



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL 40 OF 1999**

**ELISHIBA WANJIRA WANGOMBE.....APPELLANT**

*Versus*

**MUTHONI MUKOMO )**

**ELIZABETH NJOKI KIMARU).....RESPONDENTS**

***(Being appeal from the Ruling of the Principal Magistrate J. S. Mushelle in Nyeri S.P.M.C.C. No. 225 of 1984 on 6/4/99)***

**JUDGMENT**

The Appellant was, during the subsistence of this case at the lower court, substituted for the original deceased Plaintiff. The deceased Plaintiff was the Appellant's mother. The Appellant's claim in the Lower Court is that the Respondents hold the property **IRIAINI/KIAGUTHU/115** in trust for her. The Appellant sought that that suit property be divided into two with one share being given to her. The Appellant was aggrieved by the Lower Court's judgment whereby her case was dismissed and has accordingly preferred this appeal.

Appellant in her evidence before the Lower Court stated that the Respondents are registered as owners of the suit property on their own behalf and in trust for her. She further stated that she and the original plaintiff had been in occupation of the suit property for 20 years. She therefore sought that she be given half portion of that land. On being cross-examined Appellant confirmed that she was aware of succession cause No. 47 of 1974 at Karatina Court. The original Plaintiff gave evidence in that succession cause. The succession cause related to the Estate of her late father who was married to the original plaintiff and also to the mother of the 1<sup>st</sup> Respondent. The Appellant called witnesses who confirmed that the original plaintiff was one of the wives of Makomo, who was also married to the mother of the 1<sup>st</sup> Respondent. They stated that the suit property should have been divided amongst the two wives and accordingly that the Appellant should get half of that land whilst the 1<sup>st</sup> Respondent should get the other half on behalf of her mother. The Respondents on their part in evidence at the lower court stated that her father's Estate was the subject of succession cause No. 47 of 1974 proceedings of which she produced as exhibit in the case. The witness called by the Respondents stated that he was a witness in the succession cause No. 47 of 1974 where it was decided that the 1<sup>st</sup> Respondent would be registered as the owner of the suit property. The witness confirmed that the original plaintiff was present in court when the decision was made in the succession cause and did not complain about that decision. Having heard that evidence the Learned Magistrate dismissed the Appellant's case found that the succession cause decided the person who was to inherit the suit property, that is the 1<sup>st</sup> Respondent. The court also found that the Appellant's possession of land was given to the sons of the original plaintiff and accordingly she had no claim over the suit property. The Learned Magistrate therefore rejected the Appellant's claim. The Appellant argued the following grounds before me:

***1. The Learned Principal Magistrate erred in law by hearing and pronouncing judgment in Nyeri Civil Case No. 225 of 1984 when he had no jurisdiction to do so under the land Disputes Tribunals Act. Act No. 18 of 1990.***

**2. The learned Principal Magistrate erred in law in dismissing the plaintiffs case when there was another subsisting judgment dated 21.5.87 which judgment has not been appealed against.**

**3. the learned Principal magistrate erred in law and in fact by concluding that the Appellant's mother's share of the suit land was given to her 2 sons when there was no proof of such disposition.**

**4. The learned Principal Magistrate erred in law and in fact by failing to appreciate that a trust existed between the Appellant and the Defendants.**

In respect of 1<sup>st</sup> ground of Appeal, I have considered the arguments of counsel and the pleadings hereof. This ground of the Appellant is rejected. The Appellant's claim in the lower court related to the alleged Trust. That being so the Land Dispute Tribunal did not have jurisdiction to entertain the same. Section 3 of The Land Dispute Tribunal Act sets the Limits of the tribunal's jurisdiction.

In respect of the second ground of appeal, the judgment of 21<sup>st</sup> May 1987 giving effect to the Arbitration award was set aside by the court on 8<sup>th</sup> July 1997. The judgment was set aside as the court entertained the 2<sup>nd</sup> Respondent's application dated 24<sup>th</sup> June seeking to be joined in the suit. Accordingly therefore the second ground of appeal is rejected.

In regard to the third ground of appeal, I find that it is indeed correct that there was no basis from evidence upon which the Learned Magistrate concluded that the original plaintiff's son received a portion of land. But having so found I am of the view that such error on the Learned Magistrate cannot be a basis of over turning his/her judgment. The Magistrate correctly found that no trust had been proved and further that the issue of who was to inherit the suit property was decided in the succession cause which the Appellant and the original plaintiff attended and also gave evidence. In the end therefore I find that the Appellant's appeal fails and the same is hereby dismissed with costs to the two Respondents.

***Dated and delivered at Nyeri this 29<sup>th</sup> day of June 2007***

**MARY KASANGO**

JUDGE