



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

**AT NYERI**

**CIVIL APPEAL NO. 81 OF 1998**

**FRANCIS KIMANI GATHUTA.....APPELLANT**

**VERSUS**

**BENSON IRUNGU NJUGUNA.....RESPONDENT**

*(Being appeal against the judgment of Hon. P. N. Murigori Resident Magistrate in Murang'a  
Principal Magistrate's*

*Succession Cause No.144 of 1995 dated 19<sup>th</sup> December 1998)*

**JUDGMENT**

This judgment is the result of the appeal against the decision of Hon. P. N. Murigori, learned Resident Magistrate, delivered on 19<sup>th</sup> December 1997 vide **Murang'a P.M. Succ. Cause No. 144 of 1995**. The appeal arose from the matter of the Estate of Kinuthia Wageche, deceased. At the time of his death the deceased was the sole registered proprietor of **LOC. 18/KIRERE/547**. The deceased died with no surviving spouse nor children. Benson Irungu Njuguna, the Respondent herein, had applied for the Grant of Letters of Administration intestate in respect of the Estate of Kinuthia Wageche, deceased, issued to him on 7<sup>th</sup> August 1995, confirmed vide the Summons dated 7<sup>th</sup> February 1996. The Respondent stated his capacity to be the grandson of the deceased. Francis Kimani Gathuita, the Appellant herein, filed an affidavit of protest to oppose the Summons. He claimed the parcel of land known as **LOC. 18/KIRERE/647** was sold to him by one Njoroge Kinuthia at ksh.27,000/= on 8<sup>th</sup> February 1991. The dispute was heard by the learned Resident Magistrate. On 19<sup>th</sup> December 1997, the learned Resident Magistrate dismissed the protest and proceeded to confirm the grant as prayed in the Summons for Confirmation of Grant. The Appellant was aggrieved hence this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum of Appeal:

1. ***The Learned Resident Magistrate erred in dismissing the clear and admitted evidence of purchase of the suit land by the Appellant.***
2. ***The learned Resident Magistrate erred in failing to appreciate the fact that the land in question had actually been sold by PW2 who is the respondent's father.***
3. ***The learned Resident Magistrate failed to appreciate the fact that the Respondent's father (PW2) actually admitted having received Ksh.26,000/= for the land and the fact that the***

- appellant was actually in possession of the suit land.*
4. *The learned Resident Magistrate erred in failing to take into account the appellant's documents of sale as produced in court.*
  5. *The learned Resident Magistrate misdirected himself as regards the fate of the appellant's purchase price admitted by the Respondent's alleged father.*
  6. *The learned Resident magistrate erred in failing to recognize that the Respondent was not actually a son of the deceased nor of PW2 but was actually a second purchaser at a higher value.*

The learned advocates appearing in this appeal recorded a consent order to have the appeal disposed of by written submissions. I have considered these submissions. It is the submission of the Appellant that he had tendered evidence to prove that he had purchased the asset in question and that he was put into possession by the same seller who sold the same land to the Respondent who misrepresented himself as a grandson of the deceased. The Appellant claimed he has done extensive developments on the land too by planting coffee, avocados and pears. The appellant avers that he had entered into a mutual agreement with the seller that he would institute succession proceedings in respect of his father's Estate and cause the Appellant to be registered as the owner the suit land. In breach of the agreement it is said the seller sold the land to the Respondent. The Respondent was prodded to file the Succession proceedings by the Seller. It is said that the Seller, Njoroge Kinuthia, clearly avoided filing the Succession Cause to defeat the Appellant's claim. The Respondent on the other hand claimed he did not sell the land but he merely leased it to the Appellant. After a careful re-evaluation of the evidence, it has turned out that the Appellant purported to purchase land from a person who was not authorized in law to deal with the deceased's property. The transaction between the Appellant and the seller cannot bind the Estate of the deceased. The Appellant cannot therefore be regarded as creditor. The trial magistrate was right to dismiss the Appellant's protest.

In the end I see no merit in the appeal. It is dismissed with costs to the Respondent.

*Dated and delivered at Nyeri this 18<sup>th</sup> day of November 2011.*

**J. K. SERGON**

**JUDGE**

In open Court in the presence of Mr. Kirubi for the respondent. No appearance for Appellant.