

VREPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Appeal 117 of 2009

EDWARD KIMOTHO MBIA.....APPELLANT
VERSUS

BENINAH GACIRIKU MBIA.....1ST RESPONDENT
ELIZABETH WANGECI MBIA.....2ND RESPONDENT

R U L I N G

This Appeal arises out of **Kerugoya Succession Cause No. 92 of 1990**. The succession cause was in respect of the Estate of one **MBIA KORI** who died on 15.10.1989. The cause was filed by one **BENINA GACIRIKO MBIA** the deceased's wife who was appointed as the Administratrix of the Estate. The Appellant herein filed a protest on the mode of distribution saying that he was a son of the deceased by a wife who had died when he was only 1 year old. Viva voce evidence was adduced and the Appellant gave very brief evidence which I will replicate here.

“My name is Richard Kimotho Mbia. I come from Ngaru. When Mbia died we went to the homes of Mbia's brothers who went and showed us how to live on the land. The deceased was my father. My mother died in 1967. I was born in 1966. I am about 24/25 years.”

On cross examination, he said that after his mother died in 1967, he was left under the care of one Juliana Wanjiku who died in 1984/85. His witness who he admitted is the one who took him to the deceased's land after the deceased's death testified and said that he was the deceased's step brother. He told the court that the Appellant's mother died during the emergency. The date in the proceedings is not very clear but it appears like 1948. Even if we were to assume that she did not die in 1948, the period of “state of emergency” in Kenya was declared in 1952. This is monumentally different from 1966 which is when according to the protester his mother died. The learned trial magistrate considered this and other contradictions in the evidence of the witnesses who testified. In the Ruling, the learned trial magistrate said that she ***“found it difficult to find that the protestor was a son of the deceased”***. She also found that the protester had failed to account for his whereabouts before the death of the deceased. She said that it was not safe to give him the deceased's land and so his protest was dismissed and the deceased's land was shared between his 2 surviving widows.

Being aggrieved by that Ruling, the Appellant filed this Appeal through M.A. Khan Advocate.

He proffered 6 grounds of Appeal which I do not nonetheless find necessary to replicate here for purposes of this ruling. The Appeal proceeded by way of written submissions. I have considered the evidence adduced before the trial court. I have noted the material contradictions that were noted by the learned trial magistrate. The most glaring of the said contradictions was the assertion by the Appellant that his mother died in 1966 yet his witness who was the deceased's step brother maintained that she had died during the emergency which as stated earlier was in the 1950s. Even without the advantage of having seen the witnesses give their evidence, the record itself clearly shows that the witnesses and more particularly the Appellant and his witness were not witnesses of truth. They were less than candid. From the evidence before the trial court, the deceased's late wife, one Juliana who the protester claimed brought him up had 3 daughters who were still alive as at the time the succession cause was heard. Why didn't the Appellant call them as his witnesses? They would have been his best bet because if he was telling the truth, then they must have grown up together. It is noted that the other widows denounced the Appellant and the Administratrix even said she did not know him.

Surely with this kind of evidence, would any impartial court properly addressing the issues and the law applicable find in favour of the Appellant? I find not.

I have considered the submissions of both counsel herein. The issue is only one. Did the Appellant prove even on balance of probabilities that he was the son of the deceased and thus entitled to inherit part of his estate? My finding is that he did not. The evidence he presented before the learned trial magistrate was not at all sufficient to make her arrive at a different finding. Had I heard the matter in the first instant, I would not have arrived at a different conclusion.

I find the Ruling of the learned trial magistrate comprehensive and thorough to the last detail. She analyzed and considered the evidence adduced before her thoroughly. She arrived at the right decision. I cannot therefore fault her ruling.

My finding is that this Appeal has no merit. The Appellant is not entitled to inherit any part of the deceased's estate. The Appeal is hereby dismissed with costs to the Respondent.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 21st day of July 2010.

In presence of:- Mr. Gachugi for Respondent and Appellant in person.