



**REPUBLIC OF KENYA**

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

**Civil Appeal 22 of 2001**

**PHILIS MABUTI NJOKA.....APPELLANT**

**VERSUS**

**DICKSON NJERU NJOKA.....RESPONDENT**

**JUDGMENT**

This appeal is between widow of deceased and her son. Supplementary Record shows that the grounds of appeal are three:-

1. That the learned Magistrate gave a ruling that was against the weight of evidence.
2. That the second that the learned Magistrate misdirected himself in the application of the relevant law regarding distribution of estate of a deceased person.
3. That the learned Magistrate relied on in admissible and unreliable documents in deciding the case before her.

The proceedings which gave rise to the ruling of the court dated 3/4/2001 concerned the hearing of protest against confirmation of the grant issued in this suit. The protester, the Respondent, herein was the son of deceased. He took objection that the petitioner had failed to include 2 brothers in the list of survivors. And that the widow was only entitled to a life interest in the estate. There was objection to the inheritance being given to Juliana Muthoni who was a married daughter. That grandsons were given inheritance but they were to take from their fathers. The protester proposed that the land of deceased Kabare/Kiritine/781 be registered in the name of Respondent as sole owner with a life interest on behalf of Philis Mabuti Njoka, the Respondent herein. The record shows that after hearing the evidence a certificate of confirmation dated 5/4/2001 was issued as follows:-

1. Dickson Njeru to take 3 acres
2. Phillis Mabuti and
3. Juliana Muthoni both to take jointly 1.7 acres of the land.

I have perused the ruling of the Trial Magistrate, there was no agreement between beneficiaries as to how the estate should be distributed. However, there is no dispute that the deceased died leaving only one widow surviving him. Therefore the distribution of his estate falls under Section 35 of Succession Act Cap 160 which provides:-

(a) The surviving spouse shall be entitled to personal and household effects of the deceased and

(b) Life interest in the whole residue of the intestate estate. Powers of surviving widow in relation to the estate and her children is regulated under Section 35 (2) 35 (3) and (4). Under Section 35 (5) it is clear that the widow shall enjoy the estate of her husband until the life interest is terminated when the estate shall devolve upon the surviving children in equal shares.

Therefore the Trial Magistrate was in error in her interpretation of that Section. The widow appellant is entitled to enjoyment of the estate during her life time but she may allocate as a gift to any of the surviving children a share of the estate. The other issue is that under Section 42 of the said Act where intestate grants benefits to a child or grandchild or a house (in case falling under Section 40) or property has been appointed or awarded to any child or grandchild under provisions of Section 26 (dependency) or Section 35 such property shall be taken into account in determining the share of the net intestate estate finally accruing to the child. In the present case it is not disputed that two sons of deceased Jackson Njoka and Peter Muriuki Njoka were given land by deceased in his lifetime. The two do not appear to be complaining. It is clear when the life interest of the Appellant shall terminate and the estate is shared equally among the surviving children, these two brothers will have their gifts taken into account.

I therefore find that the Trial Magistrate erred in the interpretation of Section 35 of the Act and therefore her ruling was not in accordance with the law. In the circumstances, I allow the appeal. I order that the grant shall be confirmed and certificate shall be issued according to this Judgment. The estate shall be registered in the name of the widow who is at liberty to appoint any part of capital estate to any of her children.

Orders accordingly.

Dated this 18<sup>th</sup> January, 2008.

**J. N. KHAMINWA**

**JUDGE**

**18/1/2008**

**Khaminwa – Judge**

**Njue – Clerk**

**Miss Wairimu**

Judgment read in open court.

**J .N. KHAMINWA**

**JUDGE**