



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL NO.20 OF 2006**

STEPHEN MACHARIA MUNYI .....APPELLANT

VERSUS

SALOME WAIRIMU MUNYIRI ..... RESPONDENT

**(An Appeal from the Judgment of HON. A.K. ITHUKU - RM sitting at KERUGOYA in  
SUCCESSION CAUSE NO. 236 OF 2004 delivered on 23<sup>RD</sup> DECEMBER 2005).**

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

1. This appeal arises from the Judgment of A.K. Ithuku in Kerugoya Resident Magistrate's Succession Cause No. 236/04.
2. The Appellant (Stephen Macharia Munyiri) was the protestor while the Respondent (Salome Wairimu Munyiri) was the petitioner. Both of them were issued with joint letters of grant to administer their late father's estate.
3. In this appeal the appellant is challenging the decision to distribute the deceased's estate equally between two houses of the deceased.
4. The appellant's mother is ALICE WAIRIMU KIMONDO while the respondent's mother is LYDIA WACUKA KIMONDO.
5. From the evidence that was adduced the following are the undisputed facts;
  - i. The deceased died intestate on 5<sup>th</sup> May 2001 leaving behind two (2) widows and four (4) children.
  - ii. Letters of grant of administration were issued jointly to both the appellant and respondent who are children of the deceased from the two houses.
  - iii. The deceased had two properties namely;
    - a. L.R. No. Inoi/Kiamburi/51
    - b. Rice holding No.2692 Thiba section
  - iv. Through a Court Order issued by Wanguru Law Courts on 9<sup>th</sup> August 2002 and produced as an exhibit in the lower Court proceedings, it was ordered that Rice Holding No.2692 be registered in the name of Lydia Wacuka to hold in trust for herself and other family members.
6. The disputed fact is the distribution of the land L.R. No. Inoi/Kiamburi/51.
7. The learned trial Magistrate after hearing both parties herein held that the land L.R. Inoi/Kiamburi/51 be shared out equally between the two houses.
8. The following are the grounds of appeal;
  1. ***That the learned Magistrate erred in law and fact in making Judgment against the weight of***

- evidence.*
2. ***That the learned Magistrate erred in law and fact in holding that all that parcel No. INOI/IAMBURI/151 be divided equally between LYDIAH WACUKA KIMONDO and ALICE WAIRIMU KIMONDO***
  3. ***That the learned Magistrate erred in law and fact in failing to acknowledge that LYDIA WACUKA KIMONDO had already inherited part of the deceased estate to wit land parcel RICE HOLDING NO.2692 THIBA SECTION and therefore not entitled to share land parcel NO.INOI/KIAMBURI/151.***
  4. ***That the learned Magistrate erred in law and fact in giving share of land parcel No.INOI/KIAMBURI/11 to LYDIA WACUKA KIMONDO in effect giving her a bigger share of the deceased estate as she had already inherited another land parcel.***
  5. ***That the learned Magistrate erred in law and fact in failing to uphold that ALICE WAIRIMU KIMONDO should inherit parcel No.INOI/KIAMBURI/51.***
9. Both parties were represented in this appeal. Their Counsels agreed to dispose of the appeal by written submissions.

#### **SUMMARY OF THE APPELLANT'S SUBMISSIONS**

10. That the Court lacked jurisdiction to hear and determine the issue of distribution as the value of the estate at the time of filing the Succession Cause was shs.300,000/=.
11. That it was unfair for the learned trial Magistrate to award the family of Lydia Wacuka half the share in L.R. Inoi/Kiamburi/51 as they had been given the Rice Holding No.2692.

#### **SUMMARY OF THE RESPONDENT'S SUBMISSIONS**

12. That the appellant never filed an amended memorandum of appeal after leave to file the same was granted by the Court. That he only filed a supplementary record in which an unfilled copy of amended memorandum of appeal was included. And that the amended memorandum of appeal should not therefore be included in the record of appeal.
13. That the amendments to the record of appeal failed to comply with the mandatory provisions of Order 8 rule 7 Civil Procedure Rules. He relied on the case of ***MUTUKU AND 3 OTHERS –V- UNITED INSURANCE COMPANY LTD KLR 2002***. A copy of this authority was not attached.
14. That the issue of jurisdiction was never raised in the Court below, and so cannot be raised now.
15. The decree of the lower Court is not part of the record of appeal.
16. This being a first appeal this Court has a duty to re-evaluate and reconsider the evidence on record and come to its own conclusion (Refer to;

- i. ***NAMUSISI & OTHERS –V- NTABAAZI [2006] I E.A. 247 (SCU)***
- ii. ***SELLE & ANOTHER –V- ASSOCIATED MOTOR BOAT***

***COMPANY LTD & OTHERS [1968] EA 123***

- iii) ***KAMAU –V- MUGAI & ANOTHER [2006]1 KLR 150.***

17. I have considered the submissions by both parties plus the grounds of appeal. I have equally considered the evidence on record and the findings of the Court. I find the following to be:

#### **18. THE ISSUES FOR DETERMINATION**

- i. Whether the lower Court had jurisdiction to hear the Succession Cause and whether it was in order to raise the issue of jurisdiction at the appeal stage.
- ii. Whether failure to include the decree in the record of appeal rendered the appeal fatally defective.
- iii. Whether the distribution of the deceased's estate was fairly done.

#### **19. ISSUE NO. 1**

Section 48(i) of the Law of Succession Act Cap 160 Laws of Kenya provides that the Resident Magistrate's Court shall have jurisdiction to make orders in respect of an estate whose gross value does not exceed kshs.100,000/=. The affidavit in support of the petition for letters of administration and the affidavit of justification of the proposed administrator indicate the value of the deceased's estate as kshs.300,000/=. It is therefore clear that the learned trial Magistrate lacked the jurisdiction to hear and determine the case.

20. The issue of jurisdiction can be raised at any stage of the proceedings and the fact that it is not raised does not confer jurisdiction on the Court. This is what Justice Onunga Judge had to say in **NAIROBI HCCC MISC. APPLICATION NO. 167/14** which I entirely agree with. He stated thus;

***“The fact that the issue of jurisdiction is not raised does not necessarily confer jurisdiction on the Court if has none. The issue of jurisdiction can be raised at any stage of the proceedings even on appeal though it is prudent to raise it as soon as possible”.***

#### 21. ISSUE NO.2

It is true the appellant has not included a decree in the record of appeal. He has however included a certificate of confirmation of grant in what he calls ***“further supplementary record of appeal”***. In **NAIROBI HCCA NO.38/03** a similar issue KOOME JUDGE (as she then was) held thus;

***“A certificate of confirmation duly certified is a decree absolute which is a final order of the court in respect to the administration of the estate”***

I therefore find that the certificate of confirmation of grant included in the supplementary record of appeal is sufficient and hence the appeal cannot be rendered fatally defective on that account alone.

#### 22. ISSUE NO. 3

There is a misconception that Rice Holding No.2692 Thiba was inherited by Lydia Wacuka. A Rice Holding is wholly owned by the irrigation scheme under which it falls. The deceased was a mere Licencee and so is Lydia Wacuka. The record clearly shows that the Wanguru Court ordered that ***“LYDIA WACUKA HOLDS THE RICE HOLDING IN TRUST FOR HERSELF AND THE OTHER FAMILY MEMBERS”***. To my mind other family members includes the appellant and his mother. And since this was already clearly sorted out then the deceased's property due for distribution is only land L.R. NO.INOI/KIAMBURI/51.

23. The learned trial Magistrate decreed that this land be shared out equally between the two houses.

The appellant wants it given to his mother wholly, while the respondent wants it shared.

24. Section 40(1) of the Law of Succession Act provides;

***“Where an intestate has married more than once under any system of law permitting polygamy his personal and household effect and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children”.***

25. In their evidence in the lower Court the Appellant and Respondent did not indicate how many children they were in each house. On perusal of the record it's clear that the deceased was survived by two widows and four children. In Form P&A 5 which is the affidavit in support of petition for letters of administration intestate the appellant and respondent have shown that among the deceased's three daughters two are married while the respondent is not.

26. It is further shown by Form 38 that the two married daughters consented to the letters of grant being made to the appellant and respondent. The two married daughters have not filed any objections or protests in these proceedings.

- 27.It can therefore be safely concluded that those set to inherit this property are the appellant and his mother and respondent and her mother, which to me represents two units of each house.
- 28.It therefore follows that the most fair and just way of distribution of this land is by sharing it into two equal portions representing each house represented by ALICE WAIRIMU & LYDIA WACUKA. Each to hold in trust for herself and her children.
- 29.Having found that the lower Court lacked jurisdiction to deal with this succession cause I hereby allow the appeal and set aside the orders issuing the letters of grant and confirming the same. I substitute it with an order issuing fresh joint letters of grant to the appellant and respondent.
- 30.I also confirm the grant in terms of my finding at paragraph 28, that is to say that the land INOI/KIAMBURI/51 to be shared equally between the two houses represented by ALICE WAIRIMU & LYDIA WACUKA each to hold in trust for her children.

Orders accordingly.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 2<sup>ND</sup> DAY OF JULY 2014.**

**H.I. ONG'UDI**

**J U D G E**

**In the presence of:-**

**Mr. Abubakar for Magee for Appellant**

**Mr. Ithiga for Mr. Muriuki for Respondent**

**Parties**

**Njue – C/c**