



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Probate & Admin. Appeal 4 of 2006**

**MARGARET WAITHERA WACHIRA ..... APPELLANT**

**VERSUS**

**MARY MWIHAKI SIMON ..... RESPONDENT**

**JUDGMENT**

This is an appeal against the Ruling delivered on 31<sup>st</sup> March, 2006 by the Honourable **D.K. Ngomo**, the then Senior Principal Magistrate at Nyahururu. The ruling was in respect of PMCC Succession Cause Number 121 of 1994 between Margaret Waithera Wachira hereinafter referred to as the appellant and Mary Mwihaki Simon hereinafter referred to as the respondent. The two were the wives of Simon Wachira Kimondo, hereinafter referred to as “*the deceased*”.

Following the passing on of the deceased on 18<sup>th</sup> April, 1994 the respondent solely petitioned for the grant of Letters of administration intestate. In the affidavit in support of the petition, the respondent indicated the following as the beneficiaries of the estate of the deceased:-

Mary Mwihaki Simon widow

Margaret Nyiha widow

Geoffrey Kariuki Simon Adult son

Jane Wamuyu Simon Adult son

Alice Wanjugu Simon minor

Charles Maina minor

Silvia Wanjiku minor

The respondent further provided an inventory of the assets and liabilities of the estate as follows:-

Plot No. KI Section K (African Location) Rumuruti

Plot No. 6 Suguta Marmar

Plot in Suguta Marmar

Plot No. 193 Suguta Marmar

Plot No. 41 Suguta Marmar

Plot No. 57 Wamba

Title No. Laikipia/Ngobit (Muhonia) Block 1/55

Title No. Nyeri/Kirimukuyu (Kiria) 850

Title No. Nyeri/Karuthi/720

The liabilities were as follows:-

- Charge over Title No. Nyeri/Kirimukuyu (Kiria) 850  
Title No. Nyeri/Karuthi/720 in favour of Kenya Commercial Bank – Maralal branch
- Loan by Samburu trade development joint board

The appellant on being cited, raised an objection to the petition and contemporaneously filed her own petition by way of cross-application. On 29<sup>th</sup> May, 1997 however the parties herein recorded a consent in terms that the appellant and the respondent were to be appointed joint administrators of the estate of the deceased. It was further agreed by consent that the assets and liabilities constituting the estate of the deceased be shared equally between the appellant and the respondent. The parties were to agree on what assets each would take within a period of 2 months from the date of recording the consent aforesaid. It would appear however that the parties did not agree on who was to get what. Accordingly by application dated 3<sup>rd</sup> February, 1998, the respondent sought the confirmation of the grant and proposed that the estate be distributed as follows:-

- a) Plot No. 6 Suguta Marmar go to the appellant
- b) Plot No. 41 Suguta Marmar go to the respondent
- c) Plot No. KI Section K (African Location) Rumuruti to the respondent
- d) Land parcel Kieni East Farmers CO Ltd – to be shared equally between the appellant and respondent.
- e) Title No. Laikipia/Ngobit/Block I/55 to the appellant and respondent equally.
- f) Title No. Kirimukuyu/Kiria/850 to the appellant and respondent equally.
- g) Title No. Ruguru/Karuthi/720 to the appellant and respondent equally.

The respondent enumerated liabilities which she proposed that they be shared equally with the appellant as follows:-

- (i) Kshs.44,440/- owed to Monicah Wanjiru Murakaru for reimbursement as a loan repayment made to Kenya Commercial Bank, Maralal branch on behalf of the estate.
- (ii) Loan owing to Samburu trade development joint board.
- (iii) Kshs.15,290/- owed to James M. Runo for timber supplied.

(iv) Kshs.23,600/- owed to Peter Wangangi Kaguanga for beddings supplied to the lodging owned by the deceased.

(v) Kshs.13,000/- owed to Eliud Murakaru Wambugu by the deceased.

The appellant was not happy with the aforesaid proposals. Accordingly she filed an affidavit of protest dated 7<sup>th</sup> April, 1998. In the said affidavit the appellant raised the following pertinent issues:-

That both Margaret Waithera a grand daughter of the deceased and Susan Njori a sister of the deceased respectively had not been recognized as beneficiaries of the estate of the deceased. She counter proposed that all the properties save plot No. 193 Maralal town, plot Nos. 6 and 41 Suguta Marmar be shared equally between them. However plot No. 193 Maralal town should go to the respondent whereas plot No. 6 & 41 Suguta Marmar should go to the appellant. As regards liabilities, she only recognized the debts of Kshs.13,000/- owed to Eliud Murakaru Wambugu and Samburu trade development joint board.

The parties having failed to reach a consensus as to who should inherit what the cause proceeded to hearing before a total of seven magistrates at various times on the issue of distribution. The appellant in support of her scheme of distribution called 2 witnesses whereas the respondent called 3 witnesses.

From the totality of the evidence tendered the issue boiled down to who should get plot No. 41 Suguta Marmar, plot No. KI Rumuruti Kirimukuyu/Kiria/850, Ruguru/Karuthi/720, plot No. 193 Maralal, the recognized liabilities and how they should be settled.

In a short, terse and one page ruling the learned magistrate held,

*“..... I find that the confirmation is meritorious as prayed by the two administrators and I hereby confirm the letter (sic) of administration intestate accordingly .....”*

It is from this ruling that the appellant has lodged the instant appeal through Messrs Gathara Mahinda & Company Advocates. The appellant has faulted the learned magistrate's aforesaid ruling on 8 grounds to wit:-

- “1. The learned magistrate erred in law and fact in failing to appreciate the issues in dispute which were presented to him for determination thereof and thereby reached a wrong decision.
2. The learned magistrate misdirected himself in law and fact in the mode of distribution of the estate and thereby arrived at a wrong decision.
3. The learned magistrate misapprehended the consensus, reached by the counsels for the parties on the issue of sharing the estate's properties and liabilities. He failed to recognize that there was no agreement reached on the mode of distribution of some of properties comprising the estate of the deceased and therefore arrived at a wrong decision.
4. The learned magistrate erred in law and fact in failing to appreciate the number of dependants and therefore failed to make provision for some dependants thereby disinheriting them of their right over the estate.
5. The learned magistrate erred in law and fact in failing to appreciate that the plot No. 193 within Maralal Urban Council, formed part of the estate of the deceased and therefore ought to have been distributed in accordance with the Provisions of the Succession Act.
6. The learned magistrate erred in law and fact in failing to take cognizance of the submissions of the appellant.
7. The appellant is greatly prejudiced by the certificate of confirmation of grant which is defective as it purports to distribute some properties which are in contention and which the Honourable Court failed to

make a determination on the issue of distribution thereof. The respondent has therefore taken upon herself to distribute the estate in total disregard of the appellant interests.

8. The learned magistrate misdirected himself in law and fact in failing to appreciate from evidence on record, the wishes of the deceased in the distribution of his estate and therefore arrived at a wrong decision.”

When the appeal came up for hearing, parties agreed to argue the same by way of written submissions. Subsequently thereto respective parties filed and exchanged written submissions which I have carefully read and considered.

This being a first appeal to this court its duty is to Reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial magistrate’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally. See *Selle v Associated Motor Boat Company [1968] E.A. Limited (2003) KLR 425*.

I must from the outset express my disappointment at the manner in which the ruling was crafted. It is a short, one page ruling and one is left wondering whether really the learned magistrate captured, addressed and considered the issues at hand. Mark you, this is a ruling in which a total of seven witnesses had testified. Going by the evidence tendered and submissions of the counsel filed in court, it was incumbent upon the learned magistrate to make a determination on who was to take which property. As correctly submitted by counsel for the appellant, the court having failed to determine the issue of distribution, one wonders how it determined the issue of certificate of confirmation of grant yet the ruling delivered did not provide for such distribution. Particularly the Ruling did not state who would take plot Nos. 6 and 41 Suguta Marmar, plot No. KI (African location) Rumuruti and the issue of plot No. 193 Maralal counsel did not feature at all. But consequent certificate tends to distribute plot Nos. 6 & 41 and other properties.

The learned magistrate also fell into error in thinking that the application for confirmation of grant was a joint application by both the appellant and the respondent. In concluding that;

*“..... I find that the confirmation is meritorious as prayed by the administrator’s and I hereby confirm the letters of administration intestate accordingly ...”*

It is clear that the learned magistrate assumed that the application for confirmation of grant was made jointly by the appellant and the respondent. This is far from the truth. From the record it is apparent that the application for confirmation of grant was solely filed by the respondent. Thereafter the appellant filed an affidavit of protest. Thus it behoved the learned magistrate to determine the fate of the application for confirmation of grant as well the affidavit of protest. The learned magistrate failed miserably in this enviable task.

Be that as it may there was a consent order recorded by the parties herein on the 29<sup>th</sup> May, 1997 in terms that the assets and liabilities constituting the estate of Simon Kimondo Wachira be shared equally between the petitioner (respondent) and the objector (appellant). There was also a further consent recorded on 30<sup>th</sup> September, 1999 in terms that sum of Kshs.44,440/- was due and owing to Monica Wanjiru Murakaru from the estate on account of debt repayment to Kenya Commercial Bank Maralal branch on behalf of the estate of the deceased (sic) evidenced by MFI 7 and 8 (a) to (e). 1. A sum of Kshs.13,000/- was owed to Eliud Murakaru Wambugu by the estate. A sum of Kshs.8732/70 too was due and owing to Samburu trade development joint board by the estate of the deceased. Those two consents have not been set aside. Accordingly the issue as to how the estate of the deceased was to be distributed and the liabilities taken care of was determined by the said consent orders. The learned magistrate ought thus to have given effect by the said consent orders when crafting and delivering the ruling which task as already pointed out the learned magistrate miserably failed. With the consents aforesaid at the back of the learned magistrate’s mind, what could have been left for determination is the fate of plot numbers 193

Maralal and also the fate of Margaret Waithira and Susan Njeri a grand daughter and sister of the deceased respectively. On the issue of Margaret Waithira and Susan Njeri, I would agree with the submissions of the learned counsel for the respondent that the two had no valid claim against the estate of the deceased. For Margaret Waithira a grand daughter of the deceased and a daughter of Jane Wamuyu Simon an unmarried daughter of the deceased, the proper person to lay claim on the estate should have been the said daughter. The appellant also alleged that Susan Njeri, an old lady and unmarried sister of the deceased should be a dependant. However the said Susan Njeri never filed any application as such in the proceedings. The appellant thus cannot purport to be the said Susan Njeri's proxy in these proceedings. In any event sections 29 & 30 of the Law of Succession Act expressly exclude the said persons from being dependants and bar the appellant from pursuing such an argument after the grant has been confirmed. These provisions of the law and the fact that they themselves have not made a claim directly to the estate have determined the fate of Margaret Waithira and Susan Njeri in so far as their claim to the estate of the deceased is concerned.

How about plot number 193 Maralal? Is it part of the estate of the deceased? From the evidence tendered it appears to me that it is not. First and foremost the said plot did not feature in form P & A 5. What we have is plot number 193 Suguta Marmar. No attempts were made to amend and rectify the said from during the hearing of the cause. To date no such amendments and or rectification have been effected. In any event even assuming that the said plot had been correctly indicated as belonging to the estate of the deceased, on the evidence on record, I doubt whether really it should have been treated as part of the estate of the deceased. It should be noted that the deceased only occupied the said plot on a temporary occupation licence (TOL) basis. He had infact been notified to vacate the same vide several letters exhibited in court by Maralal urban council. A licence is not an interest capable of disposal nor is it transferable. It is an interest that determines on the death of the licensee. A licensee therefore has no proprietary interest on such property whatsoever. The respondent cannot therefore be accused of any wrong doing for subsequently acquiring the said plot after the demise of her husband, the deceased. The deceased after all occupied the same on temporary occupation licence basis but the council subsequently offered it to the respondent on a permanent basis. The evidence of PW 4, the clerk to Maralal Town Council puts the issue of ownership of plot number 193 Maralal beyond any doubt. It belongs and is the property of the respondent solely. It never belonged to the deceased. Accordingly it does not form part of the estate of the deceased or at all and cannot therefore be the subject of distribution.

That being my view of the matter, I would allow the appeal and set aside the ruling dated 31<sup>st</sup> March, 2006. In substitution thereof I would order that the grant be confirmed in terms of the consent orders dated 29<sup>th</sup> May, 1997 and 30<sup>th</sup> September 1999 respectively. That is to say that all the assets and liabilities of the deceased shall be shared equally between the appellant and respondent. However plot number 193 Maralal town shall be excluded from the assets of the deceased. As the protagonists are co-wives of the deceased, I shall make no order as to costs in this appeal.

*Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**