REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 31 of 1999

MIRIAM GACHAMBI GATUBU ……APPELLANT

VERSUS

RISPHA WANJA GATUBU……...RESPONDENT
(Appeal from the original judgment in the Principal Magistrate's Court at Murang'a in Succession cause No. 118 of 1994 delivered on 9th March 1999 by F. F. Wanjiku (Mrs), Principal Magistrate at Murang'a)

JUDGMENT

The subject matter of this appeal is the judgment of Mrs Wanjiku F. F. delivered on 9th day of March 1999 vide Murang'a P.M.C. SUCC. Cause No. 118 of 1994. The facts leading to the filing of this appeal are that on the 23rd day of July 1993, **FRANCIS GATUBU** alias **GATUBU KARANJA** died leaving two wives and several children surviving him. **RISPHA WANJA GATUBU**, the Respondent herein, applied for Letters of Administration intestate to succeed the Estate of Francis Gatubu alias Gatubu Karanja, deceased vide Murang'a S.R.M.C Succession Cause No. 118 of 1994. **MIRIAM GACHAMBI GATUBU**, the appellant herein, objected to the making of the grant. In fact she cross-petitioned for Letters of Administration. By a Summons dated 17th June 1994, the respondent applied to the subordinate court to issue her with the grant. On 17th August 1994 the grant was issued to the Respondent. On 2nd March 1995, the Respondent took out a summons for Confirmation of Grant dated 1st March 1995. As expected, the Appellant filed an affidavit of protest against the confirmation of Grant. The application for Confirmation of Grant and the protest were fixed for hearing whereupon oral evidence were tendered.

Rispha Wanja Gatubu (Respondent) told the trial magistrate that the deceased gave land to his children intervivos. She said, she too, was shown her portion which portion was being used by her co-wife, MIRIAM GACHAMBI (Appellant). The parcel of land she claimed to be hers is known as **LOCL. 10/KAHUTI/2679**. she proposed that the money lying in the deceased account be shared equally between herself and the appellant. It was the evidence of the Respondent that the parcel of land known as **LOC**. **10/KAHUTI/2678** should be given to Samuel Karanja.

The appellant on her part told the trial court that she should get 1 acre of the disputed land while the Respondent gets 0.6 acres. At the close of the evidence the learned Magistrate came to the conclusion that the deceased had given all his sons and the Appellant land *intervivos*. She also found that the parcels of land in dispute were **LOC 10/KAHUTI/2678** and **LOC. 10/KAHUTI/2679**. The learned Principal Magistrate found that there was no dispute that Samuel Karanja should inherit **LOC. 10/KAHUTI/2678**.

The land in dispute is known as **LOC. 10/KAHUTI/2679**. According to the Objector (appellant) the land should be shared by herself, Respondent and Samuel Karanja. The learned Principal Magistrate came to the conclusion that the deceased

died without indicating who would inherit the land. She then applied the provisions of *Section 42* of the Law of Succession Act to determine the mode of distribution. She stated that the persons who did not get gifts would be considered in priority over those who received gifts during the deceased's life time. She found that the Objector (appellant) was given two acres by the deceased in 1990. She considered that as a gift. She consequently denied the Appellant a share of **LOC. 10/KAHUTI/2679**. The learned Principal Magistrate directed the Respondent to move and occupy **LOC. 10/KAHUTI/2679** leaving **LOC. 10/KAHUTI/2678** to the exclusive use of Samuel Karanja. The money at the deceased's bank account was given to the appellant.

The Objector was unhappy with the aforesaid decision hence this appeal. On appeal the Appellant put forward the following grounds in her Petition of Appeal:

1. ***The Learned Magistrate erred in law in applying Section 42 of the Law of Succession Act (hereinafter called the Act) to a wife whereas the Section only applies to a child, grandchild or a house.***

2. ***The Learned Magistrate erred in law in failing, refusing, ignoring, and/neglecting to take notice that the Act's only alternative reference to a wife is either as a spouse, or a widow and never as a house, and the Act goes into great length where necessary to make the distinction clear.***

3. ***The Learned Magistrate erred in law in not considering at all or sufficiently that the doctrine of advancement applies virtually absolutely to property given to a wife by a husband especially in circumstances such as these where the gift might have been as a result of monetary or "invisible" valuable consideration.***

4. ***The Learned Magistrate erred in law and fact in gravely confusing the testate and intestate estate of the deceased thereby leading to a wrong decision.***
5. ***The Learned Magistrate erred in law and fact by disinheriting the elder and obviously more favoured wife of the deceased.***

6. ***The Learned Magistrate erred in fact in failing to consider that:-***
    - ***(a) The respondents dowry was paid for at least in part by the Appellant.***
    - ***(b) The Appellant had contributed most substantially to the welfare of the deceased and his estate especially as he was separated from the respondent for a long time before his death and he was living with and being taken care of by the Appellant and her children for that period.***
    - ***(c) The appellant had made his wishes known about the distribution of his estate and he had made a reasonable provision for the respondent.***
    - ***(d) The dowry of the appellant's daughter had been utilized in expanding the deceased's estate.***

When the appeal came up for hearing, learned counsels appearing in the matter agreed to have the appeal disposed of by

written submissions. I have considered the written submissions and the recorded evidence. It is the submission of the Appellant that the deceased having gifted most of his estate to his children he left the parcel of land known as **LOC. 10/KAHUTI/2679** to be distributed according to *Section 40* of the Law of Succession Act. She said that the second wife (Respondent) was not gifted by the deceased since she was estranged. It is the submission of the Appellant that the land should be distributed according to *Section 40* so that the Respondent should inherit as a unit of a child from the deceased's net Estate. It is the Appellant's view that she should share the land equally with the Respondent as co-wives.

The Respondent on her part is of the contrary view that the Appellant had already been gifted by the deceased hence she should not receive any share.

It is not in dispute that all the children of the deceased and the Appellant were given land during the life time of the deceased. It is also not in dispute that the Respondent was not given a portion of the land by the deceased. I have carefully looked at the grounds put forward on appeal. The most serious ground is which between *Section 40* and *Section 42* of the Law of Succession Act should be applied. The Appellant was given **LOC. 10/KAHUTI/2681** measuring 1.7 acres by the deceased. The parcel of land known as **LOC. 10/KAHUTI/2679** measures approximately 2 acres. After a careful consideration, I am convinced *Section 42* of the Law of Succession is the relevant law to be applied. In so doing none of the beneficiaries will have been disinherited since they were catered for by the deceased *intervivos*. In the end I find no merit in the appeal. It is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 23rd day of February 2010.

J. K. SERGON
JUDGE

Miss Mwai holding brief G. Mwangi for the appellant. No appearance for Warima for the Respondent.