



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT SUCCESSION CAUSE NO 159 OF 2015
IN THE MATTER OF THE ESTATE OF THE LATE

KANAMPIU MWANIRUA.....(DECEASED)

AND

MURUNGI KANAMPIU.....PETITIONER/PROTESTOR

VERSUS

CARMEN ITHIRU NJAGI.....1ST CAVEATOR/APPLICANT

CACELINA MUYIA KANAMPIU.....2ND CAVEATOR/APPLICANT

JUDGMENT

1. The late Kanampiu Mwanirua “the deceased” died either on 10th February, 1992 or 17th October, 1995 aged about 80 years. On 21st April, 2008, Murungi Kanampiu (“the Petitioner”), a son of the deceased, petitioned for Letters of Administration Intestate which was issued to him on 10th June, 2008. Despite as aforesaid, the Petitioner failed to apply for the confirmation thereof whereby on 12th May, 2011, Carmen Ithiru Njagi applied for the Petitioner to show cause why he had not applied for confirmation and in default, she be granted leave to apply for confirmation. The leave sought was granted and on 9th August, 2011, Carmen applied for the confirmation of that grant. In that application, she proposed that the only property constituting the estate, LR NO. Mwimbi/W.Mugumango/1005 (“plot NO.1005”) be distributed to her to hold in trust for herself and in trust for her sisters, to wit, Eusebia Mukwaiti Njue and Jane Mukwaiti Riungu. The Petitioner opposed that mode of distribution by filing a protest on 29th February, 2012. The protest was directed to be determined through viva voce evidence.

2. PW2 was Murungi Kanampiu, the Petitioner. He told the court that the only property for the estate was plot NO.1005 which the deceased had left to him to administer; that the deceased left his grandchildren Timothy Nyaga Murungi, Boniface Karani Murungi and Eliphias Mbae Murungi as his dependants living on plot NO. 1005, that Carmen had been married for 56 years and was not entitled either in law or under custom to share in the estate. He proposed that the only asset of the estate be distributed as follows:-

- a) Timothy Murungi - 0.50 acres
- b) Boniface Murungi - 0.50 acres
- c) Eliphias Murungi - 0.50 acres

d) Carmen Ithiru -

Eusebia Mukwaiti 0.5 acres

Jane Mukwanyaga

Jane Mukwamugo

3. The Petitioner further claimed that Carmen had fraudulently stolen the title to plot No.1005 from Vincent M'Muthara their uncle. He concluded that under Meru customary Law the sisters were only entitled to 0.5 acres jointly. In cross examination, he admitted that he had been provided for by the deceased during his lifetime through Mwimbi/N. Mugumango/969. That Jane Mukwamugo was also provided for through Mwimbi/ N.Mugumango/ 1004 that was given to her son Fredrick Gitonga. That the three grandsons dependants he wanted the estate distributed to were all his children. PW2 was Vincetio M'Muthara M'Mwanirua. He was the brother of the deceased. His evidence was taken de benesse because of his advanced age. He told the court that the deceased had left his family to him. That Carmen had taken the title to plot No. 1005 from him for safe custody. He denied ever hearing the deceased expressing the wish that the property be shared by his grandsons.

4. On her part, Carmen Ithiru told the court how the deceased had sub divided his Mwimbi/N. Mugumango/36 into three portions. He gave the Petitioner three (3) acres being plot No.969, one (1) acre to a son of one of their sisters, Jane Mukwamugo Marangu being plot No.1004, and the deceased was left holding two (2) acres being plot No.1005. That the deceased's intention was that plot No.1005 be inherited by his daughters excluding James Mukwamugo who had been provided for. That it was ridiculous to share the deceased's estate to the Petitioner's sons as the daughters of the deceased rank in priority over them. She denied having obtained the title to plot No.1005 fraudulently. She admitted that she was married in 1959 and was happily living with her husband. She produced a death certificate No. 335548 showing that the deceased died on 1st May, 1995 and not in 1992 as contended by the Petitioner. She admitted that she has never lived on plot No. 1005 and that the Petitioner had caused his son to pull down the deceased house.

5. Mr Mutani learned counsel for the Petitioner submitted that the court should consider the size of the estate and that the deceased died intestate. That since Carmen was married in 1959 and was living away from home, it is more likely than not that it was the Petitioner who would know the wishes of the deceased as opposed to Carmen. That under section 3 (2) of the Judicature Act Cap 8 of the Laws of Kenya, this court should be guided by African customary law. That under the Meru customary law, married daughters are only considered for inheritance upon divorce but not when they are still married. That the grandsons of the deceased should be considered as dependants as they were left on plot NO. 1005 by the deceased. Counsel urged the court to apply the decision of **Paul Kamundi Jotham .v. Janet Igoki & Others [2016]eKLR** and order equitable distribution of the property having in mind the welfare of the dependants. Mr. Muriithi learned counsel for Carmen made no submissions but urged the court to consider the evidence on record.

6. The court has carefully considered the Affidavits on record and the testimonies of witnesses. It has also considered the submissions of counsel and the authority relied on. The issues that fall for determination are whether the deceased expressed his wishes on how his estate should be inherited? Whether the sons of the Petitioners are dependents of the deceased? Whether the court should apply the Meru Customary Law on inheritance? and finally, how the estate should be distributed.

7. On the first issue, the Petitioner testified that whilst he was catered for during the lifetime of the deceased, the deceased had expressed his wish that plot No.1005 be inherited by his grandsons. On the other hand, Carmen told the court that the deceased had sub divided his property into three (3) Plots, Nos.969, 1004 and 1005. That his wish was that she and her two (2) other sisters do inherit plot No.1005.

8. The court has considered the evidence on record. It is not in dispute that the deceased subdivided his six (6) acre property Mwimbi/N.Mugumango/36 into three (3) portions of Mwimbi/N.Mugumango/969,

1004 and 1005, measuring three (3), one (1) and two (2) acres respectively. He gave plot No.969 to the Petitioner and plot No.1004 to Fredrick Gitonga, a son of Jane Mukwamugo a daughter to the deceased. Plot No. 1005 was left in the name of the deceased. Neither the Petitioner nor Carmen told the court when, where and to whom the deceased allegedly expressed his wishes on how plot No.1005 was to be inherited. To my mind, there was no credible evidence on which to make a definite finding how the deceased wished plot No.1005 to be inherited. From the evidence on record (the date of registration of the sub divided properties) it is clear that the deceased gave out plot Nos. 969 and 1004 when all his daughters had already been married and were away from home. In this regard, this courts view and so holds is that, there is no evidence that the deceased expressed his wishes on how plot NO.1005 was to be inherited. He died intestate and the same is to be inherited in accordance with intestacy. It is not to be inherited exclusively by either the sons of the Petitioner as he contended nor by the daughters of the deceased as Carmen contended.

9. The next issue is whether this court should apply the Meru Customary Law on inheritance pursuant to section 3 (2) of the Judicature Act, Cap 8 Laws of Kenya. That section provides:-

“3”(2)The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African Customary Law 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”

10. The estate of the deceased is being contested by people who are not only subject to but are affected by Meru Customary Law. The only problem is, there was no evidence that was led to show what Meru Customary Law is as regards inheritance. The only evidence on record is the testimony of PW1 Vincentio M’Muthara M’Mwanima. He was a ninety five (95) year old male Meru Man when he testified. He told the court that under Meru Customs, daughters who are married do not claim any inheritance from their deceased parents. They are only entitled to a place to live in in their parents’ home when and only if they are divorced. That in the circumstances of this case, the daughters of the deceased were still happily married and are not entitled to anything from his estate. In his submissions, Mr Mutani, learned counsel for the Petitioner strongly urged the court to apply this criteria in determining this dispute.

11. This court has a problem with the evidence of PW1. Firstly, he did not tell the court that he is an expert in Meru Customary Law, leave alone Meru Customs on inheritance. This lacking, his evidence cannot be taken to be that of an expert in Meru Customary Law. Therefore, the court cannot hold that what he told the court is the established Meru Customary Law on inheritance. Secondly, section 3 (2) of the Judicature Act enjoins this court to be guided by and apply customary law if it is not repugnant to justice and morality or is not inconsistent with any written law. In this country, the written law regarding inheritance is the Law of Succession Act, Cap 160 Laws of Kenya. Section 38 thereof provides:-

“38. Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.” (Emphasis supplied).

12. Although the deceased left a spouse, Cacia Muya Kanampiu, who had lodged a caveat in this matter but later withdrew it, she died on 6th July, 2009 immediately after the grant was issued to the Petitioner. In this regard, the deceased’s estate is subject to the provisions of section 38 of the Law of Succession Act. That being the case, section 38 of the Act does not differentiate between sons and daughters, male or female, married or unmarried. That section provide for the distribution of the estate equally to all the children of the deceased who survive him. In this regard, in so far as the Meru Customary Law of inheritance, if at all it was established, provides to the effect that married daughters of a deceased person are not entitled to inherit from his/her estate, that will be inconsistent with section 38 of the Act, which is a written law. That custom cannot therefore be applicable. Accordingly, this court holds that it will not be guided by the Meru customary Law on inheritance in determining this matter. In any event, applying that custom will be repugnant to justice and morality as the Court of Appeal has held in the case of **Rono .V. Rono & Another [2008] 1 KLR. (G & F) 803**

13. The next issue for determination is the position of the named grandsons of the deceased, that is, whether they were his dependants. Timothy Nyaga Murungi, Boniface Karani and Eliphias Mbae Murungi are the sons of the Petitioner. Although they were said to be adults, none of them was called to testify or did any one of them swear any Affidavit to stake his claim on the estate. The only evidence on record is from the Petitioner. The Petitioner's testimony on the deceased's grandsons was twofold. That the deceased had expressed his wish that the Petitioner do hold plot NO.1005 for them. This has already been rejected by the court for reasons given. The other aspect of the Petitioner's testimony on this aspect was that the deceased's grandsons were his dependants in that he left them living on plot No. 1005. He swore as follows in his Affidavit of 5th February, 2016 which was adopted as part of his testimony at the trial:-

“8. That before the death of the deceased he left the following dependants on the land LR Mwimbi/N. Magumango/1005

(i) TIMOTHY NYAGA MURUNGI (GRANDSON)

(ii) BONIFACE KARANI MURUNGI (GRANDSON)

(iii) ELIPHAS MBAE MURUNGI (GRANDSON)”

14. Earlier, in his Affidavit of protest sworn on 29th February, 2012, which he also adopted as part of his evidence in chief at the trial, the Petitioner had stated:-

“8. That before his death the deceased left the following dependants on the land of the (sic) Land Mwimbi/N. Mugumango/1005.

(i) Timothy Nyaga Murungi (Grandson)

(ii) Boniface Karani Murungi (Grandson)

(iii) Eliphias Mbae murungi (Grandson)

9. That the deceased had told me to expressly grant the land to the grandsons Timothy Nyaga Munyi, Boniface Karani Murungi, and Eliphias Mbae Murungi.”

15. These specific averments were never denied nor challenged by Carmen. While the court has found the averments in paragraph 9 unsupported and rejected them, there was neither denial nor challenge of the averments that the deceased left the grandsons living on plot No.1005 at the time of his death. If the said grandsons were living on plot No.1005 and eking their living out of that property at the time of the demise of the deceased, which has not been challenged, then obviously they qualify to be dependants of the deceased under section 29(b) of the Act. There was no evidence that was tendered to counter the assertion that they were depending on that property belonging to the deceased at the time of his demise independent of their father. Accordingly, this court makes a finding that the named grandsons of the deceased were his dependants and are entitled to a share of his estate.

16. In view of the foregoing, how should the estate be distributed? As already held, the deceased died intestate and the applicable provision is section 38 of the Act, that the estate be distributed equally amongst his surviving children. In doing so, the court has to take into consideration the provisions of sections 41 and 42 of the Act. In this case, the court takes into consideration that the Petitioner had been given 3 acres by way of plot 969 and Jane Mukwamugo one (1) acre by way of plot No. 1004 through her son Fredrick Gitonga. The estate is only two (2) acres which is far less than what the two (2) had benefited from the deceased. In this regard, the court holds that the two (2) are not entitled to participate in the distribution of the estate which measures two (2) acres only.

17. This leaves the dependants and the three (3) daughters of the deceased. There was no evidence to show whether the grandsons were cultivating plot No. 1005 at the time of the demise of the deceased and if so, to what extent. It was only stated that they were left in occupation thereof. That being the case, this

court's view is that even if the grandsons were mere dependants and not beneficiaries, they depended on the deceased as at the time of his demise. The daughters, although lawful beneficiaries, did not question the deceased why and how the dependants were in occupation and in use of plot No. 1005 although their father had already benefited with three (3) acres from the deceased.

18. In this regard, this court's view is that the estate should be distributed equally to the dependants and the beneficiaries as follows: -

LR. MWIMBI/N.MAGUMANGO/1005

(a) Timothy Nyaga Murungi - 0.33 acres

(b) Boniface Karani Murungi - 0.33 acres

(c) Eliphias Mbae Murungi - 0.33 acres

(d) Carmen Ithiru Njagi - 0.33 acres

(e) Eusebia Mukwaiti Njue - 0.33 acres

(f) Jane Mukwanyaga Riungu - 0.33 acres

19. This being a family dispute, I will not make any orders as to costs.

It is so decreed.

DATED and Delivered at Chuka this 13th day of December, 2016.

A.MABEYA,

JUDGE.