**REPUBLIC OF KENYA**

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

**Succession Appeal 4 of 2005**

**PATRICK MWANGI GACHIE ..... APPELLANT**

**VERSUS**

**BETHICIBA NYAMBURA ..... RESPONDENT**

***(Appeal from the original Judgment in the Resident Magistrate's Court at Kangema in Succession Cause No. 23 of 2004 dated 6th day of January 2006 by Mr. G. P. Ngare – R.M.)***

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

On 18th October 2006 one, **Mercy Wangari Gachie**, hereinafter referred to as "**the deceased"** passed on. She was survived by **Bethiciba Nyambura**, Daughter in law hereinafter referred to as "**the Respondent**", **Patrick Mwangi Gachie**, Adult grandson, hereinafter referred to as "**the Appellant"** and **David Mwangi Kamau**, Adult grandson.

Following the passing on of the deceased, the Respondent petitioned for the grant of letters of administration intestate of the estate of the deceased and she was granted the same on the 11th August 2004 by the Senior Resident Magistrate's Court at Kangema. On 25th February 2005 the Respondent applied to the same court for the confirmation of the grant. In an affidavit in support of the application, the respondent proposed that land parcel number **Loc. 10/Kahuti/177** measuring 1.9 acres and being the only asset left behind by the deceased be shared among the beneficiaries as follows:

**(a) Patrick Mwangi Gachie – 0.8 acres**

**(b) David Mwangi Kamau – 0.8 acres**

**(c) Bethiciba Nyambura – 0.3 acres.**

On being served with the application, the appellant filed an affidavit of Protest in which he disagreed with the mode of distribution of the deceased estate suggested by the Respondent. He counter proposed that the suit premises be subdivided into two equal portions of 0.95 acres respectively and be shared between himself and **Bethiciba Nyambura Kamau**. His argument being that **David Mwangi Kamau** and **Bethiciba Nyambura Kamau** were son and mother respectively. That his father **Gachie** was a brother to the husband of **Bethiciba Nyambura Kamau** and father to **David Kamau Mwangi**. Accordingly the estate ought to be distributed equally with regard to the two houses i.e. **Kamau's** and **Gachie's**. That if the respondent's proposal was to be accepted, the house of **Kamau** would benefit twice on account of the share due to his wife and the son.

Both the protest and the summons for the confirmation of the grant came up for hearing before **G.P. Ngare**, learned Resident Magistrate. It was the Respondent's case that the deceased was her mother in law having married her son, in 1950. That at the time of her demise the deceased left in her custody the subject parcel of land. She remembered that the appellant's father had been given land by his father, the deceased's husband which he later sold and relocated to mosoriot in Rift Valley. He however left behind the appellant whom she took care of. When he came of age, the appellant asked the respondent's husband to show him a piece of land where he could build and settle. Following Customary rites involving the giving out of a goat, the appellant was given some land. That before the respondent's husband passed on he directed that both his son and the appellant be given 0.8 acres each out of the suit premises and the remaining 0.3 acres be maintained as burial ground. The respondent maintained therefore that what she had proposed in her application for the confirmation of the grant was in accordance with the wishes of her late husband.

As for the Respondent, his evidence was to the effect that he was brought up by her aunt **Peris**, his father having gone away. His father later died. He conceded that he gave the Respondent's husband a goat as per the Kikuyu custom and he was shown a piece of land to build and cultivate. However he maintained that the suit premises was ancestral land and ought to be shared equally between the two houses of the sons of the deceased.

Having carefully considered the evidence on record, the learned magistrate found for the Respondent holding "**..... that the land in question herein belonged to the Petitioner's husband solely and that the Objector's father too had his portion but sold and shifted to Mosoriot in Rift Valley ..... I dismiss the mode of distribution proposed by the Objector and order that the land parcel No. Loc. 10/Kahuti/177 measuring 1.9 acres be distributed as follows:**

**Patrick Mwangi Gachie – 0.8 acres,**

**David Mwangi Kamau – 0.8 acres,**

**Bethiciba Nyambura – 0.3 acres and the grant is confirmed is (sic) such terms....."**

This holding provoked this appeal. In a home made memorandum of appeal, the appellant faults the finding of the learned magistrate on the following seven grounds;

**1. The learned Resident Magistrate totally failed to take into consideration that the deceased Wangari Ngari had two sons namely Gachie Ngari (protestors father) and Kamau Ngari (Petitioner's husband) and according to the Succession Act her estate ought to be shared equally between the two sons. But since the sons are also dead, the court should have distributed the estate equally between the appellant and the respondent and not otherwise.**

**2. The learned Resident Magistrate misdirected himself by allowing the**

**mode of distribution of the estate exactly and precisely as proposed by the Respondent in her affidavit thereby awarding one son child more land contrary to the law of succession Cap 160 Laws of Kenya.**

**3. The learned Resident Magistrate grossly erred in law and fact in**

**finding that the suit land belonged to the Respondent's husband yet it is clear from the evidence adduced it was actually ancestral land.**

**4. The learned Resident Magistrate was wrong in holding that the appellant's father had sold his share of land as no witness testified that he or she had bought land from the appellant's father.**

**5. The learned Resident Magistrate grossly erred in law in treating the Respondent and her son as different units thus giving them more land than the appellant – hence favouring one child over the other.**

**6. The mode of distribution as confirmed by the learned Resident Magistrate was unknown to custom and to law and resulted in miscarriage of justice and unfairness on the appellant's side.**

**7. The learned Resident Magistrate's judgment was against the weight of evidence adduced and hence misdirected in both law and fact.**

When the appeal came up for hearing before me, the appellant in person submitted that the Respondent distributed the estate as though she was his grandmother. That his grandmother had two sons, Silas Gachie and Daniel Kamau. That Silas Gachie was his father whereas Daniel Kamau was the husband of the Respondent. The land should have been shared equally between the two sons.

The Respondent too was unrepresented. She submitted that the land was registered in her mother in law's name. That the appellant had been left in her custody by her father, **Silas Gachie**. That she had given a portion of the land to him. She objected to the proposal by the respondent that the land be distributed equally because the appellant's father had been given land by his father which he sold and relocated to Rift Valley.

I have carefully considered the evidence tendered during the trial and subjected the same to fresh evaluation and analysis so as to reach my own conclusions as a first appellate court. However I do not think that the fate of this appeal turns on the evidence tendered during the trial. To my mind the determination of this appeal turns on the question of jurisdiction. In an affidavit in support of the Petition for letters of Administration intestate, the respondent deponed in paragraph 6 that the assets of the deceased consisted of land parcel **Loc. 10/Kahuti/177** with an estimated value of Kshs.200,000/=. The jurisdiction of the magistrate's court to hear succession matters is denoted by section 48 (1) of the law of succession Act. It provides as follows:-

**"Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings.**

**Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act."**

As it is evident from the foregoing the trial court in this matter had no jurisdiction to entertain the succession cause since the value of the

estate was in excess of the permissible Kshs.100,000/=. I note that this issue was not raised in the memorandum of appeal nor in the submissions before me. However it has been said that jurisdiction is everything. It can be raised at anytime and at any stage of the proceedings. It is also not lost on me that the protagonists were all unrepresented at every stage of the proceedings both in the trial court as well as in this appeal. They are lay people not schooled in the intricacies of the law of succession Act. They can be excused for having prosecuted the cause in a court that did not have jurisdiction. The same cannot be said of the learned magistrate. I am certain that the learned magistrate was well conversant with the aforesaid provisions of the law. To

have proceeded to hear the cause to its finality without considering the issue of jurisdiction is simply inexplicable. I want to believe however that failure to address the issue of jurisdiction was perhaps due to an oversight and or inadvertent error on the part of the learned magistrate. Had the learned magistrate addressed the issue at the very commencement of the dispute, there would have been no need to entertain the proceedings as he would have downed his tools for want of jurisdiction.

Since the court which had the cause and delivered judgment the subject matter of this appeal had no jurisdiction, the proceedings were thus a nullity. Accordingly I so hold with the consequence that this appeal is allowed with no order as to costs. The parties are directed to petition afresh for the grant of letters of administration intestate in a court with competent jurisdiction.

*Dated and delivered at Nyeri this 14th day of April 2008*

**M. S. A. MAKHANDIA**

**JUDGE**