



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**CIVIL APPEAL CASE NO. 22 OF 2007**  
**NANCY NYAWIRA WANJOHI.....APPELLANT**  
**VERSUS**  
**PETER NJOGU.....RESPONDENT**  
*(An Appeal from Judgment of the Resident Magistrate Kerugoya*  
*dated 25th August, 2006 in SRM Succession Cause No. 58 of 2004)*

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

The appellant in this case Wanjohi Mbogo lodged this appeal against the judgment of Resident Magistrate Kerugoya in Succession Cause No. 58 of 2004 delivered on 25/8/2006 in respect of the estate of Monicah Waruguru Mbogo. Before the appeal was determined, the appellant died on 8/11/2007 and was substituted by Nancy Nyawira Wanjohi. The respondent Teresia Nyambura Nyaga died on 28/6/2010 and was substituted by Peter Njogu.

The two applications for substitution were allowed by consent of the parties dated 28/6/2011 and filed on 20/7/2011. The parties who stepped in are now the appellant and the respondent respectively.

In his memorandum of appeal, the appellant relied on several ground:-

1. *That his evidence was disregarded by the court;*
2. *That all the children of the deceased were not provided for;*
3. *That the respondents had never lived on the land Kiine/Kiangai/1989 which fact the court did not consider;*
4. *That the wishes of the deceased were disregarded;*
5. *That the magistrate considered extraneous issues;*
6. *That the magistrate erred in making an adverse reference that the failure of the proposed beneficiaries to testify meant that their interest was properly cared for by the appellant.*

This appeal was disposed of by way of written submissions. The appellant argued that the deceased subdivided her land and did not give the respondent any portion which clearly demonstrated that she had no

intention of ever giving her any portion. The appellant further submitted that his children were grandchildren of the deceased and were entitled to inherit.

The respondent on the other hand argued that she was the only sibling of the appellant and that the appellant had been given land by the deceased during her lifetime namely LR. No. Kiine/Kiangai/220. The deceased also gave out land to her four grandsons and was left with one portion LR No. Kiine/Kiangai/1989. It was her contention that the portion the deceased retained should be bequeathed to her for she was the only landless child of the deceased. She argued that the deceased had no intention whatsoever to give the land to the two sons of the appellant contrary to what the appellant wanted the court to believe.

The appellant and the respondent are the only children of the deceased. The appellant had already been given land by his mother during her lifetime LR. No. Kiine/Kiangai/220 measuring 2.8 acres. The succession cause No. 58 of 2004 was filed by the appellant and the respondent joined in as the protester. The appellant did not inform her that he was filing the cause. She opposed the proposed mode of distribution in which the appellant wanted to distribute the deceased's estate to his sons in exclusion of the respondent. The protest was heard and determined and the protester's mode of distribution was adopted in the judgment. The protester was bequeathed the only asset in the estate of deceased Kiine/Kiangai/1989. The appellant was aggrieved by the judgment and lodged this appeal.

The appellant in his evidence admitted that the respondent was his sister and therefore a child of the deceased. In the list of survivors of the deceased, the appellant did not dispute that he failed to include the respondent. He only listed his sons and clearly indicated that they were grandsons of the deceased. From the face of Form P&A5, it was purported that the deceased was only survived by seven (7) grandsons. It is clear from the affidavit of protest that the deceased had already distributed her land upon sub-division of the original parcel to four (4) of her grandsons as follows:-

- Kiine/Kiangai/1988 - Wachira Wanjohi
- Kiine/Kiangai/1990 - Peter Muchira Wanjohi
- Kiine/Kiangai/1991 - Patrick Muriuki Wanjohi
- Kiine/Kiangai/1992 - Munene Wanjohi

It is not in dispute that the afore named persons are the sons of the appellant. The deceased had long before sub-dividing her land given land to the appellant a parcel of land measuring 2.8 acres. The appellant made it clear in his evidence that he had no interest in the deceased's estate but was out to ensure that his two sons Waihura Wanjohi and Allan Karani Wanjohi benefited by sharing the deceased land L.R. No. Kiine/Kiangai/1989 in equal shares. He also argued that the respondent was married and was not entitled to inherit any share of the estate of the deceased.

Although the appellant alleges that the deceased's oral will was that her estate be inherited by her grandsons was ignored he adduced no evidence to that effect. It is not disputed that the deceased in this case died intestate. In his testimony the appellant said that the deceased had already given land to his four sons and that he wanted the other two sons who did not get shares to inherit the only asset of deceased LR. Kiine/Kiangai/1989.

He also told the court that his sister the respondent was married and was not entitled to inherit from the deceased. The magistrate found that no marriage had been proved. However, even if the respondent was found to be legally married, the Law of Succession Act does not exclude married daughters from inheriting property of their parents. Section 38 of the Act treats all the children of the deceased equally whether single or married in matters of inheritance.

The respondent testified that the deceased did not give her any land during her life time. However, she had given land to the appellant and later to his four sons. The respondent's witness Peter Njogu

corroborated her evidence that his mother was not given land by the deceased before she died. Peter told the court that he was the son of the respondent and that he had put up a house on the land of the deceased in 1999. However, after her death, Peter was evicted from the land by the sons of the appellant.

The respondent in her evidence has satisfied the court that she was the rightful heir of the deceased considering that the only other child, the appellant had been given his land. The law recognizes that an intestate may give out gifts *intervivos* to his children in his lifetime which must be taken into consideration during distribution of the estate.

*Section 42*

*Where—*

*(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or*

*(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,*

*that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*

The magistrate in distributing the estate of the deceased took into consideration the fact that the share given to the appellant had to be taken into account. The appellant made no claim to the estate which demonstrates that he had acknowledged that what he had already received was his rightful share. The land given to the grandsons by the deceased in her lifetime was not disturbed for it was rightly given to them. The respondent was not interested in that land in her protest in the Kerugoya case. However, the other two sons are supposed to inherit from the estate of their deceased father but not from their grandmother's estate to the disadvantage of the respondent whose interest is by law recognized.

The argument by the appellant that the respondent has never occupied the land in issue does not make sense since the Law of succession Act does not make occupation a condition precedent to inheritance. This is not a case of adverse possession where occupation is an issue but one of identification of the rightful heirs of the deceased.

The appellant also argued that the trial magistrate based his finding on the fact that the two interested parties who were grandsons of the deceased were not parties in the succession cause and that they were not called to testify. In his judgment, the magistrate based his finding on the law. The issue of the interested parties being joined in the suit or failing to give evidence is immaterial since the situation would not have changed the finding of the court considering the provisions of Section 38 and 42 of the Act.

It is my finding that the magistrate reached the correct finding in identifying the heirs of the deceased's estate and in bequeathing the land Kiine/Kiangai/1989 to the respondent. I find no merit in this appeal and I dismiss it accordingly.

This being a succession cause involving members of one family there will be no order as to costs.

It is hereby so ordered.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 10TH DAY OF MARCH, 2015.**

**JUDGE**

**In the presence of:-**

**Mr. Gachuba for Kahiga for respondent**

**Ms. Kirage for applicant**

**F. MUCHEMI**

**JUDGE**