



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 30 of 2005**

**CHARLES MWAURA MUNGAI ..... APPELLANT**

**VERSUS**

**REBECCA WAIRIMU MUNGAI ..... RESPONDENT**

**JUDGEMENT**

A Grant of Letters of Administration to the estate of the late Mungai Karuga (deceased) was issued to Rebecca Wairimu, a surviving widow by then, and Charles Mungai Mwaura, a son of the deceased by another wife who had died before succession was commenced. The Grant was issued by S.N Mutuku, Ag. Resident Magistrate, Thika, at the time.

When an application for confirmation of Grant was made, an issue, in fact an objection arose as to the distribution of the estate between the 2 households. The learned Magistrate decided to call for oral evidence to determine this point. The record from Thika Magistrates court shows how many witnesses were called and what they said. At the end of it all, the Magistrate wrote a considered judgment which now forms part of the court record and also the record of appeal. It is dated 24<sup>th</sup> February 1994.

The judgment shows that the learned Magistrate applied Kikuyu customary law in distributing the estate. This was because the deceased died in 1979, before the coming into effect of the Succession Act Cap 160, Laws of Kenya.

According to the Kikuyu Customary Law, the Magistrate found that the property is shared equally amongst the houses. She also found that the 2 properties left behind belonged to the deceased and therefore formed part of the estate. This was contrary to the evidence of Rebecca Wairimu and her daughters who asserted that they had bought the property known as Makuyu/Kimorori/Block 4/207. The Magistrate ruled against Rebecca's family on this point when she declared that this piece of land formed part of the deceased's estate, and therefore had to be taken into consideration during distribution of the estate, which she went ahead to do in page j3, at the last paragraph, and page j4, where she also confirmed the grant.

Charles Mwaura Mungai who represented his late mother's household was aggrieved by the Magistrate's findings, and filed the following appeal, citing 6 grounds of appeal as appears in the petition of appeal filed.

The 2 learned advocates agreed to file submissions for the determination of this appeal.

The contention in the appeal, as shown in the written submissions by Mr. C.K Mwihi for the appellant, Charles Mwaura Mungai, was the Magistrate's decision to divide the deceased's estate equally between

the 2 households, when, according to them, the deceased had kept the 2 families “separate” in 2 different portions of land – i.e. the appellant’s mother in Loc. 5 Kabati/168, whilst Rebecca and her daughters had MAKUYU/KIMORORI/BLOCK IV/207, and that Rebecca’s family had even gone ahead and sold part of their land.

According to Mr. Mwihi, the estate of the deceased, the land L.R Loc.5/KABATI/168, should be given to Charles solely. It measures about 8.2 acres, yet the Magistrate gave a part of it, namely 2.85 acres, to the household of Rebecca Wairimu Mungai.

Counsel for the family of Rebecca Wairimu, M/s Waithira Mwangi advocate, too attacked the learned Magistrate’s finding that the land parcel No. L.R Makuyu/Kimorori/Block 4/207 (measuring 2.5 acres) was part of the deceased’s estate, though it was registered in the name of the daughter of Rebecca, and therefore not free property which the deceased could dispose of.

Because of the Magistrate’s finding that the Makuyu property formed part of the deceased’s estate, and went ahead to award it to Rebecca’s family, the Magistrate in an effort to achieve equality in distribution between the 2 households gave a portion (2.85 acres) of the bigger land being L.R Loc.5/Kabati/168 to Rebecca’s family, who did not complain but accepted it.

The advocate found no evidence in the proceedings to show that the deceased bought the Makuyu property for Rebecca and therefore separated his 2 families.

The learned Magistrate confirmed in the judgment that distribution of the estate was in accordance with Kikuyu customary law. In that respect, therefore, counsel for Rebecca’s family M/s Waithira Mwangi submitted that, “**the issue of presence or absence of sons in a household is of no bearing in this case**”, as the law only states that property has to devolve to the 2 households in 2 equal shares. No evidence was adduced in the lower court to support the submission by Mr. Mwihi that “**the unequal number of children in each household as well as the presence or absence of sons in a household, had to be taken into account in the distribution of the estate**”.

The issue of whether one of Rebecca’s daughters namely Janet was married to one Mburu, and therefore not entitled to be considered as part of Rebecca’s household during the distribution, was dealt with by the learned Magistrate at page j3 of the judgment she rejected the claim.

I have considered the evidence from the lower court as well as the judgment of the learned Magistrate’s delivered on 24<sup>th</sup> February, 1994, along side the grounds of appeal filed, and I have come to the conclusion that the appeal has no merit. I find no reasons to interfere with the judgment of the learned Magistrate, and I proceed to dismiss the appeal with costs to the respondent.

**Dated at Nairobi this 24<sup>th</sup> day of March, 2006.**

**JOYCE ALUOCH**

**JUDGE**