**REPUBLIC OF KENYA**

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

**Civil Appeal 53 of 1997**

**ESTHER WANGECHI MAINA ..... APPELLANT**

**VERSUS**

**FAITH WANGU MAINA ..... RESPONDENT**

***(Appeal from the Judgment and decree of the Principal Magistrate's Court at Kerugoya in Succession Cause No. 88 of 1996 dated 27th November 1997 by Ms F. F. Wanjiku – P.M.)***

**J U D G M E N T**

This appeal arises from the judgment and decree of the learned magistrate, **F. F. Wanjiku**, Principal Magistrate dated 27th November 1997. In the said judgment, the learned magistrate found for the respondent and decreed that:

"**.. the protester and her children to inherit the estate of the deceased and get the lands in issue i.e. Mwea/Ngucwi/204 and Mwea/Ngucwi/326".** The appellant was aggrieved by the judgment and hence preferred this appeal through **Messrs Gacheru J & Co. Advocates**. In her memorandum of appeal, the appellant faults the learned magistrate's judgment on the following grounds:-

**1. The learned trial magistrate erred in law and fact in failing to ascertain the type of marriages the deceased underwent with the petitioner and the protester and if she did so she could have arrived to different judgment than the one she arrived at.**

**2. The learned trial magistrate erred in law and fact in failing to ascertain the names and ages of the 9 children the deceased had with the petitioner and the four he had with the protester.**

**3. The learned trial magistrate erred in law in failing to ascertain the number of dependants the deceased had and hurriedly decided the succession cause without reasoning.**

**4. The learned trial magistrate erred in law interpreting "dependant" in a lay mans language rather than in law and referred to no authorities to support her case.**

**5. The learned trial magistrate erred in law in failing to justify her judgment with evidence that was not adduced by any party in the proceedings thus importing her own evidence which is a serious misdirection which rendered her judgment incurably nullity.**

**6. The learned trial magistrate erred in failing to give the alleged 13 children of the deceased a chance to air their views on the distribution of the deceased estate.**

**7. The learned trial magistrate erred in law and fact in failing to ascertain the shares each children should inherit.**

The facts of the case in the lower court may be summarised as follows; the appellant claimed that she was a wife to **Stephen Maina Mbaria**, deceased having married him in Church in 1960. Together they had 9 children. However sometimes in 1975 they parted ways and the appellant together with her said nine children retreated to her parents home; never to set foot in the deceased's home. Sometimes on 15th September 1995 the deceased passed on. Before then in 1985, the deceased had married the respondent and sired 4 children.

Following the passing on of the deceased the appellant petitioned for the grant of letters of administration vide succession cause number 101 of 1996. Similarly, the respondent sought the same letters of administration vide succession cause number 88 of 1996. Both causes were filed in the Senior Resident Magistrate's Court at Kerugoya. The two succession causes were later consolidated. In the consolidated cause, the appellant became the Petitioner whereas the respondent became the protester. It was the contention of the appellant that much as she had parted ways with he deceased 20 years ago, she still deemed herself as the first wife of the deceased entitled to a share of the estate of the deceased. She called several witnesses to support her claim to the estate of the deceased.

On the other hand it was the case of the respondent that she was the sole wife of the deceased having married him in 1986. She did not know the appellant as she never found her with the deceased when she married him in 1986. Accordingly only he and her siblings were entitled to the entire estate of the deceased. To anchor her claim to the entire estate of the deceased, the respondent also called several witnesses.

The trial court having considered the evidence adduced by both sides and the law ruled in favour of the respondent. It is that judgment that triggered this appeal.

When the appeal came up for hearing, the appellant was represented by **Mr. Gacheru** whereas the respondent was represented by **Mr. Chomba**, both learned counsels. Both counsels agreed that instead of arguing the appeal orally, they would rather put in written submissions. Subsequent thereto, counsel tendered their written submissions which I have carefully read and considered.

This being a first appeal and while I am perfectly entitled to make my own findings on the evidence, I must however be very slow to interfere with the trial court's findings unless I am satisfied that either there was absolutely no evidence to support the findings or that the trial court must have misunderstood the weight and bearing of the evidence before it and thus arrived at an unsupportable conclusion. See generally **Peters v/s Sunday Post Ltd (1958) E.A. 424, Selle & Another v/s Associated Motor Boat Co. Ltd & others (1968) E.A. 123** and **Ephantus Mwangi & Another v/s Duncan Mwangi Wambugu (1982-88) 1 KAR 278.**

To my mind, the issues which the learned magistrate was called upon to determine was whether or not the appellant was a wife to the deceased and therefore entitled to a share of the estate of the deceased. The learned magistrate found and correctly so in my view that the appellant was not a wife of the deceased as at the time the deceased passed on. From the evidence on record, the appellant claimed to have married the deceased in Church. However she tendered no documentary evidence such as a marriage certificate to back up her claim. It is also noteworthy that the evidence regarding the church marriage only came out through cross-examination. Further of all the witnesses who testified on her behalf only one testified to he fact that the appellant was married to the deceased in church. If indeed the appellant married the deceased in church as claimed, there must have been witnesses to the occasion. How come she failed to call any one of them to support her assertion. It is trite law that a party who alleges a fact must prove the same. The appellant miserably failed to do so in the circumstances of this case. Even her would be brother in law (DWIII) and sister in law (DWII) did not testify as to he marriage of the appellant to the deceased in church. Based on the foregoing, the learned magistrate was right in holding that the alleged church marriage was not proved.

All the witnesses called in the cause were however in agreement on one issue; that is that the appellant had in the time past been a wife of the deceased and together they had sired 9 children. To my mind therefore that marriage must have been a Kikuyu Customary marriage the fact of the church marriage having been discounted. From the evidence, it was also common ground that the appellant and deceased had parted ways 20 years before the deceased passed on. It was common ground that for those 20 years neither the appellant nor her children had set foot in the deceased compound. It was also common ground that the deceased married the respondent long after he had parted company with the deceased.

The appellant having stayed away from the appellant for 20 years can it really be said that she still considered herself a wife of the deceased? I do not think so. The marriage having been customary, the act of the appellant together with all her children having moved back to her parents must of necessity point to one thing, that the customary marriage had been dissolved. Although there is no evidence as to whether dowry was paid and or refunded, one can safely assume however that by the appellant retreating to her parents, it signified an end and or dissolution of the marriage hitherto subsisting between herself and the deceased. Indeed even the deceased's own brother, **Peter Muriithi Njogu** who testified on behalf of the respondent as DWIII confirmed that the deceased had in fact divorced the appellant. In view of the fact that the appellant and her children had not been living with the deceased for 20 or 50 years before his demise, the learned magistrate could not have erred in finding that she was not a wife of the deceased at the time of his demise.

It could not have been the intention of Parliament in enacting the law of succession Act to allow the parties as the appellant herein to stake a claim in perpetuity. It could also not have been the intention of Parliament, that a party who has been in the archives for 20 years should suddenly re-surface and stake a claim to an estate she has had no connection with whatsoever for 20 years. This would be mischievous to say the least.

In arguing the appeal, counsel for the appellant limited himself to four grounds. In summary these were failure to ascertain the number of dependants of the deceased, interpretation of the term dependant, importation of evidence not canvassed in court in the judgment and finally failing to ascertain the shares of each child of the deceased.

In my view, the learned magistrate having found as a fact that the appellant was not a wife of the deceased it was not open to her to ascertain the number of the dependants. According to the learned magistrate, the appellant was not entitled to petition for the grant of letters of administration in her capacity as a wife of the deceased. That being the case she was not therefore a dependant of the deceased. If her children who are all adults wished to have a share of the estate of the deceased then they ought to have objected and or protested to the grant in their own right. Section 29 of the Law of Succession Act defines a dependant as "the wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death...." The learned magistrate found as a fact that the appellant was not a wife to the deceased. Further she also found that the appellant and her children had stayed away from the deceased for 20 years. It cannot therefore be said that he deceased had been or had not been maintaining them immediately prior to his death. 20 years is such long period and cannot qualify for "**immediately prior to his death..."** The learned magistrate found as a fact that the appellant and her siblings had never set foot in the deceased compound, nor put up houses or utilized any portion of the Estate nor interacted with the deceased in his lifetime but only came 20 years after his demise to stake a claim. I have no reason to differ with this finding. Neither can the learned magistrate be said to have interpreted section 29 of law of succession Act restrictively.

The appellant also claims that the learned magistrate currently decided the succession cause. I do not understand the essence of this complain. Is the appellant saying that because the cause was hurriedly decided, the decision must of necessity be wrong? I do not subscribe to such mistaken view. In my view a judicial officer who makes a decision timeously should be commended rather than be condemned. To case aspersion to such an officer as the appellant has attempted to do in the circumstances o this case is to say the unwarranted. Be that as it may, there is no evidence that the learned magistrate wrote her judgment in a hurry. The record clearly shows that the learned magistrate sieved through the evidence presented to her and carefully analysed the same, considered the applicable law in the circumstances

before reaching her conclusion.

I am unable to discern any evidence which was imported by the learned magistrate in her judgment. The trial magistrate merely analysed and synthesized the evidence tendered before her. If ever in so doing, she considered extraneous matters, they minor and did not go to the root of the judgment.

Having carefully re-evaluated, analysed and reconsidered the evidence tendered before the subordinate court, I have come to the inevitable conclusion that the appeal lacks merit. Accordingly it is dismissed with costs to the Respondent.

***Dated and delivered at Nyeri this 31st day of January 2008***

**M. S. A. MAKHANDIA**

**JUDGE**