REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 13 OF 1995

NAHASHON MWANIKI…..…………...…………...……………APPELLANT

Versus

WANDAKA NDIMITU……………....…………………...…..….RESPONDENT

(Being appeal from the Judgment of the senior Resident Magistrate Kerugoya F. F. Wanjiku dated 6th October 1992)

JUDGMENT

This appeal emanates from Kerugoya Magistrate's court where there was filed a petition in respect of the estate of NDIMITU-NGITUBI. The property of the deceased estate is NGARIAMA/MERIKI/374 hereinafter called the estate property. The Respondent was a petitioner in that succession and the Appellant was the objector to grant of letters of administration to the Respondent. The objection proceedings went into a full hearing when the court dismissed that objection and made a finding that the estate property would be inherited by the Respondent. That finding is the subject of this appeal. The appellant has filed the following grounds:

1. The learned Senior Resident eared in ignoring the evidence of the appellant as to the relationship between the Respondent and the deceased.

2. The learned Senior Resident Magistrate erred in her finding that the land in issue was given to the Respondent in the lifetime of the deceased.

3. The learned Senior Resident Magistrate erred in finding that the appellant cultivates the land in issue unlawfully.

4. The learned Senior Resident misdirected herself in her reasoning as to why the land in issue belongs to the Respondent.

At the beginning of the hearing the parties consented to the following issues "the deceased died intestate and that the applicant (Respondent herein) and the Objector (Appellant herein) are sons of the deceased. And the deceased was subject to the Kikuyu Customary Law". The Respondents evidence stated that the appellant is his brother. He has another brother called Sabastian Mugo. The deceased was the father of the three of them. Two brothers were given land by the clan namely Mugo was given 10 acres and the appellant was given 15 acres. The estate property of six acres was allocated by the clan to the deceased who was to hold it in trust for the Respondent. He held it in trust because the Respondent was too young at that time. The Respondent said that he lives on the estate property and that he moved thereon on being requested by the deceased during his lifetime, who directed him to construct a house on that land. During their lifetime his deceased mother and deceased father were living on the Appellant's land. On the death of their father his mother moved to live with him. It is pertinent to note that during cross examination the Appellant did not question the Respondent on his relationship with himself and the deceased. That being the case the first ground of appeal would fail. The evidence of their relationship remained unchallenged and in any case they had recorded a consent in regard to that relationship. The appellant also did not cross-examine the Respondent on his evidence that he is residing on the estate property. P.W. 2 and 3 in the lower court confirmed that during demarcation in 1958 to 1959 the deceased who had two adult sons namely the Appellant and Mugo was allocated land which was registered in those two sons' names. The deceased was allocated by the clan six other acres which is the estate property. Those six acres the

deceased was to hold in trust for the respondent who by then was too young. PW.4 was also a clan member and a close friend of the deceased. He said that in his life time the deceased had confided in him that the estate property belonged to the Respondent and that the deceased did not wish the Appellant to take it away from the Respondent. The appellant in his evidence denied that the Respondent is a son of the deceased or that he is his brother. This was despite the consent recorded before the trial. The Appellant did however admit receiving land from the clan. The basis of him denying the Respondent from petitioning for letters of administration was because he alleged that he was not a son of the deceased. The appellant said that he cultivates the estate land. This however was not put to the respondent when he was cross- examined. He finally stated that if he is allowed to inherit the six acres of the estate property he would give the respondent one acre of it. The second ground of appeal fails because there is clear evidence of the three witnesses who were all clan members that the estate property had been given to the Respondent although registered in the deceased name. In respect of ground 3 of appeal the appellant failed to cross examine the Respondent on who resides on the estate property. The statement that the appellant was cultivating that property was only made after the court put a question to the appellant. It should be noted that the first court had an opportunity to hear and assess the witnesses that gave evidence. There is no material before court to lead the court to upset of the finding of the lower court. The lower court made a finding that the respondent is in occupation of the estate property. On the 4th ground of appeal the lower court had that opportunity to hear and assess the testimony before it. The Respondent called three witnesses in support of his case. The appellant did not call any witness The court was therefore entitled to make the finding that it made. The court's judgment therefore is that the appeal fails and the same is dismissed with costs to the respondent. The grant issued in the lower court can immediately be confirmed on an application by the Respondent. In making the finding that the appeal cannot succeed the court finds that the Appellant did get property during the life time of the deceased.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 2nd day of November 2007.

By: M. S. A. MAKHANDIA

JUDGE