



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 276 OF 2008

In the Matter of the Estate of M'makinya M'itimtu (Deceased)

MARGARET GACUKU SIMON.....PETITIONER

VERSUS

MARISELLA NKATHA.....OBJECTOR

JUDGMENT

[1] The deceased herein M'Makinya M'Itimtu hailed from Kambiti Sub location, Mirigamieru East Division of Imenti North Division. He died on 12th August 1979 leaving behind three Daughters and a son, namely;

- i. Elizabeth M'Imiricha;
- ii. Marisella Nkatha Makinya,
- iii. Susan Karuru and
- iv. M'Mururu M'Makinya.

[2] The deceased left behind two properties i.e. L.R. NYAKI/ MUNITHU/706 measuring 4 acres and L.R. NYAKI/ MUNITHU/357 measuring 1 ½ acres.

[3] The petitioner herein is a grand-daughter in law to the deceased by virtue of being a wife to Simon Gitara, son to M'Mururu M'Makinya (son of the deceased). The Objector is a daughter of the deceased.

[4] The objector had filed *Succession Cause No. 516 of 2009 In the Matter of the estate of Makinya M'Itimtu Marisella Nkatha Makinya versus Margaret Gacuku Simon* which was consolidated with this cause. In a Ruling dated 21st February 2017 this Court appointed the petitioner and objector as joint administrators of the estate. On 27th March 2017 the objector filed summons for Confirmation of grant which proposed the estate to be distributed as follows;

- a. Marisella Nkatha Makinya ¾ acres,**
- b. Margaret gacuku Simon ¼ acres,**
- c. Muriiki Ruthuru ¼ acres (purchaser)**
- d. Celestino Kimathi ¼ acres.**

[5] Grace Kaimuru M'Mururu wife to the son of the deceased had also filed *Succession cause No. 289 of 2009 In the matter of the estate of M'Mururu Makinya alias Mururu Makinya Grace Kaimuru M'Mururu & Margaret Gacuku Simon*. In the matter, Makau J., held that Margaret Gacuku Simon was already a beneficiary in Nyaki/Munithu/357 registered in her name on 10th May 2010. He held that Margaret was given his share in the lifetime of the deceased and as such is not entitled to L.R. NO. NYAKI/MUNITHU/706. He therefore dismissed the protest by Margaret Gacuku Simon and stated that land IN L.R. NO. NYAKI/MUNITHU/706 should be shared to Gace Kaimuru M'Mururu 2 ¼ acres, Geoffrey Kaari M'Mururu 1 ½ acres and Silas Kirunga M'Mururu 1 ½. The Court equally noted that the daughters had

alleged that the land in L.R. NYATHI/MUNITHU/357 had been bequeathed to Simon Gitara.

[6] The objector herein was first to testify. She also called three witnesses Ow1 Marisella Nkatha Makinya testified that L.R. NO. NYAKI/MUNITHU/357 should be given to her because it belongs to her father. She averred that each of the sons and daughters of the deceased were given a portion by their father. She averred that she was merely a witness in *Succession cause No. 289 of 2009 In the matter of the estate of M'Mururu Makinya alias Mururu Makinay Grace Kaimuru M'Mururu & Margaret Gacuku Simon* where the Court held that the land belongs to the petitioner. She also claims to be cultivating on the land until the day she was evicted by the petitioner.

[7] Ow2, Elizabeth Michera, daughter of the deceased relied on her written testimony where she claims the objector was given land in L.R. NYATHI/MUNITHU/357 by the deceased. She was not cross examined on it.

[8] Ow3 Joseph Miiringu also relied on his testimony which was to the effect that he is the area manager of where the deceased resided and that he is aware of the land dispute pitting the petitioner and the objector. He stated that he and other elders had dealt with the dispute and held that the land in L.R. NYATHI/MUNITHU/357 belonged to the objector. There was no cross examination thereto.

[9] Ow4 Zakaria Munyui-Margaret also testified that L.R. NYATHI/MUNITHU/357 belonged to the objector and that the petitioner was not living in the land during the lifetime of the deceased. She only came to the said land of the deceased after his death.

[10] The petitioner also called three witnesses. Pw1 Margaret Gchuku Simon testified that she has lived on L.R. NYATHI/MUNITHU/357 since 1977 and that she was married to Simon Gitara, (grandson to the deceased) under Kimeru Customary Law. She averred that in *Succession cause No. 289 of 2009 In the matter of the estate of M'Mururu Makinya alias Mururu Makinay* she wanted 1 ½ acres from plot no. L.R. No. Nyathi/Munithi/706 but the court held that she had already been gifted L.R. Nyathi/Munithi/357 hence could not claim a portion in L.R. Nyathi/Munithi/706. She averred that she has stayed on the land since 1977, when the deceased and her husband were alive and has built and still resides on the premises. She presented a photo to this effect. She also claimed that the objector was already taken care of and therefore objects to sharing of the land to strangers as shown in the Summons for Confirmation of Grant i.e. Muriiki Ruthuru ¼ acres and Celestino Kimathi ¼ acres

[10] Pw2 Francis Karandi- Pastor, claimed to know the deceased, objector and petitioner. His evidence was that Simon Gitara (deceased) was invited on to the land by the deceased. He also claimed to know that Elizabeth Michira was cultivating a small portion in land L.R. NYATHI/MUNITHU/357 but Marsella has never cultivated on the land as she is already married and lives away.

[11] Pw3 Grace Kaimuru, daughter to the deceased and widow to M'Mururu Makinya M'Makinya, claimed she was given land in *Succession cause No. 289 of 2009 In the matter of the estate of M'Mururu Makinya alias Mururu Makinay*. She also knows Marcella was not given any land by the deceased. She averred that the petitioner is married to his son and that she was present when deceased gave land to Simon Gitara. She lastly testified that the petitioner's family has complete occupation of the land.

Analysis and determination

[12] The deceased herein died before the commencement of the law of Succession Act hence the law applicable by virtue of Section 2 of the Law of Succession Act is customary Law. The same section provides;

2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) 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.

[13] The petitioner herein claims the estate as a granddaughter of the deceased but her major argument was that the suit land was gifted to the her deceased husband as gift inter vivos during the life time of the deceased. In her submissions she avers that in Kimeru Customary law the daughters could not inherit any land. This might be the case as it can be shown in *Restatement of African Law:2, Law of Succession by Eugene Contran Sweet & Maxwell 1969 pgs.30-41*

[14] However the applicability of customary law is subject to the constitutional test, that is to say, it is not repugnant to justice. the law and the Constitution. Section 2 of the Law of Succession Act also states that estates of persons dying before the commencement of the Act should be administered in accordance with the Act. Therefore, any custom that is found to be discriminatory will be overridden by the law and the Constitution. In **ELIZABETH KARUA M'RUTERE vs. JOSHUA M'IKIUGU KUURA & 2 OTHERS [2007] eKLR** the Court held;

“I should dispose of the first question by stating that although customary law is applicable to the deceased's estate by fact of his having died before July 1981, nonetheless as is the law in s.2(2) of the Law of Succession Act, “the administration of [the] estate shall commence or proceed so far as possible in accordance with [that] Act”. This being the case I do not see that any custom that discriminates women generally because they are women or because they have no sons or because they have married daughters only has any place in our legal system. As was held in *Rono vs Rono C.A. 66 of 2002*, such discriminatory practices offend the provisions of s.82(1) as read with s.82(3) of the Constitution as well as International Human Rights instruments and should be outlawed in any event. In fact in the instant case and by dint of s.32 and s.33 of the Law of Succession Act, customary law does not apply in respect of the administration of agricultural land which is the status of the deceased's land. In the end therefore the customary law relied on by the objectors has no meaning or effect and is of no help to their case.”

[15] I also note that the Court in *Succession cause No. 289 of 2009 In the matter of the estate of M'Mururu Makinya alias MururuMakinay between Grace Kaimuru M'Mururu & Margaret Gacuku Simon* did not consider the objector herein when it distributed the property. The deceased in cause No 289 of 2009 is the only son of the deceased in cause No 276 of 2008. And the petitioner herein is the daughter in law of the deceased in cause No 289 of 2009. Apparently, the lands in issue in cause No 289 of 2009 were inherited from the deceased herein and are in issue in both causes. Ironically, the Objector who is the daughter of the deceased was not considered in that cause. had the two xauswes beeb dealt with back to back perhaps the injustice to the objector may have been averted. It is now beyond peradventure that daughters have equal rights to inherit the estate of their deceased parents just as sons are. The Kimeru custom which disinherited daughters of the deceased merely because they are female has been down-trodden by the Constitution and has been declared by courts to be in violation of the Constitution for it perpetuates prohibited discrimination against women on the basis of gender and status contrary to article 27 of the Constitution as well as international instruments on elimination of all forms of discrimination against women which Kenya has ratified. The daughters of the deceased herein were disinherited by virtue of their gender and status. The only son of the deceased one Mururu was glorified and only his family have befitting from the estate of the deceased. Notably, the petitioner is the wife of the son of the son of the deceased herein. She claims the whole of No 257. The widow of the said Mururu and te other sons of Mururu claimed the whole of No 706. This is at the exclusion of the daughters of the deceased and thus contrary to Article 27 of the Constitution. The objector suffered the first tragedy in cause No 289 of 2009. The same family of Mururu has once against set the objector up to yet another but complete tragedy in these proceedings. This is a court of justice; it cannot countenance or preside over such injustice.

[16] To obviate the intended calamity befalling the objector, I find and hold that the objector is a beneficiary of the estate of the deceased. I order that the estate herein shall be distributed as hereunder;

L.R. NYAKI/ MUNITHU/357 MEASURING 1 ½ ACRES.

Shall be divided equally between MARGARET GACUKU SIMON and MARISELLA NKATHA

Dated, signed and delivered in open court at Meru this 17th day of December, 2018

F. GIKONYO

JUDGE

In presence of

Muchiri for Objector

M/s Materi for petitioner

F. GIKONYO

JUDGE