



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL APPEAL NO. 17 OF 2007**

**ESTHER NJERI .....1<sup>ST</sup> APPELLANT**

**NAOMI WANGARI .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PETER KARIUKI KIMANI.....RESPONDENT**

***(Being an appeal from the Judgment of the Senior Resident Magistrate S.M. MOKUA in Succ. Cause No. 12 of 2002 at Kigumo - SRM Court)***

**J U D G M E N T**

The deceased Kigeri Nyumu Karanja was the registered proprietor of land parcel LOC.2/KANGARI/1247 measuring about 2.08 Ha. He died on 28<sup>th</sup> May 2002. On 23<sup>rd</sup> August 2002 the Respondent petitioned for letters of administration intestate at the Senior Resident Magistrate's court at Kigumo. The Appellants cross-petitioned for the letters. On 16<sup>th</sup> January 2004 joint letters were issued to the Respondent and the 2<sup>nd</sup> Appellant. When it came to confirmation, the court received oral evidence as a result of which it was ordered that the suit land should wholly go to the Respondent. The Appellants had sought that the Respondent gets half of the suit land and they get the remainder. The court dismissed their plea. They were aggrieved by that decision and filed this appeal.

The responsibility of this court is to review the evidence of the trial court to determine whether its conclusions should stand. (***PETERS –VS- SUNDAY POST LTD [1958] EA 424***). If there is no evidence to support the particular conclusion, or if it is shown that the trial court failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, this court should not hesitate to so decide. The usual caution is that this court did not have the advantage of seeing or hearing the witnesses as they testified.

It was not in dispute that the Appellants were the married daughters of the deceased. He apparently had no other children. The Respondent was the son of the deceased's brother called Kimani Goi. Although the deceased was registered in respect of the suit land as the absolute proprietor, it was common ground that this was family land that had belonged to his late father and which therefore he was registered to hold in trust for himself and for his brother Kimani Goi. Kimani Goi surrendered his interest in the land to the Respondent. The Appellants asked that they be given half of the suit land to share and that Kimani Goi's share be taken by his son, the Respondent.

The Respondent gave evidence, and called the former assistant chief John Mwangi Godfrey and an elder William Wambugu, to say that the deceased had during his life time indicated that upon his death all the suit land would go to him. This was because, and this was not disputed, during the deceased's lifetime he was being taken care of by the Respondent. The Appellants were of course married and away from

home. The Appellants denied that the deceased had decided to give all this land to the Respondent.

The Respondent was cross-examined by Miss Mwangi for the Appellants to admit that he had not, at the filing of the petition, informed his counsel that the deceased had made the decision to give him all the land to the exclusion of the Appellants. It does appear to me that had the deceased made that critical decision the Respondent would have informed his counsel at the time of filing this cause. This cause was filed on the basis that this was an intestate administration. I find that there wasn't sufficient evidence upon which the trial court could base the finding that the deceased had gifted the whole of the suit land to the Respondent. It follows that the Respondent could inherit only the portion meant for his father Kimani Goi.

The other reason why the trial court did not provide for the Appellants was that they were married daughters of the deceased. The court sought to rely on sections 38, 41 and 42 of the Law of Succession Act (Cap. 160) as a basis for the exclusion of the Appellants from inheriting the property of their late father. However, under Article 27(3), (4) and (5) of the Constitution of Kenya, 2010 the Appellants cannot be denied the right to inherit the property of their deceased father on account of their marital status. It is neither a sin nor a punishment to be married, and it would be an act of discrimination to disinherit a woman on the basis of marriage.

The result is that this appeal is allowed. The orders of the trial court are set aside and in their place there shall be an order confirming the grant issued herein but on the basis that the Appellants shall be entitled to half of LOC.2/KANGARI/1247 which they will share equally. The other half shall be inherited by the Respondent. Costs of this appeal shall be borne by the Respondent.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 28<sup>TH</sup> DAY OF JULY 2011**

**A.O. MUCHELULE  
J U D G E**