



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL CASE NO. 285 OF 2013

LUCIA WAMUTIRA MUNYIRI.....APPELLANT

AND

JEMIMAH WANJIRU GATHIAKA.....1ST RESPONDENT

JOHN CHOMBA KATHIAKA.....2ND RESPONDENT

GLADYS KANINI KATHIAK.....3RD RESPONDENT

CHARLES WANJOHI KATHIAKA.....4TH RESPONDENT

*Being an appeal from the judgment of the Senior Resident Magistrate's Court (A. K. Ithuku) Kerugoya
Succession Cause No.74 of 2007 delivered on 7th September, 2008)*

JUDGMENT

1. Before me is an appeal by **Lucia Wamutira Munyiri** (appellant) who was aggrieved by the decision by the subordinate court in Kerugoya Principal Magistrate's Court Succession Cause No. 74 of 2007 which was in respect to the estate of the late Jeremiah Kathiaka Gaciani Alias Kathiaka Gaciani (deceased). In that cause the Appellant's daughter in law to the deceased had petitioned for letters of administration to administer the estate which comprised that property known as **MWERUA/GITAKU/508** measuring around 1.7 acres and sought to have the estate distributed to her and her children.

2. **Jemimah Wanjiru Gathiaka**, the 1st respondent (now deceased) and a widow to the deceased and her children John Chomba Kathiaka (2nd Respondent), Gladys Kanini Kathiaka (3rd Respondent) and Charles Wanjohi Kathiaka (4th respondent), protested and after trial, the trial court vide its judgment delivered on 7th November, 2008 decided that the estate of the deceased should go to the widow Jemimah Wanjiru Gathiaka and her daughter Gladys Kanini Kathiaka. The Appellant felt aggrieved and preferred this appeal. Before I look at the grounds of appeal it is desirable to consider the brief background or facts presented to the court below.

3. The cause in the subordinate court as I have stated above related to the estate of Jeremiah Kathiaka Gaciani (deceased) who died on 10th August, 1994 domiciled at Gatuya within what is now described as Kirinyaga County. The uncontested facts indicated that the deceased had married two wives namely:-

(i) Mary Mugure Gathiaka – 1st house (deceased)

(ii) Jemimah Wanjiru Kathiaka – (2nd house now deceased – died after the trial and judgment in the lower court).

4. The 1st wife (house) had two children namely Wamwirua Kibaria and Muriuki Gathiaka both of whom are the deceased in the cause. The late Muriuki Gathiaka was the husband to Lucia Wamutira Munyiri, the petitioner in the cause before the lower court.

5. The 2nd house had Jemimah Wanjiru Gathiaka, (now deceased) the 2nd wife to the deceased and the following children:-

(i) Charles Wanjohi

(ii) Jane Wangithi Mwangi

(iii) Gladys Kanini Kathiaka

(iv) John Chomba Kathiaka

The evidence adduced during the trial indicated that the deceased's property initially comprised that property known as **Mwerua/Gitaku/144** which was sub divided into 3 portions in his lifetime to parcels namely; (a) **Mwerua/Gitaku/508** which remained in his name and subject to succession cause; (b) **Mwerua/Gitaku/509** which he gave to his son Charles Wanjohi (from 2nd house) as a gift; and (c) **MWERUA/GITAKU/510** which he gave his son (from 2nd house) John Chomba Kathiaka.

6. The property that caused the dispute over the estate was that property known as **MWERUA/GITAKU/153** which was registered in the name of Muriuki Gathiaka (deceased), a son to the deceased and the husband to the Petitioner (appellant). The Petitioner maintained that the property belonged to the deceased's clan and was given by the clan while the protestors (now the respondents herein) insisted that the deceased in the cause influenced the clan to have the land given to his son. The subordinate court after evaluating the evidence tendered decided in favour of the protestors and found that John Chomba Kathiaka, Charles Wanjohi Kathiaka 2nd and 4th protestors (respondents herein) had already directly benefitted from properties (read **Mwerua/Gitaku/510** and **509** respectively) given to them by the deceased during his lifetime. In the same breadth the Court found the Petitioner (appellant) had indirectly benefitted from the property (**Mwerua/Gitaku/153**) given to her late husband Muriuki Kathiaka. The trial court further found that the estate (**Mwerua/Gitaku/508**) should be distributed to the widow Jemimah Wanjiru Gathiaka (now deceased) and her unmarried daughter Gladys Kanini Kathiaka because they were the only beneficiaries who had not benefitted from any previous gift by the deceased.

7. The appellant being dissatisfied with the above decision filed this appeal raising the following 4 grounds namely:-

(i) That the learned magistrate erred in law and fact in making judgment against the weight of evidence.

(ii) That the learned magistrate failed to fairly analyse the evidence adduced by the appellant and the witnesses.

(iii) That the learned magistrate erred in law and fact in disregarding the evidence adduced by the appellant and her witnesses.

(iv) That the learned magistrate erred in law and in fact in distributing the estate of the deceased contrary to the provisions of the Law of Succession Act Cap 160 Laws of Kenya.

8. I have looked at the evidence adduced at the subordinate court from the record of appeal herein. I have given the summary above. The widow Jemimah Wanjiru Kathiaka (now deceased) testified that her

late husband was buried in the estate where she lived with her unmarried daughter – Gladys Kanini Kathiaka the 3rd respondent. According to her the deceased had two parcels of land with one portion going to the 1st son of the deceased (Muriuki) while the other portion is where she was currently living. She confirmed that her sons Charles Wanjohi and John Chomba had also been given their respective portions by their father. Her evidence was supported by her children who were also the protestors in the cause.

9. Lucia Mutira Munyiri testified that the land given to her husband did not belong to the deceased father in law but the clan and that it was a gift from the clan rather than the deceased. She acknowledged that her husband died in 1963 and that she was living with her mother in law prior to her demise in the said property **MWERUA/GITAKU/153** where she was also buried. She further told the court that she had petitioned for letters of administration in respect to the estate of her late husband Muriuki Gathiaka and no one had raised any objection or claim to the estate. **Reuben Wanyiri** (P.W. 2) a clan elder called by the appellant to testify told the trial court that the name of the clan where he and the deceased belonged was called “Ngari” clan of the “Kahuno”. He confirmed that the deceased was married to 2 wives the 1st wife being Mary Mugure (deceased) who according to him separated with the deceased and was not living or utilizing the estate occupied by the protestors. He told the trial court that the 2nd wife was Jemima Wanjiru. He further told the trial court that the appellant went to live in her late husband’s (Muriuki Gathiaka) land before independence.

10. P.W. 3, **Josphat Muriithi Kibanya**, testified and told the trial court that he was a grandson to the deceased by virtue of being a son to Wamwirua who was a daughter to the deceased from the first house. He told the trial court that he left the deceased’s home around 1965 and that her grandmother – Mary Mugure (deceased) was being taken care of by the appellant herein in a parcel of land which according to him belonged to the late husband of the appellant.(Muriuki Gathiaka)

11. I have looked at the appellant’s written submissions made through the firm of Anne Thungu and Company Advocates. The Appellant has not pointed out in her submissions what evidence was adduced and not given due consideration by the lower court. It is true that the deceased was married to two wives but the first wife died before the petition was presented. The evidence shows that she died somewhere in 2006 and the petition for letters of administration in the cause was done in 2008. The **Law of Succession Act (Sections 35 and 40)** provides that distribution of an estate of a deceased person applies to surviving spouse and children. The Appellant in her submissions faulted the learned trial magistrate for distributing the net estate to members of one house disregarding the provisions of **Section 40** of the Act which she submitted takes care of polygamous families and that the Appellant should have been given a share as a representative to the 1st house.

12. The Respondents in their submissions filed through Messrs Maina Kagio and Company Advocates opposed this appeal. It was contended that the Appellant in the first place could not lay claim on the estate through her late mother in law Mary Mugure because she had no capacity by virtue of the provisions of **Section 82** of the **Law of Succession Act**. It was further contended the appellant could not be taken to be a legal representative of the deceased widow (Mary Mugure). It was further contended that the Appellant could not in the same breath claim on behalf of her late husband Muriuki Gathiaka as she did not present evidence before the trial court that she had been appointed the administratrix of the estate of the late Muriuki Gathiaka. This contention has posed a legitimate legal issue. Can the appellant claim to be a legal representative to the estates of Mary Mugure and Muriuki Gathiaka? Is she a dependant to either or both estates of the 2 said deceased persons? **Section 29 (i)** of the **Law of Succession Act** defines who a dependant is in law but before I look at who a ‘dependant’ is by law, let us examine who can be described as a legal representative. **Section 3** of the Act defines a personal representative as an executor or administrator of a deceased person. **Sections 53 – 66** gives guidelines on how a personal representative or administrator can be appointed and **Section 79** and **82** of the Act show what the powers and duties a personal representative has. The evidence adduced before the trial by the

Appellant did not show that the Appellant had been appointed a personal representative of either her late husband (Muriuki Gathiaka) or her late mother in law Mary Mugure. There is nothing to show that she

had powers donated to her under **Section 79 and 82** of the Act which includes suing on behalf of the two deceased persons. I also find that under **Section 66** of the Act, it was wrong and irregular for her to petition for letters of administration of her father in law when the widow (Jemimah Wanjiru Gathiaka) and children to the deceased were alive and had not been cited for declining to petition for letters of administration. They ranked higher in order of consanguinity or preference to administer the estate of the late Jeremiah Kathiaka Gaciani and should have been the ones to administer the estate of the late Jeremiah Kathiaka Gaciani (deceased).

13. It is also clear and uncontested fact that the Appellant was staying in her own parcel of land separate from the estate herein. The parcel was registered in her late husband's name and the evidence adduced shows that her late husband settled in that parcel in 1963 or just before independence going by the evidence of the witness (Mubeu Wanyiri wrongly described as P.W. 2 instead of D.W. 2. P.W. 2 was Charles Wanjohi Kathiaka) called by the Appellant to testify in support of her claim. There was no evidence adduced to show that she was a dependant to the deceased in the cause within the meaning of **Section 29** of the Law of Succession Act which describes a dependant as follows:-

“(a) wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

(b) Such as the deceased's parents, step-parents, grandparents, grand children, step children, children to 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.....” (Emphasis added)

14. Going by the above provisions of law firstly, the Appellant was not a child to the deceased. She was not a personal representative of either the child or a wife to the deceased as I have already found in this judgment; she was not being maintained by the deceased immediately prior to his demise in 1994. She was not by law entitled to any share of the estate of the late Jeremiah Gathiaka Gaciani (the deceased herein).

15. Secondly, this Court agrees with the Respondents' position that the learned trial magistrate was correct to find that the Appellant had already benefitted from a share given to her late husband (Muriuki Gathiaka). The evidence adduced clearly showed that the deceased in this cause subdivided his property comprised in Mwerua/Gitaku/144 into 3 portions as indicated above and gave her two sons in the 2nd house John Chomba Kathiaka and Charles Wanjohi Kathiaka. He did not see it fit to give any portion to the wife of her late son (Muriuki Gathiaka) and though there was no clear evidence at the trial to show whether the property given to her late son **Mwerua/Gitaku/153** belonged to the deceased or the clan, it can be discerned from the action of the deceased that he knew at the back of his mind that a benefit had already accrued to the family of his late son (Muriuki Gathiaka). I am also persuaded by the Respondents' submissions that this Court should take judicial notice of the fact that during pre-independence demarcations of land, it was usual for fathers to influence their first born son who were of age to be considered for allotment and indeed were considered and given land on the strength of intervention by their fathers. That benefit (getting land) can be considered rightfully to be a gift from the father depending on the circumstances. A gift *intervivos* is normally taken into account when distributing an estate of a deceased person to the beneficiaries under **Section 42** of the Act. The trial court in this cause considered that the remaining estate was about 2 acres (though the documents filed shows that it is approximately 1.7 acres) and that the only dependants who had not benefitted and staking a claim were the widow Jemimah Wanjiru Gathiaka (now deceased) and Gladys Kanini Gathiaka the unmarried daughter and decided that the two should share the estate because the Appellant had benefitted from 5 acres of land belonging to her late husband. This in my view was correct assuming that the Appellant was a dependant which I have found in the negative. The trial court contrary to what the Appellant submitted applied the law correctly save of course on the fact that he ought to have found that the Appellant was not a dependant and lacked the capacity to petition for letters of administration or stake claim in the estate of Jeremiah Gathiaka Gaciani. Nonetheless, the verdict would not have changed in any event the direction of the decision.

16. I also find that the Appellant inadvertently named the 1st Respondent – Jemimah Wanjiru Gathiaka (deceased) as a party in this appeal when the said 1st respondent died on 24th June, 2010 as per the death certificate on record and the consequent order of substitution made on 11th November, 2010 bringing in Jane Wangithi Mwangi the daughter in her place. The Appellant was in Court when the application for substitution was made and besides this fact, it is incompetent and bad in law to name a dead person as a party to a suit or in an appeal. This Court therefore finds that to that extent this appeal is incompetent.

In the end this Court finds that this appeal both lacks in merit and is incompetent for the reasons aforesaid. And because the appeal can suffer only one fate the same is dismissed but each party shall bear own costs.

Dated and delivered at Kerugoya this 18th day of August, 2016.

R. K. LIMO

JUDGE

18.8.2016

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Murigu for Maina for Respondent present.

The applicant is absent.

COURT: The judgment in this case was due to be delivered on 3rd August, 2016 but because this Court was on recess, the judgment was pushed to today. The file shall be placed aside to enable the applicant's counsel to be present.

LATER:

Miss Thungu for the Applicant present.

Macharia for the Respondent present

Gladys Kanini Kathiaka present.

COURT: Judgment dated, signed and delivered in the presence of Miss Thungu for the applicant and Macharia for the Respondents (1st and 4th).

R. K. LIMO

JUDGE

18.8.2016