



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 84 OF 1992

MAGDALENE NJERI KAMAU & ANOTHER APPELLANTS

VERSUS

KIZITO MATHERI RESPONDENT

An Appeal from the Original ruling in Succession Cause No. 66 of 1988 of the Senior Resident Magistrate's Court at Thika as consolidated with Succession Cause No. 312 of 1997 of the High Court at Nairobi – transferred for hearing at Thika – S. N. Mutuku (Mrs) Ag. Resident Magistrate, dated 27th day of February 1992).

IN THE MATTER OF THE ESTATE OF KINYANJUI MAINGI

(Deceased)

Issue:

Whether a stranger can be a beneficiary in the estate of a non relative deceased person.

JUDGMENT

This is an appeal from the original ruling in Succession Cause No. 66 of 1988 of the Resident Magistrate's court at Thika, Mrs S.N. Mutuku, Ag. Resident Magistrate, dated 27th February 1992.

The Appellants Magdalene Njeri Kamau and Veronicah Kanyi are represented by Mr. Wambugu Kariuki while the Respondent, Kizito Matheri, appears in person.

Five grounds of appeal are listed as follows: Firstly, that the trial magistrate erred in law in her evaluation of the evidence and the ruling is against the weight of the evidence.

Secondly, that the trial magistrate erred in law and in fact in ruling that the objector is entitled to a share of the deceased's estate while the entirety of the evidence did not reveal any degree of consanguinity whatsoever between the objector and the deceased.

Thirdly, that the trial magistrate erred in failing to address her mind to the fact that the objector being a stranger could not inherit from the deceased's estate neither under customary nor statutory law.

Fourthly, that the trial magistrate misdirected herself in reaching her decision on wrong interpretation and application of Kikuyu customary Law of inheritance; and

Fifthly, that without prejudice to the above, the trial magistrate had no jurisdiction to hear and make a ruling in this matter.

Briefly, the two Appellants and the Respondent, in May 1987 jointly petitioned for a grant of letters of administration, intestate, to the estate of the Deceased, Kinyanjui Maingi. That petition was filed as succession cause No. 312 of 1987 in the High Court at Nairobi and all the three petitioners jointly described themselves as survivors of the Deceased and beneficiaries in his estate.

While that succession cause was pending and without the two Appellants withdrawing from the cause or filing any other appropriate summons in the pending cause and without knowledge or consent of the Respondent, the two Appellants moved to the Senior Resident Magistrate's court Thika where the two jointly, and to the exclusion of the Respondent, petitioned for a grant of letters of administration, intestate, to the estate of the same Deceased, in Succession Cause No. 66 of 1988 apparently also filed in May and therefore being a full year after the filing of the first succession cause.

In both petitions the two Appellants were described as daughters of the Deceased. In the petition filed in the High Court Nairobi, the three petitioners described the Respondent as a son of a brother of the Deceased. In the petition filed in the senior Resident Magistrate's court at Thika, the two Appellants did not mention the Respondents anywhere. However, the Respondent got information about the petition filed in Thika court and proceeded to enter appearance and file an affidavit thereby raising an objection to the petition in Thika court. Subsequently the succession cause in the High Court, Nairobi, was by consent of the parties transferred to Thika court to be heard in that court together with succession cause No. 66 of 1988.

I have said that in succession cause No. 312 of 1987 all the three petitioners had jointly said they were beneficiaries in the estate of the Deceased. In succession Cause No. 66 of 1988 the two petitioners avoided talking about beneficiaries and talked of survivors only and they excluded the present Respondent.

Initially both sides had advocates. But subsequently the Advocates vanished and the parties had to conduct the cases in persons. The first important date was 8th march 1990 when the parties appeared before Resident Magistrate, J.B.N. Muturi, at Thika. The Appellants were then being referred to as petitioners while the Respondent was referred to as objector. The petitioners appeared in persons The objector who was absent was represented by an advocate Mr. Kibara who held brief for Mr. Kivuitu.

At that time two issues were before the trial magistrate. The first issue was who should be issued with the grant of letters of administration. The second issue was whether the Respondent was a beneficiary and if so, how the estate should be distributed.

It was decided by consensus that the two issues be handled separately the first issue being handled on that same day whereby it was, by further consensus, decided that the grant of letters of administration intestate be issued in the joint names of the two petitioners and the objector. In compliance with that decision, the Grant of Letters of Administration intestate was issued dated 8th March 1990 in the joint names of the petitioners and the objector.

But it was not until 16th January 1992 when the second issue was heard, the parties by then appearing without advocates and the case being heard by Mrs. S.N. Mutuku, Ag. Resident Magistrate. The ruling or judgment was delivered on 27th February 1992 to the effect that the Respondent was a beneficiary and that the two petitioners and the Respondent/Objector, share the estate of the Deceased, in particular parcel of land No. NGENDA/GITHUNGUCHU/234 measuring approximately 10.40 acres, equally so that it comes to 1/3 share each.

Prior to that decision, the petitioners were each heard and cross examined before the objector was heard and cross examined. He had two witnesses to support his case.

The petitioners, while acknowledging that the Objector's father was living with the Deceased in the

suit parcel of land; built a home in the suit parcel of land with consent of the Deceased who gave him wife who brought forth the Objector who grew up and still lives on that land, the Objector's father having been buried on the suit parcel of land; nevertheless the Petitioners did not accept that the objector had the right to inherit any portion of that land. The petitioners maintained that the objector was not a relative and therefore however long he and his parents may have lived on that land, the Objector had no right to inherit that land because he was a stranger.

On the other hand, it was the Objector's case, as supported by his witnesses, that the petitioners having both been married and being the only children of the Deceased, the Deceased remained alone and the petitioner's mother. The Deceased therefore needed someone to assist them in their work at home. As a result the Deceased requested the Objector's grandfather to give the Deceased the Objector's father to assist the Deceased. The objector's grandfather obliged and the objector's father, then a boy, went to live with the Deceased assisting the Deceased and his wife as their son. Thus, according to the evidence, the Deceased "borrowed" the Objector's father from the Objector's grandfather.

The Deceased and his wife brought up the Objector's father, gave him a wife and a portion of the suit parcel of land to build and live on. The objector was born and brought up there. After his father died and buried by the Deceased on that land, the Deceased continued to live with the Objector who took the Deceased as his grandfather as the Deceased took the objector as his grandson and entertained the wish that when he dies the objector and the two petitioners would inherit and share the suit parcel of land.

Although the parties had stated in succession cause No. 312 of 1987 that the Objector was a son of a brother of the Deceased, none of them told Mrs Mutuku that the Objector was a relative of the Deceased in any way and that included the Objector and his witnesses.

That was the evidence before the learned Ag. Resident Magistrate when she delivered her decision on 27th February 1992. This is what the magistrate said

: "The law is very clear that married daughters of a deceased cannot inherit property of deceased unless there are no other surviving members entitled to the property. In this case deceased had no sons or Other daughters save for the 2 petitioners.

On the other hand a stranger cannot inherit Property of a person he is not rightfully entitled to. Objector claims his father was borrowed by deceased. There is no evidence to show that the Objector's father was adopted to be deceased's son although there is evidence to show they lived as father and son. For all interests and purposes Objector Could be correctly referred to as a stranger.

However since the 2 petitioners did not oppose evidence that Objector's father lived with deceased as a son and is even buried on the deceased's land, I believe there is some connection between deceased and Objector. After considering evidence on both sides and bearing in mind the rules of fair play and natural justice I conclude that the 3 people are entitled to a 1/3 share each of the deceased's land. I order so forthwith"

From the above, I hold the view that grounds of appeal numbers one to three have no basis because, firstly, it has not been shown how the learned magistrate erred in law in her evaluation of the evidence and her ruling is definitely not against the weight of the evidence before her. Secondly, the learned magistrate did not rule that the Respondent was entitled to a share because he had some degree of consanguinity. On the contrary the magistrate realized there was no degree of consanguinity and the Respondent was a stranger but nevertheless the magistrate felt that on the ground of fair play and natural justice, the Respondent is entitled to a share. This covers ground numbers two and three.

As to ground of appeal number four, the alleged Kikuyu customary law of inheritance alleged wrongly interpreted and applied has not been specified.

Similarly the lack of jurisdiction in relation to ground number five has not been elaborated. In 1988

through to 1992 and even to-day, the magistrate's court at Thika variously referred to as Resident magistrate's court or Senior Resident Magistrate's court or Principal Magistrate's court or Senior Principal Magistrate's court or Chief Magistrate's court has had jurisdiction under the Law of Succession Act, Cap. 160 Laws of Kenya, to entertain, hear and determine petitions for grant of letters of administration intestate or grant of probate provided the gross value of the estate in question is not more than one hundred thousand shillings. This is by virtue of sections 47, 48 and 49 of the Law of Succession Act which enables magistrate's courts to represent the High Court and entertain any application, other than an application under section 76, and to determine any dispute under the 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. It has not been shown the gross value of the estate herein exceeds one hundred thousand shillings and the parties must have been alive to that fact when by consent they decided to have this succession cause heard in the Resident Magistrate's court at Thika instead of being heard in the High Court, Nairobi. The Appellants, then represented by an advocate, were party to that decision for transfer. Even if truly the court at Thika had no jurisdiction, why should the Appellant blame anyone else and proceed to benefit from the blame in the circumstances of this case where they did not even raise the issue of jurisdiction in the court at Thika?

It is common knowledge that where a matter like a petition for grant is entertained, heard and determined, disputes may sometimes arise, for example, as to who is entitled to the grant and who the beneficiaries are and their respective shares. When those disputes arise, the person to hear and determine the disputes is the magistrate before whom the petition is placed for hearing and determination. This is because hearing and determination of such disputes forms part and parcel of the hearing and determination of the petition. Magistrates are not therefore given jurisdiction to hear and determine petitions where there are no disputes only. Indeed the law does not so specify. They are simply given the jurisdiction to hear and determine petitions, meaning to hear and determine a petition with or without disputes as to who is entitled to the grant, who are the beneficiaries and what are their respective shares etc are. See section 48 (1) of the Act. It is after the magistrate has heard and determined such disputes that a party dissatisfied with the magistrate's determination or decision may appeal to the High Court in accordance with section 50 (1) of the Law of Succession Act which states:

“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 believe that is why the Appellants have rightly come to this court in this appeal. They never raised the issue of magistrate court's jurisdiction throughout the time they were in the magistrate's court at Thika and that makes the genuineness and propriety of ground number five questionable. Is it proper to raise that ground in this appeal when the same issue was not raised in the magistrate's court thereby making it impossible for this court to know what the magistrate's court could have said on that issue? Let this not be confused with the question of revocation or annulment of grant under section 76 of the Law of Succession Act where magistrates' courts have no jurisdiction. In this matter, nobody wants revocation or annulment of grant. The magistrate's court at Thika was never told any one wanted revocation or annulment of grant. Had the court been so told, that court could have asked that person to go to the High Court which has the jurisdiction to hear and determine disputes relating to revocation or annulment of grant. Under section 76, the following are the only grounds to form the basis of a summons for revocation or annulment of a grant:

“ (a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or in advertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either: -

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and in - operative through subsequent circumstances”.

As it can be seen, those grounds directly target the grant. They question the validity or the continual existence of the grant. It means a grant is sought to be revoked or annulled after it has been issued and even confirmed.

Where therefore the dispute is over who the beneficiaries are and their shares without attacking or genuinely attacking the validity or continual existence of the grant as proscribed in section 76, such a dispute should not disturb the relevant grant even if one of the parties wrongly asks for revocation or annulment of the grant. A magistrate's court properly handling the dispute has jurisdiction to, and can and should, strike out the misconceived prayer for revocation or annulment of grant and proceed to hear and determine the dispute as to who the beneficiaries and their respective shares are so that a party dissatisfied goes to the High Court on appeal instead of going to the High Court for revocation or annulment of grant for the High Court to end up not revoking or annulling the grant, but hearing a dispute as to beneficiaries and their shares which the magistrate's court had jurisdiction to hear and could have heard and determined thereby reducing the backlog of cases in the High Court as appeals are fewer than summons for revocation or annulment of grant some of them, as I have stated above, wrongly filed. In such a situation, where a grant has been confirmed and the determination of the dispute affects the certificate of confirmation of grant already issued, it is only that certificate of confirmation, normally its schedule, to be rectified. In which case, a proper application should be a summons filed under Rules 49 and 73 of the Probate and Administration Rules to rectify the questioned certificate of confirmation instead of a summons for revocation or annulment of grant under section 76 of the Act relying on grounds under that section which in the end are found to be irrelevant or not proved because the Applicant or objector is not actually challenging the validity or continual existence of the grant.

In this appeal, the grant, as I have already pointed out, was issued by consensus in the court order dated 8th March 1990. Nobody is questioning that court order. This appeal is not against that order. This appeal is against the court order dated 27th February 1992 confirming the grant the dispute being whether the Respondent is a beneficiary and, if so, what the share of each beneficiary is. The dispute therefore affects the schedule to the Certificate of Succession only.

That dispute was properly heard and decided by the learned Ag. Resident magistrate, Mrs Mutuku and that was before the certificate of confirmation was issued. In the circumstances what could properly come to this court from that decision was an appeal against her decision on whether the Respondent is a beneficiary and what the shares of beneficiaries are. It means that whether this appeal succeeds or not, the grant dated 8th March 1990 will not be affected. What will be affected is the schedule in the certificate of confirmation dated 27th February 1992 and that schedule will be affected only if the appeal succeeds.

It further means that, contrary to what the Appellants may be thinking will be the position, whether the appeal succeeds or not the Respondent will remain a co- Administrator together with the two Appellants because there is no appeal against the consensus court order dated 8th March 1990.

It follows that as a co-Administrator, the Respondent jointly with the two Appellants as his co-Administrators, remain bound by the powers conferred upon them by section 82 of the Law of Succession Act and the duties imposed upon them by section 83 ... of the Act and the three of them have to keep on

acting together in accordance with provisions of the Act.

I have had to go into this explanation because Mr. Wambugu Kariuki was telling me during the hearing of the appeal that although this appeal is not against the validity of the grant or its continual existence, he thinks that if the appeal succeeds the grant dated 8th March 1990 will also go, and that even if that grant remains, the Respondent as an administrator will have nothing to administer. With due respect, that is not so as an administrator is not necessarily a beneficiary so that if he ceases to be a beneficiary he also ceases to be an administrator also known as personal representative. The two roles, personal representative and beneficiary, are separate and distinct and failure by one person to be a beneficiary does not necessarily mean he has also failed to be a personal representative where he already is a personal representative as the Respondent already is in this matter. A personal representative is a special and important person given powers and duties under section 82 and 83 of the Act.

A beneficiary does not have those powers and duties although he must be a beneficiary of the deceased. A personal representative does not have to be a beneficiary or a relative of the deceased. He can be a friend or a neighbour or anybody the family has confidence in or a person who for some reason becomes a personal representative. What is important is that once he becomes a personal representative, he has to comply with the provisions of sections 82 and 83 of the Act and that is what the two Appellants and the Respondent in this appeal are jointly expected to do whether this appeal succeeds or fails. Section 82 states as follows:

“ Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that -

(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant; © to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation: Provided that, except so far as otherwise expressly provided by any will -

(i) no application shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of this estate (if any) or by the court shall be required”.

Section 83 adds as follows:

“Personal representatives shall have the following duties -

(a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration”.

Let me now conclude this judgment by looking at the relevant provisions of the Act governing the persons entitled to a share of a deceased person’s estate. The Deceased in this matter was monogamous and died leaving two married daughters, the Appellants, surviving him. They were the only members of his family by consanguinity surviving him. The relevant provision is therefore section 38 of the Act which concerns a situation where the deceased has died intestate leaving a surviving child or children but no spouse. In this case a spouse had survived but she died subsequently leaving the two daughters only. Section 38 states:

“Where an intestate has left 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”.

Section 38 does not concern itself with marriage of the surviving child or children. They just get their respective shares.

But in this case there is the Respondent, also called the Objector, present in the proceedings right from the start claiming to be entitled to a share in the estate of the Deceased. He had no degree of consanguinity to the Deceased. How does he come in to make the claim he is making? Under which

provision of the Law of Succession Act? Section 26 states as follows:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate”.

Section 27 adds that in making provision – for a dependant, the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

Section 28 sets out the things the court should look into. They include the conduct of the dependant in relation to the deceased and the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will. Section 29 gives the meaning of dependant. Of interest in this appeal is paragraph (b) of section 29 – where “dependant” means:

“Such of the deceased’s parents, ste p-parents, grand-parents, grand -children, step -children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half -sisters as were being maintained by the deceased immediately prior to his death;”

Here what is relevant is

“Children whom the deceased had taken into his family as his own”.

In my view that covers the Respondent who is the son of a man the Deceased in this succession cause had take into his family as his own son. The same Deceased subsequently took the Respondent as his own grandson. The section does not mention grandson. But if the Deceased took the father of the Respondent as his own son, could the Deceased disown the son of his son? He could not. That is why the Deceased’s subsequent conduct shows that he took the Respondent as his own grandson. It follows that the father of the Respondent was a “dependant” within the meaning of paragraph (b) of section 29 and by extension the Respondent was likewise a “dependant”

The Respondent may not have been explicit in his pleadings in this matter right from the start, but that actually was the basis of his claim as a beneficiary. That is why he is insistant. Section 38 must therefore be read together with sections 26, 27, 28 and 29 (b) in this matter.

The Respondent is not saying that since the Appellants were married, they are not entitled to share in the estate of their father. He is saying that they are entitled but they should not exclude him. The Deceased lived with the father of the Respondent as father and son on the suit parcel of land. Brought him up. Gave him a wife the mother of the Respondent. Gave the father of the Respondent where to build a house on the suit parcel of land and buried him on that land. The Deceased subsequently lived with the Respondent and his mother without the Deceased chasing them away until the Deceased remained with the Respondent alone and continued to live as grandfather and grandson so much so that when High Court Succession Cause No. 312 of 1987 was filed in Nairobi, both Appellants were minded not to question the position of the Respondent all the three accepting that the Respondent jointly with the Appellants could be given the grant and share the estate equally. Although after one year the Appellants somehow effected a shifting of goal posts, they still recognized the presence of the Respondent and retained him as a co-Administrator to-date. A man whose father’s assistance and his own assistance to the family of the Appellants, particularly their father, must have contributed a lot, not only to the maintenance and preservation of the suit parcel of land, but also to the well being of the family as a whole. Neither the Respondent’s father nor the Respondent himself was adopted under the Adoption Statute of this country but facts of this case establish that it was only formal adoption under the Adoption Act which lacked.

Otherwise the Deceased treated the father of the Respondent as an adopted son and went on to treat the Respondent as a son of his adopted son. That is a grandson. That must be how the Appellants were looking at him at least up to May 1987. In those circumstances the Respondent qualifies to be described as a “dependant” under section 29 (b) of the Law of Succession Act and as the learned Ag. Resident Magistrate, Mrs Mutuku said:

“the rules of fair play and natural justice ”

dictate that the three people; that is the two Appellants and the Respondent, are joint beneficiaries entitled to one third (1/3) share each in parcel of land No. NGENDA/GITHUNGU/234.

The order appealed from is therefore upheld and the Appellants appeal herein dismissed.

As the parties must work together, each party to bear its own costs of this appeal and in the court below.

Dated this 26th Day of May 2003.

J.M. KHAMONI

JUDGE