



**REPUBLIC OF KENYA**

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

**HIGH COURT SUCCESSION CAUSE NO 237 OF 2008**

**IN THE MATTER OF THE ESTATE OF KAWARA NGOThO(DECEASED)**

**MWANGI WANJOHI.....PETITIONER**

**VERSUS**

**ALEX TOBIKO**

**JAMES KARANJA KARIUKI**

**JANE WAMBUI GIKONYO**

**NJERI MAINA.....PROTESTERS**

**JUDGMENT**

Kawara Ngotho died on the 20<sup>th</sup> June 1974 at the age of a ripe 100 years according to the certificate of death issued on 3<sup>rd</sup> October 2007.

Mwangi Wanjohi filed this cause on the 8<sup>th</sup> of May 2008. He listed his survivors as himself, Wanjiru Kawara, Felishina Nyambura, Regina Wanja and Mary Wangui all described as Married daughters.

He listed the deceased's estate as the parcel no. LOC. 14/KIRU/481 approximately 2.6 acres as per the certificate of search dated 8<sup>th</sup> August 2007.

He cited the protesters vide citations issued on the 23<sup>rd</sup> October 2008.

The protesters entered appearance on the 3<sup>rd</sup> December 2008.

On the 18<sup>th</sup> May 2009 grant of letters of administration intestate was made to the petitioner.

An affidavit of protest was filed on the 24<sup>th</sup> May 2010 by the 1<sup>st</sup> protester on behalf of himself and the other protesters.

He deponed that the deceased was his grandfather and the petitioner his paternal uncle, and that he is entitled to a share of the estate because his father was a son of the deceased. That the 4<sup>th</sup> protester is the wife of the late Maina Ngotho, whom I deduce to have been the son of the deceased. His proposal is that the land be share equally among the three sons of the deceased.

When the protest came for hearing on the 1th June 2012, the 1<sup>st</sup> protester testified.

He told the court that his father's name was Gikonyo but he and his mother, and the petitioner all lived in Nairobi. That he, the 1<sup>st</sup> petitioner had put up a house on the land but the 4<sup>th</sup> protester was living in Ithanga, and her husband had since died.

The matter came up before me on the 27<sup>th</sup> February 2017. Mr. Mindo for the petitioner closed his case and asked for time to file submissions. He filed his on the 15<sup>th</sup> May 2017. The protesters filed none despite being served.

In his submissions Mr. Mindo argues that the deceased died before the coming into force of Cap 160 of the laws of Kenya. That the protesters were brought into the cause by the local chief through his letter of 21<sup>st</sup> August 2008. That these persons were not entitled to the estate, and therefore the only the petitioner could inherit.

The issues for determination are

1. What law is applicable to this cause?
2. Whether the protesters are entitled to a share of the deceased, and if so, in what shares?

It is not in dispute that the deceased died before the commencement of the Law of Succession Act Cap 160 Laws of Kenya which came into force on 1<sup>st</sup> July 1981.

Section 2(2) of the act provides that

*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 estates shall commence or proceed so far as possible in accordance with this Act.*

It is Mr. Mindo's submission that the estate of the deceased is governed by customary law. What is disconcerting being that it does not say what customary law. The existence and application of customary law must be proved by way of evidence as provided for under section 51 of the Evidence Act Cap 80 laws of Kenya. No evidence was led in court by the petitioner to establish the customary law applicable to the estate of the deceased, or to support his claim that he was the only person entitled to inherit the deceased's estate.

See '**in the matter of the estate of Gachoki Njuru (Deceased) Lucy Nyaruai Gachoki vs. Loise Wambui Gachoki (2017) eKLR**

The judge went on to state

*But even if it had been proved that the administration of the deceased's estate is subject to Kikuyu customs, subsection (2) of section 2 suggests that it is not altogether improper to apply the Law of Succession Act to the estates of persons who died before the Act came into force. This portion of the law acknowledges that the administration an estate of persons dying before the commencement of the Act may be subject to written laws and customs of the time but it goes further to say that the administration of those estates shall, as much as possible, be in conformity with the provisions of the Law of Succession Act. I find this provision a strong reason for the application of intestacy provisions of the Law of Succession and, more so, when the applicant has not provided any evidence of the law or customs which applied to the deceased at the time of his demise and how such law or customs should influence the distribution of his estate.*

Hence, I do not have any evidence to support any customary law as applicable to the estate herein and I find the above authority persuasive on the issue.

The 1<sup>st</sup> protester is the son of Gikonyo Kawara. He seeks to inherit his deceased's father's share, together with his siblings. The 4<sup>th</sup> protester is the widow of the late Maina Ngotho, another deceased son of the deceased herein. The petitioner has not denied these facts. Even if his married sisters have no interest in the estate of their father, the children of his late brothers are beneficially entitled to their fathers' share. It would be difficult to imagine any customary law that would deny children the inheritance of their own father.

The letter from the Chief Kiru Location dated 21<sup>st</sup> August 2008, confirmed that the protesters were indeed members of the family if the deceased and are hence not strangers. The argument that they were introduced into the cause by the chief is not tenable as the record clearly shows that the court is the one that

I am persuaded that the deceased had three sons, the Petitioner, Gikonyo Kawara, and Maina Ngotho, the latter both deceased.

I am also of the view that in the absence of evidence to the contrary the three sons are beneficially entitled to inherit even under customary law, and in their absence, their children through them.

To facilitate this, I order that

1. The grant of letters of administration intestate issued on the 18th May 2009 to Mwangi Wanjohi be and is hereby revoked.
2. That a fresh grant to issue to Mwangi Wanjohi and Alex Tobiko the 1<sup>st</sup> Protester
3. That the grant is and is hereby confirmed.
4. That the estate of the Kawara Ngotho being parcel no. LR LOC. 14/KIRU/481 be shared equally among the three sons, and they being deceased, each share be registered in the names of the children of each son to hold in equal shares. To that end the share for Gikonyo Kawara to be registered in the name of Alex Tobiko and his siblings to hold in equal shares. The administrators to identify the child(ren) of the deceased Mwangi Ngotho.
5. Each Party to bear its own costs

**Dated, delivered and signed this 18<sup>th</sup> Day of January 2018 at Nyeri.**

**Teresia M. Matheka**

**Judge**

In the presence of;

Court Assisitant:Harriet