



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 100 OF 2006

In the Matter of the Estate of M' Iringo Kirigia (Deceased)

DANIEL MWONGERA M' IRINGO.....PETITIONER

-VS-

LUCY KARAMBU M' IKIAO.....PROTESTOR

JUDGMENT

Discrimination of women

[1] By Summons for Confirmation of Grant filed in court on 27th November 2012, the Petitioner proposed to distribute the Estate e of the deceased as follows:

(a) ABOTHUGUCHI/KATHERI/680 about 4.60 acres;

(i) Geoffrey Kaburia M' Iringo)

(ii) Joseph Kirai M' Iringo)- Equal shares

(b) ABOTHUGUCHI/KATHERI/1100 about 1.10 acres;

(i) Daniel Mwongera-whole

(c) ABOTHUGUCHI/KATHERI/1130 about 6.90 acres;

(i) Daniel Mwongera- 3 acres

(ii) Geofery Kaburia and

(iii) Joseph Kirai - equal shares.

[2] But, a protest to confirmation was filed. The Protestor averred in the Affidavit of Protest that the deceased was her father yet she had not been provided for in the proposed mode of distribution of the estate of the deceased. She contended that her brothers were discriminating against her just because she was a woman- something the Constitution and the Law of Succession Act abhors as they do not distinguish between girls and boys in succession matters. She complained that, the Petitioner and her

other brothers are married as she is, thus, it was not a good ground for them to discriminate against her on that basis. Consequently she prayed to be given one acre from her father's estate L.R NO. ABOTHUGUCHI/KATHERI/1130- which was not too much to ask as the whole estate comprised of more than 12 acres and her brothers would be left with more than three acres each.

[3] During the hearing of the Application on 15th June 2016, Mr. Mburugu for the Petitioner intimated to court that his clients have agreed on the mode of distribution of the estate being proposed by the Protestor. As such, only Objector 1, one Joseph Kirai is opposed to the Protestor getting an acre of land from the deceased Estate. Joseph Kirai's view was that the Protestor who is the Petitioner's sister should not get the one acre for three reasons: (1) she is married; (2) his brother (Petitioner) had many children; and (3) his father had given him the suit property prior to the enactment of the new Constitution.

[4] On the other hand, the Protestor argued that she was a widow and that she lived on the suit property with her girls. She contended that she did not have any sons to take care of her. It was her further case that their father left them the 1 acre they were living in with their mother and younger sister. She stated, therefore, that she was entitled to an acre in ABOTHUGUCHI/.KATHERI/1130 as her younger sister had said that she does not need the land.

[5] The Petitioner herein supported the Protestor's case. He testified that the Protestor was her sister and that his father did not say that he should provide for her. He further testified that he was in agreement that the Protestor should get an acre of the suit property. He was, therefore, in agreement with the mode of distribution proposed by the Protestor.

DETERMINATION

[6] I have carefully considered this application and the rival contentions by the parties. The Petitioner and I stated this earlier, has already conceded to the Protestor's claim and agreed the estate to be distribute in the manner proposed by the Protestor. But, in determining the distribution of the estate, I am required in law to hear all protests in the cause and hear all persons interested. I will, therefore, consider the opposition by Joseph Kirai as well. See rule 41 of the Probate and Administration Rules.

[7] Mr. Kirai's main objection to the Protestor getting one acre of the estate property are twofold: (1) that his brother has many children; and (2) that the Protestor is married. We are not told how many children the brother had as to be a basis to exclude the daughter of the deceased from inheriting the estate. In any case, however, the estate to which these proceedings relate is of the late M' Iringo Kirigia (Deceased) and the rightful heirs would be his own children and or such other persons who are dependants in the sense of section 29 of the law of Succession Act. I do not think in intestacy, the number of children a beneficiary should be the measure of that beneficiary's entitlement in the estate of the deceased. Such are grandchildren of the deceased. Those who are proved to be dependants of the deceased within the meaning of section 29 of the Law of Succession Act inherit the estate of the deceased in their own right. See section 29(b) of the Law of Succession Act, which defines dependant as:-

(b) such of the deceased's...grandchildren...whom the deceased had taken into his family as his own... and.... as were being maintained by the deceased immediately prior to his death.

No such proof of dependency has been offered in this case. In all other instances, a grandchild will take the share due to his or her deceased parent in the estate under the principle of representation stated in section 41 of the Law of Succession Act. Therefore, the argument by Objector 1 in so far as it intends to disinherit the Protestor on the basis of the number of children of his brother fails totally. I reject the argument.

[8] I move on to the second point of objection by Joseph Kirai. He acknowledged in his evidence in chief that the law does not allow discrimination. He, however, stated that the deceased had given out his lands prior to the enactment of the new Constitution. From his arguments, it is clear the Objector is suggesting that the Protestor is not entitled to a share of the Estate because she is a woman and more so a married woman. Such arguments are, to say the least are worn-out notion and do not have any place in

modern-day society; it is also vehemently frowned upon by the Constitution of Kenya, 2010 as well as the Law of Succession Act. See eminent literary work by W. M. Musyoka, *Law of Succession at page 118* in relation to reference to children in the Law of Succession Act that:-

Non-discrimination of daughters

Reference to children does not distinguish between sons and daughters, neither is there distinction between married and unmarried daughters

The deceased died intestate on 23rd September 1997 and succession of his estate is governed by the Law of Succession Act. If that be the case, I do not understand what the Objector intended to achieve by stating that the estate herein was distributed before the enactment of the Constitution of Kenya, 2010. In a more pointed manner, I am content to cite **Article 27(3)** of the **Constitution which** specifically provides that:

'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres'.

And any discrimination on the basis of gender or status is prohibited discrimination in the Constitution. International instruments against all forms of discrimination against women especially CEDAW prohibits such discrimination. I need not state that Kenya has ratified CEDAW.

[9] Case law has not been left behind and I am comfortable to cite a work of court **in the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased) [2017] KLR** as follows:-

Discrimination of daughters in inheritance

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when **RONO vs. RONO [2008] 1 KLR 803** delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of **STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR** that:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution. Accordingly, the 3rd Administrator and her children who are claiming the inheritance of late Festus K. M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.

[10] Section 29 (a) of the Law of Succession CAP 160 of the Laws of Kenya in recognizing children does not classify them on the basis of gender or marital status. Makhandia, J. (as he then was) in *In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR* rendered himself inter alia thus:

'The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'

In *Peter Karumbi Keingati & 4 others vs. Dr. Ann Nyokabi Nguthi & 3 others (2014) eKLR* Kimaru J stated thus:

“as regards 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 be 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 courts would 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. The 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 those discriminative cultural practices against women be buried in history.'

[11] There is no dearth of judicial decisions on this subject. It suffices to state that Joseph Kirai's objection to the Protestor getting 1 acre in ABOTHUGUCHI/KATHERI/1130 is not tenable in law. The protestor would be entitled in equality with her brothers. But she is not making a claim of equal share with the others. She is claiming only one acre in ABOTHUGUCHI/KATHERI/1130. Nothing would make this court not to believe the Protestor when she stated that she is a widow and that she lives with her girls on the one acre in ABOTHUGUCHI/KATHERI/1130. Accordingly, I find her claim to be justified, reasonable and just. I accordingly adopt her proposal. Consequently, the Estate of the deceased shall be distributed according to the Affidavit of Protest filed by the protestor in court on 8th July 2013 more specifically as follows:-

a) ABOTHUGUCHI/KATHERI/1130 about 6.90 acres

i. LUCY KARAMBU M'IKIAO – 1 acre

II. DANIEL MWONGERA M'IRINGO – 3 acres

III. GEOFFREY KABURIA M'IRINGO and

IV. JOSEPH KIRAI M'IRINGO} to share balance equally

b) ABOTHUGUCHI/KATHURI/680 about 4.60 acres to be shared equally by:

I. GEOFFREY KABURIA M'IRINGO and

II. JOSEPH KIRAI M'IRINGO

c) ABOTHUGUCHI/KATHERI/1100 about 1.10 acres

I. DANIEL MWONGERA M'IRINGO - whole

The costs of this application shall be borne by the Objectors.

Dated, signed and delivered in open court at Meru this 27th day of April 2017

F. GIKONYO

JUDGE

In the presence of:

M/S Kiome for Mburugu for petitioner.

Petitioner present. Objector in person – present.

F. GIKONYO

JUDGE