REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 347 OF 2012

IN THE MATTER OF THE ESTATE OF THUKU SOROKO GIKUNJU (Deceased)

JUDGMENT

Thuku Soroko Gikunju died on the 31st May 2010 at the age of 89. He was survived by two widows and seven children.

Rose Wangui Waweru aged 80 (1st Petitioner) and her children Margaret Wanjiru Waweru (60), Jane Murigi Waweru (57), Charles Gikunju Waweru (55) and Milkah Wairimu Ngubiru (52), and; Sporonsa Wambui Waweru aged 72 (2nd Petitioner) and her children George Philip Waweru(deceased) Patrick Maina Waweru (51) and Joseph Waithaka Waweru (50).

He left two parcels of land; **GATUAMBA/MUHOTETU BLK 1/28**, measuring 1.839 HA and **TETU/MUTHUAINI 709**, measuring 3.4HA.

With the consent of all the children, the two widows filed this succession cause.

Grant of letters of administration intestate was issued to Rose Wangui Waweru and Sporonsa Wambui Waweru on 18th July 2012. On 5th April 2013 they filed Summons for confirmation of grant. The summons was supported by their joint affidavit in which they deponed that the deceased was survived by them and their children (whom they listed), and that there were no other dependants.

They further deponed that they had identified all the persons beneficially entitled to the Estate of the deceased and had determined their shares as follows;

BENEFICIARY	**TETU/MUTHUANI/709**	**GITUAMBA/MUHOTETU BLOCK 1/28**	**NATIONAL BANK SHARES**
Charles Gikunju Waweru	1 acre absolutely	To be registered in his name upon payment of purchase price	
Margaret Wanjiru Waweru	1 acre absolutely		
Jane Muringe Waweru	1 acre absolutely		
Rose Wangui Waweru	½ acre to have life interest but in trust for Charles Gikunju Waweru		
Patrick Maina Waweru	1 acre absolutely		

Joseph Waithaka Waweru	1 acre absolutely		
Sporonsa Wambui Waweru	½ acre absolutely		
Antony Waweru Gikunju	½ acre absolutely		
Cyrus Ndung'u Gikunju	½ acre absolutely		Share /Joint
			Share /joint

The consent to confirmation of the grant filed on the 5th April 2013 was signed by Margaret Wanjiru, Jane Muringe, Charles Gikunju, Patrick Maina and Joseph Waithaka. Milka Wairimu Ngubiru did not sign the consent and her name was conspicuously missing from the list of beneficiaries.

Clearly unhappy with this outcome, on 10th of October 2013 she filed an affidavit of protest to the summons for confirmation of the grant. She protested her being disinherited of her rightful share of the deceased's estate despite being one of his children, arguing that the estate ought to have been shared equally among all the deceased children, taking into consideration the fact that the deceased was polygamous. She urged the court to reject the proposed distribution of the estate and distribute it according to the law.

On 15th August 2016, parties took directions to proceed by way of oral evidence.

The protest was heard on the 24th of May 2017.

The protester told the court that the deceased was her father and was polygamous. She was from the first house where they were four children, and the second house had three. Her desire was to see her father's estate divided equally among the beneficiaries.

Under cross examination she told the court she was not aware that the distribution was in accordance with her father's wishes. She was unhappy with the distribution in her mother's house. She conceded having been given three acres of land in Muhotetu which had been registered in the name of her step mother. She denied that this was in lieu of her inheriting from her father's estate, Tetu/Muthuaini /709. She had no problem with the shares of the second house namely Patrick Maina, Joseph Waithaka, Sporonsa, Antony and Cyrus. She just wanted the share to her family to be shared equally.

Rose Wangui Waweru the 1st Petitioner and the mother to the protester, testified on behalf of the petitioners. She told the court that she and Sporonsa were co wives. They had distributed the estate taking into consideration where each 'house' was already settled. That the protester, Milka was left out because she was married and was at her husband's, and in any case she had been given land elsewhere at Muhotetu, Wagatundia.

Under cross examination, she told the court that she and the co administrator had shared the land between the two houses. Milka was left out because she was already married.

Mr. Nderi appeared for the petitioners, Mr. Muthoni held brief for Mr. King'ori for the protester.

Counsel chose not to file submissions each party relying on the record.

The issues for determination are whether the administrators of the estate of **THUKU SOROKO**

GIKUNJU (deceased) acted according to the law in leaving out the protester during the distribution of his estate, and whether the share for the house of the 1st petitioner ought to be shared equally among the children.

First, it is important to note that the protester did not raise any issue with the equal distribution of the estate, Tetu/Muthuaini /709, as between the two houses. She also did not have any issue with the manner in which the 2nd house distributed its own share.

Section 71 of the Law of Succession Act Cap 160, provides for the confirmation of grants**.**

> (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

The proviso there to makes it mandatory that before any such confirmation is made, the respective identities and shares of all those beneficially entitled be identified.

> Provided that, in cases of intestacy, the grant of letters of administration **shall not** be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares. (emphasis mine)

The record will show that from when the process of succession began, the protester was included as one of the children of the deceased and a beneficiary of his estate. It is only at the stage of distribution that she was left out as nothing was identified as her share. Two reasons were given for the above action; that the protester had already been given another parcel of land by the step mother, and two, that she was already married.

On the first reason, section 42 of the Law of Succession Act does provide that previous benefits ought to be brought into account during distribution. It states,

> 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
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> (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

What is clear from the evidence given by the 1st Petitioner, and the protester is that the land the protester was "given' was not part of the Estate of the deceased. It was in the name of the step mother. The circumstances under which it was given were also not disclosed. The 1st petitioner in her testimony did not make any connection between that parcel of land and the Estate herein, neither was the court told when it was given to the protester to enable this court treat it as a gift *inter vivos* or otherwise. The protester's testimony that it was not given in lieu of her inheritance was not challenged.

The second reason is that at the time of distribution she was already married, and only the daughters of the deceased who had 'returned' back home were given a share. That is to say, those daughters who got a share were either not married or they had for one reason or the other left their matrimonial homes.

As a Nation, as a people of Kenya, we are in the 21st Century, basking under the glorious protections of the 2010 Constitution, ***Katiba Mpya***. We, the people of Kenya, enacted Article 27 of the Constitution, **e**ntrenching Article 7 of the Universal Declaration of Human Rights (1948) that "***All are equal before the law and are entitled without any discrimination to equal protection of the law. All are***

entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination", doing away with all forms of discrimination as stated at sub article (1) that *"Every person is equal before the law and has the right to equal protection and equal benefit of the law"*. Sub articles (4) and (5) prohibit discrimination by the state or any person *"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".* (emphasis mine). Marriage or the marital status of a child was never intended to be a ground to determine inheritance. The Law of Succession Act at section 29 in defining a dependant defines "dependant" to mean among others *"… the children of the deceased whether or not maintained by the deceased immediately prior to his death;".* If the intention was to exclude the married child, the law would have expressly said so, and in any event, that would have been inconsistent with the supreme law of the land, and hence, null and void.

There are a host of authorities on this issue and I borrow from my brothers and sisters before me.

Even before the passing of *Katiba Mpya*, Judge Makhandia (as he then was) speaking about the existing provisions of the Law of Succession Act, made a very strong statement on the issue of discrimination against daughters generally in succession matters **IN RE ESTATE OF SOLOMON NGATIA KARIUKI (DECEASED) (2008) EKLR** where he said;

> ***"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."***

I couldn't agree more with Judge Kimaru, who, emboldened by *Katiba Mpya* in **PETER KARUMBI KEINGATI & 4 OTHERS VS. DR. ANN NYOKABI NGUTHI & 3 OTHERS (2014) EKLR** put it this way;

> ***"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."***

I am also in complete agreement with Judge Gikonyo, who put it very clearly in **the MATTER OF THE**

ESTATE OF M'NGARITHI M'MIRITI ALIAS PAUL M'NGARITHI M'MIRITI (DECEASED) [2017] KLR, regarding the **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 states 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: -***
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> ***''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…''***
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> ***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.***

(See also the Judgment of Judge Kasango in **SAMSON KIOGORA RUKUNGA v ZIPPORAH GAITI RUKUNGA [2011] eKLR)**

Hence the administrators in the present case acted unlawfully, and in violation of the *Katiba* by excluding the protester on the basis of her marital status. This court can only add its strong voice to the voices of judicial reason that seek to see to it that these discriminative shackles of patriarchy that are entrenched in our collective psyche are carefully rooted out with the sharp tools provided by progressive legislation, and above all, our *Katiba.* Hence, I dare say, regardless of her marital status, the protester is entitled to a share of her father's property, as his daughter.

The first house's share was 3 ½ acres out of TETU/MUTHUAINI 709 three siblings each got 1 acre each and their mother a life interest of ½ acre held in trust for the son. This was done on the assumption that 3.4 HA equals 7 acres. However, a simple conversion reveals that it is 8.4 acres, entitling each house to 4.2acres. Charles Gikunju from the 1st house was also given GATUAMBA/MUHOTETU BLK 1/28 1.839 HA which comes to 4.544 acres, subject to payment of the purchase price. In her testimony the protester did not express interest in GATUAMBA/MUHOTETU BLK 1/28, but in TETU/MUTHUAINI 709. There is no background information as to why this GATUAMBA/MUHOTETU/128 was given to Charles Gikunju Waweru and to whom he was to pay the purchase price. There was no objection from the other beneficiaries to his getting this parcel of land on those terms. This proposal is vague as it is not clear who will benefit from the alleged purchase price. There is also no explanation why the 1st petitioner's share would be held in trust for Charles Gikunju yet he also has a share.

The question then is whether the share to the 1st house ought to be shared equally among all the

beneficiaries as prayed for by the Protester. It was suggested that the shares were according to the wishes of the deceased. Nothing would have been easier than to produce proof of this and in any case, the deceased died intestate.

In **MARY RONO VERSUS JANE RONO & WILLIAM RONO (2005) EKLR,** the Court of Appeal also dealt with the issue of distribution. Justice Omolo JA had this to say;

> ***"Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.***
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> ***It is not the law that each beneficiary must get an equal share. The court has the discretion to distribute the estate in accordance with the law and the circumstances of the case, to ensure fair and equitable distribution."*** See also **JOSEPH WAINAINA KINUTHIA V MARGARET WAMBUI KINUTHIA [2016] EKLR.**

In this case the two administrators each took half an acre of land. Among the children none is a child needing extra care or support. Each of the beneficiaries is above 50 years of age. No justification has been made for the extra-large shares given to Charles Gikunju from the first house. Hence in the exercise of my discretion, to ensure fair and equitable distribution of the estate. This is because there was no objection to this mode, even from the protester. I will not interfere with the half share for each house in Tetu/Muthuaini/709. However, the distribution will change as per the table below.

Secondly with regard to Gituamba/Muhotetu Block 1/28, I am guided by section 40(1) of the Law of Succession Act which provides;

> ***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***.

Taking that into consideration, the total number of units is nine; the widow and the four children of the 1st house; the widow and the three children of the 2nd house. The parcel is 4.54 acres. The first house is entitled to 5/9 approximately 2. 52 acres and the second house 4/9 approximately 2.02 acres.

It would appear, from the proposed mode of distribution by the administrators that the beneficiaries (except the protester), had agreed that Charles Gikunju was to buy their shares in Gituamba/Muhotetu Block 1/28. If that was the case, the proper thing would have been to distribute it to each house so that it would be clear what proportion of the purchase price would go to each house. The other beneficiaries would then share the purchase price for their portion in equal shares. In the event that he fails to buy them out then, they can share their portion in equal shares.

Having taken into consideration all the forgoing I make the following orders.

That the grant be and is hereby confirmed in the following terms;

1. Distribution

BENEFICIARY	**TETU/ MUTHUAINI/709**	**GITUAMBA/MUHOTETU BLOCK 1/28**	**NATIONAL BANK SHARES**

	3.40 HA=8.4 ACRES Each House 4.2 Acres to be shared as follows	1.839 HA=4.544acres	
Rose Wangui Waweru	½ acre absolutely	2.52 acres' life interest to Rose Wangui Waweru. To devolve to the children in four equal shares.	
Margaret Wanjiru Waweru	0.925 acre absolutely		
Jane Muringe Waweru	0.925 acre absolutely		
Charles Gikunju Waweru	0.925 acre absolutely		
Milka Wairimu Ngubiru	0.925 acre absolutely		
Sporonsa Wambui Waweru	½ acre absolutely	2.02 acres' life interest to Sporonsa Wambui Waweru. To devolve to the children in three equal shares.	
Patrick Maina Waweru	1.175 acre absolutely		
Joseph Waithaka Waweru	1.175 acre absolutely		
Antony Waweru Gikunju	0.675 acre absolutely		Equal Shares
Cyrus Ndung'u Gikunju	0.675acre absolutely		

2. Each party will bear its own costs

3. Right of appeal explained

Dated this 28th July 2017 at Kiniu, Makueni

Teresia Matheka

Judge

Dated Delivered and signed in open court this 23rd Day of October 2017 at Nyeri

Teresia Matheka

Judge

In the presence of

Court Assistant Harriet

N/A for Nderi Kiingati

N/A other parties