REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 18 of 2003

KIHARA NJOROGE……APPELLANT

Versus

MWANGI NJOROGE……..……..……..…….RESPONDENT

(Being an appeal against the whole judgment of L. NYAMBURA, Resident Magistrate, in Muranga Senior Principal Magistrate's Succession Cause No. 97 of 1996)

JUDGMENT

On the death of Njoroge Mutanjuri, two sons were left surviving him. The two sons are Kihara Njoroge and Mwangi Njoroge. Kihara Njoroge petitioned for Letters of Administration and in so doing cited his brother Mwangi Njoroge who did not protest against the Letters of Administration being issued. The Petitioner by his application dated 30th June 1999, applied for Confirmation of Grant. In that application he sought distribution in the following terms:

(a) Parcel No. **LOC. 15/GATHUKEINI/34** to be registered in the name of **KIHARA NJOROGE** absolutely.

(b) Parcel No. **LOC. 20/KAMBIRWA/214** to be shared as follows:

Kihara Njoroge – 5.8 acres

Mwangi Njoroge – 6.2 acres

Before the hearing of that application for confirmation, Mwangi Njoroge filed an objection which the court directed to be heard by way of *viva voce* evidence. In his evidence Kihara Njoroge stated that he began to reside on Gathukeini property before the time of land demarcation that is in 1959. He said that he had planted 400 coffee bushes. He had planted trees which were mature, bananas and other fruits. He further said that he had developed that land which was now valued at Ksh.830,000/=. On the other hand he stated that the Objector Mwangi Njoroge had all along resided on the Kambirwa property. He therefore gave the reason why he wished to inherit the Gathukeini property being that he had developed the land with no assistance from the Objector.

The Objector in his evidence stated that the properties both Gathukeini and Kambirwa were his later father's properties and that accordingly since he and the Petitioner were the only surviving heirs the

properties should be shared between them equally. In the Learned Magistrate's judgment dated 3rd December 2001, the Court noted that the Petitioner had indeed developed the Gathukeini property. The Court, however, found that even if the development had been undertaken by the Petitioner, it was not sufficient reason to shut out the Objector from inheriting the same. The Court also noted that the Petitioner developed the land for his own use and therefore cannot call upon the Objector to refund him the value of that development. The Court therefore ordered that the two surviving heirs do share the two properties equally. The Petitioner was aggrieved by that finding and has therefore filed this appeal with the following grounds:

"1. The learned magistrate erred in law and fact in failing to hold that the respondent/objector has never lived in parcel NO. Loc. 15/Gathukeini/34 even during the life time of their father the owner of the estate.

2. The learned trial magistrate erred in law and fact in failing to hold that the development made by the appellant was due to the fact that the objector was not using parcel No. Loc. 15/Gathukeini/34 and the objector never attempted to have half share of the land.

3. The learned trial magistrate erred in failing to order the respondent to pay half of the valuation to the appellant for no reason.

4. The learned trial magistrate failed to appreciate that the petitioner had in his evidence and supporting affidavit given the respondent 1.6 acre more in his share in Kambirwa to compensate him for the portion he did not award (sic) in parcel No. Loc. 15/Gathukeini/34.

5. The learned trial magistrate failed to decide the case as a court of equity and therefore arrived at an erroneous decision."

I have considered the evidence tendered before the Learned Magistrate and I have also considered the grounds of appeal brought before court. It is clear by virtue of *Section 55(1)* of the Law of Succession Act that no distribution should be done before the grant is confirmed. That being the case the Appellant in developing Gathukeini property did so on his own motion and without any legal backing. Indeed by virtue of *Section 63* of the Law of Succession Act, the duties of the personal representatives are well spelt out. In summary a personal representative should pay out of the estate for funeral expenses, should get the free property of the deceased to pay out estate expenses, should pay all the deceased debts and within six months of the grant being issued, should produce to court an accurate inventory of the assets and liabilities of the estate. It is clear from those duties that the Petitioner in developing the Gathukeini property ought to only have used the monies that belong to the estate for such development. Having chosen to develop the property by using his own money the Petitioner cannot be heard to be asking for extra distribution of the property on that basis. It is also pertinent to note that the Petitioner in his evidence apart from providing a valuation report, did not produce receipts to show the developments he had undertaken. It may well be that the development reflected in the valuation report was carried out by the deceased. I find that the appeal cannot succeed and I do uphold the lower court's judgment dated 3rd December 2001. The appeal is therefore dismissed. Because this is a matter involving brothers I will not order for costs to be granted to the Respondent. Indeed the judgment of the court is that each party should bear their own costs.

Dated and delivered at Nyeri this 27th day of July 2003.

MARY KASANGO

JUDGE