



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 82 of 2003

SAMUEL GITHU WAIHENYA 1ST PLAINTIFF

CHARLES GITITU WAIHENYA 2ND PLAINTIFF

VERSUS

ROSE NJERI HIUHU 1ST DEFENDANT

KURIA HIUHU 2ND DEFENDANT

(Being an appeal from the judgment of the Resident Magistrate Nyahururu, C.N. Sifuna, Principal Magistrate's Court Succession Cause No. 83 of 2001 delivered on 28th April 2003)

JUDGMENT

Both the 1st and 2nd appellants were objectors in Nyahururu Succession cause No.83 of 2001. Being dissatisfied with the judgment of the Resident Magistrate (C.N. Sifuna) which was delivered on 28th April 2003, they have filed this appeal.

The appellants have raised four grounds of appeal which were all argued together during the presentation of this appeal.

Principally, the appellants complain that the trial magistrate erred in law by making a finding from evidence that an oral will which was not pleaded, and moreover this was a petition for letters of administration intestate not a probate for oral will and thus Counsel argued it was wrong for the trial court to base its findings on this evidence.

The magistrate erred by ignoring the evidence that the appellants were also ranked in priority with the respondents.

The facts that have given rise to this appeal may be stated briefly;

The deceased to whom this estate relate the late Iba Githu (*deceased*) died on 4th January 1977 while aged seventy eight 78 years. Rose Njeri Hiuhu and Kuria Hiuhu Githu petitioned for the letters of administration on 10th July 2001. According to a letter dated 4th July 2001 written to the court to introduce the petitioners by the Chief of Kenyaga Location, the Chief states that the deceased was survived by the family of his elder brother who is also deceased.

The deceased left property known as Plot number 232 Muruai Scheme which is under the Settlement Fund Trustee. The appellants filed an objection to the granting of the letters of administration and simultaneously cross petitioned for the grant of letters of administration. Directions were given that the matter should proceed to hearing by way of oral evidence. The highlights of the evidence adduced before the trial magistrate is that the deceased herein was not survived by a wife or children. Both the petitioners and objectors belong to the houses of his late brothers. The petitioners are the wife and son of Hiuhu Githu, the deceased elder brother and the objectors are sons of Waihenya Githu. These facts are not disputed. There was evidence that the 2nd petitioner used to live with the deceased and some witnesses notably Peter Kamau Mukora, PW3 and Nduati Ole Kioko testified that the deceased used to confide in them individually whereby he indicated to each of them that if he died his plot should go to Hiuhu that is the second petitioner.

After considering the evidence the learned trial magistrate held that it is the 2nd Petitioner who is entitled to the deceased land. It is important to high light part of the judgment.

*“All along there is no evidence to indicate that the objectors participated in anyway in taking care of the deceased’s welfare and much as **Section 66 of Cap 160** grants them a right to inherit part of the deceased estate land. In my considered view and in the best interest to all the parties, in particular in view of the fact that both objectors have land of their own and the 2nd petitioner has none, I find that both objectors are not entitled to inherit any land from their uncle. Evidence indicates that it was left to the 2nd petitioner’s father who is since deceased. The 2nd petitioner cared for the deceased during his lifetime. I see no reason why the two objectors should inherit part of the deceased’s land to the exclusion of their other cousins who have not sought to have a share yet they too are by law entitled equally as evidenced...”*

On the basis of the above findings, the learned trial magistrate dismissed the objection and went ahead to issue a certificate of confirmation of the grant even if no application had been filed under the provisions of **Section 71 of the law of Law of Succession**.

I have carefully evaluated the proceedings, as well as the judgment of the trial court this being the first appellate court it is imperative that I subject the whole evidence to my own scrutiny and come up with an independent judgment. (*See **Section 78 of the Civil Procedure Act***).

Firstly, this was a petition for the grant of letters of administration intestate. If the petitioner intended to rely on evidence of an oral will the same should have been pleaded in the petition or better still, this should have been a petition for grant of letters of administration for an oral will.

Secondly, the trial court made a finding that both the petitioners and objectors are related to the deceased and are therefore ranked in priority. The trial Magistrate despite appreciating the provisions **Section 66 of Cap 160** proceeded to declare that only the 2nd petitioner and his household should benefit and inherit the deceased entire share. In this aspect, the learned magistrate made an error and should have followed the provisions of **Section 39 (1) (c) of Cap 160** which provides;

“Where an intestate has left a surviving spouse or children, the next intestate shall devolve upon the kindred of the intestate in the following order of priority –

- a) *father, or if dead*
- b) *mother, or if dead*

c) *brothers and sisters, and any child or children of deceased brothers and sisters in equal shares*
....”

It is clear the deceased was survived by the two families of his late brothers and this estate should be shared among the two families.

Evidence was led that the 2nd petitioner was looking after the deceased prior to his death and that he was living on the deceased land. Indeed the deceased had taken him as his own son. That being the case, the 2nd petitioner was a dependant of the deceased and in addition to inheritance like everyone else consideration should have been taken of this special relationship with the deceased and a provision for his dependency should be made as provided for under part III of the Law of Succession.

In this regard the 2nd petitioner should be allocated one (1) acre as provision for dependency. The rest of the six acres be shared equally between the houses of the petitioner and objectors.

The judgment of the lower court is hereby set aside and substituted with the following orders;

1) *Letters of administrations be issued to both the petitioners and objectors who shall jointly or severally apply for confirmation.*

2) *The deceased as estate shall be shared as follows: -*

(a) *One acre to the 2nd petitioner being provision for dependency.*

(b) *Three or thereabout acres to the petitioners to be held in trust of all the children of **Hiuhu Githu.***

(c) *Three or thereabout acres to the objectors to be held in trust of all the children of **Waihenya Githu.***

This being a family matter every party should bear their costs. The lower court file be returned to Nyahururu Principal Magistrate's Court for purposes of completing the succession case.

It is so order.

Ruling read and signed on 30th May 2006.

MARTHA KOOME

JUDGE