



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
MISCELLANEOUS SUCCESSION CAUSE NO. 32 OF 2013
IN THE MATTER OF THE ESTATE OF MBUITU NDEGWA (DECEASED)
AND
TABITHA WANGUI MWANGI.....APPLICANT
VERSUS
WAGICHUGU MBUITU.....RESPONDENT

(Being an appeal from judgment and order of the Resident Magistrate at kerugoya in Succession

Cause NO. 298 of 2001 delivered by Hon. J.N. Onyiego Resident Magistrate on 18th July 2003)

JUDGMENT

This matter despite the heading is actually an appeal emanating from the judgment of the then Resident Magistrate in the subordinate court at Kerugoya in the succession cause NO. 298 of 2001. The letters of Administration in the said cause was issued to the wife of deceased, **Wagichugu Mbutu** in 2003. Upon confirmation in 2003, an objection was raised by the brother of the deceased claiming that the estate of his brother actually belonged to their late father and his deceased brother held it in trust and that they were to share the same equally. The subordinate court heard the objection and overruled the objector stating that the brother/objector should have commenced his claim during the life time of the deceased. The court however gave him one acre where he was occupying prior to the demise of the deceased brother. The objector appeared satisfied with the judgment of the court and did not appeal against the same. He passed on in 2011 and upon his demise, his wife, the present appellant brought this present appeal after obtaining leave to file appeal out of time on 2nd November, 2011 at Embu High Court vide Miscellaneous Application 195/11.

In her appeal the appellant has listed five grounds as the basis of the appeal but the main gist of the grounds is that the estate the subject matter of the succession cause in the subordinate court actually belonged to her father in law and it was only held by his deceased brother in law in trust of her husband being the brother to the deceased.

The appellants contends that the Learned Magistrate erred by not considering the prevailing circumstances and the evidence that the estate was supposed to be divided equally between the brothers. The appellant contends that the estate was a family land and did not belong exclusively the deceased's brother in law. She is faulting the trial magistrate for depriving her deceased husband his share of

inheritance.

The respondent has opposed the appeal saying that the same lacks merit as the trial magistrate correctly evaluated the evidence presented before him and applied the law correctly. The respondent further submitted that the deceased was the sole registered owner of the property forming the estate and the deceased brother never brought any claim during the life time of the deceased and it was not clear on what basis was he claiming part of the estate upon the demise of his brother and yet he was not a beneficiary in accordance with **Section 35 Law of Succession Act**.

I have considered both the submissions made and the arguments put forward by the appellant and the respondents. I have also looked at the judgment of the subordinate court and the main issue for determination for me is whether a succession cause is a proper forum for a party claiming ownership rights over an estate to ventilate his cause. The Law of Succession Act lays down procedures to be followed in succession causes. The Act deals only in cases of intestate and testamentary succession to the estate of deceased persons. Under **Section 2 (1)** of the **Act** provides as follows

“the provisions of the act shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act to the administration of the estates of those person”.

A person claiming beneficiary interests of property of a deceased person can state his/her claim in a succession cause. These are either persons dependants within the meaning of **Section 29**, those that entitled to benefit from distribution of the estate pursuant to **Section 35** of the **Act** and any other person who may have been given any of the properties or bought the same during the life time of deceased person. Where a dispute arises in any of the above instances then a court in accordance with **Section 66 and 70** of the **Act** shall proceed and determine the dispute.

However in situations where a party have a cause of action or a claim against the ownership of the property of a deceased person whether by way of adverse possession or contract, or must then such a claim is outside the succession causes and are better handled by Environment and Land Court that have jurisdiction to deal with all disputes relating to land . I do find that the Learned Magistrate was spot on when he observed in his judgment that the applicant,

“wants to get land by way of adverse possession through a succession cause”. The same is unfounded in law and the Learned Magistrate was correct in that regard.

The subordinate court properly directed itself on the evidence presented and I do not find any basis to interfere with his decision. The appeal filed before me therefore lacks merit and the same is dismissed. In view of the relationship between the parties herein I consider it appropriate to let each party pay her own costs. Order accordingly.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 5TH DAY OF DECEMBER, 2014 in the presence of

The applicant

Mr Magee holding brief for Maina Kagio for the Respondent

Mbogo Court Clerk