggrieved with the High Court's decision, the appellants have filed this current appeal based on the following grounds:-
 - *The learned Judge erred in law and in fact in finding and holding that L.R No. Muhito/Gaturi/195 and Muhito/Gaturi/197 were gift inter vivos to the 1st and 2nd appellants by the deceased when they were the first registered owners and had never been registered in the name of the deceased. (sic)*
 - *The learned Judge erred in law and in fact in not ordering that Muhito/Gaturi/83 which is the only property comprising the estate of the deceased be shared as provided for under section 35(5) of the Law of Succession Act.*
 - *The learned Judge erred in law and in fact in relying on the affidavit of Josephat Muchiri Kabogo, without having him cross-examined and thus not complying with the proviso to section 71(2) of the Law of Succession Act by satisfying himself as to the respective identities and shares of persons entitled. (sic)*
 - *The learned Judge erred in law and in fact in holding that the appellants were 'enjoined to explain how these parcels were acquired thus shifting the burden to them instead of the respondent proving that they were gift inter vivos. (sic)*
8. Mr. Wahome Gikonyo, learned counsel for the appellants, submitted that the 1st and 2nd appellants were the first registered owners of parcel numbers Muhito/Gaturi/197 and Muhito/Gaturi/195

- respectively; and that the 2nd entry on the 1st appellant's title was only to correct his name. He contended that those parcels could not have been gifts *inter vivos* from the deceased because a gift entails transfer and the deceased never transferred the parcels to the appellants. He contended that the deceased could not have given the appellants what he never owned.
9. Mr. Gikonyo submitted that the trial Judge erred in shifting the burden to the appellants to prove that they had not received gifts *inter vivos* from the deceased yet it was the respondent who had made such claims. He further submitted that the trial court erred in relying on the affidavit of Josephat Muchiri Kabogo without being cross-examined on the contents of his affidavit. Mr. Gikonyo contended that the High Court failed to comply with **section 51** of the **Law of Succession Act**. He urged us to allow the appeal and remit the matter back to the High Court.
 10. Mr. James Nderi, learned counsel for the appellant, in opposing the appeal, submitted that the appeal was based on the wrong premise that first registration following the adjudication process automatically gave the owner exclusive ownership, irrespective of other interests. He stated that the two parcels namely, Muhito/Gaturi/195 and Muhito/Gaturi/197 were registered in the name of two appellants clearly at the instance of the deceased following the adjudication process.. He maintained that if the appellants were dissatisfied with the evidence of Josephat Muchiri Kabogo they should have sought leave of the court to cross examine him.
 11. Mr. Nderi submitted that the evidenciary burden that was upon the respondent to prove that the appellants had received gift *inter vivos* during the deceased's lifetime had been discharged. Therefore, it was upon the appellants to explain their ownership of the parcel. He maintained that the trial court applied **section 51** of the **Law of Succession Act**.
 12. Being a first appeal, this Court has the duty of re-evaluating the evidence, assessing it and making its own conclusions without overlooking the conclusions of the trial court and also bearing in mind that unlike the trial court we neither saw nor heard the witnesses. See ***Selle v Associated Motor Boat Company Ltd. [1968] EA 123.***
 13. We have considered the Record of Appeal, submission by counsel, authorities supplied by counsel and the law. We concur with the learned Judge's finding that parcels Muhito/Gaturi/195 and Muhito/Gaturi/197 were granted to the 1st and 2nd appellants as gifts by the deceased. This is because despite the allegations by the appellants that their registrations are first registration, it is clear that the said registrations occurred during the land adjudication process. The appellants did not controvert the evidence tendered by the respondent that the adjudication process took place when the appellants had not attained the age of majority. Bearing in mind the history of the adjudication process where there were restrictions as to the number of parcels an individual could be registered, there can be no other explanation other than that the deceased upon adjudication registered the parcels in the names of his sons. We are of the considered view that the said registrations in favour of the 1st and 2nd appellants were tantamount to gifts given by the deceased during his life time. **Section 42** of the **Law of Succession Act** provides:-

'Where

a) an intestate has, during his lifetime 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 and 35

that property shall be taken into account in determining the share of the net estate finally accruing to the child, grandchild or house. '

Therefore, the trial court was correct in holding that the parcels of land that were given to the appellants would be taken into account in distribution of the deceased's estate.

14. We find that contrary to the contention by the appellants, the trial court did direct in its decision that the distribution of the deceased's estate would be in accordance with **section 35** of the **Law of Succession Act**. **Section 35** provides for the mode of distribution that is applicable where the deceased has died intestate leaving behind a surviving spouse and children. Consequently, the trial

court correctly held that the respondent was only entitled to life interest over the suit property.
15. We finally find that the trial court did comply with the proviso to **section 71** of the **Law of Succession Act** by identifying the parties entitled to the deceased's estate and the consideration to be taken into account in calculating their respective shares. The proviso to **section 71** of the **Law of Succession Act** provides:-

'Provided that, in case of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.'

Before the High Court could confirm the grant, the appellants filed this current appeal. We are of the considered view that the respective shares that each beneficiary is entitled to should be determined in the High Court.

16. The upshot of the foregoing is that we see no reason to interfere with the findings of the High Court. Accordingly, the appeal herein is dismissed with costs to the respondent. We order that the matter be remitted back to the High Court for confirmation of grant.

Dated and delivered at Nyeri this 25th day of July, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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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 of the original.

DEPUTY REGISTRAR