



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

P & A APPEAL NO. 17 OF 2009

SAMUEL GAKIRIA GAKUO.....APPELLANT

VERSUS

JOHN NJOMBOU GAKIRIA.....1ST RESPONDENT

MATHEW WAWERU GAKIRIA.....2ND RESPONDENT

(Being appeal from the judgment of L. Mbugua, Ag. Principal Magistrate in Karatina Senior Resident Magistrate's Court Succession Cause NO. 39 of 2006 delivered on 25th November 2009)

JUDGMENT

Samuel Gakiria Gakuo, the appellant herein, petitioned for Letters of Administration intestate in respect of the Estate of Samuel Gakiria Gakuo alias Kakiria Kakuo, deceased, vide Karatina **S.R.M. SUCC. CAUSE NO. 39 OF 2006**. When the appellant applied for the grant to be confirmed, **Mathew Waweru Gakiria** and **John Njombou Gakiria**, the respondents herein, filed an affidavit of protest. The dispute was heard by L. Mbugua, learned Principal Magistrate. The court proceeded to confirm the grant by distributing the parcel of land known as **OTHAYA/GURA/72** as follows:

- (i) Samuel Gakiria - 1 acre.
- (ii) John Njombou - 3.65 acres.
- (iii) Mathew Gakiria - 3.65 acres.

The Appellant was dissatisfied with the decision hence this appeal. On appeal the Appellant put forward the following grounds:

When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. It is the contention of the Appellant that the land should have been shared in equal measure i.e. 2.73 acres each. The Respondents are the sons of the deceased while the appellant is a grandson of the deceased. A critical look at grounds 1, 2 and 3 will reveal that those grounds related to the distribution of the Estate. The trial magistrate was of the view that the Law of Succession Act which came into effect in 1981 did not apply to the deceased's Estate. With respect, I think the learned Principal Magistrate cannot be faulted. The deceased died in 1980 before the enactment of the Law of Succession Act. The applicable law is the Kikuyu Customary Law, which only allowed

sons to inherit land. Unmarried daughters were also allowed to get a share of the land. Grandchildren were not entitled to directly inherit their grandfather's Estate except where the deceased expressly stated. The deceased in this case had expressed his wish that the Appellant should be given a portion to occupy. The clan decided to give the Appellant 1 acre to fulfill the deceased's wishes.

The Appellant argued in ground 4 that the trial court entertained a succession dispute which was beyond its pecuniary jurisdiction of Ksh.100,000/=. Let me state from the outset that it should not lie in the mouth of the Appellant to challenge the jurisdiction of the trial court while it was him who filed the succession cause before that court. He swore the affidavit in support of the petition. In paragraph 6 of the aforesaid affidavit, he stated that the suit premises was Kshs.100,000/=. He cannot now turn around and say the value of the property is more than Ksh.100,000/=. The Appellant risks being cited for purgery. In any case there is no evidence that the land has been valued to establish the actual value. On the other hand, I doubt whether the pecuniary jurisdiction of Ksh.100,000/= should be used because I have already stated that the Law of succession Act which set the aforesaid ceiling at *Section 44 (3)* does not apply. In grounds 5 and 6 the appellant has accused the trial court of failing to find that there was no oral will or wish and that there was a referral order made to the elders to arbitrate the matter. I think I dealt with this ground when determining grounds 1, 2 and 3. Let me hasten by stating that in such disputes, the clan plays a very vital role in solving. The trial court in any case relied on the evidence presented to it. There was clear evidence that the Respondents were willing to honour the wishes of the deceased, by giving the Appellant a portion.

In the end, I see no merit in the appeal. The same is dismissed in its entirety.

Dated and delivered at Nyeri this 21st day of October 2011.

J. K. SERGON
JUDGE

In open court in the presence of Wambugu holding brief Miss Mwai for the respondents and Kingori holding brief Gacheru for the Appellant.