



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

CIVIL APPEAL NO 51 OF 1985

SAMUEL M MUGENYAAPPELLANTS

VERSUS

WANJIRU MUGENYA & ANOTHER.....RESPONDENT

JUDGMENT

Cases

1. *Sha v Aguto* [1970] EA 263 at p 265

November 11, 1987, **Nyarangi J A** delivered the following Judgment.

This is an appeal from the judgment of the late Mr Justice J S Patel to interfere with the decision of the second class magistrate, Nyeri, that land parcel number Tetu/Unjiru/623 be shared equally between the houses of Wanjiru d/o Mugenya and Margaret Nyokabi w/o Mugenya.

At the trial, the respondents testified that their deceased husband had two parcels of land one of which was registered under the name of Thuguri the first wife of the deceased. The two respondents said that the other piece of land should be shared between themselves. Livingston Ndugu, David Mwangi and Wagura sons of the deceased man by his second wife identified the two parcels of land as number 56/Maraihu/Tetu (4.2 acres) and number 623/Unjiru/Tetu (5.5 acres) and added that land number 56 was given to the first wife of the deceased man, by the deceased, that the first wife was buried on the land but that no land was registered in the names of the respondents. Livingston expressed the wish that land no 623 should be given to the respondents and registered in their names. Robert Gathogu and Samuel Mugunyu, sons of the deceased by the second respondent agree with Livingston that land number 623 be divided between the respondents.

The appellant, one of the sons of the deceased by his wife Thuguri, was an objector during the succession proceedings before the District Magistrate. It was stated, and not denied, that the land given by the appellant's deceased father to the appellant's mother is registered in the name of the appellant's brother, who was the second objector.

The appellants case was that his deceased father did not sub-divide his land and that the two parcels of the land should be sub-divided into three equal portions each for three houses. The first question raised

by the memorandum of appeal is whether it was a misdirection for the magistrate and the judge to hold that the land had been sub-divided according to the three houses. The next question is whether the lower courts properly considered all the evidence. Those are the points on which this appeal turns.

The appellant's main argument necessarily means that his appeal must fail unless he can show that there are grounds for interfering with the judgment of the high court.

The trial and first appellate courts analysed and considered all the matters of fact and decided that the land number 623 be inherited by the respondents, the two wives of the deceased to whose houses he gave no land. That decision is in accordance with the Kikuyu customary law under which the land of polygamous man is divided amongst the houses of wives.

The contention of the appellant that his mother's house was left out is contrary to the evidence that his own mother was allocated land wherein she was buried and which land is now registered in the name of the appellant's brother. None of grounds of appeal in the appellant's memorandum of appeal raise matters worthy of consideration under Section 72(1) of the Civil Procedure Act. It is manifest that the magistrate and the judge correctly considered all the evidence and their conclusions are supportable on that evidence. In this state of facts, there can be no question of interfering with the judgments *Sha v Aguto* [1979] EA 263 at page 265.

The result, therefore, is that in my view this appeal is unmeritonus and deserves to be dismissed with costs and as my brethren agree, it is so ordered.

Platt J A Having entertained some doubt whether the courts below came to the right conclusion, it is nevertheless true, that there is no apparent matter of law upon which this court can interfere.

Accordingly I agree with the judgment of Nyarangi, JA and the orders proposed by him

Apaloo J A I agree that there is no sound basis on which we can interfere with concurrent findings of the two Courts below. I would also dismiss the appeal.

November 11, 1987

NYARANGI, PLATT & APALOO, JJ A



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