

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 196 OF 2013

IN THE MATTER OF THE ESTATE OF STANLEY KORI KIONGO alias KORI KIONGO-
DECEASED

JUDGEMENT

Stanley Kori Kongo (herein after referred to as the deceased) died intestate in 9th July 1972 at the age of 91 years. On 18th March 2013 **Joshua Wanjohi Kori** (hereinafter referred to as the petitioner) took out citations^[1] for service upon **Francis Weru Wanjohi** and **Jeremiah Murage Kori**. The letter from the local chief annexed to the said citation shows that the deceased had four wives. On 10th February 2014, the petitioner petitioned for letters of administration to the deceased estate and listed title number **Nyeri/Waraga/466** as the only property comprising the deceased's estate. No consent pursuant to Rule 26 (2) was attached to the petition.

The petition was gazetted on 23rd My 2014 and the grant issued to the petitioner. On 20th April 2015, the petitioner filed a notice to amend for **P & A 5** and amended the beneficiaries list and also the list of properties to read **Nyeri/Waraga/120** and Plot number **F-15**, Majengo. The petitioner also applied for the confirmation of the grant and proposed that **Nyeri/Waraga/466 (i.e 120)** be shared equally among *Joshua Wanjohi Kori, Duncan Weru Kori, Ngatia Kori, Leah Njeri Harun, Simon Karogo Kori, Hanah Wangui Maina, Mathenge Kori, Grace Njeri Kori, Francis Weru Wanjohi (on behalf of the family of Samuel Wanjohi Kori-deceased), Jeremiah Murage Kori, Charles Ngatia Kori and Cecilia Wanjiku Miano.*

He also proposed that plot number **F-15**, Majengo be sold and the proceeds shared equally among the above persons.

On 2nd July 2015, *Francis Weru Wanjohi, Jeremiah Murage Kori and Ngatia Kori* being sons and grandsons of the deceased herein filed an affidavit of protest opposing the proposed mode of distribution stating that the deceased was married to four wives, namely *Wangui Theru Kori-deceased, Esther Mumbi Kori-deceased, Zipporah Wairimu Kori and Peris Wairimu Kori.* That the second wife *Esther Mumbi* has one child, namely *Joseph Ngatia Kori*, the petitioner herein. The children of the third wife *Zipporah Wairimu Kori* are *Lucy Wanja Kori, Veronica Wamaitha Kori-deceased and Wambugu Kori-deceased.*

The children of the fourth wife the late *Peris Wairimu Kori* are *Lucy Wamucii Kori, Duncan Weru Kori, Jeremiah Murage Kori, Simon Karogo Kori, Peninah Wanjiku Kori, Samuel Wanjohi Kori-deceased, Joseph Miano Kori-deceased and John Maina Kori-deceased.*

The protestors stated that prior to his death the deceased apportioned *Nyeri Waraza/120 & Plot number F/15* Majengo equally among the three houses.

The petitioner filed a replying affidavit in which he averred that all the beneficiaries have been utilizing the land equally except that the third protestor has for many years been living in Nairobi and that the deceased's children should get equal shares. He argued that the fact that the deceased was polygamous is not a sufficient ground to share the land as per the number of houses. He also averred that the second protestor has all along been managing the Majengo plot and has been collecting all the rent.

The second protestors evidence was that prior to his death the deceased divided his land among all the his family members as follows, the first wife was given the upper portion of title number 120, the third wife

as given the middle portion, the fourth wife was allocated the lower side, while the first wife was given a parcel of land at Tetu, Nyeri, and that the land at Tetu was not among the ones mentioned in court, though he was not sure if the land was registered in the deceased's name. He insisted that the deceased shared plot number 15 in 1968 among three of his children, namely, Jeremiah Murage Kori, Aaron Wambugu and Simon Karogo Kori. He maintained that the foregoing was the position as at the time of the deceased's death. He also stated that title number 120 is presently used by the following, namely, Joseph Ngatia, a son to the second wife, George Wanjohi Kori, Charles Ngatia and from the third house and John Maina Kori and Karogo Kori from the fourth house. He maintained that the deceased had divided the land on the ground. He also stated that the deceased built houses for his wives as stated above and that the above portions were equal but the position is no longer so on the ground. He however admitted that he was not present when the deceased allegedly divided the land. He insisted that he preferred the land to be divided as per the houses, namely, three houses since one house has land at Tetu. He proposed that the Majengo plot be sold and proceeds shared among the 2nd, 3rd & 4th houses. Upon cross-examination, the witness admitted that all the protestors are sons of the 4th wife. His evidence was supported by the first protestor *Francis Weru Wanjohi*.

Richard Mathenge Ngatia, a grandson to the deceased testified that the deceased had given clear indications on how his property was to be shared as early as in 1968 and that the deceased's wishes were respected until the last wife died. Nevertheless, the position is still reflected on the ground especially in the manner the land is currently occupied and used. His proposal was that the land be shared among the three houses while plot number 15 be shared among all the houses.

Upon cross-examination, he admitted that at the time the deceased allegedly distributed the land he was barely 6 years old, that he has never lived on the land and that essentially what he stated he learnt from his father/uncles.

The petitioners adopted his affidavit in support of the summons for confirmation and stated that the proposed mode of distribution had been agreed with the deceased's children. He maintained that the deceased never communicated any wishes as alleged, and that all the deceased stated was that his properties belonged to him so long as he lived, that upon his death they would belong to his wives, and if the wives are not there the properties would pass to his children. He maintained that the deceased never shared his land at Waraza. He reiterated his proposal in his affidavit. His evidence and proposal were supported by *Duncan Weru Kori*.

Both parties filed written submissions. Counsel for the protestor maintained that the deceased's estate ought to be distributed as proposed in the affidavit of protest, that is equally among the three houses, while counsel for the petitioner submitted that the estate ought to be distributed equally among all the beneficiaries, thus ensure fairness and equality.

The deceased in this cause died in 1972. The Law of Succession Act^[2] 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 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.

Counsel for the protestor submitted that the deceased shared his land prior to his death and urged the court to honour the deceased's wishes while the petitioner urged the court to find that the deceased died intestate and distribute the estate as proposed in the application for confirmation of the grant.

I find it necessary to reiterate that cases are decided on evidence and the law applicable. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*^[3] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the

particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

Turning to the facts of this case, and upon evaluating the evidence tendered and the applicable law, I find that the issues for determination are **(a) whether the deceased divided his land prior to his death, (b) How is the deceased's estate to be divided among his beneficiaries.**

With regard to the first issue, I am fully aware that it is possible for a person to distribute properties during his/her lifetime. I am fully aware that sufficient evidence to prove that a deceased person distributed his properties during his life time is necessary. I am also aware that such proof cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case.

Where, however, there are suspicious circumstances, the onus would be on the person alleging to explain them to the satisfaction of the Court before the court can accept such evidence. Where there are doubts or suspicious circumstances, it is the duty of the person alleging to satisfy the conscience of the court.

What are suspicious circumstances must be judged in the facts and circumstances of each particular case. The **burden of proof** (*Latin: onus probandi*) is the duty of a party in a trial to produce the evidence that will shift the conclusion away from the default position to that party's own position. In the present case it was necessary to adduce sufficient evidence such as involvement of clan elders, family members or local administration evidently demonstrating the deceased's unequivocal desire and actions to distribute his properties as alleged. Such evidence must be clear, cogent and must demonstrate evidence of absence of suspicious circumstances.

If the distribution of the property is unfair or skewed in such a manner that the person so alleging gets a prominent part in the alleged distribution of the estate which confers substantial benefits to him or his children to the exclusion of the other beneficiaries like in the present case, then, unless the contrary is sufficiently proved, that itself is a suspicious circumstance and in appreciating the evidence in such a case, the court should proceed with an open but nevertheless vigilant and cautious mind.^[4] I must quickly point out that the protestors hail from the same house and the proposed distribution clearly gives their house a larger share and totally disadvantages the rest of the beneficiaries.

More important to note is the fact that the protestors carefully avoided to call their father, a son to the deceased as a witness, and a very key witness in this case claiming that he was ailing though no evidence was tendered to support this fact. The omission to call such a crucial person cannot be ignored considering the core dispute. The petitioners case is that all the children of the deceased had agreed to the distribution including the protestors father whom the protestors carefully avoided to produce in court claiming that he was old and ailing. I note that no medical or tangible evidence to support his inability to appear before the court, hence the court was denied the opportunity to verify this fact. This inevitably leaves open to the court to conclude that the evidence of the protestors father would have been adverse to their case, hence the reason why they carefully omitted to call him.

I hasten to support my above conclusion by reiterating that it should be made clear that the rule in *Jones vs Dunkel*^[5] which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. A party has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned. Nonetheless, I should outline what I apprehend to be the basic jurisprudence that has developed in

relation to the rule and that has governed the way I approach the issue at hand.

The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.[6]

Whether the failure to call a witness or tender a document gives rise to an inference depends upon a number of circumstances. In *Fabre vs Arenales*[7] Mahoney J (Priestly and Sheller JJA agreeing) said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The foregoing position was cited with approval by Miler JA in *Hewett vs Medical Board of Western Australia*[8] and also the same position has authoritatively been stated by Heydon J D in *Cross on Evidence*.^[9]

The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; *Schellenberg vs Tunnel Holdings*,^[10] *Ronchi vs Portland Smelter Services Ltd*^[11] and *Hesse Blind Roller Company Pty Ltd vs Hamitovski*^[12] and its also reiterated in *Cross on Evidence*.^[13]

When no challenge is made to the evidence of witnesses who are called, the principle in *Jones vs Dunkel* cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.^[14] A look at the record shows that the protestors evidence is largely challenged, and truly speaking the omission by the protestors to call their father as a witness leaves serious gaps in the protestors case. The witness who was not called was to give the same evidence or corroborate the protestors testimony whose evidence has gaps which need further clarification. It should be recalled that the it was admitted in evidence that the said witness left home in the 1950's or thereabouts and was entirely an "absentee" father and was "brought" back home by his son in the year 2000. Thus, this is one of the witnesses who was expected to support the view that his father distributed his land in his life time. It is the petitioners case that all the deceased's sons including the protestors father (who was not availed in court) had agreed to the mode of distribution proposed by the petitioner. I am tempted to draw an adverse inference and conclude that failure to call him in court by the protestors was deliberate because his evidence was not helpful at all to their case.

In order for the principle cited above to apply, the evidence of the missing witness must be such as would have elucidated a matter.^[15]The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case. Thus, upon taking into account the circumstances of this case, I arrive at the above inference.

Further, the evidence adduced must be clear and there should be no inconsistencies at all like in the present case. The evidence adduced by the protestors does not in my view meet the threshold to show that the deceased distributed his land. Evident inconsistencies and contradictions in the evidence of the protestors raises serious doubts on the question of the alleged distribution. In fact, there is nothing to show that the deceased divided his land during his life time. In fact, no evidence was tendered establishing this fact to the required standard.

The burden of proof is often associated with the Latin maxim semper necessitas probandi incumbit ei qui agit, a translation of which in this context is: "the necessity of proof always lies with the person who lays

charges." I find that the evidence tendered by the protestor falls short of the required standard to clear the doubts in the mind of the court that the deceased ever distributed his land during his life time.

I am aware that the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.[16] But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her life time.

There is no tangible evidence to demonstrate that the deceased divided his land during his life time as alleged. The evidence tendered by the protestors is manifestly inadequate to warrant this court to conclude that the deceased divided his land during his life time or distributed his properties. The position on the ground presently suggests otherwise. I had the opportunity of observing the demeanor of the protestors as they gave evidence in court, and other than the evident inconsistencies and contradictions cited above, I found their evidence to be totally untruthful. I find that the petitioner and his witness was more composed, consistent and truthful. Hence, I find that the deceased did not distribute his properties during his life time.

Section 34 of the Law of Succession Act[17] provides that:- *"A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."*

Having found that the deceased died intestate, and bearing in mind the deceased estate is to be administered in accordance with the act, I find that distribution must be fair, equitable and just and even though customary law may apply in the present case since the deceased died prior to the act coming into force, a custom that permits inequality, unfairness and skewed distribution cannot be permitted in the present day and age. Such a custom would be repugnant to justice and morality and totally unconstitutional. Thus, I find that, I cannot uphold a custom that insists on sharing the deceased's estate as per the number of wives and openly disadvantage the "houses" that had more children. Clearly, the proposal by the protestors seems to be driven by the fact that by upholding distribution as per the wives, their house stands to gain because they are few. I reiterate that such a scenario will create inequality, discrimination, unfairness and oppression, hence, evidently unconstitutional and unacceptable in the present day and age.

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*[18] 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[19] 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 has more children than the others, like in the present, there is a tendency of the party with less number insisting on distribution as per houses 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 I am not persuaded that the deceased distributed his land before his death. Even if he had distributed, I would still have difficulties in the present 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.

Under section 51 of the Evidence Act,[20] 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. *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 book by **William Musyoka**, now a Judge of the High Court of Kenya and the above cited work by **Dr. Mbote**. 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*,^[21] on (distribution of the land of a deceased person during his lifetime), *Gituanja vs Gituanja*,^[22] (life interest of a widow) only to mention but some.

The courts are empowered by section 3 (2) of the Judicature Act^[23] to be guided by African customary law in civil cases where the parties are subject to it. **Section 3(2)** of the Judicature Act^[24]:-

“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*^[25] 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 usuallythe 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. To me, the evidence tendered by the protestors did not prove that the deceased customarily distributed his land in conformity with the Kikuyu Customary Law.

I have carefully considered the affidavit evidence adduced by the parties and the submissions by both advocates. I have considering the justice of the case and taken into account that it is not always easy to achieve equality in cases of this nature as was observed in the case of *Rono vs Rono*^[26] and what may be fair in one case may not fair or applicable in another case. I have also considered that each case has to be determined on its peculiar facts and circumstances.

After due consideration, I find that the protest has no merits nor was it supported by evidence. Hence, I dismiss the protest.

I find that the distribution as proposed by the petitioner is fair, just and equitable and I allow it. I find that it is in the interests of justice and fairness that I allow and order distribution as proposed by the petitioner. Accordingly I order and decree as follows:-

(a) That the grant of letters of administration intestate to the estate of **Stanley Kori Kiongo** alias **Kori Kiongo-deceased** made to **Joshua Wanjohi Kori** in this matter on 24th June 2014 be and is hereby confirmed.

(b) That title number **Nyeri/Waraga/120** be shared equally among the following, namely; **Joshua Wanjohi Kori, Duncan Weru Kori, Ngatia Kori, Leah Njeri Harun, Simon Karogo Kori, Hanah Wangui Maina, Mathenge Kori, Grace Njeri Kori, Francis Weru Wanjohi (on behalf of the family of Samuel Wanjohi Kori-deceased), Jeremiah Murage Kori, Charles Ngatia Kori and Cecilia Wanjiku Miano.**

(c) That plot number **F- 15, Majengo** be sold and the proceeds shared equally among the above persons listed in paragraph (b) above.

(d) That the protestors do pay to the petitioner the costs of this cause.

Right of appeal 30 days

Dated at Nyeri this 23rd day **November**, of 2016.

John M. Mativo

Judge

Delivered at Nyeri this 23rd day **November**, of 2016.

Hon. Justice Jairus Ngaah

Judge

[1] Under Rule 21 of the Probate and Administration Rules

[2] Cap 160, Laws of Kenya

[3] {2007} 4 SLR (R) 855 at 59

[4] See H. Venkatachala Iyengar vs B. N. Thimmajamma & Others, 1959 AIR 443, 1959 SCR Supl. (1) 426- Supreme Court of India

[5] {1859} HCA 8; {1859} 101 CLR 298, 308, 312

[6] See Schellenberg vs Hesse Tunnel Holdings Pty Ltd {P2000} HCA 18

[7] {1992} 27 NSWLR 437, 449-450

[8] {2004} WASCA 170

[9] 7th Edition, Page 1215

[10] Cubillo (No. 2) 355

[11] {2005} VSCA 83

[12] {2006} VSCA 121 28

[13] Supra at page 1215

[14] See Cross on Evidence, Supra.

[15] See Payne vs Parker, 202 Cubillo)No. 2) 360

[16] See the Judgment o A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**

[17] Cap 160, Laws of Kenya

[18] HCCC 1289/74

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

[20] Cap 80, Laws of Kenya

[21] Supra

[22] (1983) KLR, 575

[23] Cap 8 Laws of Kenya

[24] Ibid

[25] {1965} E.A. 735

[26] Supra