



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 42 of 2001

SAMUEL KIHARA WAMBUGU.....APPELLANT

VERSUS

PETER GITAHI KAMAU.....RESPONDENT

(From original Judgment of the Senior Resident Magistrate's Court at Kangema (ABDUL EL-KINLDY – S.R.M) in S.R.M.SUCC. NO.20 of 1998 dated 9th April, 2001.)

J U D G M E N T

Samuel Kihara Wambugu, hereinafter referred to as “*the appellant*” was the petitioner whereas Peter Gitahi Kamau, hereinafter referred to as “*the respondent*” was the objector in the original petition for the grant of letters of administration intestate lodged in the Resident Magistrates Court at Kangema. By that petition, filed in court on 5th March, 1998 the appellant sought to be appointed the sole administrator of the estate of **Paul Mukua Kamau** who had passed on, on 10th July, 1989 in his capacity as a stepson. He indicated in the affidavit in support of the petition for letters of administration that the deceased had died intestate and left behind the following as surviving him:-

- (a) **Rhoda Wandia Mukua – Wife**
- (b) **Peter Gitahi Kamau (Respondent herein) – Brother**
- (c) **Gitonga Kamau – Brother**
- (d) **Samuel Kihara Wambugu – Step brother**
- (e) **Peter Mwai Wambugu – Step Brother**

In the assets section, the appellant deponed that the only asset that belonged to the deceased was land parcel **No.Mahiga/Kihome/386** whose estimated value was indicated as Ksh.400,000/=. The significance of this estimated value will become apparent later.

Contemporaneously with the filing of the petition, the appellant issued a citation to accept or refuse letters of administration to the survivors of the deceased aforesaid and an affidavit in support of the citation. On 11th May, 1998, the respondent filed an objection to the making of the grant and an answer to the petition. In the affidavit in support of the objection, the respondent questioned the jurisdiction of the court to hear the cause, also the suitability of the applicant to petition the court for the grant of letters

of administration intestate in view of the fact that the deceased had an immediate family i.e. the wife and brothers who should rank in priority to the appellant.

On 21st May, 1998, the appellant applied for the issuance of temporary letters of administration claiming that the survivors of the deceased had been cited but had not responded and had not filed any objection and that the cause had been gazzetted in the Kenya Gazette on 13th March, 1998 and 30 days had lapsed. The application came up for hearing before the learned Magistrate on 8th July, 1998. The respondent appeared and objected to the application. The learned Magistrate went ahead and made an order to the effect that **“Grant to issue jointly to the petitioner Samuel Kihara Wambugu and respondent Peter Gitahi Kamau. Confirmation within six months. Costs in the cause.”**

On 26th January, 1999, the appellant made an application for the confirmation of the temporary grant of letters of administration. In support of the application, he deponed that the identification and shares of all persons beneficially entitled to the estate of the deceased had been ascertained, determined and reached as follows:-

That 3.3 acres out of land parcel **Mahiga/Kihome/386** be registered in the name of the respondent whereas 1 acre out of the same parcel of land be registered in the names of the appellant and **Peter Mwai Wambugu** jointly.

On 3rd March, 1999 when the application came up for hearing, the learned Magistrate stood over the cause generally to enable all the survivors of the deceased to avail themselves in court. It was not until 6th September, 2000 that the matter again came up for hearing. Although the respondent and the other survivors of the deceased had not filed any affidavit of protest to the application, nonetheless the learned Magistrate ordered for the formal hearing of the application with both the appellant and the respondent testifying together with their witnesses. This in my view was erroneous. There was no legal basis for the hearing of the application by way of viva voce evidence in the absence of an affidavit of protest filed in answer to the application.

The appellant testified that he was entitled to the 1 acre on his own behalf and on behalf of his brother as the deceased had always held that portion of the land in trust for his deceased father. As for the respondent, he testified that he did not desire any portion of the land. He only wanted to ensure that the land went to the survivors of the deceased. Having evaluated the evidence, the learned Magistrate reached the conclusion thus:

“.....In my opinion the only rightful inheritor of the deceased is his spouse. The land should therefore be registered in the name of the deceased’s wife. Thereafter she can decide whether to allow the petitioner to continue living on that land.....”

That holding provoked this appeal. By an amended memorandum of appeal dated 2nd May, 2008, filed through **Messrs Nderi & Kiingati Advocates** the appellant impugns the learned magistrate decision on the following 9 grounds:-

- 1. The learned Senior Resident Magistrate erred in law and in fact in not looking into the totality of the whole matter and failing to address himself on all the issues raised by the appellant in his pleadings and during the hearing to enable him to arrive at a just conclusion.**
- 2. The learned Senior Resident Magistrate erred in law and in fact in giving judgment in favour of a 3rd part who was not party to the proceedings before him and who even after being summoned on several occasions to appear in court declined to do so.**
- 3. The learned Senior Resident Magistrate erred in law and in fact in addressing himself to matters that had not been put before him for determination and further on matters that he had no jurisdiction to determine.**

- 4. The learned Senior Resident Magistrate erred in law and in fact in giving judgment in total disregard to the provisions of the Succession Act.**
- 5. The Senior Resident Magistrate erred in law and in fact in acting ultra vires his powers by entertaining matters pertaining to Trust and adverse possession and giving a decision thereto which was contrary to the provisions of law. As provided under section 48 law of Succession Act when the apparent value of the estate had already been declared at Ksh.400,000/=.**
- 6. The senior Resident Magistrate erred in law and in fact in failing to appreciate the fact that the Resident Magistrate had no power of Attorney to speak on behalf of the deceased's wife and therefore his evidence was not be regarded by the honourable court as being that of the deceased wife.**
- 7. The Senior Resident Magistrate erred in law and in fact in failing to appreciate the fact that the appellant had lived on the land in question for over 40 years without any interference from anybody and he was therefore entitled by adverse possession to inherit and or acquire the same.**
- 8. The learned trial Magistrate erred in making a finding against the weight of evidence that there was no trust.**
- 9. The learned trial Magistrate erred in assuming there was a protest to the confirmation and proceeding to hear the same when none existed to warrant the hearing as he did.**

When the appeal came up for hearing, both **Mr. Nderi** and **Mr. Wachira** learned counsel for the appellant and respondent respectively agreed to argue the appeal by way of written submissions. The court was not averse to the idea. Accordingly a consent to that effect was recorded. Subsequent thereto, parties filed their respective submissions which I have carefully read and considered.

In my view this appeal can easily be disposed off on only one issue – jurisdiction. The jurisdiction of the magistrate's court to hear and determine a succession cause is donated by *section 47* of the Law of Succession Act. That section allows a magistrate's court to entertain a succession cause for an estate whose value does not exceed Ksh.100,000/= and where there is no High court within the local limits of the jurisdiction of the subordinate court. As I indicated earlier, the appellant in his own affidavit in support of his petition for the grant of letters of administration intestate put the value of the land the only asset of the estate at Ksh.400,000/=. By virtue of this value of the estate of the deceased, the jurisdiction of the learned Magistrate to hear and determine the cause is completely ousted. The learned Magistrate ought to have downed his tools immediately. I do not think that the learned Magistrate was not aware of this fact. If he had any doubts, they must have been put to rest when the respondent in his statement of objection raised the issue of jurisdiction in clear and unambiguous manner. Once the issue was raised, it behoved the learned Magistrate to deal with it first before he could proceed with the matter any further. The respondent in his submissions has not seriously challenged this issue. He has merely glossed over the same. He takes the view however that it is the appellant who chose to file the matter in the magistrate's court whilst knowing very well that there was a High Court in Nyeri. He cannot now turn around and raise the issue of jurisdiction. In essence the respondent is raising the issue of estoppel.

As I have said in the past and I will say it now again, estoppel cannot be used to confer jurisdiction where there is none. Nor can it be used to oust jurisdiction. Estoppel cannot be used to override clear provisions of law, an act of parliament nor can it be used to override or subvert the law. In the circumstances of this case the value of the estate of the deceased was put at Ksh.400,000/= well beyond the jurisdiction of the Magistrate's court in succession matters. That being the case the proceedings were a nullity and I so hold. The consequence of my so holding is that the appeal is allowed and the judgment of the lower court is set aside. In substitution thereof I order the dismissal of the cause for want of jurisdiction. Because the parties involved are relatives, I will make no orders as to costs in this appeal as well as in the cause in the subordinate court.

Dated and delivered at Nyeri this 9th day of October, 2008.

M.S.A. MAKHANDIA

JUDGE