



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 502 OF 2013**

**IN THE MATTER OF THE ESTATE OF MUTHONI KANYUA(DECEASED)**

**BEATRICE GATHIGIA NGUNJIRI.....PETITIONER**

**-VERSUS-**

**JULIA NYAGUTHII KANYUA.....PROTESTER**

**JUDGMENT**

On 16<sup>th</sup> April 2014, Beatrice Gathiga Ngunjiri brought a summons for the confirmation of the grant of letters of administration intestate made to her on the 1<sup>st</sup> October 2013 to the estate of Muthoni Kanyua, who died on the 6<sup>th</sup> September 2012, domiciled in Kenya.

In the affidavit in support of the summons she avers that the deceased was survived by herself and her two sisters Julia Nyaguthii Kanyua and Rose Wamuyu Kanyua. She identifies each one of them as beneficially entitled and proposes that their mother's estate comprising of L.R KIRIMUKUYU/NGANDU/46 measuring 5.4 acres be distributed so that Julia gets 3 acres, and she and Rose get 1.2 acres each; and L.R GILGIL/KARUNGA BLOCK 9/225 be shared equally among them.

Her proposed mode of distribution provoked an affidavit of protest filed on the 6<sup>th</sup> May 2014, from Julia describing herself as the unmarried daughter, and her sisters as married. She also proposed that the L.R KIRIMUKUYU/NGANDU/46 devolves to her absolutely, and her two sisters to share L.R GILGIL/KARUNGA BLOCK 9/225. This was, according to her, the wishes of the deceased.

In a response filed on the 3<sup>rd</sup> June 2014, Beatrice stated that the problem was that because she was not married Julia had assumed that she was entitled to the whole estate of the deceased. That she Beatrice had made the proposal according to the portion each had occupied all this time and which were allocated by the deceased to each one of them in her lifetime.

Directions were taken on the 12<sup>th</sup> June 2014 that the matter to proceed by way of oral evidence.

It landed in my docket on the 12<sup>th</sup> June 2017. I noticed that these were three elderly sisters and thought to myself, they would find it easy to settle the matter out of court given a chance. I challenged the elder one to invite the others for a cup tea and for them to discuss their mother's property as sisters.

However, come November 7<sup>th</sup>, they had not been able to meet because Julia would just not talk with her sisters.

We fixed the matter for hearing.

Julia's testimony was that she is the eldest of the sisters and was married. Her parents did not have a son. In 1980 their father one Papius Kanyua went for her from her husband's home and took her to the shamba in Kirimukuyu Ngandu to stay there. Upon his death in 1993, their mother registered the land in her name. that she lived with their parents and was the one who helped them, hence the sisters were not entitled to their father's estate.

In cross examination by Beatrice she confirmed that indeed Beatrice was cultivating part of that land. She accused her of coming onto the property only to take their mother's property, of passing through the window of their sick other's house and ferrying things away, of cutting trees and ferrying the timber to her home.

Cross examined by Rose she denied that she was given three acres and challenged Rose to produce proof thereof. She denied that their mother had allocated her, Julia three acres and directed the rest be shared equally. Julia was of the view that her sisters should go to Gilgil.

Their cousin Joseph Wachira Ngare P.W.2 testified that when his uncle their father was alive, he told him that he had called Julia to come

from her husband with her children to come and live on the land at Kirimikuyu and that he had provided his two other daughters who were married with the land in Gilgil measuring about 2.2 acres.

That following his death, their mother his aunt (the deceased herein) registered the land in her name. It was during this time that Beatrice went there claiming a portion of the land. As a result, his aunt called him, his brother James Munuhe Ngare, two clan elders whom he named as Mwangi Gatee and Mathenge Machira. That they sat down on the case and Beatrice failed to prove her claim in their presence. That their mother decreed then that the land belonged to Julia and the other two could have the Gilgil land.

On cross examination he claimed that he did not know that Beatrice was cultivating part of the land at home.

He also did not know how Julia was brought home by her father. He denied being called by the deceased at some point and refusing to attend the meeting. He said he was not aware that the deceased had made her final wishes known in his absence.

P.W.3 Simon Mwangi Gakere told the court that the deceased was his aunt. He too said that Julia's father brought her to inherit his land because he had no son and when he died he left her on that land. That the other two sisters were married. According to him during the life of the deceased, Beatrice wanted land at home but their mother refused in his presence and that of other elders, saying that she could not interfere with her husband's wishes. He accused Beatrice of misleading her mother to transfer the land to herself without informing the other elders.

When cross examined he could not tell when it was that he went to the deceased's home to discuss these issues. He said that married daughters are not allowed to inherit from their parents but from their husbands. That upon payment of dowry a woman belongs to where she is married.

The petitioner testified that when her mother became weak and could no longer cultivate her land, Julia refused to do any extra farming to cater for their mother, but she took up the duty. She would cook and feed their mother despite her living with Julia. That she did this until the old lady told her that her time was up and she stopped eating till she passed on. That before she died she sent for P.W.2 Wachira who refused to come. It is then that she told her that the big land would be shared into three with the big sister taking three acres and she and Rose 1.2 acres each; that the other land would be shared equally.

Julia's cross examination was basically that Beatrice had carried away their mother's sufurias, fork jembe, trees, all which she denied. She denied ferrying away stones belonging to Julia. She denied bearing any hatred against Julia's children, and telling Julia to take them to their father.

According to Rose, her mother did not favour any of them. She knew she had three daughters and each would inherit her properties. On cross examination she denied neglecting visiting their mother, and staying away from family meetings.

Clearly the only issue for determination is the mode of distribution of the estate of the deceased.

Section 38 of the Law of Succession Act automatically comes into view. It provides for the situation where intestate has left a surviving child or children but no spouse. It states;

*Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.*

The protesters' position is that she was removed from her marriage by her father to come and inherit her father's property. That she is the one who took care of her parents and hence the one entitled to inherit.

But the issue then, if that was the father's idea, surely nothing would have been easier than her father to sign over the land to her. Between 1980 and 1993 when he died there was 13 years. If Papius Kinyua had intended that his daughter, Julia to inherit all his land as alleged by Julia, he would have given the land to her. He did not do that and hence there is no evidence to that.

Secondly, if her witnesses are to be believed, if that was the wish of her father, which was known to her mother, then she would have during her life time transferred the property to Julia. She died in 2013, 10 years after her husband.

Julia and her witnesses did not produce any evidence that her father removed her from her marriage and brought her home to inherit his land because he had no son. Neither PW2 nor PW3 could support that position. There was no evidence also provided that the properties were in the name of her father Papius Kinyua at the time he allegedly brought Julia from her marriage to come and live at home. There was also no evidence that their mother was misled by Beatrice to transfer the property to herself after the death of her husband. How could she have done so without succession proceedings?

In any case if Julia was married then, she stands on the same ground as her sisters as they too could end up at home, just like her for one reason or the other.

In a case involving sisters only one would not have expected the 'marriage card' to be played. It's dark shadow here reveals how discriminatory cultural practices turn women into their gate keepers, demonstrating just how deep the socialization about the effect of marriage on a woman is; - total alienation from her family as long as dowry has been paid- the woman ceases to belong to her parents but now belongs to the people who married her. This is the card the PW2 and PW3 tried to play against the petitioner and her other sister.

The Law of Succession Act is blind to these lines of differentiation, and the Constitution of Kenya 2010 article 27 refuses them, as neither the state nor any person is permitted to discriminate a person on the basis of among other things sex, gender, marital or other status. Courts have spoken before the new Constitution see **In re Estate of Warui (Deceased) [2001] eKLR** where the deceased, died before the coming into force of the Law of Succession Act, had only daughters who were all married. Their male cousin came to court seeking to revoke the grant on the basis of applicable Kikuyu Customary Law. The court said no, on the basis of the provisions of the Act which gives every child an equal right to inherit her parents' property. The court recognized that Customary law is not a dead letter law. Customary law is living law and has undergone a lot of changes.

In **Mary Wangari Kihika v John Gichuhi Kinuthia & 2 others [2015] eKLR** the court cited and applied several authorities on the place of daughters when it comes to inheritance. The fact of the matter is unmarried or married, that is neither here nor there. The only ground would be renunciation of the right to inherit. And that applies equally to both the males and the female children.

These ladies are each beneficially entitled. The two sisters acknowledge something about their big sister, the protester, in allowing her to inherit a bigger portion of the land at home. May be the fact that she is their elder sister, or that she has lived longer at home, I don't know. But they are both willing to take less out of the larger parcel of land and allow her have more than twice what each will get. Instead of being happy about that she wants everything. She has not justified her want. As demonstrated above, the ideal situation as provided for by section 38 of the Law of Succession Act, is that the whole estate would be shared equally among the children of the deceased.

In my view the mode of distribution proposed by the petitioner appears quite fair. I find that the protest is unfounded. The same is dismissed.

The grant is confirmed as per the summons for confirmation of grant in the following terms;

1. L.R KIRIMUKUYU/NGANDU/46 measuring 5.4 acres Julia Nyaguthii Kanyua,3 acres, Beatrice Gathiga Ngunjiri and Rose Wamuyu Kanyua 1.2 acres each
2. L.R GILGIL/KARUNGA BLOCK 9/225 be shared equally among the three of them.
3. No orders as to costs

**Dated, delivered and signed at Nyeri this 15<sup>th</sup> February 2018**

**TERESIA M MATHEKA**

**JUDGE**

In the presence of:

Court Assistant: Hariet

Beatrice Gathigia

Rose Wamuyu

N/A for protester