



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

**Civil Appeal 20 of 1998**

**STANLEY WAHOME MUKONO ..... PLAINTIFF**

**VERSUS**

**SAMUEL GITHUKU MAINA ..... DEFENDANT**

***(Appeal from original Judgment of the Senior Resident Magistrate's Court at Murang'a in Succession Cause No. 43 of 1982 dated 2<sup>nd</sup> March 1998 by Mrs. A. M. Macharia – R.M.)***

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

This cause has graced the court corridors since 1986, a period of well over 22 years. It all started with the death of one **Mwangi Mukono** on 15<sup>th</sup> March 1980 in Murang'a. Having died intestate, his widow, **Lucy Nyambura** thereafter petitioned for a grant of letters of Administration intestate. That petition sparked objections from the deceased's brother and the wives of the deceased other brothers who had also died, that is to say, sisters in law. Simultaneously with the filing of the objection, they also cross-petitioned for the grant of letters of Administration intestate.

The then resident magistrate at Murang'a **J. A. Amendi** having heard both the petitioner and Objectors dismissed the objection and cross-petition. That was on 21<sup>st</sup> February 1985. Two months later on 4<sup>th</sup> April 1985 he ordered that the letters of Administration intestate do issue to the Petitioner jointly with her son **Stanley Wahome M. Mukono**, the appellant herein.

Following the grant, **Wanyoike Mukono, Gladys Wanjiru Maina** and **Wambui Munderu**, hitherto the Objectors moved to the District Officer, Kiharu to have the land which formed the only asset of the deceased Estate being **Loc 10/Kahuti/699** be arbitrated upon between themselves and the Petitioner and her son, the appellant. Apparently this move was informed by the comments of the learned magistrate in the ruling that led to the grant of the letters of administration intestate to the petitioner and the appellant.

The dispute was duly heard by the panel of Elders chaired by the D.O. whose award, as required was subsequently filed in the Resident Magistrate's court in Murang'a in case number 3 of 1986. The Elders unanimously decided that that LR. No. Loc **10/Kahuti/699**, hereinafter referred to as "**the suit premises**" be subdivided in four equal parts and be shared between the three objectors; **Wanyoike Mukono, Gladys Wanjiru, Wambui Munderu** and the Petitioner and the appellant to get jointly one of the four portions. The Petitioner was dissatisfied with the award. Accordingly she applied to have the same set aside which application was however dismissed. Not deterred, she preferred an appeal to the High Court of Kenya at Nairobi, being civil appeal number 185 of 1986.

The appeal was heard by **Aluoch J.** (as she then was) and in a judgment dated 8<sup>th</sup> April, 1992, she

allowed the appeal stating that “..... **the Panel of Elders ended up adjudicating on title to the registered land i.e. the disputed land when they had no jurisdiction to do so. For this reason, I will proceed to set aside the rulings of 21/2/85, 4/4/85 in the succession case, and the one dated 11/7/86 in the arbitration case, and direct that the petition for letters of Administration filed by Lucy Nyambura, plus the objection and cross-petition by Wanyoike Mukono and Gladys Wanjiru and Wambui Munderu, be heard in a court of law, by way of viva voce Evidence. For this order to be effected, the lower court’s file, i.e. succession case No. 43/82 will be referred back to the Resident magistrate’s court Murang’a, for trial and determination by a magistrate of competent jurisdiction but not the original magistrate, who has already dealt with case .....**”

Pursuant to the said order, the cause was again heard afresh before **Mrs. Macharia**, Resident magistrate beginning on 27<sup>th</sup> January 1998. As far as I can gather from the record of the proceedings which I must say are so faint as to be illegible and clear, only the appellant testified on the part of the petitioner, whereas on the part of the Objectors, the objectors and three witnesses testified.

The appellant testified that the deceased was his father who passed away on 15<sup>th</sup> March, 1980. The appellant’s mother too passed on sometimes in December 1992 and he had come into the proceedings by way of substitution. That his deceased father had five sons and four daughters. That out of the estate it is only the suit premises that has a dispute. He maintained that the suit premises should be shared among the deceased’s children minus a daughter who was married. That being the case 5.3 acres should be subdivided into eight equal portions and distributed among his siblings. He denied that his deceased father held the land in trust for anybody. Cross-examined by **Samuel Thuku Maina**, the first objector on behalf of all the other objectors, the petitioner conceded that they lived on the suit premises with the objectors. That his father had 4 brothers. He was a child when the land was consolidated. He went on to state that the objector could not have a share in the suit premises as he was not his brother. That he should inherit his father’s land. However he did not know where such land was. That was the close of the Petitioner’s case.

On 10<sup>th</sup> February 1998, the Objectors case commenced. The first to take the stand was **Samuel Thuku Maina**, who had come in the proceedings I believe by way of substitution as well. He testified that the appellant was his step brother. That the suit premises belonged to their grandfather who had 5 children. One of the children was given land. He wanted the elders award enforced so that the suit premises is divided into 4 equal portions and each one of them, the appellant and the three objectors get their respective portions. He maintained that each one of them stayed in their respective portions in the suit premises as the suit premises were sub-divided by the D.O. and the chief. That they had constructed in their portions of the suit premises. Cross-examined by the appellant, the objector stated that he was young during land demarcation. That the land was registered in the name of the deceased in trust for others.

The Objector next called as a witness one **Gachia Gathii**. He was a clan member to which the appellant and objector’s belonged. He talked of a dispute regarding the suit premises that was arbitrated upon by the District Officer. That the father of the appellant and objectors were brothers. The D.O. resolved that the suit premises should be divided into four equal portions and shared between the appellant and the Objectors. He maintained that that decision ought to be respected. Under cross-examination he stated that he was present when the land was demarcated. He stated that the grandfather to the appellant and objector had four children. That each cultivated their respective portions.

In came **Mwangi Njuguna** as the second appellant’s witnesses. He testified that the disputants were children of his step brother. He also referred to the decision of the D.O. and wished to have it enforced. That the objectors had no other place to go as the suit premises belonged to their grandfather. That the Chief and his assistant had already subdivided the land into 4 equal parts. Under cross-examination, the witness maintained that the land was registered in trust.

Witness number three was **Mukuha Mukono** who testified that she was a sister to the father of disputants. She took the view that the land be subdivided in four portions in terms of the D.O.’s award. Cross-examined, she stated that during demarcation, land could be registered in the name of a person in

trust for himself and others. That the appellant's father used fraudulent means to have the land. That marked the close of the Objector's case.

In a short judgment dated 2<sup>nd</sup> March 1998, the learned magistrate held "..... Now, after a careful analysis of evidence before me here, I find that the deceased estate should be divided per objector's proposal i.e. into 4 equal parts and be registered in names of following people:-

- (1) Petitioner
- (2) Objector
- (3) Wambui Mukono
- (4) Grace Wanyoike"

That decision sparked this appeal. In a self-made memorandum of appeal, the appellant faults the decision of the learned magistrate on the following grounds:-

1. The learned Resident Magistrate erred in law and fact in ruling that the deceased Mwangi Mukono held land parcel Loc. 10/Kahuti/699 in trust for the respondent's/objector's father when the fact of beneficial ownership has not been proved by the objector in a separate civil suit as required by law.
2. The learned Resident Magistrate erred in law and fact in finding that the objector was entitled to a share in the deceased's estate while as the objector was not a beneficiary but only remotely and/or distantly related to the deceased.
3. The learned Resident Magistrate erred in ruling that the appellant/Petitioner and three other persons including the respondent should share the deceased's estate equally without considering that the deceased left five sons and three unmarried daughters and therefore the appellant's share, should have been greater to cater for the survivors adequately.
4. The learned Resident Magistrate erred in ruling that the estate should devolve to people who were not even interested in the estate like Grace Wanyike and Wambui Mukono.
5. The learned Resident Magistrate in law and fact in giving undue weight to an award reached by clan elders that the land in issue should be divided into 4 equal parts when the same had been set aside by the High Court ruling at Nairobi in H.C.C.A. No. 185 of 1986 (per order of Aluoch, J. dated 8.4.92).
6. The learned Resident Magistrate erred in law and fact in not considering the appellant's proposed mode of distribution which was reasonable in the circumstances in that it catered for all the survivors of the deceased.
7. The learned Resident Magistrate erred in law and fact in not finding that the objector, (respondent herein) occupies land parcel Loc. 10/Kahuti/699 illegally and that the respondent sold off his land parcels given to him by the father of he deceased.
8. The learned Resident Magistrate erred in law and fact in not finding that the respondent and two other persons Grace Wanyoike and Wambui Mukono were busy bodies and did not have locus standi in the succession proceedings in that they did not survive the deceased and neither were they beneficiaries and/or dependants within the meaning of the law of succession Act.
9. The learned Resident Magistrate erred in law and fact in not considering the appellant's evidence when ruling on the mode of distribution of the deceased's estate and hence reached an unreasonable finding.

10. **The learned Resident Magistrate erred in not find that it was ironical that he objector/ respondent herein and the other 2 persons were only claiming land from the deceased's estate and not from the respondent's witness one Mukuha Mukono who has his own land and was a brother to the deceased and also a brother to the respondent's father.**

11. **The learned Resident Magistrate erred in not ruling that the objector who is the respondent herein and the other 2 persons can only lay their claims to the administrators of the deceased's estate, in a civil case and that they did not have a right to object to the mode of distribution proposed by the appellant as were remotely related to the deceased and could only share the deceased's estate (if their claims are proved in a civil court) through the appellant.**

12. **The learned Resident Magistrate erred in reaching a decision which was against the law the weight of evidence adduced.**

When the appeal came up for hearing, the appellant in his oral submissions in support the appeal stated that the suit premises belonged to his father and not grandfather. That the suit premises should have been shared among his brothers and not the sons of his paternal uncle. That before the death of his father the objectors had never claimed interest in the same.

In response, **Mr. Irungu**, learned counsel who appeared for the objectors submitted that the distribution of the suit premises was on the basis of a clan decision which was communicated to court through three witnesses, one of them was even a brother of the deceased. That the deceased having passed on in 1980, the suit premises ought to have been subdivided in accordance with Kikuyu Customary law as the law of succession act had not come into force. The lower court received evidence to that effect. That the deceased was registered as the proprietor of the suit premises in trust for himself and his brothers. That the four families had occupied for a very long time the suit premises. They had nowhere else to go. That the appellant never called any witnesses to support his case. The appeal therefore ought to fail.

This is a first appeal and so this court is obliged to reconsider the evidence, assess it and make appropriate conclusions on such evidence, but always remembering that I have neither seen or heard the witnesses – see **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.**

First and foremost, it is said that the appeal is from the judgment of the learned resident magistrate **A. M. King'oo (Miss)** dated 2<sup>nd</sup> March 1998 in Murang'a Succession Cause number 43 of 1982. From the record of the proceedings before me at no time did the said magistrate hear the cause or deliver a judgment thereon. The cause was heard and determined by **A. M. Macharia (Mrs.)**. Unless of course the appellant is referring to some other proceedings that are not available to this court. I was prepared to hold that because the memorandum of appeal was drawn and filed in court by the appellant in person he may inadvertently have referred to the magistrate who heard and determined the case as **Miss King'oo** and not **Mrs. A. M. Macharia**. I was also prepared to give him the benefit of doubt that though the case was presided over by **Mrs. A. M. Macharia** perhaps for reasons which are not clear, the judgment may have been delivered by **Miss King'oo** on her behalf. However my fears and or suspicions were laid to rest when I resorted to the original record. From this record there is no doubt that the decree extracted pursuant to the judgment indicates that the case was presided over by **Miss King'oo** and not **Mrs. Macharia**. Indeed the decree as extracted was signed by **Miss King'oo** herself as the magistrate who presided over the case. The original record also shows that the judgment was delivered by **Mrs. A. M. Macharia** herself and not by **Miss King'oo** on her behalf. It is possible that we may be dealing with two separate court proceedings and decrees in the same cause? I do not wish to speculate.

Pursuant to the provisions of section 65, 66, 67 and 68 of the Civil Procedure Act appeals only lie from an original decree or part of a decree of a court. The same requirements are captured by the provisions of order XLI of the Civil Procedure rules. That therefore presupposes that the decree must proper and valid in the sense that it must reflect proceedings giving rising to the appeal, the court, the case number, the parties thereto, when it was heard, before whom it was heard, date of judgment and those present when

the judgment was delivered and the decision. Any decree short of the above requirements cannot pass for a valid court decree. Similarly any decree which does not tally with the record of proceedings and judgment cannot be said to be a valid court decree. The decree the subject matter of this appeal has the correct court cause number, parties, date of judgment, those present during the delivery of the judgment and decision of the court. However the presiding magistrate and who also signed the ensuing decree is indicated as **A. M. King'oo (Miss)**. This of course going by the record is incorrect. The record shows that the case was presided upon, judgment crafted and delivered by **A. M. Macharia (Mrs.)**. There is no suggestion from the record that perhaps the said judgment was delivered by **Miss A. M. King'oo** on behalf of **Mrs. A. M. Macharia**. In any event if that was the case, the decree issued would have reflected that much. Accordingly the decree issued and which was the basis of the instant appeal was erroneous. That being the case, this appeal is incompetent and ought to be struck out.

I realise that the issue was not raised by the parties in their submissions. However as the issue goes to the jurisdiction of this court, it cannot be ignored. After all it has been said that jurisdiction is everything.

The appeal having been incompetent for the aforesaid reasons, I do not think that it is necessary to consider the grounds of appeal raised in the petition of appeal. The appeal is accordingly struck out with no order as to costs.

***Dated and delivered at Nyeri this 30<sup>th</sup> day of June 2008***

**M. S. A. MAKHANDIA**

**JUDGE**

Delivered by Hon. Lady Justice Kasango this 30<sup>th</sup> day of June 2008

**MARY KASANGO**

**JUDGE**