



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

**Civil Appeal 67 of 2001**

**STANLEY KIHARA MUCHUNGU ..... APPELLANT**

**VERSUS**

**PRISCAH WANJIRO MUCHUNGA ..... RESPONDENT**

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

This appeal relates to the Estate of MUTHIRIMI KAGWATHI deceased. The deceased was married to two wives. The first wife is called Priscah Wanjiru Muchunga, the Respondent in this appeal. The second who is deceased was called Beatrice Wanjiru Muchunga. On the death of Muthirimi Kagwathi, Priscah Wanjiru, hereinafter called the Respondent petitioned for a grant in respect of that estate. In so petitioning she named the following as surviving the deceased.

Prisca Wanjiru Muchunga – widow

Stanley Kihara Muchunga – son – 2<sup>nd</sup> wife

Josphat Njunga Muthurimi – son – 2<sup>nd</sup> wife

Thuo Muthurimi – son – 2<sup>nd</sup> wife

Ngurumba Muthurimi – son – 2<sup>nd</sup> wife

Respondent stated that the asset of the deceased was Loc. 19/858 but later amended in original record to No. 2271. On 14<sup>th</sup> February 2000 an objection to making grant was filed by Stanley Kihara Muchunga. The grounds of his objection were:

**“(a) The petitioner failed to disclose to the Honourable Court in Form 5 that there are other properties belonging to the deceased namely Kenya Post Office Savings bank A/C No. KYYY 6168, and 10 shares with Kangema Farmlands Limited.**

**(b) The act by the Petitioner to disclose to the Honourable Court the said properties of the deceased is fraudulent and intended to dis-inherit the Objector and other survivors.**

**(c) The petitioner who is the mother of the Objector and elderly (sic) cannot be trusted to administer the estate, of the deceased fairly”.**

On an application of the Respondent for a grant to be issued the objector stated in court on 8<sup>th</sup> March

2000:-

**“The land was left for two ladies her and my mother. The deceased had two wives. My mother later passed away. So she and my mother can share this land.”**

The Respondent in response stated:-

**“I and his mother can share the land equally.”**

It ought to be noted that the mother of the objector by then was deceased. The court proceeded to order that the grant be issued to both the Objector (Appellant in this appeal) and the Petitioner (the Respondent in this appeal). When the matter was listed for confirmation of grant objection was raised by Stanley Kihara, Josphat Njunga, Thuo Muturimi. The court ordered that the matter be heard by way of viva voce evidence. The Respondent in her evidence stated that she was the first wife of the deceased while Beatrice Wanjiru deceased was the second wife. That Beatrice Wanjiru passed away in 1999 while the deceased died in 1996. Beatrice Wanjiru (deceased) had six children, four boys and two girls. She stated that she had four daughters. She further stated that the deceased had companies and parcel of land No. 858 which he gave his sons of the second wife during his life time. On subdividing the land to give those sons the deceased retained a portion of land and the Respondent said that it was the portion she was seeking to be registered in her name. She also requested that the shares in Kangema and post bank be registered in her name. The protestors through the evidence of Stanley Kihara he said that their deceased father gave each one of them their share of land during his life time and the fifth portion of that land was registered in the deceased's name which was for his use and his two wives. When he passed away the two wives shared the use of that land and when the second wife died the Respondent effused to share the land with the protestors. He however stated that the deceased warned them not to interfere with that portion. It was also clear from his evidence that the protester's concern is that the Respondent's daughters are all married and if the Respondent was to die the daughters may lay claim over the property. In his considered judgment the learned magistrate he upheld the wishes of the deceased and ordered that **Loc. 19/RWATHIA/2271** be registered in the name of the Respondent absolutely and the ten shares of Kangema Farm Lands and the Post Bank **A/C No. KYYY 6168/1** be shared equally between the Respondent and the protestors. That decision aggrieved the protestors who have preferred this appeal. The protestors have the following grounds of appeal:

- (a) The learned magistrate erred both in law and fact in involving some other parcels of land which did not form the estate of the deceased in disinheriting the other beneficiaries.**
- (b) The learned magistrate erred in law in disinheriting the appellant and the other beneficiaries while they had a right to inherit their father's estate.**
- (c) The learned magistrate erred in law in failing to invoke sections 35 and 40 of the succession Act (Cap 160) when distributing the deceased's estate.**
- (d) The learned magistrate erred in law and fact in confirming a grant in a succession cause which was filed wrongly.**
- (e) The learned magistrate erred in fact in failing to note that the respondent had agreed in page 2 of the proceedings for the estate to be shared equally between herself and the appellant's mother.**

The Appellant's counsel argued that the Respondent was only entitled to a life interest of he parcel of land in the deceased's name and made reference to section 35 of the Law of Succession. He therefore suggested that the land be divided amongst all the protestors/Appellants and the Respondent. It ought to be noted that the Appellant's clearly stated that the wishes of the deceased were that the land 2271 be for him and his wives. The Appellants after all had received parcels of land from the deceased as gifts intervivos. Section 42 of the Law of Succession provides that such gift ought to be taken into account with that provision coupled with the wishes of the deceased that the sons were to have nothing to do with property 2271. I find that I am in agreement with the finding of the learned magistrate. Also considering

that in accordance with the Kikuyu customary law in polygamous homes the estate is divided amongst the houses, the Respondent being the head of the first house is entitled to share in the shares of farm land of Kangema and also the proceeds of the post office account. I find no reason presented by the Appellants why the lower court's judgment should be interfered with.

Accordingly the appeal is dismissed with costs being awarded to the Respondent.

**Dated and delivered at Nyeri this 13<sup>th</sup> day of July 2007**

**MARY KASANGO**

**JUDGE**