REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

H.C.C.A 141 OF 2002

KANYI MURUGU .... APPELLANT

VERSUS

ZIPPORAH WANJIRU MWONI .... RESPONDENT

(Appeal from the Judgment of the Senior Principal Magistrate's Court at Murang'a in Succession Cause No. 116 of 1997 dated 12th August 2002 by Ms L. Nyambura – R.M.)

J U D G M E N T

Zipporah Wanjiru Muoni, hereinafter referred as "***the Respondent***" petitioned for the grant of letters of administration intestate to the estate of her father, the late **Isaac Muchoki Thiongo**, in the Senior Principal Magistrate's Court at Murang'a being succession cause number 116 of 1997. She sought to have the estate of the deceased comprising land parcel numbers **Loc. 10/Gatheru/734** and **Loc. 10/Gatheru/474** distributed equally between her sister **Rachael Wanjiru Hari** and herself. **Kanyi Murugu**, hereinafter referred to as "***the appellant***" through his son Michael **Murugu Kanyi** while describing himself as the nephew of the deceased objected to the making of the grant to the respondent. Subsequent thereto the appellant then replaced his son aforesaid and filed a petition by way of cross-petition and also filed an answer to the petition.

The respondent sought to inherit her father's estate on the footing that her sister and herself were the only surviving beneficiaries of the estate of the deceased. On the other hand the appellant and his son premised their claim to the estate of the deceased on the basis that "**the objector his father and brother have been depending on the deceased before his death and they are in occupation of the two land parcels where they have constructed their houses and have planted cash crops i.e. coffee and subsistence crops."** The appellant's son in the petition by way of cross-application for grant of letters of administration stated.

"**1. The suit premises were registered in the names of the deceased in trust for my father.**

2. That I have lived on the land since demarcation even before the death of the deceased.

3. That the deceased had only two daughters who are both married.

4. That I am the rightful heir of the estate of the deceased....."

As pointed out by **Mr. Mbuthia**, learned counsel for the respondent, from the foregoing it would seem that the basis of the appellant and his son's claim to the estate of the deceased hinged on:

(i) User of land

(ii) Trusteeship

(iii) Dependancy

This then was the case that confronted the learned magistrate. In a well thought out and reasoned judgment, the learned magistrate dismissed the appellant's claim saying "**........ Deceased died and left behind two daughters. Since deceased estate is subject to both written laws and customs, the court finds that the deceased's land should go to his closest next of kin....... his two daughters Zipporah Wanjiku and Rachael Wanjiru Hari. Though the two daughter's are married they cannot be disinherited because they are married and did not have brothers....... the petitioner and her sister Rachael are the surviving children of the deceased and estate of the deceased should devolve upon them. The court finds that Kanyi Murugu herein is a stranger to Isaack Muchoki and there was no prove of any relationship with the deceased. Petitioner and her sister are the surviving children of the deceased and they are entitled to inherit their father's estate consequently, this court confirms the grant and order that the deceased's estate be done as per the affidavit sworn by the Petitioner Zipporah Wanjiku Muoni. The deceased two parcels of land be shared equally by Zipporah Wanjiku Muoni and Rachael Njiru Hari ......"** It is this holding that has provoked this appeal. Through a memorandum of appeal filed through **Messrs Gacheru J & Co. Advocates**, the appellant has faulted the learned magistrate's judgment on 5 grounds to wit;

1. The learned magistrate erred in fact in failing to hold that the appellant's use of the deceased's lands was consistent with his evidence that he was related to the deceased.

2. The learned magistrate erred in principal in holding that the Appellant and the deceased were not related when the evidence before her showed the contrary.

3. The learned magistrate erred in fact and principal in ruling that the appellant had inherited his father's property when there was no evidence to support the ruling.

4. The learned magistrate erred in law in and principal in failing to evaluate the evidence in its totality and thus made an erroneous judgment.

5. The learned magistrate erred in law in not appreciating that married daughters cannot inherit under Kikuyu customs.

A brief synopsis of the case is necessary. The respondent is the daughter of the deceased. Her father, deceased **Isaack Muchoki** had no brothers. He only had step brothers. The deceased father had three wives and the deceased was the son of the Elder wife. The appellant and his son according to the respondent was not related to them as they were neither brothers or step brothers of the deceased. It was on that basis she claimed that her father's estate be shared equally between herself and her sister. She stated that together with her sister they jointly cultivate land parcel **Loc. 10/Gatheru/734** which comprises 4 acres though the appellant had encroached on a portion of it. In her testimony the respondent was able to produce a document showing that the deceased had objected to the appellant occupying a portion of his land aforesaid. She was also able to show by documentary evidence that the deceased paid fees for land adjudication in respect of the two parcels of land. That when her father became ill, he gave her all the documents for safe custody. She also stated that she harvests coffee on land parcel **Loc. 10/Gatheru/474** and produced documentary evidence to back up that claim.

Her evidence received a further boost from PW2 **Mukaru Thiong'o**. He testified that the deceased was his step brother. He knew the appellant as a clan and not a family member. He knew the family of the appellant which had their own separate parcel of land. He further testified that the appellant had encroached and built a house on the deceased land. That according to Kikuyu custom a married daughter could inherit her father's estate if the father had no sons.

As for the appellant the evidence was that the deceased was his step brother. He said that the deceased died and left behind the two parcels of land that are not used by the respondent and her stepsister. That

two were in fact his step-sisters. He went to testify that he uses both parcels of land. That he should be allowed to inherit the two parcels of land with a rider that **Rachael Wanjiru Hari** should be allowed that portion of land that she cultivates. His cast of witnesses included DW1, **Samuel Mwangi** and DW2 **Magondu Kiiru**. DW1 testified that he was a stepbrother to the appellant. The deceased was his step brother too. He stated that the father of the appellant was **Kimani** and was related to the father of the deceased. That the appellant was the only surviving son. He testified further that the deceased gave the appellant his land before he died. He concluded his testimony by stating that married daughters are not considered in the inheritance of their parents property under Kikuyu /customary Law.

As for DW2, he testified that he knew both the appellant and deceased. That the deceased was an uncle to the appellant. He said that before the deceased passed on he left behind the two parcels of land. The deceased had 2 daughters who were all married and could not therefore inherit the deceased property. That the appellant had built on the deceased land with his permission. That he had been sent to the deceased by the appellant to claim his land from the deceased. Under cross-examination by **Mr. Mbuthia** counsel for the respondent, the witness stated that the appellant was not a brother to the deceased. However their fathers were related. That the deceased told them that his father was not **Thiong'o** but **Kimani**. That the appellant had no relationship with **Thiong'o**. That there was no close relationship. That the deceased took the property of **Kimani** and not **Thiong'o**. The property of **Thiong'o** was with **Mukeru**. That **Kimani** is known in the clan. Finally that apart from what the deceased said, nobody else knew about **Kimani**. That the deceased was a cripple and had been unable to remove the appellant from his land because he was a cripple and therefore agreed that the appellant occupies the land.

When the appeal came up for hearing, both **Mr. Irungu** and **Mr. Mbuthia**, counsel for the appellant and respondent respectively intimated to the court that they wished to have the appeal argued by way of written submissions. The parties proceeded to file their respective submissions which I have carefully considered.

It is the duty of this court as a first appellate court to re-evaluate the evidence afresh and see whether the conclusions reached by the learned magistrate are supportable by evidence and the law.

It was clear from the learned magistrate from the word go that the appellant's objection will either fall or be sustained depending on whether or not the deceased and the appellant were related. Having carefully analysed the evidence tendered, the learned magistrate reached the inescapable conclusion that the two were not related at all. Who can blame her? The evidence on record on this issue is at best tenious and flippant. Whereas the appellant stated that the deceased was his step brother, others claimed that the deceased was an uncle, whereas other witnesses merely said that the father of the appellant and deceased were related by virtue of the fact that the father of the appellant was **Kimani** and the father of **Kimani** and deceased were father and son. Yet other witnesses claimed that the appellant was a step brother of the deceased. Further there is even evidence to the effect that the deceased was not fathered by **Thiong'o**. Now **Thiong'o** is supposed to have fathered the father of DW1 who claimed to have been the step brother of the deceased. Again there is evidence that in fact the deceased was not a son of **Thiong'o** but of **Kimani**. That when **Kimani** passed on, the deceased mother married **Thiong'o,** when she already had the deceased. With no clear cut relationship established by cogent evidence, the magistrate and indeed this court has been left with tremendous doubt as to whether there was any relationship between the deceased and the appellant. It is a cardinal principle of law that whoever asserts must be prepared to prove. It therefore behoved the appellant and his witnesses to be clear cut in their testimony as to the reality on the ground regarding the relationship between the deceased and the appellant. It should not be left to the court to wind its way through the muddle in a bid to establish the relationship if at all. The same cannot be said of the respondent and her witness. They were forthright, consistent and maintained that the appellant was not at all related to them. Even under intense cross-examination by **Mr. Gacheru**, then counsel on record for the appellant, these witnesses stood their ground. Comparing the evidence of the appellant plus her witnesses and that of the respondent and her witnesses, I think that the respondent is more believable than the appellant. One can easily see and read through the appellant's efforts and endeavours to sort of create some relationship that would justify his continued occupation of the land belonging to the deceased. His efforts hit a dead end though.

The appellant's efforts were not made easier by what they brought up in their pleadings. In one breath he was saying that he was claiming the parcels of land on the basis of a trust. That the suit premises were registered in the names of the deceased in trust of himself and presumably members of his family including the appellant. If that be case surely this was not the forum to ventilate such claim. Again it would appear that the appellant was claiming his entitlement to the estate of the deceased on the footing that they were dependants of the deceased. Yet no evidence was adduced to back up this claim. If anything there was evidence on record that showed that the appellant and members of his family had their own separate parcel of land, to wit; **Loc. 10/Gatheru/733**. The appellant and his son could not therefore have been dependants of the deceased. The claim by the respondent that the appellant had been slowly but surely encroaching on the deceased land in the valley seems to me more logical.

The other premise upon which the appellant sought to inherit the deceased estate to the exclusion of the respondent and her step sister was one of user. That they had lived on the land parcels, constructed their houses and have planted cash crops such as coffee and subsistence crops. I think that usage of the land perse by a stranger cannot by itself confer on such stranger a beneficial interest in the Estate of the deceased who happens to be the registered owner of such parcel(s) of land. In any event the usage of the land by the appellant was properly explained. There is documentary and oral evidence on record that the deceased wanted the appellant's continued use of his land brought to an end. Indeed there is an entry in Exhibit tendered in evidence during the trial to this effect "**....... On 22nd June 1966 I sent an Elder called ..... Ngunu to Kanyi telling him that the house if at falls down, he should rebuild the house on his own land, signed Isaack Muchoki....**" This line of evidence was not seriously challenged by the appellant. So that it would appear that as at this point in time, the deceased viewed the appellant as a trespasser and wanted him to cease occupying or is it encroaching on his parcel of land. Even the appellant's own witness (DW2 **Magondu Kiiru** does seem to confirm the deceased's efforts in having the appellant vacate his land. Under cross-examination by **Mbuthia**, he stated "**...... Isaack Muchoki was a cripple. He was a weak person. He had not been able to move Kanyi Murugu because he was a cripple and weak....**" My understanding of this evidence is that because of his physical condition, the deceased had been unable to evict the appellant from the suit premises much as he desired to do so.

DW2 did go on and testify that the deceased was an uncle to the objector. He gave evidence that he was responsible for the consolidation of the said parcels of land and confirmed that actually the deceased gave land to the objector in a meeting of Elders where he attended. In my view it is highly unlikely that the deceased would have undertaken such venture in the light of the evidence by his daughter, the respondent and this witness's own admission that the deceased had wanted the appellant removed from his land but for his physical condition. Further if that was the case, how come, none of the alleged elders were called to testify in support of the appellant's case.

There is also evidence that the appellant is not in exclusive possession of the suit premises. He conceded that the respondent and his step sister use portions of the suit premises. Indeed in his prayers he states that though he should be allowed to inherit, the deceased's Estate both the respondent and step sister should nonetheless be allowed to inherit those portions that they utilise. This evidence clearly demonstrates that the respondent and her step sister have always laid a claim to their father's Estate. It also flies in the face of the argument that under Kikuyu custom married daughters should not inherit their father's property. I am aware that in the case of **Gituanja v/s Gituanja C.A. 25 of 1982**, the court of Appeal held that "**..... Among the Kikuyu a woman has no rights over land except in the case of an unmarried daughters and widows who have a life interest ....**" I think that the situation obtaining herein is distinguishable from the facts of the aforesaid case. It could not have been the intention of the law, customary or otherwise to confer on strangers the benefits of the deceased Estate in the event that such deceased person did not have boys, widows but only married daughters. The law could not have intended that married daughters should be denied the right to inherit their father's estate merely because they are married and their father is not survived by sons and widows or brothers. That in such eventuality the land should revert to the government and or strangers. The law could not have envisaged such scenario. In any event what is being dealt with here is registered land and not clan land. The appellant has his own land and cannot be allowed to act on the wrong belief that once the deceased is survived by married daughters he should easily acquire the Estate because he is in occupation thereof and in the absence of any relationship whatsoever between him and the deceased.

It is noteworthy that the deceased passed on sometimes in 1971 before the enactment of the Law of Succession Act. By virtue of Section 2(2) of the Law of Succession Act, the applicable law was Kikuyu customary law. For it is provided under the law of Succession Act that in pre-1981 Succession matters, customary law would be applicable. As submitted by **Mr. Gacheru,** which submissions I entirely agree with, it was wrong and irregular for the learned magistrate to have invoked and relied on section 38 of the law of Succession Act in deciding on how the Estate of the deceased should devolve. The learned magistrate should have fallen back to Kikuyu customary law in determining the issue. This was an error on her part. However as I have already held the appellant was a stranger to the Estate of the deceased. The deceased had no sons, widows or indeed brothers who would otherwise have inherited her sons. The other relatives of the deceased if any were not interested in the Estate. That being the case the respondent and step sister being the only surviving children of the deceased it was only fair and just that the Estate should devolve to them and not a stranger going by the name of the appellant.

It is clear from what I have so far stated that the appellant did not establish on a balance of probability that he was indeed related to the deceased. It is also clear from the evidence on record that he was not a dependent of the deceased. Nor was the suit premises registered in the deceased's name to hold in trust for the appellant and members of his family. Accordingly the learned magistrate was right in turning down his claim.

I see no merit in this appeal. Accordingly it stands dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 11th day of February 2008

M. S. A. MAKHANDIA

JUDGE