



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 203 OF 2004

In the Matter of the Estate of William Mbogori Kathiama (Deceased)

KIRIMI MBORI.....PETITIONER

-Versus-

CHARITY KAINDA.....1ST OBJECTOR

CATHERINE KAREA.....2ND OBJECTOR

JUDGMENT

[1] This decision relates to the estate of William Mboroki Kithiama. The deceased had 5 daughters and one son- the father of the Petitioner but deceased also. The estate of the deceased consists in two parcels of land namely;

1. L.R ABOTHUGUCHI/GITHONGO/313 measuring 2 ½ acres

2. L.R ABOTHUGUCHI/GITHONGO/1353 measuring 2 ½ acres.

Now, confirmation of Grant of Letters of Administration made to the Administrators on 9th June 2016 and distribution of the estate has been sought in Summons for Confirmation of Grant dated 17th February 2016.

Petitioner: Devolve estate to me

[2] According to the Petitioner, he lives with his family on **L.R ABOTHUGUCHI/GITHONGO/313**. He further contended that he farms on **L.R ABOTHUGUCHI/GITHONGO/1353** and that the Objectors do not use any part of this land. He stated that his late father and the deceased left him using the whole estate as per the deceased's wishes. Consequently he proposed that the estate be distributed to him as per the status quo in use.

[3] Pursuant to directions given by the court on 20th March 2017 that distribution of the estate be determined by way of written submissions, the Petitioner filed submissions to reinforce his avowed stand point. He submitted that he was a grandson of the deceased. That the Objectors had not been relying on the estate since they got married long ago and were settled with their husbands away from the estate. He, on the other hand, was in occupation and use of the estate which comprised two parcels of land. He, however, stated that he was equally comfortable if LR NO. ABOTHUGUCHI/GITHONGO/1353 shared between them although that would be against the deceased's wishes. He stated that such sharing would be in the interest of justice and equity.

Daughters: Petitioner wants double portion

[4] The Objectors contended inter alia that their deceased father had made his wishes known to all the dependants and particularly his children: that his estate should be shared as follows:-

(a) LR NO. ABOTHUGUCHI/GITHONGO/313 measuring 2.80 acres to be shared to Judith Gaiti Mutea for Jennifer Mukami Mutea, Mary Mwari, Charity Kaindia and Catherine Karea in equal shares.

(b) LR NO. ABOTHUGUCHI/GITHONGO/1352 measuring 2 ½ acres to Francis Mburugu Mbogori (deceased) his share to Kirimi Mbori his son.

(c) ABOTHUGUCHI/GITHONGO/ 1353 measuring 2 ½ acres to Judith Gaiti Mutea for Jennifer Mukami Mutea, Mary Mwari, Charity Kaindia and Catherine Karea in equal shares.

[5] The Objectors submitted that, pursuant to Section 38 of the Law of Succession Act, all the children of the deceased were entitled to estate of the deceased in equal shares. The Petitioner's father- the son of the deceased- received a gift from the deceased during his lifetime, to wit, transfer to him of **LR NO. ABOTHUGUCHI/GITHONGO/1352**. As daughters of the deceased, they are therefore entitled to **LR NO ABOTHUGUCHI/GITHONGO/313** and **1353** in equal shares. According to them, **LR NO. ABOTHUGUCHI/GITHONGO/1352** should be taken into consideration in the distribution to avoid the Petitioner from receiving double portions in the estate at the expense of other dependants.

DETERMINATION

[6] The issues herein are straight-forward.

a. Whether the Petitioner is entitled to the entire estate to the exclusion of the other beneficiaries?

b. Depending on the answer to (a), in what proportions should the estate be distributed?

[7] The following facts are not disputed.

a. The Petitioner is a grandson to the deceased while the Objectors are daughters of the deceased. The deceased had 4 daughters and one son. The son is the Petitioner's father but is now deceased.

b. The estate of the deceased comprise of the following parcels of land; LR NO. ABOTHUGUCHI/GITHONGO/313 and LR NO. ABOTHUGUCHI/GITHONGO/1353.

c. The deceased transferred LR NO.ABOTHUGUCHI/GITHONGO/1352 to his son- the Petitioner's father who is now deceased. Both the Petitioner and the Objectors were indeed in agreement that the Petitioner was in occupation of this parcel of land and there was no dispute about that.

Gift inter vivos

[7] From the evidence available, the deceased, during his lifetime, made a gift *inter vivos* to his son- the petitioner's father. The gift was transfer of **LR NO. ABOTHUGUCHI/GITHONGO/1352** to his son. The Petitioner currently occupies this parcel of land. I will therefore take this gift into account in determining the share of the net intestate estate finally accruing to the Petitioner under the principle of representation. See section 42 of the Law of Succession Act which provides as follows:-

42. Previous benefits to be brought into account

Where

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,

that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house

[8] I have stated before, and I will state it again; Section 42 of the Law of Succession Act assists in attaining equity in the sharing of the estate amongst the beneficiaries.

Principle of equality

[9] In law, children of the deceased should share the estate equally. In this case, there is no surviving spouse but children. Therefore, section 38 of the Law of Succession Act applies. The section provides that:

38. Where intestate has left a surviving child or children but no spouse

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.

[10] As I have stated, in order to attain equity, I will guided by Section 28 (d) which provides for: **Circumstances to be taken into account by court in making order** as follows-

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

(a).....

(b).....

(c)

(d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime;

[11] In this case, the Petitioner who is grandson to the deceased, proposed to distribute the entire estate of the deceased to himself. He claims to be in exclusive use of the estate even before the death of his father as well as the deceased as was the deceased’s wishes. There was no evidence to support this allegation. In any event, use or occupation of estate property does not *per se* entitle a person to indomitable or exclusive or automatic right to any part of or the entire estate of the deceased. Dependency in accordance with the law must be proved. The unconverted evidence adduced was that the deceased, during his lifetime, made a gift to the Petitioner’s father; transferred, **LR NO. ABOTHUGUCHI/GITHONGO/1352** to his son. The Petitioner would take his father’s entitlement through representation. This I will discuss in detail later. Of importance is that the Petitioner is in use of this parcel of land.

[12] But there is one disturbing thing; the Petitioner seems to be under the mistaken belief that since the Objectors had been married and settled away from the estate of the deceased, they were not entitled to a share of the deceased estate. This smacks of the much loathed patriarchal posture; it portends discrimination of daughters of the deceased on account of sex and marital status. Article 27 of the Constitution of Kenya prohibits such discrimination. See full text below;

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

[13] In addition, it is now a constitutional principle that inheritance and ownership of land is free of any discrimination. See Article “60(1) of the Constitution of Kenya which provides;

Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles;-

a

b

c

d

e.....

f. Elimination of gender discrimination customs and practices related to land and property in land; and

g”

[14] For further elucidation of these principles see the case of **MARY WANGARI KIHKA vs. JOHN GICHUHI KINUTHIA & 2 OTHERS 2015 eKLR** Muigai J where she stated as follows;

“This Court has found it necessary to emphasize...; that all children of the deceased, including the daughters who are married, are entitled to inherit. One of the grounds on which the Respondents relied on in seeking to dismiss the Applicant’s summons for revocation of the grant was that the Applicant and her sisters were married and it was the deceased’s will to have the suit property only distributed to his sons and unmarried daughters. It is therefore useful to clarify the fact that Section 29 of the Law of Succession Act Cap 160 does not discriminate beneficiaries on any grounds, be it gender or marital status. On the contrary, it defines dependants as including the children of the deceased without any adverse distinction. This position is well established in our legal system and has consistently been restated in our jurisprudence. In the case of *Eliseus Mbura M’Thara v Harriet Ciambaka and Another* [2012] eKLR, Lesiit J stated that:

The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.

More recently, the above position has been reaffirmed in the case of Peter Karumbi Keingati & 4 Others v Dr Ann Nyokabi Nguithi [2014] eKLR, where Kimaru J debunked much of the myth and disingenuous logic that underlies arguments that are typically advanced in a bid to disinherit unmarried daughters. He held as follows:

As regard to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history."

[15] I need no say more. Taking in totality of all the circumstances in this case, I find the proposed mode of distribution proposed by the Objectors to be fair, just, reasonable and guided by law and need for equitable distribution of the estate herein. As we are distributing the estate of the deceased, I take into account the gift made to the father of the petitioner and he would not be entitled to anything more. The petitioner has not shown that he is entitled to a share in this estate in his own right. He must come through his late father. Accordingly, the Grant of Letters of Administration issued to the Petitioner and the 2nd Objector are hereby confirmed. Distribution of the estate shall be as follows;

(a) LR NO. ABOTHUGUCHI/GITHONGO/313 measuring 2.80 acres to be shared among Judith Gaiti Mutea (taking share of Jennifer Mukami Mutea), Mary Mwari, Charity Kaindia and Catherine Kareia in equal shares.

(b) ABOTHUGUCHI/GITHONGO/ 1353 measuring 2 ½ acres to be shared among Judith Gaiti Mutea (taking share of Jennifer Mukami Mutea), Mary Mwari, Charity Kaindia and Catherine Kareia in equal shares.

[15] This being a succession cause there will be no order as to costs.

Dated, signed and delivered in open court at Meru this 23rd day of May 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Kithinji advocate for Objectors

Mr. Muthamia advocate for petitioner

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F. GIKONYO

JUDGE