REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 115 of 2007

FRANCIS MWAI KARANI ……..…..…… APPELLANT

AND

ROBERT MWAI KARANI …….…..…. RESPONDENT

(Appeal from the proceedings and judgment of the High Court of Kenya at Embu (Khaminwa, J.) dated 28th June, 2006

in

H.C.SUCCESSION CAUSE NO. 221 OF 2004)

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JUDGMENT OF KOOME, J.A.

This is an appeal from the judgment of Khaminwa, J. delivered on *28th June, 2006* in the High Court of Kenya at Embu in *Succession Cause No. 221 of 2006*. It would appear that what was before the learned Judge was the confirmation of a Grant issued to one of the sons of the deceased, ***Richard Karani Mwai***. It was admitted that before his death, the deceased had distributed his land to each of his four sons so that out of the 11 acres, each son was given 2 acres and separate titles issued accordingly. The deceased remained with 3.8 acres (or thereabouts) still registered in his name when he died. At the time of his death, the deceased was survived by the four sons, 8 daughters and a grandson.

The Administrator of the deceased's Estate had proposed that the remaining 3.8 acres of the land be shared by the daughters and the grandson of the deceased. The appellant herein, ***Francis Mwai Karani***, objected to that proposal and it was that objection or ***"protest"*** that called for determination by the learned Judge. The learned Judge considered the objection and in a short judgment delivered on *28th June, 2006* dismissed it by stating inter alia:-

"Section 42 law of Succession Act demands that the gifts settled on the beneficiaries in the life of the deceased be brought into account on distribution of estate.

It is agreed here that the daughters are entitled to inherit a portion of the deceased estate.

The daughters were not given any land during the life time of the deceased. I find that the sons who were given land in the lifetime of deceased should keep their portions settled on them which is 2 acres each.

The daughters shall share the 3.8 acres as indicated by the administrator.

The distribution of shares is not disputed.

In the circumstances I find it fair for the grands to inherit 1.8 acres on the ground that he will live on this land while daughters are all married residing with their husbands. I dismiss the protest as without merit."

It is the foregoing that provoked this appeal based on the following six grounds of appeal:-

1. ***THAT*** *the learned judge erred in law and fact in failing to appreciate the nature of the cause to hear the same by way of* ***Viva voce*** *evidence of both sides and therefore made judgment against the weight of the evidence tendered.*

2. ***THAT*** *the learned judge erred in law and seriously misdirected herself in failing to consider the ranking of the appellant in priority to the grandson whom she gave 1.8 acres of the estate of the deceased.*

3. ***THAT*** *the learned judge erred in law and in fact in failing to find in favour of the appellant against the respondent yet no credible evidence was adduced by him to challenge the appellant's testimony.*

4. ***THAT*** *the learned Judge erred in law and fact in finding that the distribution of shares was not disputed when the appellant's protest was based on the argument of the distribution of shares as quoted in his statement "I object because what is proposed is not proper, I have proposed the manner of distribution in my schedule attached to the affidavit, daughters reside with their husbands.*

5. ***THAT*** *the learned Judge erred in law and in fact in giving a portion of 3.8 Acres to the daughters without providing for the sons in the said portion left by their deceased father which was the only part of the estate not distributed as at the time of death.*

6. ***THAT*** *the learned judge erred in law and fact in failing to consider that the case before the court was that of protest and the subject matter was the 3.8 acre portion the deceased had left after giving his four sons two acres each out of his land and in giving the grandson 1.8 acres of the estate, who was not a beneficiary and dependant of the deceased before his death."*

When the appeal came up for hearing before us on *7th February, 2012*, the appellant, Francis Mwai, appeared in person, while Miss Wairimu Mubari, appeared for the respondent. In addressing the Court, the appellant asked us to consider his grounds of appeal and make appropriate orders. It was his submission that the Court should apportion the property equally to the two houses of the deceased in accordance with the law of Succession.

In opposing the appeal, Miss Mubari submitted that the main issue was whether the sons were entitled to the 3.8 acres in view of the fact that they had already benefited by getting 2.0 acres each. Miss Mubari further submitted that the issue of distribution between the two houses was never raised. Finally, Miss Mubari submitted that even the appellant had admitted that the daughters were entitled to the portion of the land in dispute and so the holding by the learned Judge was reasonable and legal; and that it should not be interfered with.

I have carefully considered the background to this appeal, the submissions by both the appellant and Miss Mubari and it would appear that the only issue is whether the portion of land measuring about 3.8 acres should be shared by only the daughters and whether the sons who had already been given their own portions of land measuring about 2 acres each are also entitled to this portion of 3.8 acres. As already observed elsewhere in this judgment, the deceased had distributed his land to his four sons so that each son got 2 acres and when the deceased died, there was 3.8 acres which had not been distributed. It was this portion of land that has led to this dispute. According to the appellant who is one of the sons who benefited from distribution of 2.0 acre per son, the remaining portion should be divided into two in

accordance with customary law. The respondent on the other hand supports the learned Judge's finding that this land be shared by the daughters and the grandson.

Section 42 of the Law of Succession Act provides:-

"Where –

(a) ***an intestate has, during his lifetime or by will, paid, give 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".

In view of the foregoing, I am satisfied that the learned Judge adopted the correct approach in reaching her conclusion. It is to be observed that even the appellant had admitted that the daughters were entitled to a portion of the deceased's land. I therefore cannot interfere with the judgment of the learned Judge.

For the foregoing reasons, I find no merit in this appeal. I order that the same be and is hereby dismissed.

This judgment has been delivered under Rule 32(2) of this Court's Rules, as ***O'Kubasu, J.A.*** *is no longer performing Judicial functions.*

Dated and delivered at Nyeri this 25th Day of October, 2012.

M.K. KOOME

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JUDGE OF APPEAL

JUDGMENT OF RAWAL, J.A.:

I have had the opportunity of reading in draft the judgment of my sister, *Koome, JA*. I agree with her fully and have nothing useful to add. In the event, the judgment of the Court shall be in the terms proposed by *Koome, JA*. The appeal is hereby dismissed as proposed.

Dated and delivered at Nyeri this 25th day of October, 2012.

K. H. RAWAL

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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