



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 253 OF 2013**

**IN THE MATTER OF THE ESTATE OF ZAKAYO MURAGE NGARE (DCD)**

**ROSE WAMUTIRA KAGUNYA .....APPLICANT**

**V E R S U S**

**RICHARD NGARU MURAGE .....1<sup>ST</sup> RESPONDENT**

**JAMES MURIITHI MURAGE .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This matter relates to the estate of Zakayo Murage Ngare (deceased). A petition for Letters of Administration in the estate of the deceased who died intestate on 13/7/1997 was filed by Richard Ngaru Murage and James Muriithi Murage. A Grant of Letters of Administration was issued on 28/10/11.

2. Rose Wamutira Kagunya filed a summons for Revocation of Grant dated 14/4/2015, Rose Wamutira and David Kangi Murage had also filed an objection to the making of Grant dated 6/1/2014. Their contention was that the objectors and the petitioners are all children of the deceased whose estate these proceedings relate.

3. On their part, the petitioners filed a summons for Confirmation of Grant dated 13/12/2016. This prompted the objector Rose Wamutira Kagunya to file an affidavit of protests.

**The Protestor's Case.**

She is opposed to the mode of distribution suggested by the petitioners on the ground that Richard Ngari Murage is not entitled to a share of land parcel No. Mutira/Kanguyu/540 as he has settled on the clan land being L.R No. Mutira/Kaguyu/28. She proposes that land parcel No. Mutira/Kaguyu/540 be shared as follows:

- a) James Muriithi Murage - 1.725 Acres.
- b) David Kangi Murage - 1.725 Acres.
- c) Reuben Muriuki Murage - 1.725 Acres
- d) Beth Kaguu Wanjohi
- e) Rose Wamutira Kagunya - 1.725 Acres Equally.
- f) Jeneffer Nyaguthii Kinyua

**The Petitioner's case.**

They propose that land parcel No. Mutira/Kaguyu/540 be shared as follows:-

- a) James Muriithi Murage - 1.725 Acres
- b) David Kangi Murage - 1.725 Acres

- c) Beth Kagu Wanjohi
- d) Rose Wamutira Kagunya - 1.225 Acres Equally
- e) Jeneffer Nyaguthii Kinyua
- f) Richard Ngaru Murage - 0.5 Acres
- g) Reuben Muriuki Murage - 1.725 Acres

4. The parties had been urged by the court to agree and file a consent. This did not materialize and the matter proceeded to hearing.

5. The protestor Rose Wamutira (PW-1-) testified that Richard Ngaru Murage should not inherit anything because he has settled on clan land L. R. Mutira/Kaguyu/28. She further testified that Richard Ngaru had renounced his claim to his father's land when their mother was alive.

6. The protestor called Two witnesses, James Kiragu Kamonde (PW-2-) and George Karuga Kamonde (PW-3-). The gist of their evidence is that they had been told by the protestor's mother that the petitioner had renounced his claim to the deceased's estate. The two had filed witness statements which they relied on.

7. James Kiragu Kamonde testified that he is from the same clan with the deceased. He told the court that Richard (Petitioner) was given land by the clan as he was the first born of the deceased but he was a minor. There was consideration to be paid for the land which the petitioner was allocated and it is the deceased who paid.

8. PW-2- further testified that before the mother of the parties died, she called out all her children and sub-divided the land amongst James Muriithi Murage, David Kangi Murage and Reuben Muriuki Murage. Her share was to be jointly owned by her daughters. Richard Ngaru Murage was however, not interested in L.R. Mutira/Kaguyu/540 and agreed with the way the mother had distributed the land. Later he was surprised when he heard Richard had planted tea bushes on the land as he had no permission to do so. Similar evidence was adduced by Charles Kanja Kamonde (PW-3-). He further states that after the land was sub-divided Richard approached him and confirmed to him that it was his own initiative to have his late mother sub-divide the land the way she did. He testified Richard assured him he was not interested in land parcel No. Mutira/Kaguyu/540 as he had his own land.

9. The Petitioner Richard Ngaru Murage relied his affidavit sworn on 13/12/16 and filed a statement on 7/5/2018. He states that the three sisters are married. He opted to give his sisters 1.225 and he gets 0.5 acres out of 1.725 which was his share.

The parties then proceeded to file submissions.

10. For the protest it was submitted that the only contention in this matter is whether the petitioner should get a share or not.

11. She submits that the petitioner who is the first born in the family of the deceased was allocated land during land demarcation to hold in trust for other siblings. This is parcel No. Mutira/Kaguyu/28 and the green card clearly proves that the land was allocated during land demarcation in 1959. The petitioner's land measures 2.3 Ha. She further submits that in all fairness the other siblings should share the deceased's land.

12. For the petitioner it is submitted that the deceased herein Zakayo Murage Ngaru alias Murage Njage died on 13/7/77 before the **Law of Succession Act** came into force. That the deceased had only one asset Mutira/Kaguyu/540 measuring 6.9 Acres. He proposes that the protestors and other daughters who were married and not entitled to a share of deceased's estate under Kikuyu Customary, get 1.225 Acres which they should share equally. He denied ever renouncing his share of the estate. He submits that land Parcel No. Mutira/Kaguyu/28 is his and that it was allocated to him by the clan. He submits that by dint of **Section 2(2) of the Law of Succession Act**, the estate of the deceased is subject to Kikuyu Customary Law. He relies on the book by 'Eugene Cotran, Restatement of African Law in Kenya Vol. 11 dealing with The Law of Succession Chapter -2- which deals with Principles of Succession and Distributable Estate among the Kikuyus, a passage which states with regard to Estate of married man with one wife, sons and daughters –

***“Daughters do not normally share the inheritance. They live with their mother until they are married. If however, a daughter remains unmarried, she may be allocated a piece of land by the Muramati for use during their lifetime.”***

13. He submits that the protestor and her sisters who were all married were not entitled to share the estate. That however the petitioner is enlightened and is forward thinking since he filed his petition under the **Law of Succession Act** which provides under **Section 38**, that where an intestate is survived by children only, the net intestate estate shall be divided equally among the surviving children. The petitioner has opted to give the daughter a portion of 1.225 Acres to share equally and he has given himself a small portion of 0.5 Acres where he has planted tea. That the contention that he is not entitled to inherit is not tenable.

14. I have considered the evidence tendered and the submissions. The issue for determination is whether the petitioner is entitled to 0.5 Acres out of the estate of the deceased. I have arrived at this issue because there is no dispute that the deceased died intestate on 13/7/1977 which was before the commencement of the **Law of Succession Act Section 2(2) of the Act** provides:-

***“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death but nevertheless the administration of their estate shall commence or proceed so far as possible in accordance with this Act.”***

15. The law that applies to the distribution of the estate of the deceased in this case is the customary law it is the administration of the estate that shall commence and proceed so far as possible in accordance with the Act. As rightly submitted by the petitioner under the Kikuyu customary law married daughters do not inherit their father's estate. The book on Eugene (supra) refers. However despite this the petitioner has proposed to give the protestor who is married and her married sisters a portion of 1.225 Acres out of the estate of the deceased. The petitioner has submitted that he is forward looking and is aware of **Section 38 of the Law of Succession Act**.

16. In the case of **Muthami and Others –v- Mwaniki H. C. C. A 267/80 Gachuhi J (as he then was)** analysed the **Law of Succession Act** and the Customary Law prior to the enactment of the Act. He stated that:-

*“The deceased died intestate in 1975. At that time he was subjected to Customary Law on intestacy applicable to members of the Kikuyu tribe which they belonged ----- Due to the provisions of the Succession Act, the administration of the Estate shall commence or proceed so far as possible in accordance with this Act”.*

**The Court of Appeal in Phillis Michere Mucembi –v- Wamai Muchembi 2010 eKLR** where the deceased had died before the commencement of the Law of Act, the Court Stated:-

*“Section 2(2) of the Law of Succession Act clearly excludes the distribution of the estate of a person who died before 1<sup>st</sup>/7/1981. Such property must be distributed in accordance to the Law of Succession that was in place before the Law of Succession was enacted -----“*

17. This position has been asserted in various decisions of the High Court. This was stated by Justice Rawal (as she then was) in the **matter of the Estate of Kiiru Mulua ‘A’** where she held the provisions of the Law of Succession Act do not apply to persons who died before **the Act** came into force. This was also the holding in the **Estate of Mwaura Mutugi alias Mwaura Gichigo alias Mwaura Mbura. H.C 935/2003 Nairobi**.

**Section 2(2) of the Act** must be taken to mean that the estate is administered in accordance with the **Act** as far as possible. Despite the fact that the law applicable is the customary law due to the fact that the deceased died before the commencement of the Act, where parties are in agreement that the daughters can inherit, this court will give effect to the proposals as it is promoting justice among the family members. The dispute in this case is not whether the married daughters should inherit. There is consensus that the married daughters get a share.

18. Indeed despite the customary law that married daughters cannot inherit, the law has undergone changes due to the dynamics of the present society. Harris in the case of **The matter of the estate of Stephen Mbuthia, HCCC 1289/74** while commenting on the Justice Contrans book on the distribution of the estate under Kikuyu customary law stated that:-

*“African customary law is in a fluid State, that changes occur due to various factors such as education, the influence of religion and social economic advancement and that the volume ( a restatement of African Law) should not be taken to be a once and for all statement. He further stated that - ----- “ should take Judicial notice of the relative increase in the degree of emancipation of the young generation of women which has become prevalent ----- such as education, empowerment and ownership of property and the leaning towards the equality of rights, privileges and obligations as between sexes indicated in the Constitution of the Country and apply this in consideration of the question of the right of unmarried sisters in the distribution or inheritance of the property of their deceased father.”*

Customary Law is not static – should not be repugnant to Justice **Section 3(2) Judicature Act**.

19. Considering the circumstances of this case, I find that the dispute is not whether the protestor and her sisters should get a share of the estate. I will then proceed to determine the issue as to whether the petitioner should get a portion of 0.5 Acres. The dispute is based on the fact that the petitioner was allocated land during land demarcation and cannot claim the land of the deceased. The registration of person during land demarcation created a customary trust. The Law is now settled as to the existence of a customary trust as an overriding interest in land. This was recognized by the courts even before the land **Registration Act** was enacted. The Act at **Section 30** recognises the customary trust at **Section 30(g)** which provides that:-

*“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and effect the same without their being noted on the register. The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”*

20. With regard to customary trusts under Kikuyu Customary Law in the case of **Kanyi & Muthiora (1984) KLR** it was held that the registration of land in the name of the appellant under Registered Land Act did not extinguish rights of the respondent under Kikuyu customary Law. In **Mwangi & Another –v- Mwangi (1986) KLR 328** it was held that the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the provision of **Section 126 (1) of the Registered Land Act** as to the reference to a trustee are merely permissive and not mandatory. **Section 28(b) of the Registration Act, Cap 300** provides that all registered land shall be subject to overriding interests like trust including customary trust.

21. From the foregoing, it is clear that customary trusts need not be noted in the register. The circumstances surrounding the registration must be considered to assist the court when determining the purpose of registration.

22. I have considered this issue of the customary trust as there is an allegation that the petitioner was given land parcel No. Mutira/Kaguyu/28 during land demarcation at the same time the deceased was allocated and registered on land parcel No. Mutira/Kaguyu/540. A copy of the Green card which the petitioner annexed shows that he was registered in 1959. The petitioner admitted

that he was the first born in the family and that land parcel No. Mutira/Kaguyu/28 was allocated to him by the clan. The period around the year 1959 was during land demarcation.

23. This was allocation, the petitioner did not acquire the land through his own initiative. His brothers and sisters were not allocated. My view is that having been allocated land by the clan during land demarcation he is not entitled to inherit the land of the deceased. The protest is based on this ground which I find has merits

24. The petitioner by his own admission when he was cross-examined stated:-

***“I have never lived on land parcel No. 540 nor have I built”.***

25. He admitted that he is settled on Land Parcel No. Mutira/Kaguyu/28. Though he said he planted tea on Parcel No. 540, the evidence tendered by the protestor is that he planted it when his mother was on her death bed. The fact that he has never lived on the deceased's land parcel or utilized it shows that he was not entitled to any land from the deceased. This is also confirmed by the fact he is claiming 0.5 Acres and not an equal share with his brother. He should be contented with what he got from the clan and leave his father's estate to his siblings who are not challenging his entitlement to parcel No. Mutira/Kaguyu/28. Having been registered in circumstances which show that he was allocated the land by the clan just like his father, he received his fair share and has no claim on the land of the land of the deceased.

**In Conclusion:-**

I find that the protest has merits and so I allow it.

I order that –

- 1) The petitioner is not entitled to 0.5 acres from the estate of the deceased.
- 2) The estate of the deceased shall be distributed as proposed by the protestor that is to say,-
  - Land parcel No. Mutira/Kaguyu/540 be distributed as follows:-
    - a) **James Muriithi Murage – 1.725 Acres.**
    - b) **David Kangi Murage – 1.725 Acres.**
    - c) **Reuben Mwaniki Murage – 1.725 Acres.**
    - d) **Beth Kaguu Wanjohi**
    - e) **Rose Wamutira Kaguya share 1.725 Acres equally.**
    - f) **Jeneffer Nyaguthii Kinyua**
- 3) The grant issued on 28/10/11 be confirmed and the estate be distributed as stated under Para 2a- f.
- 4) Each party to bear its own costs.

**Dated at Kerugoya this 29<sup>th</sup> day of November 2019.**

**L. W. GITARI**

**JUDGE**