REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 17 of 1991

FRASIA WANJIRU MAINA……..…….APPELLANT

VERSUS

THUKU MAGU KITHENYI……..……..RESPONDENT

JUDGMENT

The deceased, Lilian Wangui Thuku, (*hereinafter referred to as the deceased)* to whose estate these proceedings relate died on the 15th of March 1985. Thereafter Frasia Wanjiru Maina (hereinafter referred to as the petitioner) claiming to be the only child of the deceased, applied for letters of administration intestate before the Resident Magistrate's Court Nyahururu. The property of the deceased that she intended to inherit is parcel number ***Nyahururu/Silibwet/131***. She duly obtained letters of administration. Thereafter the said letters of administration were confirmed. The petitioner was issued with the certificate of confirmation of grant. After the certificate of confirmation of grant was issued, Thuku Magu Kithenyi (*hereinafter referred to as the objector*) made an application under the provision of **Section 76 of the Law of Succession Act** seeking to have the letters of administration issued to the petitioner revoked. He further prayed to be allowed to file notice of objection to the grant and answer to the petition out of time.

The objector made this application before the Resident Magistrate's Court sitting at Nyahururu inspite of the fact that the said Resident Magistrate's Court lacked jurisdiction to hear and determine such objection proceedings as provided by **Section 48(1) of the Law of Succession Act** which provides that:

> ***"Notwithstanding any written law which limits jurisdiction, but subject to the provisions of Section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings;***
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> ***provided that for the purposes of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all the disputes under this Act".***

The Resident Magistrate heard the objection proceedings and in the course of hearing the said objection proceedings made an order amending the affidavit which had been filed by the objector to change the name of the person he alleged to have been his father. The Resident Magistrate also heard evidence both from the petitioner and the objector. She also heard four witnesses who had been availed to the court by the objector. After hearing the said evidence, the Learned Resident Magistrate found that the petitioner had concealed material facts when she had applied for letters of administration by claiming she was the only child of the deceased. She revoked the letters of administration intestate which had been issued to the petitioner and further granted leave for the objector to file his objection out of time. The decision of the Learned trial magistrate as regards granting leave to the objector to file objection proceedings was unnecessary in light of her finding that indeed the objector was a son to the deceased. Having heard the witnesses who testified, the proper order that the Learned Resident Magistrate ought to have made, (the fact of the Resident Magistrate's lack of jurisdiction notwithstanding) was an order that both the petitioner and the objector should be the joint administrators of the deceased estate. No matter. The petitioner was aggrieved by the said decision of the Learned Resident Magistrate and filed an appeal to this court pursuant to the provisions of **Section 50(1) of the Law of Succession Act.**

In his memorandum of appeal, the petitioner faulted the trial Resident Magistrate for finding in favour of the objector after relying on the affidavit which had been irregularly amended and allowed in evidence by the said trial magistrate's court. The petitioner was aggrieved that the trial magistrate had allowed for additional evidence to be adduced contrary to the law resulting in the said decision against her. At the hearing of the appeal, I heard the submission made by Mr Muihia, Learned Counsel for the petitioner and Mr Kahiga, Learned Counsel for the respondent. Having heard the said submissions made, and also read the record of appeal in this case, the issue for determination by this court is whether the Learned trial magistrate erred in arriving at the decision that she reached, putting into consideration the procedure that she adopted in allowing additional evidence to be adduced and further, in determining that the objector was a child of the deceased.

As noted in this judgment, the trial Resident Magistrate did not have jurisdiction to hear and determine an application made under **Section 76 of the Law of Succession Act.** Further, the order that she issued pursuant to the said hearing established, on a balance of probabilities, that the objector was a child of the deceased. It was therefore unnecessary for the court to order the parties to this appeal to start afresh the objection proceedings. This court has considered several factors in the decision that it will hereintoafter. Due to the nature of the proceedings (*i.e. succession proceeding*) and also the fact that this case has been pending on appeal for a period of nearly fifteen years, this court will be constrained to consider the said evidence heard by the trial magistrate without jurisdiction and arrive at a final decision in respect of this succession proceedings.

This court has seen the need to invoke its inherent jurisdiction so as to do justice to the parties and spare them further additional costs that would result were this court to order that the said objection proceedings be set aside and the parties start their case afresh before the High Court. In reaching this decision, this court has been guided by the provisions of Section 50(1) of the Law of Succession Act which provides that;

> ***"An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final".***

I will therefore consider the said evidence adduced, re-evaluate it and reach a determination which, hopefully, would bring these proceedings to a close.

In the proceedings before the Resident Magistrate, evidence was adduced by the objector that he was the son of the deceased. He testified that his mother (the deceased) was married to one Maina Kimone who died about one month after the birth of the objector. Thereafter the deceased was married to a brother of her deceased husband called John Gathirimu. She conceived a child and gave birth to the petitioner. The objector testified that the petitioner and himself were both circumcised at the same time in the year 1948. The objector testified that although the petitioner's father and his father were different, their mother (*the deceased*) was one. The testimony of the objector was corroborated by the evidence of PW2 Daudi Kariuki Kibii and PW4 Wilson Mutuhumni Magu who testified that the petitioner and the objector were brother and sister born of one mother but different fathers. PW5 Ibrahim Wairagu confirmed the evidence of the objector and PW2 and PW3. PW5, a Church Minister baptized the deceased and also presided at the funeral ceremony during the burial of the deceased. He testified that he knew the petitioner and the objector to be brother and sister. PW3 Martha Wanjiru Daudi, the wife of PW2, testified that she knew the deceased since the time she was a maiden. She further testified that she had witnessed when the deceased gave birth to the objector. Later she was present as a birth attendant when the deceased gave birth to the petitioner. When the petitioner testified, she denied that she was related in any way to the objector. It was her evidence that the objector had brought the objection proceedings specifically to secure his inheritance of the deceased's estate to the exclusion of the petitioner on account of her being a woman.

Having re-evaluated the evidence adduced in the said objection proceedings, I do hold that the objector did establish that the deceased was his mother. His evidence was corroborated by the evidence of PW2 and PW4. Of particular importance was the evidence of PW3 who was present when both the petitioner and the objector were given birth to by the deceased. The evidence adduced established the fact that the

deceased conceived the petitioner and the objector by different fathers. As the estate to which these proceedings relate is that of the deceased mother of both the petitioner and the objector, the identity of the father of either the objector or the petitioner is irrelevant. This court having reached the finding that the petitioner and the objector are brother and sister declare that they are the dependants of the deceased within the meaning of **Section 29 of the Law of Succession Act**. I hereby order that that they shall jointly be issued with the letters of administration to the deceased estate. The said letters of administration are confirmed in their joint names. In the light of the history of this case, I hereby order land parcel number ***Nyahururu/Silibwet/131***, the sole property comprised of the deceased's estate be subdivided into two portions of land and shared equally between the petitioner and the objector.

In conclusion, I would state that the trial Resident Magistrate erred in allowing the objector to amend the affidavit that he had sworn. An affidavit being sworn evidence in written form cannot be amended. The contents of an affidavit can only be retracted by the deponent thereto upon swearing another affidavit. In the circumstances of this case, however, the petitioner was not prejudiced as she had an opportunity to cross-examine the maker of the affidavit – the objector. This matter being a succession cause, there shall be no orders as to costs. It is so ordered.

DATED at NAKURU this 11th day of November 2005.

L. KIMARU

JUDGE