



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 9 OF 2005

MBURU WAINAINA AND

JOHN WAINAINA MBURU.....APPELLANTS

VERSUS

JOHN WAINAINA NJUGUNA.....RESPONDENT

(An Appeal from the Judgment of the Learned Senior Resident Magistrate L. W. Gicheha (Mrs.) delivered on 7th day of January, 2005 in Succession Cause No. 164 of 1999 THIKA)

JUDGMENT

1. The deceased herein Wainaina Karwiru died intestate on the 7th of April 1992. He was survived by two widows and children.

2. The 1st wife of the deceased was Loise Gathoni. She had the following children.

Paul Mburu

Joseph Kabugi

Kariuki Wainaina and

Hannah Wambui – daughter

3. The second wife was Rebecca Njoki and she had the following children:

i. Samuel Njuguna Wainaina

ii. Joseph Karwino (deceased)

iii. Scholastic Njoroge Mathera

4. The Respondent is the son of Scholastica Njoroge Mathera from the second house and all witnesses are in agreement that she died 1 month after giving birth to the respondent. And that she had by then returned home from failed marriage to one Kaggia who denied having fathered the objector.

It is also said that the Respondent's mother had another child with Kaggia much earlier and who remained with his father.

5. The trial court indeed found that the Objector/Respondent was brought up by his grandparents and knew of no other parents and as such found the Objector to have been a dependant of the deceased.

6. The Appellants in pursuing this matter heavily relied on a book that is said to hold notes of a meeting the deceased held with his family about the 19th February 1984. It is argued by the Appellants that the deceased divided his land to his 5 sons in that meeting without any mention of his grandson, the Respondent.

7. Not all sons of the deceased were in agreement with the contention of the Appellants. PW1 **Samuel Njuguna Wainaina**; a son of the deceased maintained that their nephew should inherit an equal portion as his uncles. He also denied that their father wrote the book being said to contain details of how the deceased distributed the land amongst the 5 sons.

8. In her testimony **PW3 Hannah Nyanga Kariuki** a daughter of the deceased is in agreement with PW1. She further told the court that she is married and lays no claim in the estate.

9. Evidence on record is that at the time the document that was relied upon to subdivide was said to have been written the deceased was blind. Further the said document was not written by the deceased, executed by him nor attested. Its authenticity is questionable

10. The deceased having been polygamous, Section 40 of the Law of Succession comes into play. The section provides that in the circumstances all the children and wives of the deceased are to inherit the estate based on the number of persons in a home.

11. Further the law is such that all children of the deceased are to inherit irrespective of their gender save where one renounces their inheritance as **Hannah PW3** who is a married daughter did in her evidence. Therefore all other children of the deceased alive, and the estate of his deceased children are entitled to get a share of his estate.

12. The Respondent apart from claiming through his mother makes a claim as a dependent citing the fact that he was brought up by his grandparents. **Section 29 (b) of the Law of Succession Act** describes dependants as:

“such of the deceased parents, stepparents, grandparents, grand children, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.”

13. The Respondent is said to have left his grandfather’s house before completing school for Nairobi before his grandparents died. I will therefore on this score not acknowledge him as a dependant of the deceased immediately prior to his death.

14. However, I am of the view that the Respondent has a right to claim his mother’s share as his mother, a daughter to the deceased is entitled to a share of the estate.

15. In the matter of the **Estate of Veronica Njoki Wakagero (deceased) (2013) eKLR** the court stated:

“under Part V, grand children have no right to inherit their grandparents who die intestate after 1st of July, 1981. The argument is that such grandchildren should inherit their own parents. This means that the grand children can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time the grandchildren inherit directly from their grandparents is when the grand children’s own parents are dead. The grand children step into the shares of their parents and taken directly the share that ought to have gone to the said parents.”

16. In her judgment the trial magistrate found that the court was not bound by the minutes of the alleged meeting of 19th April 1992. Secondly she found that the Respondent/Objector having been brought up by his grandparents was deemed to be a beneficiary of his estate and would therefore be entitled to **Ngenda/Kimunya/24** in equal shares with his uncle.

17. In the Memorandum of Appeal the Appellant felt aggrieved. He states that the trial court erred in the application of the law; was unfair to other grandchildren, failed to apply distribution by the deceased and the Respondent’s claim was untenable and unsustainable.

18. From this court’s analysis above this court agrees with the trial court that the so-called minutes/book distributing the deceased Estate fails the legal test and cannot be used to disinherit a party entitled. It cannot be deemed to qualify as a testimony or will of the deceased.

Secondly though not for similar reason as the trial court, this court finds the Respondent’s claim merited and is in agreement with the trial court that the Respondent ought to get an equal share as his uncles for the reason that his mother had a stake in the estate and if alive would have been entitled to a share equal to her brothers.

19. For the above reasons the appeal is dismissed.

20. Each party to bear their own costs.

SIGNED DATED and DELIVERED in open court this 24TH day of OCTOBER 2019.

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ALI-ARONI

JUDGE