



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL NO. 91 OF 2007**

**SIMON MUNENE KABUTHI.....APPLICANT**

**VERSUS**

**JUDITH WAMARWA KABUTHI..... RESPONDENT**

*(An Appeal from the judgment and consequent decree of the learned Hon. A.K. Ithuku ESQ, RM sitting in Kerugoya SRM's Succession cause No.82 of 2005 in the matter of the Estate of Kabuthi Kithitu (Deceased) delivered on 17/8/2007)*

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

This an appeal from the judgment and decree of the Resident Magistrate at Kerugoya who found that the Appellant was not the son of the deceased Kabuthi Kithitu and was not entitled to benefit from the estate of the deceased. In the Memorandum of Appeal the Appellant stated that there was sufficient evidence called to show that he was the son of the deceased who was entitled to benefit from the estate.

The Deceased died intestate on 6<sup>th</sup> May 1989 at the age of 78 years. The estate which he left is comprised in land parcel INOI/THAITA/122 measuring 12 acres. The Respondent petitioned for letters of administration. She was a widow of the deceased. The letters were granted on 22<sup>nd</sup> July 2005. When the matter came for the confirmation of the grant, the Appellant had filed a protest. The other protests had been filed by Nancy Wachira, Jane Wanjiku Kabuthi and Agnes Gathigia Kabuthi, respectively. There was no dispute that the deceased was polygamous. The Respondent and the rest of the family say that the deceased had five wives whereas the Appellant says that there was a sixth wife who was his mother. There is no dispute that the Respondent and Agnes Gathigia Kabuthi were the only widows who survived the deceased. It was also the Respondent's case that the deceased had nine sons. There is no dispute that one of the sons had died leaving his wife Nancy Wachira. The deceased had daughters who are married. One such daughter was Jane Wanjiku Kabuthi. The court decided that the married daughters to the deceased could not inherit his estate. There was no appeal on this point and therefore the court will not deal with it.

The Appellant claimed that he was one of the sons of the deceased. It was the Respondent's case that the Respondent was not a son to the deceased but his grandson. Each side called evidence and the court believed the Respondent's version and dismissed the Appellant bid to inherit. The court then found that the estate would be shared among the nine sons of the deceased, Nancy Wachira and the two widows as additional Units in accordance with section 40 of Law of Succession Act (Cap. 160). One of the sons was Joseph Gathanji Kabuthi whom the Respondent testified, and court agreed, that he was the father of the

Appellant.

This a first appeal and it is the duty of this court to reconsider and evaluate the evidence presented to the trial court to be able to reach an independent conclusion thereon. (***SELLE –VS- ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123***).

Under section 71(2) of the Law of Succession Act the trial court was supposed to identify the persons beneficially entitled to the estate of the deceased and to indicate their respective shares. The Appellant's position was that being the son of the deceased he was entitled to a share of the estate. He testified that his mother was Mary Wangechi who was one of the wives of the deceased and who had passed on. He wanted the estate to be shared according to houses and therefore that he was entitled to the share belonging to the house of his mother. The Appellant testified that he was born in 1960 and that his mother had died when he was only five years. He was then brought up in the house of Faith Muthoni, another wife of the deceased. He produced a school leaving certificate (exhibit 1), birth certificate (exhibit 2) and identity card (exhibit 3) each of which showed the deceased to be his father. The birth certificate showed Mary Wangechi to be his mother. He called Joseph Kabuthi, the son of the deceased by Faith Muthoni who allegedly brought him up after his mother died in 1964. He also called Simon Mathira Kiragu who said that the late Mary Wagechi was sister to his mother and was wife to the deceased.

The Respondent testified that the deceased had only five wives and got nine sons and that he did not have any wife by the name Mary Wangechi. Such was also the evidence of her co-wife Agnes Gathigia, the deceased daughter-in-law Nancy Wachira and the deceased's clansman Bonface Muriuki Ngache. Their evidence was that the Appellant was the grandson of the deceased by his son Joseph Gathanje. It would appear that this is the Joseph Kabuthi whom the Appellant called to say that he (the Appellant) was the deceased's son.

The court considered the evidence by these two witnesses. It had the benefit of seeing and hearing them. That is the advantage this court does not have. The court considered that all the documents the Appellant relied on had been obtained after the deceased's death. At some point during the trial the Appellant indicated he was going to have a DNA test done to prove his parentage. He abandoned the idea without explanation. Whereas his evidence was that Mary Wangechi was his mother, he was cross-examined to say that he did not know any of his uncles or aunts. These would be the brothers or sisters of Mary Wangechi. My own assessment of the recorded evidence is that the trial court cannot be faulted for having found in favour of the Respondent and her witnesses. There is no dispute that Joseph Kabuthi (or Joseph Gathanje) will benefit from the estate the deceased following the confirmation.

In conclusion, I find the appeal not merited and the same is dismissed with costs.

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

**A.O. MUCHELULE  
JUDGE**