



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 8 OF 2017

(FORMERLY MURANG'A CHIEF MAGISTRATES COURT SUCCESSION CAUSE NO. 317 OF 1999)

RE ESTATE OF DAVID KIMANI MAZIWE ALIAS KIMANI MAZIWE (DECEASED)

HANNAH GATHONI KIMANI.....ADMINISTRATOR

VERSUS

JOHN NJOROGE KIMANI.....PROTESTOR

JUDGMENT

1. The issue for determination is whether the estate of the deceased should be distributed under the Law of Succession Act or *Kikuyu* customary law. It is *not* disputed that the deceased died on 13th January 1978 before the Act came into force.
2. The administrator, *Hannah Gathoni Kimani*, is the widow of the deceased. It is common ground that the deceased was also married to *Wanjiru Kimani* (now also deceased). The latter was the mother to *John Njoroge Kimani*, the protestor.
3. The deceased left behind one property known as *Plot 41 Maragua Ridge Settlement Scheme* measuring 23.40 acres. The affidavit of protest was filed on 7th July 2014. At paragraphs 6 and 7, the protestor claimed that in June 2014, the administrator clandestinely subdivided the land and sold one acre.
4. At paragraph 8, the protestor deposed that the property should be divided "*in equal shares among the beneficiaries*". However, there is a further joint affidavit with Regina Njeri Mwangi sworn on 8th September 2014. In that affidavit, the deponents propose that the property be divided *equally between the two houses*.
5. There is no dispute that the surviving dependents are-
 - a) Hannah Gathoni Kimani, widow
 - b) John Njoroge Kimani, son
 - c) Regina Njeri Mwangi, daughter in law
 - d) John Kamau, son
 - e) Stephen Gachanja Kimani, son
 - f) Tirus Njoroge Kimani, son
 - g) Francis Mwangi Kimani, son.
6. On 16th October 2017, the parties *agreed* that the *Summons for Confirmation of Grant* be determined by way of *submissions*. Learned counsel for both parties opted *not* to lead *oral evidence*. I will set out their address to court verbatim-

"The only issue to be canvassed is whether the distribution of the estate should be under Cap 160 (as desired by the administrator) or under customary law (as proposed by the protestors). There is no issue of who the beneficiaries are....There is nothing to be tried by evidence."

7. The submissions by the administrator were filed on 30th April 2018; those by the protestor on 19th June 2018. On the latter date, I briefly heard further submissions by learned counsel for both parties.

8. I have considered the summons, depositions and rival submissions.

9. It is *not* disputed that the deceased died on 13th January 1978. The Law of Succession Act only came into force on 1st July 1981. Section 2 (1) of the Act expressly provides that it shall apply to the estates of persons dying *after* commencement of the Act. I thus readily find that the Act could *not* apply *retrospectively* to the estate of the deceased.

10. Section 2 (2) further provides that estates of persons who died before commencement of the Act are subject to the written laws and *customs* applying at the date of death. It is common ground that the deceased was married to *two wives* under Kikuyu customs. I thus find that the estate of the estate was governed by Kikuyu customary law.

11. The only question is whether the custom was *in conformity* with section 3 of the Judicature Act. No evidence was led by any of the disputants to suggest that Kikuyu customary law on intestate succession is repugnant to morality or justice. I am also guided by a long line of precedents including *Kimani v Gikanga* [1965] EA 375, *Apeli v Buluku* [1985] KLR 777, *Joash Ochieng Ougo & another v Wambui Otieno* [1987] KLR 364, *Wambugi Gatimu v Stephen Kimani* [1992] 2 KAR 292, *MWG v EWK*, Court of Appeal, Eldoret, Civil Appeal 20 of 2009 [2010] eKLR.

12. The mere fact that the property was registered under the Registered Land Act (now repealed) did *not* remove the estate from succession under the Kikuyu customary law. See *Mbuthi v Mbuthi* [1976] KLR 145. The two High Court decisions cited by learned counsel for the administrator in *Re Estate of Mwangi Ngamba* [2015] eKLR and *Re Estate of Ngamini Kirira* are persuasive but not binding on this court.

13. Having reached that conclusion, the estate of the deceased shall be divided *equally* between the *two houses* of the deceased.

14. Learned counsel for the administrator submitted that it was not clear which beneficiaries belonged to which house. That is *incorrect*. I have studied the letter by the *area chief* dated 25th September 1999 and filed by the *administrator* on 28th November 1999. The letter has *not* been contested by any party. The two children from the *first house* are listed in the letter as John Njoroge Kimani and Regina Njeri Mwangi. The four children from the *second house* are John Kamau, Stephen Gachanja Kimani, Tirus Njoroge Kimani and Francis Mwangi Kimani. The widow is from the second house.

15. *Half* of the property shall thus go to the two heirs from the first house namely John Njoroge Kimani and Regina Njeri Mwangi. The other half shall devolve to the four children from the *second house* namely John Kamau, Stephen Gachanja Kimani, Tirus Njoroge Kimani and Francis Mwangi Kimani. However, their mother Hannah Gathoni Kimani (the administrator), shall have a *life interest* on that *half* of the property.

16. The grant shall be *confirmed* in terms of this judgment.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 28th day of June 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Mbuthia for the administrator instructed by J. N. Mbuthia & Company Advocates.

No appearance by counsel for the protestor.

Mr. Kiberenge, Court Clerk.