



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

Probate & Administration 5 of 2006

ISAAC GATAKAAPPELLANT

VERSUS

PERISINA WAIRIMU MBURURESPONDENT

(Being an appeal arising from the judgment of Abdul El Kindyl, Principal Magistrate, vide Murang'a Senior Principal Magistrate's Succession Cause NO. 58 of 1999 delivered on 12th July 2002 at Karatina.)

JUDGMENT

The judgment is the result of the appeal against the judgment of Abdul El Kindyl, learned Principal Magistrate delivered on 12th July 2002 vide Murang'a Senior Principal Magistrate's Succession Cause No. 58 of 1999.

The history leading to this appeal is short and straightforward. The deceased, Muiruri Gathua, died on 7th July 1998. He was survived by **ISAAC GATAKA** and **PERISINA WAIRIMU MBURU**, the Appellant and Respondent herein respectively. The record shows that the assets which are available for distribution were:

- (i) **L.R. 17/SABASABA/1066 and**
- (ii) **LOC. 6/GIATHAINI/1218.**

Both parties participated in the succession proceedings before the subordinate court. They agreed to share equally the parcel of land known as **L.R. NO. 17/SABASABA/1066**. They disputed the mode of sharing **LOC. 6/GIATHAINI/1218**. The dispute was heard and determined by the learned Principal Magistrate on 12th July 2002 in which the land was solely given to the Respondent. Being aggrieved, the Appellant preferred this appeal to challenge the decision. On appeal the Appellant put forward the following grounds in his Memorandum of Appeal:

1. "The learned trial magistrate erred in law and fact in ruling that the appellant had been given land in the lifetime of MUIRURI GATHUA whereas there was no cogent evidence to that effect.

2. *The learned trial magistrate misdirected himself in fact in believing the respondent's witnesses whereas their evidence was contradictory and of little or no probative value.*

3. *The learned trial magistrate erred in law in misinterpreting the evidence on record and thus made an erroneous judgment.*

It is the submission of Mr. Gacheru, learned advocate for the Appellant, that the learned Principal Magistrate erred when he gave judgment in favour of the Respondent yet there was no cogent evidence to support the Respondent's case. It is alleged that no written agreement had been presented to show that the Appellant had been given land which he later sold.

This being the first appellate court, the parties are entitled to a re-evaluation of the evidence. It is apparent from the evidence on record that the Appellant herein had proposed to have the parcel of land known as **LOC. 6/GIATHAINI/1218** shared equally between the beneficiaries. The Respondent on the other hand protested to the aforesaid proposal alleging that the aforesaid land had been solely given to her. The Respondent told the trial court that the Appellant had been given land which he sold to one Anna Wanjiru Wahogo. The Appellant denied the allegation that the deceased gave him land *intervivos*. The Respondent summoned the evidence of three independent witnesses. **JOHN KAMANDE**(D.W.3), a step-brother of the deceased told the trial court that Muiruri Gatherere, deceased, had three sons namely: **MBURU, NGUGI** and **ISAACK** (appellant). D. W. 3 said that the deceased gave land to each of his sons. It is said Ngugi and Isaac immediately sold their portions. D. W. 3 said Mburu (respondent's husband) did not sell his land. The Respondent is occupying that portion. **BILDAD NDUNGU** (D.W. 4), a son to Muiruri Gatherere, deceased, told the trial court that he was aware that the deceased subdivided his land into four portions in early 1970s. D. W. 4 said Muiruri Gatherere, deceased, gave 1 acre each to Ngugi, Mburu and Isaack. He is said to have remained with a portion for himself. D. W. 4 said he is aware that Muiruri Gatherere, deceased, Ngugi and Isaac each sold their portions. D. W. 4 said that the only person who did not sell his portion is Mburu Muiruri, deceased (Respondent's husband). When faced with the above evidence, the learned Principal Magistrate believed the evidence of the Respondent and her witnesses. I have also re-considered the evidence and it is clear in my mind that the Respondent and her witnesses were consistent in their evidence. I am convinced the deceased gave land to his sons including the Appellant *intervivos*. I am also satisfied that the Appellant sold his land soon thereafter. The Appellant has no right to inherit the land given to the Respondent's husband. The Appellant sold his portion while his late brother Mburu Muiruri (husband to the Respondent) decided to retain his inheritance for his family. I see no merit in the appeal. The same is ordered dismissed in its entirety. The Appellant is condemned to pay costs of the appeal.

Dated and delivered at Nyeri this 9th day of July 2010.

J. K. SERGON

JUDGE

In open court in the presence of J. Macharia holding brief Gacheru for Appellant. No appearance for Respondent.