REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 65 of 2000

NDUMBI GATHAE……....……..APPELLANT

Versus

WAMAITHA MUTONYO

WANGAMWA NGARI....……...RESPONDENTS

(Being an appeal form the judgment of

J.B.A. Olukoye, Ag. Resident Magistrate,

dated 18th May, 1999, in the Principal

Magistrate's Court, Muranga, Succession

Cause No. 245 of 1994)

JUDGEMENT

Although the memorandum of appeal in this case says that the Appellant's appeal is against the trial magistrate's judgment dated 8th March, 1999, I have looked for that judgment and failed to find it in the record of appeal filed in court in this matter. But if it is the one starting at page 44 of the record of appeal, that judgment was dated 18th May, 1999 and it is the one I am assuming is the judgment in question.

That judgment was in a Succession Cause filed by the Appellant in the Principal Magistrate's Court at Muranga and the Respondents had first come into the proceedings as objector under rule 17 (1) of the Probate and Administration Rules and ended up as protesters under rule 40 (6) of the Probate and Administration Rules.

The objection was settled by the Appellant and the First Respondent being made Co-Administrators and there was no appeal against that court decision which appears to have been by consent of the parties. The protest came at the stage of confirming the common grant when the issue of the rightful beneficiary or beneficiaries in the estate of the deceased arose.

While the appellant claimed he was the sole beneficiary, the two Respondents opposed it asserting that

they, or their sons through them, were the only beneficiaries. An important question was how the parties were related to the deceased. The Appellant claimed to be the deceased's half brother. It was not disputed that the Respondents were daughters of the deceased but it was the Appellant's case that since the two daughters were each married, neither of them was entitled to be heir to any part of the estate of the deceased Under Kikuyu Customary law. It was further argued for the Appellant that since the deceased had died on 29th May, 1975 being a date before the Law of Succession Act Cap 160 Laws of Kenya, came into effect, section 38 of the Law of Succession Act did not apply. Instead, it was section 2 (2) of the Act which applied. It states:

"the estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but never the less the administration of their estate shall commence or proceed so far as possible in accordance with this Act."

In the matter therefore Kikuyu customary law had to apply instead of section 38 of the Law of Succession Act which stipulates that where an intestate has died leaving a surviving child or children but no spouse, the net intestate estate

"shall-----devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

The deceased was survived by his two daughters only. No spouse. But since each daughter was married and the deceased died before the commencement of the Law of Succession Act, Kikuyu Customary Law had to replace section 38 – by virtue of section 2 (2) of the Act.

The learned trial magistrate carefully considered that issue together with other related issues which have not been stressed in this appeal and granted the protest so that the two Respondents became the only beneficiaries in the estate of the deceased. The Appellants claim to be a beneficiary was rejected although it had been stressed on his behalf that as the nearest male relative to the deceased, he took precedence over the female daughters of the deceased under Kikuyu customary law and he was therefore the only beneficiary. Male sons of the two daughters who were blood grand sons of the deceased were taken, by the Appellant, to be people whose relationship to the deceased was further away from the deceased than was the relationship between the deceased and the Appellant.

The deceased had had no son and the evidence on Kikuyu customary law was from people who could not be referred to as experts in Kikuyu customary law. In my view, this was a situation where the evidence of an expert in Kikuyu Customary law was necessary to let the court know whether there was actually in existence Kikuyu Customary Law governing such a situation and to prove clearly before the court, who among the competing male relatives of the deceased, being the Appellant on the one hand and the deceased's grandsons on the other, was in relationship according to Kikuyu customary Law, closer to the deceased than the other and was therefore entitled to inheritance. That expert evidence was sadly lacking. Who is a closer relative in Kikuyu customary Law? A half brother with no clear connecting evidence or a grandson from a daughter? Of the deceased?

The Respondents were saying that even if the two of them did not qualify to inherit because they were married, their respective two sons qualified under Kikuyu customary law as the nearest male relatives to the deceased. They therefore asked the court to dismiss the Appellant's claims so that the Respondents get the judgment on behalf of the two grandsons of the deceased. The learned Resident Magistrate granted the Respondent's plea and it has been argued in this appeal that the grandsons who were adults by then, ought to have been joined as parties in the proceedings. In my view I do not think that was necessary in the circumstances of this case , as the Respondents effectively represented interests of their sons

In the absence of the evidence of an expert in Kikuyu Customary law, I am satisfied the learned magistrate did her best in applying Kikuyu Customary law and I have no good reason to interfere with her decision when I have had no opportunity to hear and see even a single of the witnesses she heard and saw. Accordingly, this appeal is hereby dismissed with costs to the Respondents.

Dated this 29th day of May, 2006.

J. M. KHAMONI

JUDGE