REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

CIVIL APPEAL 77 OF 2006

FRANKLINE KITHINJI.....1ST APPELLANT
MURITHI MURITHI.....2ND APPELLANT
LOYFORD RIUNGU.....3RD APPELLANT
FRED MBAE.....4TH APPELLANT

AND

PHARIS NYAGA MURIITHI.....RESPONDENT

(Appeal from the Ruling and Orders of the High Court of Kenya at Meru(Sitati, J.) dated 24th November, 2005

IN

H.C.SUCESSION CAUSE NO. 208 OF 1993)

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JUDGMENT OF THE COURT

This Appeal arises from the Ruling and Orders of the High Court ***(Hon. Sitati, J.)*** in ***H.C. Succession Cause no. 208 of 1993*** made on 24th November, 2005. The appeal is filed by four sons of the 2nd house of the deceased(***MurithiMugambi).*** Grant of Representation of the estate of the deceased was given to the respondent who is the eldest son of the 1st house of the deceased. The appeal raises five grounds which are as under:

1. The trial judge erred in law by her failure to see that filing the notices to court of facts relevant to the application for grant made under rule 16of the probate and administration rules does not require any leave of the court and expunging them from the record effectively denied the 13 dependants the right to be heard and this contravened the law of natural justice. Further, she failed to see that two inconsistent decisions were made by the same court of same level regarding the same notices.

2. The trial judge erred in law by her failure to see that parcel No. 1476 is not the property of the deceased.

3. The trial judge erred in law by her failure to see that paragraph 5b and 5d(i) and (iii) of the

affidavit sworn on 28.10.94 by the petitioner PharisNyagaMurithi in support of confirmation is false.

4. The trial judge erred in law by her failure to see that the testimony of the petitioner and his three witnesses is unacceptable because of time factor in relation to what the law requires in oral wills.

5. The trial judge erred in law by her failure to see that the widows and fatherless have been robbed of their rights in parcel No. 1478 against their wish, against the wish of the deceased and against the law and there is clear danger of a break-out of chaos and violence in the polygamous family of the deceased.

It is not in dispute that the deceased was survived by three widows with 15 sons and 12 daughters. He left behind four parcels of land titled:

(i) MWIMBI/MURUGI/1475 (of 0.97 Ha)

(ii) MWIMBI/MURUGI/1476 (of 0.97 Ha)

(iii) MWIMBI/MURUGI/1478 (of 0.97 Ha)

(iv) MWIMBI/MURUGI/1479 (of 0.405 Ha)

The High Court, on completion of the trial, found that the appellants' case was not supported by the evidence and further found that proposals contained in supporting affidavit of the respondent sworn on 28th October, 1994 were as per wishes of the deceased and also fair and just.

This appeal was listed earlier for hearing on 26th October, 2011. The 2nd,3rd and 4th appellants were present in Court with the respondent. The 1st appellant was reported to be unwell. The appellants present informed the Court that they wanted to withdraw the appeal as they had overcome their difficulties and that they had also agreed to share propertiesof the estate as per the family agreement. The Court directed them to draw the consent and file it in Court. Accordingly, theconsent was drawn and filed on 4th November, 2011 which is signed by all parties except the 1st appellant. At the hearing of the appeal, he distanced himself from the consent and urged us to hear the appeal. So did John Gitari who had filed the cross appeal on 9th November, 2011.2nd, 3rd and 4th appellants on the other hand submitted that they wanted us to adopt the consent and to make it the order of the Court. They all stated that the family is tired of long standing court process and wanted an end of family disputes.

The consent presented to the court reads as under:

1. The respondent PharisNyagaMurithii remains the sole administrator of the estate of the deceased i.e. JONATHAN M'MURITHI.

2. Parcel No. Mwimbi/Murugi/1478 to be subdivided according to the grant orders so that PharisNyagaMurithii gets his share.

3. The balance of parcel NO. MWIMBI/MURUGI/1478 to be given to Lyford RiunguMurithii I.D No. 2504330 as a trustee for the grand children of the 2nd& 3rd wives of the deceased namely Eunice Igoji and the late Joyce Muiro respectively.

4. That we are all in agreement that respondent move the superior court to rectify the grant so as to replace the name of Reuben Kiraithe i.e. (deceased) with that of his wife Margaret Cirindi Reuben.

5. That we are all in agreement that Administrator will register a Mutation of an existing access road that cuts all land parcels, including through parcel No. 1476 owned by the Appellants.

6. That we are in agreement that all existing boundaries of land parcel No. MWIMBI/MURUGI/1478

be picked that the part currently occupied by PharisNyaga be registered in his name as per the provisions of the Grant and the Grant to be amended so that the balance of this land parcel will be held in trust by LoyfordRiunguMuriithi I.D. 2504330 for preservation of the graveyard, for use by any estranged daughter of the deceased and for use by the grandchildren chosen by the appellants.

7. That the administrator will rectify the Grant to correct minor typing errors including names KIRIMI GITARI to read JOHN GITARI & parcel No. 1477 the name MurithiMurithi to read MiritiMuriithi

8. That there be no order as to costs.

The three appellants had annexed minutes of family meeting held on 18th October, 2011. Those minutes show John Gitari and the 1st appellant were in attendance. Apart from the other family members, the Local Chief, the Family Head and Muyia Clan Chairman and Secretary were also present and signed minutes of the meeting as witnesses.

We proceeded to hear the appeal as the consent was not unanimous and reviewed the record of the cause, this being first appeal.

The 1st appellant contended that the affidavits sworn by several beneficiaries of the estate filed on 10th June,2002 contained relevant information and they were unfairly expunged by the High Court order dated 13th June, 2002. We perused those affidavits and found that they are similar in all relevant aspects.Apart from one ***Joyce Muiro*** (PW2) none of the deponents gave evidence at hearing of the objections.Moreover, they all had raised apprehensions that due to differences between the respondent and his mother, this succession cause would drag on to the detriment of other beneficiaries. The order expunging those affidavits is not challenged. In our opinion, the learned Judge was correct in finding that it would not consider those affidavits. We also find so, simply because the respondent had no opportunity to challenge the averments made in those affidavits.We accordingly reject ground No. 1 of the appeal.

We are unable to understand the propriety of ground no. 2 of the Memorandum of Appeal. On considering the evidence led, we find that the High Court had no evidence that parcel no.1476 was not the property of the estate. ***John Gitari,*** one of the objectors in the cause, had testified that the said parcel was given by the deceased to the sons of 2nd house who are the appellants. There is no evidence contrary to what was said by this objector. We thusreject this ground.

Ground no. 3 cannot be upheld simply because the widows are not alive and the evidence on record appraised by the High Court supports the respondent's averments to the effect that the deceased had set apart parcel No. 1478 for the widows and gave him 0.20 acre because he was the eldest son of the family. The High Court rightly observed that he enjoyed a special place in the family and had taken over the family's responsibility as a father. Ground No. 3 of the appeal is also rejected.

We further observe that there is sufficient evidence from the record that the widows and the respondent had settled on the divided portions in parcel number 1478 asshown by the deceased during his life time. In the premises, the submissions that the oral will of the deceased cannot be relied upon in view of ***Section 9 the Law of Succession Act (Cap.60)*** cannot stand. We reject ground No. 4 of the Memorandum of Appeal.

Ground No. 5 of the Memorandum, in our opinion, is taken over by the demise of all the widows who had already occupied their shared portions. We do note that, apart from the 1st appellant, all other beneficiaries have consented to share the estate as per the family meeting. We thus reject this ground also.

The issues raised by John Gitari are appropriately considered and dealt with in Clause 7 of the consent. We do find that on rectification of the confirmed grant, he would be adequately catered for in the estate. When attention of John Gitari was drawn to that fact, he did not make any response which we deem as his

consent. We do further note that as per Minute 3/2011 of the meeting attached to the consent,he had statedthat***"all big and small issues related to the family land be "solved onceand for all" so as to bring peace in the family."*** Now we note that the consent has brought peace in the family.

The 2nd to 4th appellants along with the respondent have echoed the same sentiments in urging us to accept the consent as an order of the Court so that the family feud since 1993 comes to an end.

We may add that over and above what is observed hereinbefore, we have, as is required of us in the matters of first appeal, re-evaluated the record of the appeal and we are unable to find any error of fact or law in the ruling of the High Court and we shall not interfere with those findings. However, asthe family has now resolved the dispute amicably and parties havesettled on their respective portions of the estate, it shallnot be appropriate to upset that atmosphere of peace and tranquility that is prevailing in the family. The Constitution also enjoins the courts to promote reconciliation and traditional dispute resolutions *inter alia*as per ***Article 159 (2) (c).*** Moreover, ***Sections 3A and 3B of the Appellate Jurisdiction Act*** confers duty on this Court to facilitate the just,expeditious, proportionate and affordable resolution of the appeal. We intend to follow those provisions in this cause.

The upshot of all the above is that we dismiss the appeal and further direct that the order of the High Court dated 24th November, 2005 be substituted byour order that the estate of the deceased ***MutithiMugambi*** be distributed as per contents of the consent filed in the Court on 4th November,2011. We do not make any order on costs, this being a family cause.

Dated and delivered at NYERI this 17thday of May, 2012.

E. O. O'KUBASU

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

K. H. RAWAL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR