



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 182 OF 1996

EBSON KIARIE .....APPELLANT

VERSUS

FRANCIS MWANGI MBOTE.....RESPONDENT

### **J U D G M E N T**

During March 1992, the appellant filed a Succession Cause No. 33 of 1993 at Nyahururu Principal Magistrate's Court to claim the estate of one Mwnyua Gakuha, the deceased, otherwise known as Geta scheme 1072 and money believed to have been left at some post office savings account.

This succession cause was based on the fact that the deceased had inherited his mother after his father, one Mukono, died.

According to him, therefore, on his mother being inherited by the deceased, he too, was adopted by the said deceased as his son.

After temporary letters were issued to the appellant in June 1992, the respondent filed an objection to the grant of such letters to the appellant.

The matter was placed before Acting Principal Magistrate (Mrs Karanja) on 17th November 1994, 16th February 1995, 27th April 1994, and 21st September 1995 when both parties testified together with their witnesses.

The magistrate wrote her judgment on 20th June 1996 allowing the objection and dismissing the petition with costs payable by the appellant to the respondent and this is how this appeal arose.

The magistrate based her decision on the fact that the appellant had not proved that he was an adopted son of the deceased and that, apart from the deceased having sold 3 acres from parcel No. 1072 Geta Scheme to the respondent, he had bequeathed to him the remaining one acre and any other asset belonging to him by a will he made about 3 months before he died.

The appeal was filed in court on 16th July 1996 in a memorandum of appeal which listed 14 grounds of appeal.

These grounds were that the learned magistrate erred in fact and law when she declared the respondent the rightful heir of the deceased estate; that she erred in basing her decision on the parental issue rather than whether the deceased died intestate in legally testate.

That she erred in finding that the entire deceased acreage was contained in the deceased will, that

the said will was properly executed or that it was valid or that it was capable of bequeathing to the respondent the deceased entire property.

The grounds stated further that the learned magistrate erred in finding that DW2 was a witness to the will although he did not sign the same; that she erred in not taking into account the deceased age vis a vis the respondent's and that the latter had an interest in the deceased property as a buyer, that she erred in finding the respondent's 5th witness as credible despite her being the respondent's wife by which attestation the will was vitiated.

The grounds further provided that the learned magistrate erred in not considering the appellant's spirited attempt which culminated in the issue of temporary letters of administration to him, that she erred in not considering that the respondent's objection was only based on intestacy and not on parentage or adoption; that the magistrate should have found that the sale transaction between the respondent and the deceased was illegal and null and void for all purposes; that she erred in finding that the appellant was not the next of kin of the deceased despite the evidence adduced; that she erred in excluding from consideration the evidence adduced by the appellant's witnesses and that she erred in not finding the appellant the next of kin of the deceased in spite of his identification as such by both PW2 and PW3 as well as the respondent and his witnesses.

In court on 23rd October 2002 counsel for both parties appeared and submitted either for or against the appeal.

Counsel for the appellant submitted that the deceased had no wife or children and that the closest relative he had was the appellant while the respondent was only a purchaser of 3 acres of land number 1072 Geta Scheme.

That the appellant was a nephew of the deceased and that his interest in the land should have taken priority to that of the respondent yet he got nothing.

Counsel submitted that the will alleged to have been made by the deceased was not valid and that since there was no Land Control Board Consent for the sale agreement alleged the sale agreement entered into between the deceased and the respondent was invalid.

That the judgment was wrong since it was founded on wrong consideration. Counsel prayed that the appeal be allowed with costs.

Counsel for the respondent opposed this appeal and stated that the appellant had filed the petition in the lower court as the deceased son and not his nephew.

That according to the appellant, his mother had been married to one Mukono, the deceased brother, and that when Mukono died, the deceased inherited his appellant's mother, thereby inheriting or adopting him as well.

But according to counsel if the appellant's mother married to the deceased who died before he was born there was no blood relationship between deceased and appellant hence, he could not be a nephew to the deceased.

According to counsel, the appellant did not give evidence that his mother was married to the deceased's brother Mukono but that he was the son of the deceased by adoption.

That the magistrate gave sufficient consideration to this issue and arrived at a finding that the appellant had not proved the alleged adoption.

That it was improper for the appellant to come to the appellate court to raise evidence of fresh relationship between him and the deceased as a nephew.

Counsel submitted further that one Joel Thuo, one of the witnesses in the case, and a blood nephew of the deceased, disowned the appellant and confirmed that it was the respondent looking after the deceased during his old age and that the latter had left all his estate to the former.

That Joel himself said he was not interested in the deceased estate yet he was his closest relative.

Counsel said that the magistrate considered the relationship between the appellant and the deceased and the fact that the transaction did not receive the consent of the Land Control Board was not relevant as this was settlement land.

That the deceased had put the respondent in possession of 3 acres of the land where he had built his house.

According to counsel the deceased made a will which was witnessed by 5 people and that, apart from putting the respondent in possession of 3 acres of plot number 1072 Geta Scheme by the sale agreement the deceased bequeathed the respondent the rest of his estate in the will. That this will was made about 3 months before his death.

That the appellant appeared on the scene during the burial of the deceased when the respondent sent for him and that during that time the said appellant did not raise any interest in the deceased assets.

He prayed that the appeal be dismissed with costs.

These are the submissions I have heard and recorded from both parties for consideration and decision.

If the appellant was born in 1930 and his alleged father Mukono died in 1927, it is most improbable that he was Mukono's son to be adopted by the deceased even if the latter inherited his, the said appellant's mother.

The learned magistrate thought, and I think, rightly so, that the appellant did not adduce sufficient evidence to prove that his mother was inherited by the deceased.

According to the magistrate, there was no independent evidence to prove that the appellant's mother was inherited by the deceased and/or that all customary rites were performed to confirm such inheritance or the adoption of the appellant.

The appellant had testified about deceased having been detained during the emergency and the magistrate rightly queried why he did not join the appellant and his mother after such detention if indeed he had inherited her and also adopted the said appellant; and as the latter was then an adult, he should have welcomed his adopted father on being released from detention rather than leave him to wonder around looking for a place to live which eventually landed him on the suit land.

That even when the appellant's mother died, the deceased did not attend her funeral.

All these were valid points which discounted the appellant's claim that he had been adopted by the deceased or that the said deceased had inherited his, the said appellants, mother.

They also raised a valid question in the mind of the learned magistrate as to whether the appellant had the necessary locus standi to file the petition subject to this appeal.

As regards the issue of sale of 3 acres of the deceased land No. 1072 Geta Scheme and whether the consent of the Land Control Board was obtained, this was the appellant's case and the burden was upon him to prove that such consent was necessary in this particular transaction where it was disclosed that the land involved was under Settlement Fund Trustees which is the body which should answer to such charge or complaint.

Moreover, the magistrate who heard the case in the lower court saw and perused the will which was said to have been made by the deceased immediately before his death and he was satisfied it was validly made and/or attested to.

I was informed the will was produced in the original file which went missing after the lower court judgment and I am not in a position to fault the magistrate over a document I have not had an opportunity of seeing and perusing myself.

At the same time the learned magistrate saw and heard parties to the case subject to this appeal testify and he was in a better position to assess their credibility. She accepted and believed the evidence of the respondent as true and disbelieved and rejected that of the appellant as false, which she was entitled to do.

She believed the appellant had come round because he knew or believed the deceased had died intested yet he had no next of kin to inherit his estate, yet the magistrate could not entertain this kind of claim.

The magistrate was right and she wrote a good judgment which took into consideration all the evidence adduced and the prevailing circumstances thereat.

I cannot interfere and dismiss this appeal with costs.

Delivered this 31st day of October, 2002.

D.K.S. AGANYANYA

JUDGE