



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

P&A APPEAL NO. 12 OF 2013

BERNARD KIMANI MWIHURI.....APPELLANT

VERSUS

JULIUS MWANGI MUTHOGA.....RESPONDENT

(Being an appeal against the judgment delivered in Murang'a Senior Principal Magistrates Court Succession Cause No. 214 of 1984 (Hon. J. Gathuku) on 19th February, 2010)

JUDGMENT

Kuria Kamori (hereinafter called “the deceased”) died intestate on 14th February, 1984 without a spouse or children. Prior to his death, he was the absolute registered proprietor three parcels of land known as **Nos. Loc.13/Gitugi/1477, Loc.13/Gakoe/966 and Loc.13/Gitugi/200.**

On 25th September, 1984, one Muthoga Kamwega took out a citation in **Succession Cause No. 214 of 1984** in the Resident Magistrates Court at Murang'a, citing one Mwihuri Muhia and one John Mwangi Mwihuri to accept or refuse letters of administration intestate in respect of the deceased's estate; the citees were described as the deceased's cousin and nephew respectively. The citor also described himself as the deceased's cousin and one of the persons entitled to his estate.

The citees were directed to enter appearance and accept letters of administration within fifteen days in default of which the grant of these letters would be made to the citor, Muthoga Kamwega.

In response to the citation, the citees duly entered appearance on 3rd October, 1984 and objected to the making of the grant to the citor; they petitioned for grant of letters of administration to themselves.

Despite the entry of appearance and the petition for grant of letters of administration, the citees were never issued with those letters; it appears from the record that by an application dated 28th May, 1985, the citor asked the court to issue him with the grant of letters of administration of the deceased's estate.

Sometimes in 1994, the citor, Muthoga Kamwega and one of the citees John Mwangi Mwihuri died; the citor was substituted with his son, **Julius Mwangi Muthoga**, the respondent herein, while John Mwangi Mwihuri was substituted with his brother **Bernard Kimani Mwihuri**, the appellant herein.

It would appear that the dispute between the parties herein was at some stage referred to District Officer's office, Kangema Division for arbitration and for most part of the 1980s nothing much happened in court until April, 1989 when the District Officer gave his award. The proceedings also indicate that an application was made to set aside the award; although it is not clear when that application was heard, it appears from the subsequent events that the award must have been set aside.

In an apparent response to the citor's summons referred hereinbefore for grant of letters of administration, the appellant filed an affidavit of protest stating that the citor was only a distant relative of the deceased and that the appellant was the properly placed person to administer the deceased's estate. It would seem that a compromise was reached between the citor and the citee because they were subsequently jointly granted with the letters of administration of the deceased's estate; this is apparent from the summons for confirmation of grant in which the citor specifically asked the court to confirm the grant of letters of administration issued to Julius Mwangi Muthoga and Bernard Kimani Mwihuri on 6th July, 2000.

The summons for confirmation of grant was strenuously contested; oral evidence was taken before the subordinate court and after hearing the parties and their respective witnesses, the learned magistrate delivered himself as follows:-

“It is by no means easy to disentangle this intricate family tree but it is clear from both parties that they both share a common ancestry namely, “Gathiga”. None of the two can claim any direct connection with the deceased Kuria Kamori who left no survivors. It is also not easy to discern whether, the land registered in the deceased's name is clan land or whether it was acquired solely by the deceased. I have read the proceedings of the elders and the award made thereof and note that the petitioner had been awarded the parcel at Gakoe while the objector had been awarded the two parcels at Gitugi. That award was nevertheless set aside. I am satisfied that the two parties are relatives of the deceased in the nearest degree of consanguinity as defined in section 39(1) (e) of the Law of Succession Act Cap 160 Laws of Kenya. That being my finding in the matter I conclude that the three properties composing the estate be shared equally between the petitioner and the objector. Each party will bear his own costs. It is so ordered.”

A certificate confirming the grant of letters of administration in terms of the judgment was subsequently issued.

It is this decision that the appellant appealed against; in the memorandum of appeal lodged in court in March, 2010, the appellant faulted the learned magistrate's decision on the following grounds:-

1. The learned magistrate erred in law and fact in distributing the estate in the manner he did without paying regard to the evidence on record;
2. The learned magistrate erred in fact in not appreciating the appellant had a higher degree of consanguinity and thereby disinherited the appellant.
3. The said judgment was against the weight of the evidence.

The appellant has asked this court to set aside the judgment and have the estate devolve exclusively upon the appellant; he has also sought for the costs of the appeal.

Parties agreed that the appeal should be determined by way of written submissions; they accordingly filed and exchanged their respective submissions which I have duly considered.

As noted from the excerpt of the learned magistrate's judgment, the evidence proffered by both parties revolved around their relationship to the deceased and in his view, their degree of consanguinity to the deceased was at par; none of them could claim a closer relationship to the deceased than the other.

Muthoga Kamwega described himself in the citation and in his affidavit in support of the petition for grant of letters of administration as the deceased's cousin; he adopted the same description in the affidavit in support the summons for confirmation of grant. His son, the respondent herein who stepped into his shoes in these proceedings upon his demise, however, denied that his father was the deceased's cousin. In his evidence in chief he testified that the deceased was his great grandfather. He also told the court that he was “connected to Kuria Kimani (apparently the deceased) through his father who was the son of

Gathungu.”

In cross-examination, his evidence went as follows:-

“My father was Muthoga Kamwega. His father was Kamwega. Kuria Kanoru deceased had no children or bother. His father was Kamori. He was a step brother to Kaburi who was a father to my great grandfather. It is not true that my father swore an affidavit on 24thSeptmber, 1984 described himself as cousin to the deceased.”

The inconsistency in the respondent’s evidence as far as his relationship with the deceased is quite evident; the version in the pleadings and affidavits filed in the cause varies from what he testified in his evidence in chief which in turn contradicted what he told the court in cross-examination.

The appellant, on the other hand, testified that Kuria Kamori (the deceased) was the son to Kamori Njine. This Njine had a brother called Kaburi. One of Kaburi’s children was called Kamwega who was in turn the father to Muthoga Kamwega, the original petitioner and the father to the respondent.

It would imply therefore that Kamwega who is Muthoga Kamwega’s father and the respondent’s grandfather was Kamori Njine’s nephew.

Kamori Njine, according to the appellant had two wives, one of whom gave birth to Muhia Njine who in turn begot Mwihuri Muhia who was one of the original objectors and the father to the appellant. The other wife of Kamori Njine gave birth to Kuria Kamori (deceased).

This means that Muhia Njine, the father to Mwihuri Muhia, the appellant’s father, was a step-brother to Kuria Kamori.

It is therefore logical that the family line comprising the appellant, his father Mwihuri Muhia, whose father was Muhia Njine, ensued from Kamori Njine who happens to have been the father of Kuria Kamori the deceased; thus Kamori Njine was Mwihuri Muhia’s grandfather and at the same time Kuria Kamori’s (the deceased’s) father.

Looking at the evidence of both the appellant and the respondent, the appellant’s evidence appears to me to be more, plausible, consistent and credible; no reason was given and I do not see any, why the learned magistrate did not consider it. My conclusion is that if the respondent shared the same lineage as the deceased at least from the generation of Kamori Njire, he is in the nearest degree of consanguinity to the deceased compared to the respondent. The deceased’s estate would therefore devolve upon him absolutely. This is consistent with **section 39(1)** of the **Law of Succession Act** which states:-

39. (1) where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father, or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of the deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree in equal shares.

Sub-section (1) (e) is more pertinent to the issue at hand; in my view, the appellant appears to me to be

the deceased's closest relative; however, if for any reason I am wrong on the interpretation and analysis of the evidence presented in the subordinate court, then the respondent's citation and the affidavit sworn in support thereof should clear the air on who between him and the appellant's brother was closer in the degree of consanguinity to the deceased.

In the citation taken out by the respondent's predecessor in the succession cause, the citor acknowledged that Mwihuri Muhia, the appellant's father was the deceased's cousin and therefore notified him that "***in default of your appearing and accepting and extracting letters of administration this court will proceed to grant the letters of administration of the said estate to the said Muthoga Kamwega your absence notwithstanding.***"

His affidavit in support of the citation went further to state:-

"1. THAT KURIA KAMORI the above named deceased died on 14th February 1984 at Gitugi village Muranga District intestate leaving Mwihuri Muhia and John Mwangi Mwihuri as cousin and nephew of the deceased surviving him but no person entitled by virtue of any enactment in priority to the said Mwihuri Muhia and John Mwangi Mwihuri to share with them his estate."

My understanding of the citation taken out by respondent's father as read with the affidavit he swore in support of the citation is that Mwihuri Muhia and John Mwangi Mwihuri were the deceased's closest surviving relatives and therefore entitled not only to the grant of letters of administration of his estate but also to the inheritance of this estate. In other words, pursuant to the provisions of **section 39(1) (e)** which has been quoted above, Mwihuri Muhia and John Mwangi Mwihuri were the surviving relatives who were in the nearest degree of consanguinity to the deceased. The deceased's estate should, therefore, have devolved upon them in equal shares.

It is not clear why the learned magistrate did not make the grant of letters of administration intestate to the said Mwihuri Muhia and John Mwangi from the very beginning when they complied with the citation issued against them and opted to accept the letters of administration. When the citees entered appearance and petitioned for the letters of administration, they ought to have been granted these letters; this appears to me to be the meaning of **rule 22(1)** as read with **rule 22(5)(a)** of the **Probate and Administration Rules**; they provide as follows:-

22.(1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

(2)...

(3)...

(4)...

(5) If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may-

(a) in the case of a citation made under sub rule (1), petition the court (if he has not already done so) for a grant to himself;

The citees never renounced their right once they were cited and they entered appearance within the prescribed time. There was therefore no reason for the citor to petition for the grant of letters as if the citees had renounced their right or had failed to enter appearance.

The learned magistrate also conceded, as is clear from the excerpt of his judgment, that he was not sure whether the deceased's parcels of land comprising his estate were the deceased's or formed a clan land; I do not see why this doubt should have arisen because attached to the affidavits in support of the petition

for grant of letters of administration and the summons for confirmation of grant are copies of the green cards and certificates of official search showing that the deceased was the absolute proprietor of the parcels in question; there is nothing to suggest and neither did it come out in evidence that his registration as the absolute proprietor of these parcels of land was subject to any form of trusteeship. If the learned magistrate's doubt influenced his decision, then he certainly misdirected himself and arrived at a wrong decision; he, as it were, considered matters which he ought not to have considered and disregarded those that he should have considered.

For the reasons I have stated, I am satisfied that the appellant's appeal is merited and it is hereby allowed. The learned magistrate's judgment is set aside and substituted with the following orders:-

1. Land parcels known as **Loc.13/Gitugi/1477, Loc.13/Gakoe/966** and **Loc.13/Gitugi/200** shall devolve upon Bernard Kimani Mwihuri absolutely.
2. Parties will bear their own costs both in the subordinate court and in this court.

It is so ordered.

Dated, signed and delivered at the High Court in Murang'a this 10th day of December, 2014

Ngaah Jairus

JUDGE