**FRANCIS MASUNI KYANGANGU ……...…….... APPELLANT**

**VERSUS**

**BARNES MUEMA…….. RESPONDENT**

**JUDGMENT**

1. This is an Appeal from a ruling in Probate & Administration Cause No. 19 of 1999 at **Kitui** (*In the Matter of the Estate of Kyangangu Maithya* (Deceased)). The impugned ruling was delivered by the Honourable *M.N. Gicheru*, the Principal Magistrate on **07/11/2003.**

2. It is important to first set out the procedural posture of the case. On **15/03/1999**, **Francis Masuni Kyangangu**, the Appellant herein ("*Appellant*") petitioned for Letters of Administration intestate in the estate of his late father, **Kyangangu Maithya** ("*Maithya*"). In his petition, the Appellant duly listed the assets of the deceased as four parcels of land registered in the deceased's name. These are:

a. Kyangwithya/Mutune/747

b. Kyangwithya/Mutune/594

c. Kyangwithya/Mutune/485

d. Kyangwithya/Mutune/589

3. The last described parcel i.e. Kyangwithya/Mutune/589 is the subject of the instant dispute and will be referred to as "*Suit Property*" hereinafter. The Letters of Administration were granted to the Appellant on **08/07/1999.** About a month later, on **20/08/1999**, he filed an application seeking an early confirmation of the grant of Letters of Administration on the grounds that he had medical problems and wanted to subdivide the parcels to his sons. The court obliged him and confirmed the grant on **02/09/1999** as evidenced by the Certificate of Confirmation of a Grant issued on **08/09/1999.**

4. Then the rain started falling. On **04/10/1999,** the Respondent herein, **Barnes Mwema** ("*Respondent*"), through his advocates, took out a Chamber Summons seeking the revocation or annulment of the grant issued to the Appellant on the ground that the same was obtained fraudulently by the making of false statements and concealment of material information. There were many applications and counter-applications thereafter – including one a reference to this Court to issue guidance on the interpretation of **Rule 73** of the **Probate & Administration Rules.** In the end, the Learned Magistrate revoked the grant issued to the Appellant and permitted the Respondent to file an objection to the making of a grant to the Appellant. For all intents and purposes, therefore, the proceedings in the lower court were objection proceedings.

5. In the end, the Learned Magistrate delivered his ruling of **07/11/2003** wherein he ruled that the distribution of the Suit Property will be equal between the Appellant and the Respondent. The other three parcels belonging to **Maithya** which were not disputed were to be registered in the name of the

Appellant.

6. Aggrieved by the decision of the Learned Magistrate, the Appellant preferred the instant appeal. The Appellant listed seven grounds of appeal but a number of them overlap. In the end, the Appellant's advocates pressed two major points on appeal. First, they questioned the standing of the Respondent to have brought the Objection proceedings in the first place. The Appellant's argument is that the Respondent is neither bringing this claim in his own capacity as an heir to **Maithya's** estate nor as creditor. He can only bring the claim on behalf of the estate of his late grandfather, **Katulwa Muthenya** ("*Muthenya*") whom he claims owned the Suit Property. Yet, the Respondent neither proved nor even alleged to be the legal representative to the estate of **Muthenya.**

7. Second, the Appellant argues that, in any event, the ruling by the Learned Magistrate was a serious misdirection in law and fact because the evidence on record clearly shows the Suit Property belonged to **Maithya** and not **Muthenya.**

8. I have carefully analyzed the record of appeal and the file from the lower court and considered the submissions of counsel. I have come to the conclusion that the Respondent must succeed on both arguments. I will explain my reasoning below.

9. I will begin with an analysis of the Learned Magistrate's ruling. The Learned Magistrate begins by describing the Appellant's case which included a straightforward account and proof of the fact that the Suit Property belonged to **Maithya;** and **Maithya** alone. The Appellant's case also included testimony that the Respondent only moved to the Suit Property in **1999.** The Appellant also sought to show that the blood relationship between Maithya and Muthenya was quite remote: his testimony was that Maithya was a cousin to Muthenya's father. And, Muthenya is the grandfather to the Respondent. In all these, the Appellant's case was that it was improbable and far-fetched that the Respondent could have any hereditary claim to Maithya's land.

10.Next, the Learned Magistrate describes the Respondent's case. It was the Respondent's claim that the Suit Property was, in fact, family land. Though the Learned Magistrate describes Muthenya as the Respondent's father, the Respondent's evidence showed that he claimed that Muthenya was his grandfather. The Respondent's case is that the Suit Property was family land. He alternates between claiming the whole parcel belonged to Muthenya alone and Maithya was registered as a trustee for the benefit of Muthenya to claiming that the Suit Property was family property to which both Maithya and Muthenya were entitled.

11.In the end, the Learned Magistrate placed a lot of importance to proceedings in Objection Case No. 37 during the land adjudication process. The objection had been filed by a **Stephen Kithome Muli.** The proceedings, copy of which was produced by the Respondent and admitted into evidence shows that the case was against "*Kyangangu Maithya*." After hearing both parties, and visiting the land, the Land Adjudication Officer concluded:

"L.A.O. [Land Adjudication Officer] noted this is inheritance between Kyangangu Maithya Ukungu originally with Katulwa Muthenya, formerly their sharing was done by their grandfather Ukungu.

Stephen Kithome Muli is only __ a portion where Vooi Muli has got homestead and this portion is the one which is supposed to have been claimed by Stephen Kithome Muli."

12.The **Land Adjudication Officer** proceeded to dismiss the objection.

13.The Learned Magistrate below placed emphasis on this extracted part of the Land Adjudication Officer's conclusions and reasoned:

[T]here is evidence from the committee case records which clearly show that land parcel No. 589 did not belong to Kyangangu Maithya alone but to him and Katulwa Muthenya. These records were produced as an exhibit by the Objector [Respondent]. He record of 19/12/75 [quoted above] found….relating to parcel

No. 589 Mutune [the Suit Property] clearly show[s] that the land belonged to Kyangangu Maithya and Katulwa Muthenya. The geneology of Kyangangu and Katulwa cannot be used as the basis of inheritance because it can be misleading. This is especially so when one considers that Kyangangu is said to have come from Kikuyuland.

The evidence on this score is very credible. I would therefore go by the documented history of the land rather than by the ancestry of the two patriarchs because it is not definite.

14. I am unsure the plain and natural import of the words of the Land Adjudication Officer lends themselves to the very strong meaning of co-ownership of land the Learned Magistrate finds. If one considers that this was a suit against Maithya alone respecting the Suit Property, and that Muthenya was not only not sued but was only mentioned once in the proceedings – and by the Land Adjudication Officer – one can easily come to the conclusion that the mention of Muthenyain the findings of the Land Adjudication officer was not meant to denote co-ownership. Instead, my view is that the reference to Muthenya was meant to show that the specific portion was, at some point part of a larger parcel that was shared out by **Ukungu** to **Maithya** and **Muthenya** and perhaps to others. This is borne out by the usage of the word "*originally"* by the Land Adjudication Officer.

15.This position, in my view, is buttressed by the fact that **Muthenya** was registered as the sole owner of other parcels of lands. This raises two issues which makes the Respondent's claim implausible. First, what was the rationale for registering only this one parcel of land in trust while all the rest were registered either in the name of Maithya or Muthenya? Ostensibly, Muthenya acquiesced to the land being registered in the name of Maithya because he (Muthenya) was too old. However, if he was too old respecting the Suit Property, he would have been equally old to be registered as the sole owner respecting the other properties, say Parcel No. 714. This latter parcel was, in fact, registered later in time than the Suit Property (i.e. Parcel No. 589). There is no good explanation for this disparate treatment of parcels.

16.Additionally, it is very telling that Objection No. 37 respecting the Suit Property is filed against the Appellant only. No other witness testifies on behalf of the Appellant. If it is in fact true that the Suit Property belonged to the Respondent and that the Appellant only held it in trust for him that fact would have come out clearly during the hearing of the Objection No. 37. In fact, nothing of that sort comes up. This seems quite odd.

17. In my view, therefore, the documentary evidence which the Learned Magistrate chose to rely on to reach his decision that the Suit Property was co-owned by **Maithya** and **Muthenya** does not ineluctably lead to the conclusion. On the contrary, in my view, it leads to the very opposite conclusion that the Suit Property belonged to **Maithya** alone.

18. In any event, I would agree with the Appellant here that the Respondent had no legal standing to sue on behalf of the estate of Muthenya. He neither claimed nor proved that he was the legal representative of the estate of Muthenya and therefore capable of maintaining the suit on behalf of the estate. Our statutory and case law is quite clear that a person cannot bring an action on behalf of the the estate of a deceased person without a grant of letters of administration. One need only start with **section 82** of the **Law of Succession Act** and the celebrated case of *Virginia Edith Wambui Otieno v Joash Ougo & Another* (1982) 1 KAR 1048 where the Court of Appeal clearly stated that one does not have standing to bring an action as administrator before the grant of letters of administration, and that any such suit would be incompetent at the date of inception to appreciate that the Respondent's suit was not maintainable at law. The case of *Troustick Union International & Another v Mrs. Jane Mbeyu & Another* (Civ. App. No. 145 of 1990) and a legion others are in accord.

19.It is important, before concluding, to indicate that the Respondent appeared to vacillate between claiming the Suit Property for his own benefit and claiming it as part of the estate of the **Muthenya,** his grandfather. It is clear, however, that the Respondent does not have any independent claim to the Suit Property. He is not claiming as an heir to **Maithya.** He is claiming as an entitlement not based on inheritance but on the law of trust. That claim is Muthenya's not his. It follows that he cannot succeed because he lacks standing to maintain that action on behalf of the estate of Muthenya.

20. Hence, because the documentary evidence relied on by the Learned Magistrate does not prove co-ownership of the Suit Property between **Kyangangu Maithya** and **Katulwa Muthenya** and because the Respondent did not have *locus standi* to bring the suit in the first place, this Court reverses the decision of the Learned Magistrate and holds that the Suit Property (**Kyangwithya/Mutune/589)** shall be registered solely in the name of the Appellant in his capacity as the Personal Representative to the estate of **Kyangangu Maithya.** The Respondent shall pay the costs of this Appeal.

**DATED, SIGNED** and **DELIVERED** at **MACHAKOS** this day **27TH** day of **FEBRUARY 2012**.

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**J.M. NGUGI**
**JUDGE**