REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 60 OF 1996

WMN ………………………APPELLANT

VERSUS

JMG & ANOTHER ………………… RESPONDENTS

J U D G E M E N T

This appeal arises out of the decision made by the Senior Resident Magistrate (Ndungu H.N. (Miss) on 7th February, 1996, in Kiambu Senior Resident Magistrate's court Succession Cause No.31 of 1993.

The deceased Nahashon Ruhiu, died on 22nd September, 1979 leaving behind his son by his wife E – deceased, WMN – the objector herein, and his second wife – widow – N petitioner. He was the registered proprietor of a piece of land known as PARTICULARS WITHHELD.

At the time of his death, he also left behind WMN – – son to his deceased sister WM and JPM son of the daughter of his widow, N, before marriage.

That when the daughter of N was married to some other man she left Peter Mwangi with N. Thus, both Githae and Peter were brought up by N and were living on the suit land up to the date of the judgement subject to this appeal.

What happened herein was that after the deceased died, the petitioner N and objector WM applied for joint letters of administration to his estate.

The letters of administration were then issued to the two petitioners on 24th November, 1993.

The two then made an application for confirmation of grant on 15th June, 1994 but before such confirmation was made, the objector filed an affidavit of protest on 5.8.94 stating that before the deceased death, he had directed that the petitioner N would only have a life interest in his estate and prayed that the whole land should be registered in his sole name.

The reason for the objectors request was because N had no surviving sons, hence she was only entitled to a life interest in the deceased land.

The matter was then placed before the said Senior Resident Magistrate as a full trial. It was heard on 10th May, 1995, and 10th January, 1996 when the parties to the dispute and their witnesses testified.

Judgement was delivered on 2nd February, 1996 wherein the learned Senior Resident Magistrate ordered that the deceased estate should be shared equally between the two houses, E and N. That the share to the house of E to be registered in the name of the protester, Wilfred Macharia, while the share to N's house should be registered in the names of GN and JPMR in equal shares.

This is the decision which gave rise to the appeal filed herein on 9th February, 1996 through a memorandum of appeal which listed 5 grounds of appeal.

All the grounds of appeal complained that the deceased estate should have been distributed to the appellant being the only surviving son of the deceased with the widow N having only a life interest therein.

That no share thereof should have been distributed to either GN or JPMR as these were not the deceased sons.

The appeal was placed before this court on 21st February, 2002 and 30th May, 2002 when counsel for the parties submitted thereon.

Counsel for the appellant submitted that the learned Magistrate erred when she equaled the respondents to the appellant and ordered that the deceased property be subdivided equally between them.

According to him the respondent's had not been adopted by the deceased as his sons under the Kikuyu customs – they were not his sons, hence his entire estate should have been given to the appellant as his only surviving son.

That the second respondent was not landless and had some land at Maragua Ridge and that the appellant was willing to give both respondents ½ acre of the land each to build their houses on. He prayed for the appeal to be allowed with costs.

The respondents replied that the deceased was their grandfather and had brought them up since their childhood with N caring for them as their mother.

That, in fact, after the deceased death, he had left some money in some bank which was shared out to them all without any protest from the appellant. That he must have considered them as his brothers to share this money to them.

That in fact the respondent GiN had constructed a permanent house on the suit land where he lived with his wife and children and had planted 300 stems of coffee there.

They prayed for the dismissal of this appeal with costs.

I have heard and recorded the submissions of counsel for both parties in this appeal and also perused through the record of the lower court proceedings and judgement.

Here is a case where the appellant and the respondents have lived with the deceased during his lifetime until he passed away in 1979. The appellant never raised any question as to the respondents stay on the suit land.

In fact the real respondents are not alive. They were GN and JNR who have died and were substituted by their sons JM and JPM

None of the parties told us where they were buried but in view of the fact that GN had already put up a permanent house on the suit land, I have no doubt in my mind that they were buried on the suit land. Why would this have been allowed if they had no share at all to this suit land?

And if the appellant is sure that the respondents have no claim or share at all in the suit land, why was he offering to give them ½ acre each of the same land given that in fact one of them; JPM has his own land at Maragua Ridge.

I think offering them ½ acre each in the deceased land was his recognition that they have a right to it.

There was evidence that when the deceased died he left some money at some bank which was shared to them all through the Public Trustee. The appellant did not refute this except to come up with a theory that no customary rites were performed for the deceased Nahashon Ruhiu to adopt the respondents.

He called no evidence in the lower court to explain what these customary rites are.

All the witnesses called supported that the respondents were treated as sons of the deceased and that even before he died he instructed that they should not be evicted from the land unless the person who married the mother of PM decided to accept him as his son.

This must be viewed as conduct of a person who had accepted the respondents as his sons and that the turn about by the appellant to deny then what the deceased would willingly here given them from his property just because he is dead, cannot be sustained.

The provisions of the Succession Act referred to are the existing law but they cannot be applied to override the intention of the deceased which was to treat the respondents as his sons.

It is even more important to realize that the reason why the respondents were brought up by N, the deceased wife who had no sons, was intended to give her the feeling that she also could have sons which is evidence of a customary adoption.

In my view the protest subject to this appeal was an afterthought on the part of the appellant and I am satisfied it had no merit.

I dismiss this appeal with no order for costs.

Delivered this 28th day of June, 2002.

D.K.S AGANYANYA

JUDGE