REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 62 of 2004

CHARLES H. K. KAMAU……..…….....APPELLANT

VERSUS

BARNABAS MUCHANGI……..…..…..……..….RESPONDENT

J U D G M E N T

The appellant, Charles H. K. Kamau was appointed as the administrator of the estate of Karanja Kamau – deceased (the deceased) by the subordinate court at Murang'a. Letters of Administration intestate that were issued to the appellant were confirmed on 12th October, 1998. The appellant was aggrieved by the mode of distribution that was adopted by the court in sub-dividing the land that comprised the estate of the deceased, i.e. Loc.14/Gakurwe/400. The appellant challenged the sub-division of the suit parcel of land as appeared in the schedule of distribution in the Certificate of Confirmation of Grant. The case was heard by the subordinate court. In a judgment delivered on 4th December, 2003, the court ruled that the suit parcel of land would be sub-divided equally between the three (3) sons of the deceased, namely, Charles H. K. Kamau, Barnabas Muchangi and Benson Mwangi Maina. The appellant was aggrieved by the said decision of the court. He duly filed an appeal against the said decision to this court.

In his memorandum of appeal, the appellant raised three grounds of appeal against the said decision of the subordinate court. He contends that the trial magistrate erred when she shared the estate of the deceased according to the number of children of the deceased as opposed to the number of houses of the deceased who died before the commencement of the **Law of Succession Act**. The appellant contends that the decision by the trial court was made contrary to **Section 2** of the **Act**. The appellant argued that the trial magistrate had erred in law by failing to consider the fact that the deceased was polygamous and had died leaving behind two wives and therefore the law that ought to have been applied was the customary law that was applicable at the time of death of the deceased. The appellant was aggrieved that the trial magistrate had failed to consider all surviving children of the deceased and thus confirmed the grant in the names of some survivors while leaving out other survivors. The appellant therefore craved for an order of the court setting aside the judgment of the subordinate court and replacing it with a judgment of this court distributing the suit parcel of land to the two houses of the deceased estate.

At the hearing of the appeal, I heard rival submissions made by Mr. Kirubi for the appellant and by Mr. Barnabas Muchangi, the respondent who was acting in person. I have considered the said arguments. I have also read the entire proceedings of the subordinate court. The facts of this appeal are more or less not in dispute. The deceased died in 1968. He died intestate. He was married to two wives. He was blessed with three sons. The appellant was the only son of one of the wives. The respondent and his brother Benson Mwangi Maina were born to the other wife of the deceased. According to the appellant, the suit parcel of land should have been divided in accordance with the number of wives of the deceased and not in accordance with the number of the sons. The appellant argued that since the deceased died before the **Law of Succession Act** came into effect on 1st July, 1981, **Section 2 (2)** of the **Law of Succession Act** applied. The said section provides as follows:

> *"The estates of persons dying before the commencement of this Act are subject to the written laws and customs and applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act."*

The appellant argues that the law that was applicable in regard to sub-division of the deceased property was the Kikuyu Customary Law which provided that the deceased's property, and especially his land, was to be shared out in accordance with the number of houses of the deceased. On his part, the respondent argued that the suit parcel of land was sub-divided between the three sons of the deceased by the deceased himself when he was alive. He argued that each son of the deceased occupies a specific portion of land on the ground which is equal in size to the other. It was the respondent's case that the court should not interfere with the mode of distribution that was adopted by the deceased before he died.

This being a first appeal, it is the duty of this court to re-evaluate and re-consider the evidence adduced before the subordinate court so as to reach an independent determination in regard to whether the trial magistrate reached the correct decision. In the present appeal, the trial magistrate found as a fact that the three sons of the deceased were brought up by one mother, the mother of the appellant, the mother of the respondent having died in 1953. The trial magistrate found as a fact that the deceased sub-divided the land equally to his three sons before his death. The trial magistrate found no reason to deviate from the expressed wishes of the deceased. Having re-evaluated the evidence, it was clear to this court that the trial magistrate reached her decision on the basis of the correct evaluation of the evidence that was adduced.

This court was not persuaded by the argument advanced by the appellant to the effect that the Kikuyu customary law ought to have been applied in the distribution of the suit parcel of land that comprised the estate of the deceased. From the evidence adduced, it was apparent that the deceased had expressed his wish for his three sons to share the land equally irrespective of who had given birth to them. At the time of the death of the deceased, the deceased had one wife. The mother of the respondent died in 1953. It cannot therefore be said that by the time the deceased died in 1968 he considered himself to be having two wives. The mother of the appellant brought up the respondent and his brother. The respondent considers the appellant's mother as his mother. It is the view of this court that the appellant resurrected the issue regarding the fact that the deceased had two wives with a view to justifying his assertion that Kikuyu customary law ought to apply in respect to the succession of the deceased estate. **Section 2 (2)** of the **Law of Succession Act** does not apply where a deceased person expressed his wish regarding the distribution of his estate prior to his death.

In the present appeal, it was clear that the deceased settled his sons before his death. Each son received an equal share of the suit parcel of land. The deceased distributed the suit parcel of land equitably. From the evidence adduced before the trial court, it was evident that the appellant and the respondent, together with his brother, have more or less settled on the parcel of land that is equal to the other. The land has been demarcated and surveyed. This court finds no fault in the decision that the trial magistrate reached. The appeal lacks merit and is hereby dismissed with costs to the respondent. The decision of the trial magistrate is hereby confirmed.

DATED AT NAIROBI THIS 18TH DAY OF JUNE, 2010

L. KIMARU

JUDGE