



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 199 OF 2004

IN THE MATTER OF THE ESTATE OF JOSEPH MATHIU IRINGO (DECEASED)

IRINGO IMATHIU.....PETITIONER

ANN KUIYA.....2ND PETITIONER

-VERSUS-

PURITY GACHERI MWIRIGI.....PROTESTOR

JUDGMENT

[1] The Protestor herein is called Purity Gacheri Mwirigi. On 13th February 2006 she filed an Affidavit of Protest against Confirmation of Gant issued to the Petitioners on 29th September 2004 in which she deposed grounds *inter alia* that the Petitioner herein who she alleged was her father in-law, filled this succession cause secretly and without involving her yet she was the bona fide wife of the deceased.

[2] In support of her protest, the Protestor gave oral evidence as PW1. It was her testimony that the deceased was her husband having married her under Kimeru customary law. The union was blessed with one child, namely Daniel Munene. She told court that the Petitioner was her father in-law and paid dowry to her parents (*Mwati* and *Ngome-heifer*). In her evidence, she stated that her relationship with the Petitioner was a frosty one as the Petitioner refused to recognize her as the deceased's wife. She reiterated that she was the deceased's wife and that when he died, they were living together.

[3] She continued to testify that, during his lifetime, the deceased had given her 6 title deeds and 2 log books of his vehicles. To her, this act only showed that she was the deceased's wife, for the deceased could not trust her with these documents if she was not his wife. It was her further evidence that the Petitioner had totally excluded her from these succession proceedings and that the entire distribution as proposed by the Petitioner was unfair and illegal. She wished to be included as one of the administrators of the estate. It was her further evidence that the Petitioners had included strangers namely Esther Wanja and Mercy Mwendwa who were not beneficiaries of the estate.

[4] PW2 Francis Mwirigi who is the Protestor's father testified that he knew the Petitioner as his in-law and that he had come to him where they discussed the marriage of his daughter who was marrying the Petitioner's son (Joseph Mathew Iringo (deceased)). His evidence was that the deceased married the Protestor in Kimeru tradition- the deceased brought *Mwati* and the Petitioner brought a heifer after which the Protestor and the deceased started living together at Mitunguu. He said that the two were blessed with one son namely; Daniel Munene.

[5] DW1 M' Iringo Imathiu (the Petitioner), testified that the deceased was his son and was married to Ann Kuya (the 2nd Petitioner) and that he did not have another wife. He testified that the deceased and the 2nd Petitioner had one child namely; Martin Mwititi and that the deceased had 4 other children outside marriage. It was his evidence that the Protestor was never the deceased's wife though they had a child namely; Daniel Munene and denied having ever paid dowry to the father of the Protestor (PW2). It was his further evidence that the deceased brought the child that he had sired with the Protestor to live with Ann Kuya (the 2nd Petitioner), and that when the deceased took the child, he took a cow called "*Mwaria Mururu*" to her father which signified that they wanted to take child and not the mother.

[6] DW2 Ann Kuya testified that she knew the deceased as her husband and that they got married in 1985 and that they were blessed with one child; Martin Mwititi. It was her evidence that the deceased had 5 other children outside marriage. She denied that the deceased was ever married to the Protestor.

[7] DW3 Stephen Kimonye testified that he knew the deceased who was his long time friend and adopted his statement dated 30th September 2015, as evidence. In the statement, he stated that Ann Kuya was the deceased's customary wife and that they had a residential plot at Kulamawe where Ann resides to date. He further stated that the deceased had never married the Protestor save for the fact that he had sired a child with her.

[8] DW4 Gideon Mutai a retired magistrate adopted his statement dated 15th July 2017 in evidence and explained how Meru customary law

marriages are contracted; payment of dowry among other things. It was his further evidence that when a man makes somebody else's daughter pregnant, fails to marry her, but wants to take custody of the child, he had to give a heifer to the father of the girl.

Submissions

[9] Upon close of the respective parties' cases, parties 'filed written submissions. The Protestor submitted that her evidence as well as that by her witness PW2 (her father) was satisfactory to prove that the Protestor was married to the deceased under Kimeru customary law. She was therefore a beneficiary of the deceased estate. With regard to distribution, she contended that it was not in dispute that Daniel Munene was a son of the Protestor and the deceased with equal entitlement among others and thus he should not be disadvantaged by being given parcels of land in only dry and unarable areas and that all the sons should be able to get shares in both areas; dry and un-arable and arable areas. It was further submitted that the son of the Protestor was already over 18 years and there was no need to have his entitlement given to anybody to hold it in trust and that the proposed mode of distribution was not fair as some beneficiaries were given larger shares than others and that this disparity had not been explained.

[10] On the other hand, it was submitted for the Petitioners that, the evidence of the Protestor and her witness (PW2) was riddled with contradictions, inconsistencies and shortcomings, thus, one cannot resist from concluding that they were attempting to invent existence of a marriage between the Protestor and the deceased that never was. With regard to the issue of the Protestor's son having been given land in a dry and unarable area, the Petitioner contended that he had no reason to discriminate against any of the beneficiaries and that when he proposed to give Daniel Munene (the Protestor's son) land at Tunyai, he had considered the fact that he had been living with his mother at Mitunguu since 2001, and that Mitunguu was only a few kilometers to Tunyai. He submitted that Tunyai was not in the dry part of Tharaka. He stated that the Petitioners subsequently redistributed the estate. She refuted that Mercy Mwendwa and Esther Wanja were strangers in the deceased estate- the Petitioners contended that they were daughter and purchaser respectively, and were thus entitled to a share of the estate.

DETERMINATION

[11] A careful consideration of the evidence adduced by the parties and the rival pleadings, I see two main issues for determination in this succession cause to wit:

a) Whether the Protestor was married to the deceased under Kimeru customary and as such, a beneficiary of the estate of deceased; and

b) Distribution of the estate amongst the beneficiaries in accordance with the law.

Customary marriage

[12] PW1 the Protestor herein was categorical in her evidence that she was married to the deceased under Kimeru customary law and they were blessed with a child; Daniel Munene. It was her evidence that the Petitioner paid dowry to his father namely *Mwati* and *Ng'ombe* (heifer). In cross examination she reiterated that the dowry was paid in the form of *Ng'ombe* but the sheep was in form of money i.e. Kshs 10,000. She stated that she knew the deceased before 1995 when she got married to him. She said in cross-examination that she was impregnated by the deceased in 1994 and married him in 1995 after she gave birth to Daniel. At that time, Anna Kuya had been divorced and had left her home. Upon marriage, the deceased rented a house for her in Meru Town at Makutano (inside Kinoru) at Gwa Karutimi. The deceased was transferred to Marimanti, Tharaka and so she was relocated to Marimanti in 1999. She was again moved to Mitunguu in 2001 or thereabout due to health problems. This is where she lived with the deceased until his death.

[13] She further stated that the heifer was brought by Lawrence Mutwiri and another person who disappeared when this case commenced. PW2 (her father), corroborated her evidence and stated that the deceased had married her daughter and that he was paid dowry. In cross examination he cemented PW1's evidence and stated that *Mwati* was brought in the form of Kshs 10,000 and was brought by one Mutwiri and Kaaru. He further corroborated PW1's evidence that they lived in Mitunguu. DW1 as well confirmed that PW1 was living at Mitunguu. Except, DW1 denied having ever taken dowry to PW2. He stated that after the deceased took his son to Ann Kuya (the 2nd Petitioner herein), he took a cow to the Protestor's father (PW2) called "*Mwaria Mururu*" which signified that they wanted to take the child and not the mother. In cross examination he stated that the heifer was taken to PW2 by Lawrence Mutwiri on his behalf. He however did not state who was present when the said heifer was taken to PW2. The said Lawrence Mutwiri was not called as a witness. No other evidence was called to prove that "*Mwaria Mururu*" was taken to the father of the Protestor.

[14] The evidence herein show that the deceased and PW1 had a relationship out of which a child was sired. The two have been cohabiting at Kinoru, Marimanti and Mitunguu from 1995 to 2001. DW1 admitted that the deceased and PW1 lived together at Mitunguu. He also told the court that the deceased took Daniel with him in 1999 to Tharaka. Although he stated that he used to visit his son's house at Marimanti, he stated that he did not care to know how such small boy, i.e. Daniel was doing or being taken care of. That was interesting and his demeanor showed this was conjured evidence. He was not telling the truth. I believe his sole but ominous aim was to show that the Protestor was not living with his deceased son at Marimanti. DW2, Anna Kuya, denied that the deceased was ever married to the Protestor, but she admitted that the deceased had a child with Protestor. She did not also deny that the deceased and the Protestor were living together at Mitunguu. In re-examination, she stated, albeit evasively, as follows'

"I hear Purity Gacheri lives at Mitunguu."

[15] Additionally, the evidence by PW1 that, during their cohabitation as husband and wife, the deceased gave her 6 title deeds and 2 log books of his landed properties and vehicles, respectively, for safe keeping, is not for nothing. Evidence show that the deceased bestowed extra ordinary trust upon PW1 on a basis which is not merely of bailment arrangement, but of a much more robust relationship, for it is not always or common for a person to entrust title deeds and log books to a mere acquaintance. An inference could be drawn upon the entire evidence I have stated above that this act by the deceased supports the evidence of PW1 and portend she was his wife. Her evidence towards

that point remained unchallenged throughout the hearing.

[16] The evidence of DW4 was provided general understanding of Meru customary law on marriages. In light thereof, and taking into account the totality all the circumstances in this case, the evidence on record proves on a balance of probability that the Protestor was married to the deceased. The two cohabited for a considerable period of time and had a child out of their marriage. The Protestor is therefore a beneficiary of the estate of the deceased pursuant to section 29 of the Law of Succession Act which defines dependant as follows:-

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

Accordingly, the protestor is a dependant and is therefore entitled to a share in the estate of the deceased.

[17] One other thing in order to ascertain identities of all rightful beneficiaries of the estate: whether Mercy Mwendwa and Esther Wanja are beneficiaries of the deceased estate. The Protestor contended that these two were strangers while the Petitioner asserted that they were Daughter and purchaser respectively of the estate of the deceased. What does the evidence say?

[18] DW1 (the Petitioner herein), testified that the deceased had 5 children namely; Martin Mwiti, Lawrence Mutwiri, Mercy Mwendwa, Lawi Karimi and Daniel Munene. His evidence remained unchallenged throughout the hearing. This was corroborated by DW2 who testified that besides her child with the deceased, the deceased had 5 other children outside their marriage whom she did not name. Doubtless, evidence on record show that Mercy Mwendwa was a child of the deceased and such she is, therefore, a beneficiary of the estate of the deceased. As for Esther Wanja, it was contended that she was purchaser having purchased a portion of the deceased estate. No evidence documentary or otherwise was however tendered to support these claims. DW1 simply stating that he had been told so by the deceased. When such claims are made, proper evidence should be produced as proof of purchase of land from the deceased and such person will not be denied his or her right in law. However, as I have stated, no evidence whatsoever was adduced. Accordingly, in light of the evidence on record, I find and hold that the said Esther Wanja is a stranger to the estate of the deceased estate and is not entitled to a share thereto.

[19] In the end, I find and hold that the following are the persons beneficially entitled to the estate of the deceased:

- 1. Ann Kuya***
- 2. Purity Gacheri Mwirigi***
- 3. Martin Mwiti,***
- 4. Lawrence Mutwiri,***
- 5. Mercy Mwendwa,***
- 6. Lawi Karimi and***
- 7. Daniel Munene.***

Distribution of estate

[20] Now the identities of the rightful beneficiaries of the estate has been ascertained. Is the proposed mode of distribution just, fair and equitable in the circumstances? The Protestor had challenged the proposed mode of distribution by the Petitioner on the grounds inter alia that whereas the Petitioner had acknowledged that the Protestor's son Daniel Munene was a son of the deceased, he discriminated against him by giving him land in dry and unarable areas while all sons should get shares in dry and unarable and arable areas. She also protested that the Petitioners had included one Mercy Mwendwa and Esther Wanja as beneficiaries of the deceased estate yet they were strangers. The Petitioner contended that in giving the Protestor's son land at Tunyai, they had inter alia taken into consideration the fact that Tunyai was close to Mitunguu where the Protestor lived with his mother and that the land in Tunyai was not in the dry part of Tharaka. I have carefully looked at the Affidavit in support of the Application for Confirmation of Grant dated 11th May 2005. At paragraph 7 (a) for example, the Petitioner had proposed to give Lawrence Mutwiri 8 ½ acre, at paragraph (b) thereof he proposed to give Marin Mwiti 4.8 acres while at pagraph (d) he proposed to give 1.21 acres of land to Daniel Munene (the Protestor's son, to held in trust for him by Ann Kuya. The Petitioner has not attempted to explain this disparities; some beneficiaries were given larger shares than others. Similarly, it doesn't make sense for the share awarded to the Protestor's son (Daniel Munene) to be held in trust for by the 2nd Petitioner Ann Kuya since her mother Purity Gascheri (the Protestor) is alive and in any event there was evidence that the Protestor's son was now an adult. The Protestor had further contended that her son had been given land in Tharaka area which was very dry and unarable. The Petitioner on the other hand contended that the land given to the Protestor's son was not in the dry part of Tharaka. It is not in dispute that the land given to the Protestor's son is in Tharaka. Without going into specifics as to whether the said land is in the dry part of Tharaka or not, this court takes judicial notice that some areas of Tharaka are classified as hardship areas, for example judicial staff working at Marmanti Law Courts are entitled to a hardship allowance. I will say no more regarding this issue.

[21] The Petitioners changed the initial proposed mode of distribution in their submissions. May be they may have become more enlightened. That notwithstanding, the proposed distribution is not fair, just and equitable. It does not conform to the law. In such case where there are two houses, distribution of the estate is governed by sections 40 of the Law of Succession Act which provides:-

40. Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

[22] The principle of equality enshrined in section 38 and now the Constitution should guide the distribution in these proceedings as the law frowns upon any form of discrimination. Thus, in the upshot all the estate properties namely:-

1. Ex-Lewa Settlement Scheme/493
2. Ex-Lewa Settlement Scheme/496
3. Mutunyi/420
4. Tunyai "A"/1428
5. Kibirichia/1003
6. Kibirichia/Ntumburi/193
7. Plot No. Kulamawe/Isiolo/231
8. Pension

shall be shared among the beneficiaries in equal shares, to wit:-

1. **Ann Kuya**
2. **Purity Gacheri Mwirigi**
3. **Martin Mwiti,**
4. **Lawrence Mutwiri,**
5. **Mercy Mwendwa,**
6. **Lawi Karimi and**
7. **Daniel Munene.**

On SACCO dues

[23] It be known that the Petitioner has not staked any claim to the estate of the deceased. He stated that his claim is limited to the SACCO dues in HARAMBEE CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD as the nominee. Such monies subject of nomination does not from part of the estate of the deceased. It goes to the person nominated in accordance with the applicable rules. I order that the said SACCO dues shall be paid to the nominee. But, if there is no nominee, the dues shall be shared equally amongst the beneficiaries I have stated above. It is so ordered.

Accordingly I ascertain the beneficiaries of the deceased estate as follows:

1. **Iringo Imathiu.....Father**
2. **Ann Kuya.....Widow**
3. **Purity Gacheri.....Widow**
4. **Lawrence Mutwiri.....Son**
5. **Martin Mwiti.....Son**
6. **Daniel Munene.....Son**

7. Lawi Karimi.....Son

8. Mercy Mwendwa.....Daughter

[24] The parties are further directed to file a joint proposed mode of distribution of the estate within 30 days so that this matter comes to its logical conclusion thereof. This matter being a succession matter, there will be no order as to costs.

Dated, signed and delivered at Meru this 21st day of March, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Muthamia advocate for Protestor

Mr. Wamache advocate for Mr. Mburugu for petitioner.

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F. GIKONYO

JUDGE