



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

Civil Appeal 83 of 2003

**CHRISPUS KABIRU KIBUTHI
JOSEPH KABIRU KARIMI.....APPELLANTS
JOSEPH MWANGI KABIRU**

VERSUS

**PHILLIS NJOKI MWANGI.....RESPONDENT
(Appeal arising from the judgment of J. N. Nyaga, Senior Resident Magistrate, in Senior
Principal Magistrate's Succession Cause No. 37 of 2001 delivered on 13th June 2003 at Karatina)**

JUDGMENT

This judgment is the result of the appeal preferred against the judgment of the Honourable J. N. Nyaga, learned Senior Resident Magistrate, delivered on 13th June 2003 vide Karatina **S.R.M. SUCC CAUSE NO. 37 of 2001**. The background of the case leading to the filing of this appeal appear to be short and straightforward.

PHILLIS NJOKI MWANGI, hereinafter referred to as 'the Respondent' was granted Letters of Administration intestate in respect of the Estate of Joseph Mwangi Kabiru, deceased on 7th September 2001. The Respondent thereafter took out the Summons for Confirmation of Grant dated 25th March 2003, in which she sought for the temporary grant to be confirmed. **CHRISPUS KABIRU KIBUTHI, JOSEPH KABIRU KARIMI** and **JOSEPH MWANGI KABIRU** hereinafter referred to as 'the Appellants', filed a joint affidavit of protest to oppose the summons for Confirmation of Grant. Both the Protest and the Summons for Confirmation of Grant were directed to be disposed of by oral evidence. The learned trial Senior Resident Magistrate heard the case and in the end he distributed the Estate in accordance with the provisions of *Section 40 (1)* of the Law of Succession Act. The Appellants were dissatisfied with the manner of distribution hence they filed this appeal.

On appeal, the Appellants put forward the following grounds of appeal in their Memorandum of Appeal:

1. ***That the learned trial Magistrate erred in law and in fact in not distributing the estate L.R. MAGUTU/GATEI/231 equally according to three (3) households of KABIRU GAKUNYU as agreed by the clan meeting of 10.8.1985 and the Deceased JOSEPH MWANGI KABIRU in respect of whom the succession proceedings relate was present and did not oppose the clan resolution.***

2. ***That the Learned trial Magistrate erred in law and in fact in disregarding the affidavit in support of summons for confirmation of Grant sworn by the Respondent PHYLLIS NJOKI MWANGI on 5.4.2002 and presented to court on 30.7.2002 and entertaining and/or believing hers sworn on 25.3.2003 and filed on 4.4.2003 which introduced a stranger JOSEPH KABIRU KARIMU and eliminated JOSEPH MWANGI KABIRU of the third household.***

3. ***That the Learned trial Magistrate misapprehended the import of section 40 (1) of the Law of succession Act and thus applied the inapplicable principle of the Law in distributing the estate.***

4. *That the Learned trial Magistrate erred in law and in fact in failing to distribute the land/estate into three (3) equal portions as sub-divided physically on the ground according to the three (3) households each house occupying its designated portion.*

5. *That the Learned trial Magistrate erred in law and in fact in taking into account extraneous matters.*

When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order with the approval of this Court to have the appeal determined by written submissions.

I have reconsidered the case that was before the trial court plus the written submissions. According to the Appellants, the parcel of land known as **L.R. NO. MAGUTU/GATEI/231** was registered in the name of Joseph Mwangi Kabiru, deceased, since the original owner, Kabiru Gakunyu had died before land consolidation. It is said the late Kabiru Gakunyu was married to three wives. It is alleged that when the Respondent herein filed Karatina **S.R.M.SUCC NO. 37 OF 2001** to succeed the deceased, the children of the late Kabiru Gakunyu lodged their claims for the rightful share contending that Joseph Mwangi Kabiru, deceased was registered in trust for the family of Kabiru Gakunyu, deceased. The Appellants are of the view that the learned Senior Resident Magistrate erred when he disregarded the proposals made in the Summons for Confirmation of Grant and the Protest. The Appellants further alleged that the learned Senior Resident Magistrate did not distribute the Estate according to the houses in compliance with the provisions of *Section 40 (1)* of the Law of Succession Act.

The Respondent on her part conceded that the learned Senior Resident Magistrate erred when he misapprehended the application of the provisions of *Section 40 (1)* of the Law of Succession Act. She, however, stated that the trial court arrived at the correct method of distribution. The Respondent alluded that the relevant provisions of the law was Section 39 91) of the Law of Succession Act.

After a careful reconsideration of the case before the trial court and after considering the oral submissions of learned counsels, I think the main issue which was put for the determination of the learned Senior Resident Magistrate was whether or not Joseph Mwangi Kabiru, deceased, held the parcel of land known **L.R. NO. MAGUTU/GATEI/231** in trust for the family and or beneficiaries of the late Kabiru Gakunyu. The learned Senior Resident Magistrate found that indeed the deceased was a trustee. The question is whether or not the learned Senior Resident Magistrate could have resolved that issue through the proceedings presented before him. In my view the issue relating to trust could only be sorted out under *Order XXXVI* of the Civil Procedure rules and not through an application for Confirmation of Grant. Under *rule 41* of the Probate and Administration Rules, the learned Senior Resident Magistrate was required to postpone the confirmation of grant pending the outcome of the proceedings necessary to establish a trust. Even if the learned Senior Resident Magistrate was correct in his conclusion, I doubt whether his judgment can stand in view of the fact that he misapplied the provisions of *Section 40 (1)* of the Law of Succession Act.

In the end I find the appeal to be well merited. It is allowed and the order confirming the grant is set aside and is substituted with an order postponing the confirmation of grant generally until the claim on trust is proved. I hereby direct the parties to take out proceedings to establish a trust under *Order XXXVI* of the Civil Procedure Rules. Costs shall abide the outcome of the aforesaid proceedings.

Dated and delivered at Nyeri this 7th day of October 2010.

J. K. SERGON
JUDGE

In open court in the absence of learned counsels but in the presence of the parties.