



IN THE HIGH COURT OF KENYA AT MURANG'A

P & A APPEAL NO 1 OF 2013

(FORMERLY NYERI HC P & A APPEAL NO 10 OF 2011)

(Appeal from an Order in Murang'a SPM Succession Cause No 146 of 1996 dated 02/07/2008 – J. Gathuku, RM by which the Grant of Letters of Administration Intestate therein was confirmed)

GICHUHI KANG'ETHE.....APPELLANT

VERSUS

STEPHEN MAINA.....RESPONDENT

J U D G M E N T

1. This is an appeal from an order of the lower court by which a grant of letters of administration intestate in respect to the estate of **Kang'ethe Ndegwa, Deceased** was confirmed. The court directed that the asset constituting the estate, **L.R. Loc. 15/Geitwe/236**, be shared equally between the administrator and the protestor. The Appellant herein was the administrator in the lower court while the Respondent was the protestor.
2. The grounds of appeal as stated in the memorandum of appeal dated 12/10/2011 are –
 - i. That the Respondent being a son of the Appellant's married sister, he was not a dependant of the Deceased and could only inherit from his own father.
 - ii. That the Appellant had volunteered to give to the Respondent 1.0 acre from the land constituting the estate, and that the lower court therefore erred in ordering that the land be shared equally between the Appellant and the Respondent.
 - iii. That the lower court failed to consider that the Appellant had 5 children who are dependent on the land, and that therefore giving the Respondent half of the land was biased against the Appellant.
3. I have read the proceedings of the lower court and its judgment. Both parties testified and called witnesses. I have also considered the submissions made before me by the Appellant (who was unrepresented) and those of the learned counsel for the Respondent.
4. The Respondent's mother was the Appellant's sister who had been married but had been chased away from her matrimonial home and had gone back to her parents. She died and was buried in the land constituting the estate of the Deceased. Both the Appellant and the Respondent's mother were the Deceased's children. There was an elder brother who it appears was given his own inheritance *inter vivos* and did not feature in the cause before the lower court.

5. The Deceased died on 11/12/1978 before the coming into force of the **Law of Succession Act, Cap 160** (on 1/07/1981). The Deceased's estate therefore was subject to the written laws and customs applying at the date of his death, though administration of his estate would proceed in accordance with the Law of Succession Act. See **section 2(2)** of that Act. The estate of the Deceased should thus have been distributed in accordance with Kikuyu customary laws.

6. As is well known, however, customary laws are matters of fact to be established by evidence. There was no evidence placed before the lower court of any Kikuyu customary law to show that a married daughter who has been chased away from her matrimonial home or who has been divorced and has returned to her parents was not entitled to inherit from her father. The Appellant's action of giving, or being ready to give, the Respondent 1.0 acre of the land appeared to be an acknowledgement of his sister's entitlement to inherit a portion of her father's estate. The Respondent being the surviving son of that sister, was simply seeking his mother's share of her father's estate.

7. In these circumstances, there was nothing inherently unfair or unjust, and certainly nothing illegal, in the lower court ordering that the Deceased's estate be shared equally between the two children of the Deceased.

8. It is also to be noted that the grant was confirmed way back in the year 2008. The confirmed grant was effectuated and each party got his own share of the estate. It is common ground that both parties have since disposed of portions of their inheritances to third parties. Disturbing the confirmed grant at this stage may therefore open a can of worms and have unpleasant unintended consequences as there would be third parties affected.

9. In the event I find no merit in this appeal. The same is dismissed. Parties shall bear their own costs of the appeal. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF JUNE 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 19TH DAY OF JUNE 2015