REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 29 of 2008

JANE WANJIRU MUCHIRI ……...……...…….....… APPELLANT

AND

PHOEBE WATETU MUCHIRI .....…….....……...… RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 15th November, 2007 in H. C. SUCC. CAUSE NO. 94 OF 1996)

****

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the High Court (Kasango, J.) distributing land title **No. Nyeri/Endarasha/61** between the appellant and the respondent as the widows of *Solomon Muchiri* – the deceased proprietor. The land measures 4.1 Hectares. The High Court identified the share of the appellant as 3.15 acres and the share of the respondent as 7.15 acres. The appellant is aggrieved by the decision of the High Court.

The deceased died on 2nd September, 1979 before the Law of Succession Act came in operation on 1st July, 1980. He was survived by two widows – the appellant and the respondent. The respondent *Phoebe Watetu Muchiri* is the first wife and has one son *Joseph Muchiri Ndungu.* The appellant is the second wife. She has four daughters and one living son.

The petition for Grant of Letters of Administration intestate was filed by the appellant citing the respondent. The appellant indicated in the petition that, the estate comprised of **Plot No. 61/Endarasha** (Endarasha land) scheme measuring 7.0 acres. The respondent entered appearance to the Citation and filed an objection to the petition on the ground that the deceased also owned **Plot No. 909 G** Gatarakwa Company comprising of 36 acres which she was to get four shares of four acres each-total 16 acres whereas the appellant was to get five shares of four acres each-total 20 acres. However, she claimed that upon subdivision she realized that she had been given 5.11 Hectares equivalent to 12.72287 acres.

The appellant deposed in the replying affidavit, in essence that, the acreage each got in respect of Gatarakwa land should not be taken into account and that the respondent if dissatisfied should have appealed to the Presidential Commission in Gatarakwa. However, by a letter dated 15th September, 2003 the appellant withdrew the objection in the following terms:-

"I Phoebe Watetu Muchiri has today withdrawn the objection filed by me on 28th February, 2000 against the Petitioner (sic) who is my co-wife. I pray the matter to proceed and she be issued with letters of administration."

It seems from the record that a Grant of Letters of Administration Intestate had earlier been issued to the appellant and respondents jointly on 10th May, 2000. The appellant subsequently on 24th May, 2004 filed an application for confirmation of Grant indicating that the Endarasha land would be shared equally between her and respondent each getting 3.5 acres. The respondent however, filed a protest to the confirmation and proposed that she should get 7.5 acres of the Endarasha land which comprises of 10.3 acres while the appellant should get 3.15 acres to compensate her for shortage of four acres of the share which she got from Gatarakwa land. She deposed that the appellant got 19.23 from Gatarakwa land whereas she got 15.23 acres.

The respondent testified in support of her objection that the Endarasha farm comprising of nine (9) shares should be divided equally and further the Endarasha farm should also be divided equally. The appellant's son *Joseph Ndungu Muchiri* also testified in support of the objection. His evidence was in essence that Gatarakwa land comprised nine (9) shares of four (4) acres each – a total of 36 acres; that the appellant and the respondent agreed to share the land with the appellant getting five (5) shares while the respondent was to get four (4) shares (16 acres) but the respondent only got twelve (12) acres instead of 16 acres.

The appellant gave brief evidence in support of the application for confirmation of the Grant reiterating that the Endarasha land should be shared equally. She testified in cross-examination that she was supposed to get 20 acres in Gatarakwa but she only got 17 acres.

Mr. Gathiga Mwangi, the learned counsel for the appellant condensed the nine (9) grounds of appeal essentially into three (3) main grounds, namely, that, the trial Judge erred in fact in finding that the appellant got 20 acres from Gatarakwa land; that learned Judge erred in law in failing to take into account the monetary value of the Gatarakwa and Endarasha land respectively and that the learned Judge erred in law in failing to distribute the Endarasha land to each house equally in accordance with African Customary Law.

On his part, *Mr. Muhoho*, learned counsel for the respondent, submitted, among other things, that the issue in dispute was whether the respondent should be compensated for shortage in Gatarakwa land; that Gatarakwa land was to be shared equally; that although, the respondent was supposed to get 16 acres she in fact got 11 acres; that the value of the land and shares and conversion from hectares to acres were not in issue and that the court equitably distributed the estate.

There was no dispute that the remaining estate of the deceased comprising of **Nyeri/Endarasha/61** comprising of 4.1 hectares should have been shared equally by the applicant and the respondent. The dispute was whether or not in distributing the Endarasha land the respondent should have been compensated for the alleged shortfall of 4 acres in respect of the distribution of the Gatarakwa farm. The trial Judge in a brief judgment believed the evidence of the respondent and her son that she in fact got 4 acres less from Gatarakwa farm.

It is apparent from the evidence, including the affidavit evidence, tendered in the High Court that the deceased had bought nine (9) shares in Gatarakwa Farmers Company but he had not been allocated land equivalent to the shares he had bought before he died. The affidavit evidence of the respondent in support of the objection to the petition for the Grant shows that the applicant agreed that the appellant was to get five (5) shares and the respondent four (4) acres. The respondent's son, *Joseph Ndungu Muchiri* gave similar evidence at the trial – that his mother was to get four (4) shares while the appellant was to get five (5) shares.

At the outset it is clear that the shares were not shared equally. The appellant was to get one extra share by mutual consent. Furthermore, although the respondent and her son claimed that each share was equivalent to four (4) acres there was no concrete evidence to support this. The parties did not call any witness from the Gatarakwa Farmers Company or produce any supporting documents relating to the acreage comprised in one share. The respondent claimed in the affidavit to support the objection to the Grant, claimed that she was supposed to get 16 acres but she only got 12.72281 acres. However, in her affidavit of protest against the confirmation of the Grant she claimed that she was allocated

Nyeri/Gatarakwa/Block 111/1012 measuring 15.23 acres while the appellant was allocated **Nyeri/Gatarakwa/Block 111/821** measuring 19.23 acres.

The appellant on her part claimed that she was supposed to get 20 acres from Gatarakwa farm but she only got 17 acres. It seems from the record that the copy of the register relating to the Gatarakwa land allocated to the appellant was not produced and thus the acreage of her land was not ascertained by documentary evidence.

It follows that the respondent's case for compensation with four (4) acres and the finding of the learned Judge were not supported by concrete evidence. Indeed, the respondent had withdrawn the objection relating to the petition for Grant which objection was based on unequal distribution of Gatarakwa farm only to revive it later at the time of the confirmation of the Grant. Furthermore, the learned Judge, as the counsel for the appellant correctly submitted, should have considered the value of the acre of land in Endarasha as compared to the value of the land in Gatarakwa. It is probable, as counsel for the appellant endeavored to show, that an acre of land at Endarasha is far much valuable than an acre of land at Gatarakwa.

Lastly, the respondent categorically testified that her case was that both the Endarasha land and the Gatarakwa land should be shared equally between her and the appellant. The appellant's case was that the Endarasha land should be shared equally so, as stated before, it was a common ground that the Endarasha land should be shared equally. It seems that the respondent by her protest to the confirmation of Grant and her claim that the Gatarakwa farm should be shared equally was reviving a dispute which had already been determined albeit not satisfactorily according to her, and respective Title Deeds issued.

In the result, the appeal is allowed. The judgment of the High Court is set aside. We substitute therefor a judgment that land title **No. Nyeri/Endarasha 61** be shared equally by ***Jane Wanjiru Muchiri*** and ***Phoebe Watetu Muchiri***. The Grant is confirmed to that effect. The cost of this appeal to the appellant.

Orders accordingly.

Dated and delivered at Nyeri this 13th day of December, 2012.

E. M. GITHINJI
……
JUDGE OF APPEAL

R. N. NAMBUYE
……..…
JUDGE OF APPEAL

D. K. MARAGA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR