



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL APPEAL NO. 13 OF 2003**

**MARGARET WANJIRA MUTHIKE.....APPELLANT**

**VERSUS**

**JANIFER WANJIRA NJOKA**

**LUCY WANJIRU NJOKA.....RESPONDENTS**

**MORRIS NDAMBIRI NJOKA**

**PAUL NJAGI NJOKA**

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

**A. Introduction**

1. This is an appeal from the judgment of Senior Resident Magistrate Kerugoya delivered on 5<sup>th</sup> March, 2003 in Kerugoya Succession Cause No. 10 of 1996.
2. The appellant filed a protest against the confirmation of grant to the mode of distribution proposed by the respondent's mother one Philisira Mabuti, the mother to the appellant's deceased husband whose estate the proceedings related. The trial court dismissed the protest on the grounds that the appellant had separated with the deceased 6 months prior to his death and that the customs of the area that once a woman deserted her marital home, she forfeited any claim to her husband estate.
3. The trial court further held that since the deceased's family were hostile towards the appellant, allowing her protest would be tantamount to putting the appellant's life at risk and further that the appellant and her children were not dependant on the deceased at the time of his death as they had been away from the deceased's estate for over 10 years prior to delivery of the judgment.
4. Being dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal dated 2<sup>nd</sup> April 2003 based on 14 grounds of appeal that can be summarized as follows;
  - a) *That the learned magistrate erred in law and fact by failing to hold that the appellant had adduced overwhelming evidence to show that she was validly married to the deceased and was thus the lawful heir to the deceased.*
  - b) *That the learned magistrate erred in law and fact by dismissing the applicants protest on account of hostility of the deceased's family members and customs of the local area without any adduced evidence.*
  - c) *That the learned magistrate erred in law and fact by holding that the deceased held the suit property, L.R. No. Kabare/Gachigi/753, jointly and in trust with his mother without any evidence.*
  - d) *That confirmation of the grant to the deceased's mother who had also passed on was delivered without substitution which was a misdirection.*
5. The parties were to file submissions to dispose of the appeal but only the appellant complied.

**B. Appellant's Submissions**

6. The appellant submitted that trial magistrate's hearing of the matter after the death of the petitioner before substitution was effected was irregular and unlawful and this rendered the proceedings and judgement invalid and of no legal effect. The appellant relied on the case of **In Re Estate of M'Mboroki M' Imanyara alias Mboroki Imanyara alias Mboroki M'Manyara High Court at Embu, Succession Cause 66 of 1985** where it was held that upon the death of an administrator, the correct course of action was to revoke the grant made to the deceased administrator and appointment of another administrator.

7. The appellant further submitted that despite the overwhelming evidence that she was the wife of the deceased and that she had borne the deceased children, the trial court erroneously caused her to be disinherited. The appellant also submitted that the trial court considered irrelevant matters thus arriving at the wrong conclusion.

8. The appellant submitted that there was no evidence given establishing the existence of a custom that when a married woman separates with her husband and returns to her parent's home she forfeits any claim to the deceased's estate and that if any such custom would have been proved it would have been repugnant to justice and inconsistent with the Law of Succession.

9. It was submitted that the trial court erred when it held the appellant and her children were not entitled to the deceased's estate as they had not lived on the deceased's land for a period of 10 years which in itself was not correct as the deceased and the appellant had been estranged for a period of only six (6) months prior to the deceased's death.

10. The appellant relied on the case of **In the matter of the Estate of Mary Nyamuthithi Maina Nyeri High Court Succession Cause No. 880 of 2009** where the court held that the fact that the 2<sup>nd</sup> respondent therein had been separated from the deceased for a period of 16 years prior to his death did not *ipso facto* deny her a right to a share of his estate.

11. The appellant also submitted that the trial court erroneously held that the deceased held the suit property jointly and in trust with the petitioner without any documentary evidence like the green card.

### **C. Analysis & Determination**

12. I have considered this appeal, submissions herein and authorities relied on.

13. The issues for determination in my mind are as follows:

*a) Whether the appellant was validly married to the deceased and was thus the lawful heir to the deceased.*

*b) Whether the applicants protest was wrongly dismissed on account of hostility of the deceased's family members and customs of the local area without any adduced evidence.*

*c) Whether the deceased held the suit property, L.R. No. Kabare/Gachigi/753 jointly with and in trust with the petitioner.*

*d) Whether the confirmation of the grant to the deceased's mother who had also passed on was a misdirection.*

14. It is not in dispute that the deceased was married to the appellant and that 6 months prior to his death, she went back to her parents home after they had a disagreement. The appellant further testified that the deceased was paying school fees for all their children prior to his death. The petitioner at the time alleged that the deceased was divorced from the appellant and further that customs dictated that a married woman separated with her husband and who returned to her parent's home forfeited any claim to the deceased's estate.

15. The Court of Appeal in dealing with the issue of a party relying on customs expressed itself in the case of **Njoki v Muteru [1985] KLR 874** in the following manner: -

***"The existence of a custom must be established by the party who intends to rely on it..."***

16. That is also the rationale behind **Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya** which states as follows: -

***"107.(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

17. It was therefore incumbent upon the Petitioner to clearly demonstrate that the deceased's marriage to the appellant had broken down in line with their customs as alleged. No such evidence was presented before the trial court.

18. Despite the 'separation' so to say, the **Section 3 of the Law of Succession Act, Chapter 160 of the Laws of Kenya** still considers the appellant as a wife. The said section states as follows: -

***"Wife" includes a wife who is separated from her husband..."***

19. Further, it is the appellant's case that the deceased still provided for her and the children in terms of paying school fees and this shows

that the appellant and her children were dependants of the deceased.

20. As to whether custom aforementioned herein is repugnant to justice and morality, the petitioner in the trial court stated that custom dictated that when a married woman separates with her husband and returns to her parent's home she forfeits any claim to the deceased's estate. I agree with the appellant that by virtue of the **Judicature Act**, customary law must be measured on constitutional yard stick. Any custom before being upheld by Court must not be repugnant to the Constitution, natural justice and morality. **Article 159(3)(a)(b) and (c) of the Constitution of Kenya 2010** provides: -

**“159. (3) Traditional dispute resolution mechanisms shall not be used in a way that: -**

**(a) contravenes the Bill of Rights;**

**(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or**

**(c) is inconsistent with this Constitution or any written law.”**

Further **Article 2(4) of the Constitution** provides: -

**“2. (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”**

21. In dealing with a situation similar to the one before the Court, I have to state that it is imperative that such case be dealt with and be determined on its own facts as there is no case that is similar to another. The mere fact that the appellant was separated from the deceased does not disinherit her. As I have already stated, Section 3 of the Law of Succession Act, still considers the appellant as a wife of the deceased. I therefore reach a conclusion that the trial magistrate misdirected himself when he found that the appellant was not a wife of the deceased.

22. The reasoning by the trial magistrate that there was hostility towards the appellant by the deceased's relatives was an extraneous matter that had no bearing in the appellant's right of inheritance.

23. Regarding the learned magistrate decision to hold that the deceased held the suit property, L.R. No. Kabare/Gachigi/753, jointly with and in trust with the petitioner without any evidence. I do note that no evidence was tendered to support this assertion. The suit property was an inheritance of the deceased from the estate of his late father which all the deceased siblings were entitled to and as such could not be said to be held jointly with the petitioner.

24. On the effect of death of a sole administrator on the grant, substitution of a deceased administrator is not possible as the particular proceedings in which he/she had been appointed administrator do not relate to his estate. The court in **Julia Mutune M'mboroki v John Mugambi M'mboroki & 3 others [2016] eKLR** held that: -

**“The Law of Succession Act does not talk of substitution of administrator; it provides for making of a grant to another person or persons after revocation of grant or on the death of the administrator or on renunciation of right to apply or executorship etc....In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise. ...Accordingly, in such case, the proper procedure is to apply for revocation of grant of letters of administration under section 76(e) of the Law of Succession Act on the reason that the grant has become useless and inoperative through subsequent circumstances and a grant to be made to another person named in the application.”**

25. In the case of **In the Matter of the Estate of Mwangi Mugwe alias Eliza Ngware (Deceased) Nairobi High Court Succession Cause No. 2018 of 2001** where Khamoni J (as he then was) held that an application for substitution was improper and could only be brought under Section 76 of the Law of Succession Act for Revocation of Grant on the grounds that it had become useless and inoperative following the demise of the holder. As a result, it is my opinion that once the petitioner passed away the grant given to her ought to have been revoked as a matter of course. Consequently, the trial magistrate progress to confirm the grant was a misdirection on his part.

26. The upshot of the above is that the appellant is successful in her appeal.

27. The trial court's decision is hereby set aside and substituted with an order that the appellant was the widow of the deceased and as such entitled to inherit his property.

28. It is hereby ordered that the estate of the deceased L.R. Kabare/Gachigi/753 be vested in the appellant to hold in trust for herself and the children of the deceased

29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF OCTOBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthoni for I.W. Muchiri for Appellant**