



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Zedekia Asige Kabaragi (Deceased) (Succession Cause
232 of 2007) [2023] KEHC 3473 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 232 OF 2007
RN NYAKUNDI, J
APRIL 27, 2023**

BETWEEN

KELINA KATZILIKA GERSHOM APPLICANT

AND

ELKANA MADIANGA ASIGE 1ST RESPONDENT

TIMOTHY RICHARD MAGAYA 2ND RESPONDENT

JUDGMENT

1. What is pending before the court is the objection proceedings with regards to the distribution of the estate of the deceased. The deceased died intestate on November 7, 1991. From the affidavit in support of the confirmation of grant, he was survived by three daughters and two sons;
 1. Elkana Mudianga Asige – son
 2. Richard Timothy Magaya – son (Deceased)
 3. Kelina Katzilika Gershom - daughter
 4. Judith Bulimu - daughter
 5. Phanice Mmbone – daughter
2. The deceased left behind the following properties;
Plot No 240, Ngenyilel measuring 10.7 Ha (26.4 acres)
3. The proposed mode of distribution was as below
Kelina Katzilika Gershom 1 ¼ ACRES
Judith Bulimu 1 ACRE



Phanice Mmbone 1 ACRE

Richard Kabaragi ½ SHARE

Elkana Mudianga Asige ½ SHARE

4. The matter proceeded to full hearing and the parties adopted their witness statements as evidence in chief. The same were subjected to cross examination and the parties were then directed to file submissions.

Objector's Case

5. The objectors instituted the objection proceedings vide an affidavit of protest dated August 3, 2015. It was her case that the reason the mode of distribution was in this manner was that the male were the only ones to inherit. They said that in fact did their sisters a favour. They also stated that the sisters would inherit from their husbands. These reasons are based on traditions and culture. She submitted that tradition has no place in this matter and cited article 27 and article 2 of the Constitution in support of her submissions. Further, that the Constitution and the International Law relating to women rights provides for equal treatment for both man and woman. Neither should be discriminated upon. This applies also to the issue of succession and in the instant case when it comes to matters of distribution of the estate. She relied on the case of in the estate of Michael Warui Gicharu (deceased) [2017]eKLR where it was stated that 'exclusion of female heirs' from inheritance is an action which belonged to the 'dark' ages and which the Court cannot condone.
6. The objector stated that the only consent recognized by the succession court would be in form 38 and 39. The consent purportedly done on February 23, 2015 is thus not binding. She urged the court to disregard the purported consent which was obtained by undue influence. The same is also not compliant with the provisions of the law.
7. It is the applicant's case that the administrators intermeddled with the estate of the deceased. That during the trial, the 2nd petitioner admitted that he had disposed of 2 acres of the deceased parcel for his personal use without involvement of all the beneficiaries. . The 3rd petitioner /objector also testified that upon her father's demise her brother, the 1st petitioner chased her and her son Julius Indire from the parcel. This was witnessed by PW4 and confirmed by petitioners' witnesses that the 3rd administrator no longer stays as the father's place despite having lived there prior to his demise.
8. The applicant contended that the proposed mode of distribution is not executable as there is only one property and the 2nd administrators maliciously proposed to divide the estate of themselves as V1 and V2 shares make a whole. It is not clear if it is being divided in acreage or shares. She stated that the administrators claim that they paid loans owed by the estate yet they failed to include it as part of the liabilities. This is against the duties bestowed upon them. They do not give a true reflection of what is on the ground and cannot therefore claim from the Estate. Further, that the administrators claim that they paid loans owed by the estate yet they failed to include it as part of the liabilities. This is against the duties bestowed upon them. They do not give a true reflection of what is on the ground and cannot therefore claim from the Estate. She informed the court that the 2nd administrator represents his father in the estate of his grandfather Zedekiah Asige. Further, that his father had other children and as his interest is that of trust therefore he should include his siblings and not inherit the parcel as an individual. If the other siblings are not interested they should give consent. The objector urged that the property be divided equally among the children of the deceased.



Respondent's Case

9. The respondents submitted that Article 2 (4) of the Constitution provides that customary laws shall form part of the laws of Kenya whereas the Judicature Act under Section 3 it stipulates that customary law shall take pride of place in its application so long as it is not inconsistent with the Constitution. Further, that the whole family of the deceased, the Plaintiff/Objector and the Defendants/Petitioners amongst them met with the help of the Administration led by Chief Ngenyilel Location, Church and Village Elders to try and resolve the issue of amicable distribution of the estate of the deceased. They then signed an agreement and there were 22 people who were present.
10. The respondents submitted that the issue of the ambiguous proposal was cured by the Defendants/Petitioners and their witness. It was clearly stated that the two will subdivide the rest of acreages into half thus the Vi Share. Further that the objector together with her sisters Judith Bulimu Asige, Phanice Mmbone Zedekia voluntarily agreed to also meet the costs of the succession cause and survey fees. The said costs were as follows, Kelina Katzilika Gershom Kshs 65,000/=, Judith Bulimu Asige Kshs 50,000/= and Phanice Mmbone Zedekia Kshs 50,000/=, that it should be noted that neither force nor coercion was used prior to signing of the said agreement so as to invalidate the same.
11. Learned counsel for the respondent submitted that consent can oust the express provisions of the Constitution of Kenya, 2010 and/or law if the same wasn't procured through fraud, collusion, undue influence and/or coercion. That the parties entered into a valid contract and/or agreement during a meeting held on the February 23, 2015 that was well attended with a total of twenty-one (21) persons present. Counsel urged that it is dishonest on the part of the Plaintiff/Objector Kelina Katzilika Gershom to now reengaging on the clear and express terms of the said contract, consent and/or agreement they entered into claiming that the same is invalid.
12. The respondents cited the Court of Appeal case of Njogu & Company Advocates vs. National Bank of Kenya Limited [2016] eKLR in respect to enforcing an illegal, invalid agreement and/or contract like what the Plaintiff/Objector is alleging in regards to the said contract, consent and/or agreement of February 23, 2015 whereby the three (3) judge bench Alnashir Visram, HM Okwengu and F Sichale in concurring with M, A Warsame J stated as follows; 'We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this Court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention'. He urged the court to distribute the estate as per the agreement.
14. The respondents contended that Julius Indire Asige was the grandson of the deceased as per the DNA test ordered by the court on December 17, 2018. They urged that the objector is the one to bequeath Julius as he is her son.
15. It was the respondents' prayer that the mode of distribution be upheld.

Analysis & Determination

16. Upon consideration of the protest, submissions and testimonies of the witnesses, the following issues emerge for determination;
 1. Whether the mode of distribution should be upheld

Whether the mode of distribution should be upheld

17. The protestor contends that as the daughters of the deceased they feel that the mode of distribution is discriminatory as it gives the sons more property than the daughters. The respondents in opposition



state that the agreement was made without coercion and as such should be allowed as is. They further intimated to the court that a consent can oust the Constitution and went further to submit that an illegal contract can be enforced.

18. It is not lost on this court that traditional practices were heavily discriminatory on women because of gender, something that was manifest in inheritance law. In fact, the respondents themselves cited the Judicature Act, where at section 3, it allows for application of traditional customs and laws on condition that they are not inconsistent with the provisions of the Constitution. In that regard I refer to the relevant article of the Constitution, Article 27 which provides as follows;
19. The Court of Appeal in *Rono v Rono & Another, 2008 1 KLR (G & F)* page 803, in particular the opinion by Waki, JA, gallantly stated that:-

' Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two International Human Rights Covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966). In 1984, it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women in short 'CEDAW'. Article 1 thereof defines discrimination against women as:

'Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field'.

20. In *Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR* the Court of Appeal categorically held in a pointed manner that:

'The Appellant's complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 and 40 of the Law of Succession Act. Cap 160 Laws of Kenya. Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. 12. Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased.' See *Rono versus Rono & another [2008] 1KLR (G&F) 803*.

21. In *Eliseus Mbura M'Thara v Harriet Ciambaka & Another [2012] eKLR* to demonstrate the level of non-discrimination that is required in the distribution of a deceased person's estate as follows:

'The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.'



22. In *Re Estate of Solomon Ngatia Kariuki (Deceased) (2008) eKLR*, the court stated as follows on the existing provisions of the *Law of Succession Act* and made a very strong statement on the issue of discrimination against daughters generally in succession matters ;
- ' The *Law of Succession Act* does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'
23. It is clear from the authorities cited that the *Constitution* and the *Law of Succession Act* cannot condone any form of discrimination.
24. The respondents have elected to compare the agreement on the mode of distribution with a consent, stating that a consent can oust the provisions of *Constitution* and enforce an illegality. An illegal contract/consent is not enforceable and is a nullity ab initio. This is an issue that has been extensively discussed by the courts and goes to the basics of agreements and contract.
25. The respondents cited the case of Nairobi Civil Appeal No 165 of 2007 D Njogu & Company Advocates vs National Bank of Kenya Limited (2016) eKLR where the Court of Appeal in support of the submission that the court can enforce an illegal agreement. It must be elucidated that in that matter the same involved fees agreements entered into between a firm of Advocates and a client in lieu of the Advocates Remuneration Order under the *Advocates Act*, Cap 16 of the Laws of Kenya. The agreements provided for lesser fees than those provided for in the said Order. The agreements therefore contravened the statute for they provided for undercutting on the legal fees. Such conduct is expressly prohibited under the *Advocates Act*. The parties later disagreed and the firm of Advocates withdrew its services. It then filed bills of costs under the Advocates Remuneration Order and in disregard of the fees agreements. The taxing officer disallowed the bills. A reference to the High Court was also disallowed. On appeal to the Court of Appeal the Court reiterated the general legal position on unenforceability of illegal contracts at formation. However, the Court went further and considered the facts of the matter. It pointed out that the Advocates were the legal experts who were advantaged on legal issues as against their clients. The Court held that the Advocates could not willingly contravene the law by entering into a void agreement and later seek to go round their actions. The Court firmly stated that since the Advocates had made their bed, they must lie on it. The appeal was disallowed.
26. The court takes judicial notice of the nature of family meetings and the environment surrounding the same. The objectors clearly felt pressure to agree with the proposals and as such their claims of undue influence cannot be said to be unfounded.
27. With regard to Julius Indire, it emerged that he was a grandson of the deceased and it is my considered view that as the objector changed her mind on whether to conduct the same, his claim as a beneficiary was therefore relinquished.
28. In the premises, it is my considered view that the mode of distribution is not binding as it is discriminatory and contrary to the provisions of section 38 of the Succession Act and Article 27 of the *Constitution*.



The objection succeeds as follows;

1. The petitioners are to render accounts of the estate and provide the court with a report of what portion of the estate remains.
2. The property be distributed equally among the children of the deceased, taking into account that the 2nd petitioner already sold off 2 acres of the estate. The same shall be subtracted from his share of the estate.
3. The estate be distributed among the following
Jessica Bulimu and Timothy Richard Magaya
Kelina Katzilika Gershom
Judith Bulimu
Phanice Mmbone
Elkana Mudianga Asige
I make no order as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET VIA EMAIL ON THIS 27TH DAY OF APRIL 2023

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R. NYAKUNDI
JUDGE

