



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**P&A APPEAL NO. 8 OF 2010**

PRISCILLAH WANGECHI GITAHI.....APPELLANT

VERSUS

SERAH NJERI MURAGURI.....RESPONDENT

*(Being an appeal against the Judgment of the learned Magistrate Joseph Gathuku, Resident Magistrate Muranga, delivered on 08/05/2009 in Muranga PM. Succ. Cause No. 34 of 2005)*

**JUDGMENT**

On 8th May 2009, Hon. Gathuku, learned Resident Magistrate, issued an order confirming the grant of letters of administration intestate issued to **Priscillah Wangechi Gitahi**, the appellant herein, on 22nd March 2007 on the basis of the following mode of distribution:

1. **Priscillah Wangechi Gitahi- ¼ acre to be excised from L.R.no.Kiine/Kibingoti/Nguguiri/577 to hold in trust of the Estate of Gathiru Gaitho, deceased.**
2. **1 acre each to Moses Muriithi Gitahi and Titus Mwangi Gitahi to be excised from the aforesaid parcel of land.**
3. **Sarah Njeri Muraguri – 1 ¼ parcel of land.**
4. **Margaret Wangui – ¼ parcel of land.**

The appellant was unhappy with the decision hence she preferred this appeal by putting forward the following grounds:

1. **The learned trial Magistrate erred in law and fact in failing to hold the deceased was registered to hold land parcel No.Kiine/Kibingoti/Nguguine/577 in trust for the family of Gathiru Gaitho and Kangau Nyokabi.**
2. **The learned trial Magistrate erred in law and fact in failing first to determine who were the heirs of the parcel of land and hence share the same as indicated by the appellant.**
3. **The learned trial Magistrate erred in accepting there was a land sale agreement yet the vendor had no land to pass the purchaser.**
4. **The learned trial Magistrate erred in accepting the sale agreement and yet it has not complied with the provisions of the Stamp Duty Act.**
5. **The learned trial Magistrate failed to give reasons in his judgment why he gave the bigger**

## **portion to some beneficiaries.**

On appeal, Mr. Gacheru, learned advocate for the appellant, beseeched this court to set aside the order on the basis that the trial Magistrate erred when he failed to hold that there was a subsisting trust in which the deceased held L.R.no.Kiine/Kibingoti/Nguguri/577 in trust for the family of Gathiri Gaitho alias Kangatu Nyokabi. It was argued that the land was registered in the name of the son when the father became mentally sick, therefore the land should have been distributed evenly. **Serah Njeri Muraguri**, the Respondent herein, was of the view that the trial Magistrate's decision should not be disturbed because his decision was fair. It is said the Respondent got a bigger share to cater for the debt she incurred.

I have re-evaluated the evidence presented before the trial court. It is clear from the recorded evidence that the trial Magistrate accepted that the land in question was registered in the name of the deceased in trust for Gaitho's family. There was also evidence that the Respondent's husband had incurred some expenses to reclaim a portion of the land that had been sold off to a third party. There is no doubt that the issues relating to the identification of the asset and the beneficiaries are settled. The question which has been posed to this court on appeal is whether the estate was fairly distributed!

It is admitted by the Respondent that she received a bigger portion because the court found that the Respondent's deceased husband had incurred extra expenses in reclaiming a portion of the land from a third party. In her evidence, she claimed her late husband incurred Kshs.80,000 to refund money paid to his late step-brother what purported him to sell the family land to one Daniel Wakeri. For this reason, the learned Resident Magistrate awarded the Respondent  $\frac{1}{2}$  acre to compensate for the expense. With respect, I think the trial Magistrate fell into error when making the order. First, the law requires courts to distribute the net estate. In this case, it would appear the deceased's estate incurred a debt of Kshs.80,000 which should have been taken as a liability to the estate. In an ideal situation, the aforesaid debt should have been settled by the estate first so that whatever remains could easily be distributed. The second error committed by learned Resident Magistrate is that there is no explanation as to how he arrived at Kshs.80,000 being the value of the  $\frac{1}{2}$  acre.

For the above reason, I find the appeal to be well founded. I set aside the order confirming the grant. I direct that the liabilities of the Estate must first be identified and settled and thereafter the net estate should be distributed according to law. If the parcel of land will be used to offset the expenses incurred, the land must first be valued to establish the actual value rather than just estimating. In the end, the appeal succeeds to that extent. I direct that each party meets his or her own costs.

**Dated, Signed and delivered this 16th day of December 2013.**

**J.K.SERGON**

**JUDGE**

- In open Court in the presence of Ndirangu holding brief for Gacheru for Appellant.
- Respondent present in person.