



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal 31 of 2001

NJUHA MUGO)

TERESIA WANJIKU NGANGA)
PLAINTIFFS

VERSUS

TABITHA WAIRIMU MUTHANGA
DEFENDANT

(Appeal from the original judgment and decree Senior Resident Magistrate's Court at Kangema Succession Cause No. 27 of 2000 dated 14th March 2001 by Mr. Abdul El Kidiy – P.M. – Kangema)

J U D G M E N T

This is an appeal arising from succession cause No. 27 of 2000 relating to the estate of the late Mugo Muthanga who died on 6th September 1970. Njuha Mugo a son of the deceased initiated the process in the Senior Resident Magistrate's Court at Kangema by filing a petition for letters of Administration Intestate on 3rd March 2000. A few days later Tabitha Wairimu Muthanga a widow of the deceased's son Muthanga Mugo (also deceased) filed a caveat. Thereafter a gazette notice was duly published giving notice of the petition filed by Njuha Mugo.

On 22nd May 2000 Njuha Mugo applied to be issued with letters of Administration through summons (general form) which was served on Tabitha Wairimu Muthanga. The parties appeared before the Senior Resident Magistrate and Tabitha Wairimu indicated that she was objecting to the letters of administration being issued to the Petitioner alone. Whereupon the magistrate ordered that the letters of administration be issued to the two jointly.

By summons filed on 30th November 2000 Njuha Mugo applied for confirmation of the grant. The same was served on Tabitha Wairimu. The parties again appeared before the Senior Resident Magistrate when Tabitha indicated to the magistrate that she was objecting to the confirmation. The magistrate then fixed the matter for hearing on 31st January 2001 on which day he proceeded to hear the evidence of the parties and their witnesses.

In a judgment which is not dated the Senior Resident Magistrate directed that the estate of the deceased which comprised of a 7.7 acre piece of land be distributed between the Petitioner and Tabitha Wairimu, the Petitioner getting 4 acres whilst Tabitha Wairimu getting 3.7 acres. The Petitioner and Teresia Wanjiku Nganga are aggrieved by this judgment and have now lodged an appeal citing various grounds.

Mr. Nzioki who appeared for the appellant submitted that the objection was raised orally contrary to

section 68 of the law of Succession Act, and that the laid down procedures for handling objections and protests as laid down in rule 17 and rule 41(1) of the Probate & Administration Rules were not followed.

It was further submitted that the trial magistrate erred in treating the objector as if she was not a wife of his deceased brother, and also failing to appreciate that the claim of the Respondent Tabitha Wairimu Muthanga was limited to 0.7 acres out of the 1st Appellants proposed share.

Mr. Wachira who appeared for the Respondent submitted that the appeal was defective as the 2nd Appellant was never a party in the lower court, and further there was no decree being appealed against. He maintained that no prejudice was occasioned to the parties by the oral objection as substantial justice was achieved by the hearing of the parties and their witnesses. He urged the court to find that the distribution was fairly done.

From the proceedings it is evident that no objection or protest was filed as provided under the law of Succession Act or Probate and Administration Rules. The question is whether this vitiated the proceedings before the trial magistrate and the confirmation of the grant of letters of administration intestate identifying the respective shares of the deceased's heirs.

It is clear from the Probate and Administration rules that before the court can consider an objection or protest to the issuance or confirmation of a grant the filing of an objection or protest is not only a mandatory requirement but must also be in the required format i.e. Form 10 in the case of Protest and Form 76 in the case of an objection. The court is required to give directions upon receipt of such formal objection or protest. Without the filing of the protest or objection the Petitioner cannot know the particular issues which are being raised. In this case this task was even more difficult for the Petitioner who called his evidence first without knowing what the protest was hinged on. I find that the trial magistrate erred in failing to follow the laid down rules and this prejudiced the 1st Appellant and vitiated the proceedings.

As for the 2nd Appellant she was included in the proposal for distribution as a beneficiary of the estate. The magistrate however made a specific finding that she was not entitled to inherit. She is therefore entitled to appeal against that ruling and was therefore properly enjoined.

For the above reasons I do hereby allow this appeal and set aside the orders made by the trial magistrate. I order that the file be referred back to the Senior Resident Magistrate's court at Kangema for the issue of confirmation of the grant and distribution of the deceased's estate to be determined in accordance with the Law of Succession Act and the Probate and Administration Rules.

Each party shall bear his own costs.

Dated signed and delivered this 20th day of July 2005

H. M. OKWENGU

JUDGE