REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 100 OF 2013

IN THE MATTER OF THE ESTATE OF NGAMINI KIRIRA-DECEASED

JUDGEMENT

Ngamini Kirira (herein after referred to as the deceased) died intestate on 8th February 1970 at the prime age of 80 years.

On 1st day of August 2012, **Philiph Mugo Ngamini,** a son to the deceased (herein after referred to as the Petitioner) petitioned for letters of administration intestate to the deceased's estate. The petitioner named the following persons as persons surviving the deceased:-

i. Philip Mugo Ngamini-Son.

ii. Ngarua Waihenya-Son.

iii. Purity Waguthi Kirira-Daughter in Law

iv. Esther Wanja Muhoro-Daughter-Married.

v. Pauline Wairimu Wachira-Daughter Married.

vi. Felicita Muthoni Munyi-Daughter-Married

Annexed to the said petition is a letter from the local chief dated 28.1.2013 naming the same persons as survivors of the deceased.

There is a consent pursuant to Rule 26 (2) of the Probate an Administration Rules purported to have been signed by all the above beneficiaries. The only property listed in the affidavit in support of the said petition is **Kirimukuyu/Mutathiini/406.**

The petition was gazetted on 10.5.2013 and the grant was issued on 14.6.2013 and on 18.12.2013 the petitioner herein applied for confirmation of the said grant and proposed that the above property be distributed as follows:-

i. Philip Mugo Ngamini--1 acre

ii. Ngarua Waihenya & Purity Waguthi Kirira-1 acre jointly.

On 10th July 2015 **Ngarua Waihenya** (herein after referred to the first protestor) filed an affidavit of protest in which he averred as follows:-

*i. That the deceased had two wives, namely **Rebecca Wanjiru Ngamini** and **Hellen Wambui Ngamini.***

*ii. That the applicant is from the house of **Hellen Wambui Ngamini** while the protestor is from the house of **Rebecca Wanjiru Ngamini**.*

iii. That prior to his death the deceased had divided the above land ***<u>into three portions</u>*** *and they have at all times respected the boundaries put in place by the deceased, hence his protest to the mode of distribution in the application which seeks to upset what the deceased put in place.*

iv. That all the other beneficiaries have renounced their rights to the estate.

v. That the estate should be shared among the three sons equally.

On 22.10.2015, **Purity Waguthii Kirira,** (herein after referred to as the second protestor) and a daughter in law to the deceased filed an affidavit of protest stating *inter alia* as follows:-

i. That the petitioner is a step brother to her deceased husband, namely ***Kirira Ngamini.***

ii. That prior to his death the deceased in this estate had subdivided his land among his three sons, namely, ***Philip Mugo Ngamini, Kirira Ngamini****-Deceased and* ***Ngarua Waihenya*** *and that pursuant to the said informal subdivision, they occupied their respective portions and observed and respected the boundaries as determined by the deceased, hence her protest to the mode of distribution proposed by the petitioner.*

iii. That though the deceased had two wives he divided his land among the three sons and in the event of destabilizing the boundaries as determined by the deceased, each person stands to suffer greatly since each one of them has been in occupation for long and each has developed his/her respective portion.

iv. That the petitioner is fully aware of this fact and further his proposal that the two protestors share only one share is unfair.

On 23.9.2015 Ngaah J directed that this case proceeds by way of oral evidence. Hearing commenced before me on 2.11.2015. The first protestor's evidence was essentially a repeat of his affidavit of protest, namely, the deceased had two wives, and that prior to his death he had divided his land into three equal portions, the first portion to his left was given to the petitioner, the middle portion to Kirira Ngamini-deceased now represented by the second protestor and the first protestor was allocated the right portion and insisted that is the position on the ground. The deceased showed them the portions and the boundaries before he died and each one of them build on their respective portions. He maintained that there are clear boundaries on the ground, that trees were planted by their father, and that the three portions are equal and asked that the distribution be as per what their father gave them which is what is on the ground. The first protestor also denied that he signed the consent to making the grant and insisted that his signature is as per the affidavit of protest.

Answering questions from the court, the first protestor stated that he was over 40 years by the time his father died, that, he had already built on the portion his father gave him and indeed the petitioner and his late brother had also settled on their respective portions by the time his father died and insisted that if the court was to visit the site, that is the position the court will find on the ground.

The second protestors testified that her husband and biological brother to the first protestor died in 1991 and by that time they were long settled in the portion her husband was given by the deceased, and that the deceased had given each of his three sons a portion and trees were planted marking the boundaries. The proposal by the petitioner to divide the land into two is contrary to what the deceased's did and asked the court to order that the land remains as per the deceased subdivision which is what has existed on the ground for many years.

The petitioner, **Philip Mugo Ngamini** testified, that he agreed to petition for letters of administration with both protestors, that he proposed to have the land divided into two because the two took the portions touching the road and he is on the lower side. He also said his father had two wives, hence since the protestors come from one house and himself from the other wife, he preferred the land to be divided into two as per the number of wives. He denied his father ever divided the land and insisted that they have just

been living on the land.

Answering questions from the court the petitioner stated that he built on his portion in 1970, that his father showed him his portion, and that both protestors had also built on their respective portions when the deceased was alive. He also admitted that if the court visits the land, it will find that the land is divided into three portions occupied by the three families and there are clear boundaries and that the boundaries on the ground are the boundaries left by the deceased.

The petitioner called 4 witnesses, namely:-

> ***(i) Joseph Gathugu****, whose evidence did not shed any light on the dispute;*
>
> ***(ii) Esther Wanja*** *a sister to the petitioner, testified that the land should be divided into two so that she can get her share from the petitioner while the second protestor should get her portion from the first protestor. She insisted that the land should be divided into two portions as per the number of houses. She however confirmed that the parties in this case had settled in their respective portions before the deceased died;*
>
> ***(iii) Pauline Wairimu's****, a sister to the petitioner confirmed the deceased had two, hence the land should be divided into two, she insisted that the deceased never divided his land, but admitted that long before the deceased died each of the parties before court had built on their respective portions. On cross-examination she admitted each of the parties had his own portion of land and each had built on his portion.*
>
> *(**iv). James Karai**, a neigbour stated that he knew the deceased for about 5 years, and that by the time the deceased died all the parties before court had settle on their respective portions, and a visit to the land will find three homesteads belonging to the parties before court, each n its own portion.*

The issues for determination are:-

i. *Whether the deceased divided his land into three portions before he died and if so, should the said position be maintained.*
ii. *Whether the land should be divided into two as per the number of houses(wives).*
iii. *What is the law applicable in this case.*

The deceased in this cause died on 8.2.1970. The Law of Succession Act[1]came operation on 1st July 1981. Section **2 (1)** of the Act provides that:-

> *(2) The estates of persons dying before the commencement of this Act are subject to the <u>written laws and customs applying at the date of death</u>, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.*

The deceased person was a Kikuyu by tribe and therefore as per Section 2 (2) cited the applicable law in so far as it is not repugnant to justice or inconsistent with any written law is Kikuyu customary practices. The administration of the estate however must be in accordance with the Law of Succession Act.[2] This position of law has been evident in various decisions of this Court and the Court of Appeal. In the case of *Philis Michere Mucembi Vs. Wamai Muchembi*[3] the deceased had died before the commencement of the Law of Succession Act.[4] The court made the following observations:-

> *"Section 2(2) of the Law of succession Act clearly excludes the distribution of the estate of a person who died before 1st July, 1981. Such property must be distributed in accordance to the law of succession that was in place before the Law of Succession was enacted......."*

Rawal j (as she then was) *in the matter of the Estate of Kiiru Muhia "A'-Deceased* held that the provisions of the Law of Succession Act do not apply to a person who died before the Act came into force.

A similar position was repeated in the case of *in the matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo alias Mbura alias Mwaura Mbura-deceased*[5] where Kamau J held that where a deceased died before the Law of Succession Act came into force the distribution of his estate would be strictly governed by the applicable customary law, but the provisions of section **2 (2)** govern the administration of such estate.

W. M. Musyoka in his book *A Casebook on the Law of Succession*[6] observes that a father was allowed under Kikuyu Customary Law to distribute the bulk of his estate during his life time. The case of *Karanja Kariuki vs Kariuki*[7] illustrates this point. **Madan, Potter** and **Kneller JJA** held that *'property of a Kikuyu man could be distributed during lifetime to his children, or he could give directions on the administration and distribution of his property shortly before his death.'*

Kneller JA put it more clearly when he stated:-

> *"Now, by custom, Kikuyu father has to distribute his land among his sons during his lifetime if possible, and usually does so. This often happens where a son marries and it counts as that son's share if his father has not revoked the gift before he dies. (See Restatement of African Law: Kenya:2 Succession by Eugene Cotran, 1969, (1 ed) page 15). He may make a will in old age or on his death bed and the only formalities required are that he must say before the elders of his family (Mbari) and of the clan (Muhiriga) and close friends who will be administrator (Muramati) of his estate and to whom each item of it shall go..."*

The evidence adduced by all the parties is in agreement that each of the three sons had build on his own portion long before the deceased died and that each one of them was shown his portion by the deceased. In fact the evidence of the protestors is that the deceased divided his land into three portions and gave each son a portion and they all settled on their respective portions, a position that prevails till today. The deceased's' mode of distribution catered for all his children. It was also admitted in evidence by all the parties that the said portions are clearly marked on the ground and that there are clear boundaries with fully grown up trees planted by the deceased. I am persuaded that the deceased divided his land into three portions and gave each son a portion long before he died and each son established his household on the portion given by his father. The evidence in support of this position is overwhelming and credible and is supported by the current position on the ground where each of the three sons occupy the parcel of land given to each one of them by the deceased.

It must be admitted that African Customary Law has undergone some significant changes. **Harris J** in the case of *The Matter of the Estate of Stephen Mbuthia****[8]*** commenting on **Eugeniue Cotran's**, Restatement of African Customary Law observed as follows:-

> *"African customary law is in a fluid state, that changes occur due to various factors such as education, the influence of religion and social and economic advancement and that the volume (a reinstatement of African Law) should not be taken to be a once-and-for all- statement."*

Customary Law is not static, should not be repugnant to justice and morality or inconsistent with any written law. **Dr Patricia Kameri-Mbote** observes that the fact that customary law is fluid, flexible and dynamic makes it capable of gross manipulation by the main actors in it[9] a position I fully agree with because many parties before court tend to interpret the customs to suit their case. For example where one house had more children than the others, like in the present case where one had two sons while the other had one, there is a tendency of the party with less number insisting on distribution as per house which is what customary law provided while the house with more children insist on distribution as per the number of children.

The position in the present case is that the deceased distributed his land long before his death, hence the application of the customary practice where the property was distributed as per the number of wives does not apply to this case. Even if he had not distributed, I would still have difficulties in the age and time upholding a practice that would promote unequal distribution of property among children. To me, such a practice would be repugnant to justice.

I am persuaded by the position held by **Kneller J** in the above cited case where the learned Judge correctly stated that "*by custom, Kikuyu father has to distribute his land among his sons during his lifetime if possible, and usually does so. This often happens where a son marries and it counts as that son's share if his father has not revoked the gift before he dies..*" This is exactly what happened in the present case.

Under *section 51 of the Evidence Act,**[10]*** opinions of persons who are likely to know of the existence of any general custom or right are admissible where the court is required to form an opinion of the existence of such custom or right. The phrase *"general custom or right"* is defined in *Section 52 (2)* to include customs or rights common to any considerable class of persons.

Lastly, *Rule 64 of the Probate and Administration Rules* makes provision for the application of African Customary Law in the following terms:-

> *"Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross- examination."*

The effect of the above provisions of the *Evidence Act* and the *Probate and Administration Rules* has been to make admissible, among others, the works of Dr. Eugene Cotran pertaining to the customary laws and practices of many Kenyan communities and the above cited book by **William Musyoka**, now a Judge of the High Court of Kenya. Dr Cotran's treatise on African customary law has for example, been admitted and relied upon to prove Kikuyu customary law in the case of *Karanja Kariuki vs Kariuki,* ***[11]*** on (distribution of the land of a deceased person during his lifetime), *Gituanja vs Gituanja,**[12]*** (life interest of a widow) only to mention but some.

The courts are empowered by section **3 (2)** of the Judicature Act[13] to be guided by African customary law in civil cases where the parties are subject to it. **Section 3(2)** of the Judicature Act[14]:-

> *"3(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."*

Duffus JA in *Kimani vs Gikanga*[15] observed as follows:-

> *"...The difficulty remains how are these customary laws to be established as facts before the courts? In some cases the court will be able to take judicial notice of these customs without further proof as for instances in which cases where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document of reference as provided in subsection 92) above, but usually ....the relevant customary law will, as a matter of practice and of convenience, have to be proved by witnesses called by the party relying on that particular customary law in support of his cases...."*

From the above decision, it's clear that customary law is a matter of fact and that if it is of wide notoriety, the custom may be judicially noticed and if not judicially noticeable, the custom may be proved by testimony of witnesses and or by reference to a text book of reference and that courts are to guided by African customary law where one or more of the parties is subject to it, so far as it is not repugnant to justice and morality.

Relating the law and authorities cited above to the facts of this case, I find that it was possible for the deceased under Kikuyu customary law to divide his land and give it to his three sons which he did as the evidence on this point is overwhelming. That each of the three sons took possession of their respective

portions and settled on the said portions long before the deceased died and the deceased divided his land among his children not as per the number of his wives. Accordingly, my answer to issues numbers one and two are in the affirmative, while on the third issue as held earlier on, the law applicable in this estate is Kikuyu customary law, but the administration of the estate must be in accordance with the Law of Succession Act a provided under Section (2) cited earlier.

Accordingly I allow the protests by the two protestors and order as follows:-

a. *The a certificate of confirmation of Grant of letters of Administration to the deceased's estate be issued jointly to* ***Philip Mugo Ngamini, Ngarua Waihenya*** *&* ***Purity Waguthi Kirira****.*

b. *That the said* ***Philip Mugo Ngamini, Ngarua Waihenya*** *&* ***Purity Waguthi Kirira*** *are entitled to equal portions out of land parcel* **Kirimukuyu/Mutathiini/406** more particularly as demarcated by the deceased.

c. *That the said land number* **Kirimukuyu/Mutathiini/406** be divided into three equal portions as aforesaid among ***Philip Mugo Ngamini, Ngarua Waihenya*** *&* ***Purity Waguthi Kirira****.*

d. *The said sub-division shall maintain as much as possible the existing boundaries and shall ensure each of the said persons retains the portion they have been occupying as allocated by the deceased.*

e. *No orders as to costs.*

Right of appeal 30 days

Dated at Nyeri this **26th** day **January** of 2016

John M. Mativo

Judge

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[1] Cap 160, Laws of Kenya

[2] Ibid

[3] {2010} eKLR

[4] Supra

[5] HC Succ Cause No. 935 of 2003, Nairobi

[6] LawAfrica Publishing Company Ltd, Chapter 21

[7] {1983} eKLR

[8] HCCC 1289/74

[9]The Law of Succession in Kenya: Gender Perspectives in Property Management and Control Published in Nairobi: Women & Law in East Africa, 1995

[10] Cap 80, Laws of Kenya

[11] Supra

[12]*(1983) KLR, 575*

[13] Cap 8 Laws of Kenya

[14] Ibid

[15] {1965} E.A. 735