REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.18 OF 1998

BERNARD KAMAU NGACHA…….……………..APPELLANT

VERSUS

HANNAH WAIRIMU GATEMBU……….…..…RESPONDENT

(From original Judgment of the Senior Resident Magistrate's Court at Murang'a (A.M. KING'OO – R.M) in R.M.SUCC. NO.88 of 1997 dated 25th February, 1998.)

J U D G M E N T

The genesis of the dispute between the appellant and the respondent is the Succession Cause number 88 of 1997 filed by the respondent herein in the Senior Resident Magistrate's Court at Murang'a. The Succession Cause was in respect of the estate of the **late Nganga Turungi** who died in March, 1968. The deceased was the father of the appellant and a brother in law to the respondent. In the Succession Cause aforesaid, the respondent had sought for the grant of letters of administration intestate. In the affidavit in support of the petition the respondent indicated that the deceased had died intestate and left behind surviving him the appellant and the respondent. She also indicated in the same affidavit that she was related to the deceased by reason of being her sister in law and that the only asset of the estate was land parcel **LOC.6/MUTHITHI/150**. As required by the rules, the respondent then issued a citation to accept or refuse letters of administration intestate to the appellant.

The appellant's reaction to the citation was to file an objection to the making of the grant to the respondent claiming that the respondent was a stranger to the estate of the deceased. That the petitioner was only related to the deceased by virtue of being his step-brother's wife. Contemporaneously with the filing of the objection, the appellant also filed a petition by way of cross-petition for the grant of the letters of administration. However it would appear that by that time a temporary grant had already been issued to the respondent. Indeed from the record it was issued on 1st September, 1997, the same having appeared in the Kenya Gazette on 1st August, 1997. Undettered, the appellant then on 10th September, 1997 filed affidavit of protest against the confirmation of the grant to the respondent. In the said affidavit of protest, the appellant reiterated what he had stated earlier in his objection; that the respondent though a survivor of the deceased was nonetheless not rightful petitioner since the deceased was the appellant's father. That the respondent could not pass as a beneficial owner of the estate of the deceased by consaquinity and the appellant alone was the only person entitled to inherit the estate of the deceased.

The matter was then placed before **A.M. Macharia (Mrs.),** the then Resident Magistrate for hearing which commenced on 3rd December, 1997. At the hearing both the appellant and respondent testified. The respondent testified orally that she wanted to give the appellant a portion of the suit premises according to the decision of the clan elders. She proposed to give to the appellant 0.5 acres out of the 2 acres comprising the suit premises. She claimed that the deceased had sold his inheritance and the

appellant was not therefore entitled to inherit the suit premises or any portion thereof. It was thus humanitarian grounds that she was willing to give the aforesaid portion of the suit premises to the appellant. She even offered to enhance the same to 0.7 acres.

The respondent also called **Gabriel Wanyoike Thuku** as her witness. He testified that he was a step-brother to the appellant and the respondent was his step mother. That he was part of the team that was consolidating the suit premises. That they decided to register the suit premises in the names of the appellant's father as the respondent's husband had not married. After sometime the appellant came from elsewhere and asked the respondent's husband who had already settled on the suit premises for a portion of the suit premises to settle on. He was given a portion thereof. However he was not satisfied and he summoned a clan elders meeting. This witness was among the clan elders who attended the said meeting. The clan elders decided to give the appellant0.6 acres. He was still not satisfied. He appealed to the Assistant Chief and to the Chief who decided that the appellant gets 0.8 acres. The appellant was still not happy and hence the instant proceedings. According to this witness the suit premises belonged to the appellant's father and respondent's husband.

The appellant testified as follows; that the suit premises belonged to his deceased father and that he was the first born. That the deceased went to look for employment and was duly employed at Itara ranch. In 1961 the deceased came for his family from suit premises and took them to Itara ranch where they stayed until 1965. When the deceased learnt that land in Muthithi was being consolidated he came back and had the suit premises consolidated and registered in his name. On 10th November, 1965, he fenced off the suit premises and went back to Itara ranch leaving the documents relating to the suit premises with the respondent. In 1967 the deceased got sick and passed on in March, 1968. However since the appellant did not have the money to transport the deceased's body for burial in the suit premises he buried it in the land of **Kamau Njoroge** a local politician. He could not also construct on the suit premises for the same reason. In 1980 when he got married he went to the suit premises and planted coffee. However he was attacked by the respondent together with her children who threatened to kill him unless he left the land. Fearing for his life he left the suit premises. The appellant maintained that the deceased never held the land in trust for anybody. That there were no clan members who heard the dispute. That the respondent never claimed the suit premises in the lifetime of his father. Finally he wished to have the entire suit premises to himself.

The trial court after hearing the dispute in a rather short, terse but disappointing judgment ordered that the suit premises be shared equally between the appellant and the respondent. It is from this decision that the appellant has lodged the instant appeal. In a memorandum of appeal filed through **Messrs J.N. Mbuthia & Co. Advocates**, the appellant faults the decision of the learned Magistrate on the following grounds:-

1. THAT the learned Magistrate failed to analysis the evidence at all in her judgment and hence gave no reasons for her findings.

2. THAT the learned Magistrate erred in law in allowing matters of trust to form the basis of a succession claim whereas the appellant was the only proper beneficiary of the estate of the late NGACHA TURUNGI.

3. THAT the learned Magistrate appears to have been wrongly swayed by the respondents claim to have cultivated the land parcel No.Loc.7/Nginda/150 while not giving any regard to the appellants evidence that the respondent's husband had sold their family land.

When the appeal came before me for hearing on 3rd March, 2008 the respondent and her counsel were absent though counsel for the respondent had been served. I therefore directed the appeal to be heard the absence of the respondent and her counsel notwithstanding. I further directed the appellant to file written submissions by 14th April, 2008 on which date I would also give a date for judgment. Come that day and although the appellant had filed his written submissions, the respondent had got wind of what had transpired on 3rd March, 2008 and had also sneaked in her written submissions. I cannot ignore her said written submissions though as they are already part of the record. I have therefore carefully read and

considered all the respective written submissions as tendered.

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 the court neither saw nor heard the witnesses. **See Peters V Sunday Post Ltd (1958) E.A 424, Selle & Another V Associated Motor Boat Co. Ltd & others (1968) EA.123 and Ephantus Mwangi & Another Vs Duncan Mwangi Wambugu (1982 – 88) 1 KAR 278.**

I must say that the learned Magistrate's judgment left a lot to be desired. It was a mere one page. Most of that page was taken up by the summary of the evidence which was also poorly done and in one paragraph consisting of five sentences, she made her decision. This is what she said:-

"…**..Now what is the correct mode of distribution of deceased's estate here. I find that the petitioner and objector are entitled to share LOC.6/MUTHITHI/150. I find that they should share this land in equal portions. I accordingly order that this land be divided into 2 equal parts for the 2 parties herein each to hold in trust for their families."**

From the foregoing it is not possible to tell whether the learned Magistrate ever evaluated or analysed the evidence tendered as required. Having merely reproduced the evidence tendered albeit in a summary form, the trial court moved straight away to order that the suit premises be shared equally between the parties. As correctly submitted by **Mr. Mbuthia,** learned counsel for the appellant, it is not possible to tell which facts swayed her decision or the law applied. The parties were very clear on what either of them wished the court to do. The appellant wanted the whole land while the respondent wished to retain 1.3 acres and allow the appellant 0.7 acres. The court did not uphold either of the two positions. Again and as correctly submitted by **Mr. Mbuthia**, this was totally wrong as it leaves the parties uncertain and unsure of the rationale for the decision. To my mind this inadequacies on the part of the learned Magistrate in crafting the judgment alone are sufficient to dispose off this appeal.

However as already stated and as a first appellate court, I am required to subject the evidence tendered during the trial and reach my own decision on the same however with the usual caveat that I did not as the trial court had the benefit of seeing or hearing the witnesses as they testified.

The issue before court to my mind was not confirmation of the grant. I have combed through the original record as well as the record of appeal and I have yet to come across any application for the confirmation of the grant issued on 1st September, 1997. I note though that the petition for the grant of letters of administration filed by he respondent was gazetted on 1st August, 1997 and the grant was issued on 1st September, 1997. On the very last day of the 30 days period required under the Probate and Administration rules for the objection to the grant of letters of administration to be raised. The speed with which the limited grant was processed and issued to the respondent raises some suspicion. Be that as it may, there was no application for the confirmation of the grant that would have given jurisdiction to the learned Magistrate to distribute the estate of the deceased as she did.

It should be recalled that on 3rd October, 1997, the appellant filed an application seeking injunctive orders against the respondent. The application sought to restrain the respondent, her servants, agents, workers from cultivating or doing any work on the suit premises until the court determines the person who should administer the estate of the deceased. That application came up for hearing on 18th November, 1997. Both the appellant and respondent orally submitted in support of and in opposition to the application and the learned Magistrate reserved the ruling for 25th November, 1997. On that day and staying with her tradition she delivered a short ruling in these terms;

"…**.this suit to be heard on priority basis as I am unable to grant application dated 17/11/97 without full evidence. Oral evidence to be adduced 3/12/97….."**

From the foregoing it is clear that the oral evidence was to enable the learned Magistrate to make a decision on the appellant's application dated 3rd October, 1997 and not 17th November, 1997 as

erroneously referred to in the proceedings. It was not for purposes of distributing the estate of the deceased, their being no application for confirmation of the grant filed. Again on this ground the appeal ought to succeed.

It would appear that the learned Magistrate's decision was informed by the concept of a trust. Although she does not come out categorically that the respondent was being given ½ of the suit premises on the ground that the deceased held the suit premises in trust for her husband it is however implicit in her decision. This was not the venue where a trust could be ventilated. A claim based on a trust can only be entertained by way of an originating summons. As correctly submitted by **Mr. Mbuthia**, the respondent should not have pursued a grant of letters of administration in the lower court but should have allowed the appellant to be appointed the administrator of the estate of the deceased and then file an originating summons for her claim based on trust. The court in proceeding as it did was in effect hearing the Succession Cause as though it was suit based on trust. This was wrong. Accordingly the subsequent confirmation of the grant and distribution of the estate with respondent as one of the beneficiaries was wrong in law.

Finally even on the merits of the case, it is noteworthy that the respondent did not at all cross-examine the appellant on his evidence. That being the case the appellant's evidence remained unchallenged and uncontroverted. Accordingly the learned Magistrate ought to have acted on it.

Be that as it may, I find that the appeal has merit. Accordingly I allow it and set aside the judgment of the lower court. However I am unable to declare the appellant the sole heir of the estate of the deceased as doing so will be premature in the absence of a formal application for the confirmation of the grant. Le the parties go back to the drawing board. I make no order as to costs since the dispute involves members of the same family.

Dated and delivered at Nyeri this 3rd day of June, 2008.

M.S.A. MAKHANDIA

JUDGE