



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
CIVIL APPEAL NO. 26 OF 2002
IN THE MATTER OF THE ESTATE OF
NAHASHON GAKURU RUIRIE - (DECEASED)

JOYCE WAMBUI SAMUEL..... 1ST APPELLANT

HELLEN WANJIRU NDEGWA.....2ND APPELLANT

VERSUS

JANE NJERI GAKURU.....RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate W. N. Njage at Kerugoya on 19th December 2000 in SRMCC Succession Cause No. 110 of 1998)

JUDGMENT

1. This is an appeal from the judgment delivered on 19th December 2000 by the Principal Magistrate at Kerugoya regarding the distribution of the estate of the deceased Nahashon Gakuru Ruirie who died intestate on 13th March 1998 at Ruiru in Kirinyaga. The decision followed a challenge by the appellants to the application for the confirmation of the grant of letters of administration which had been issued to the respondent. The Court received oral evidence from the parties and their witnesses before finding that the respondent was the 2nd wife (widow) of the deceased and was therefore, together with her children, entitled to inherit the estate. The Court, in dismissing the plea by the appellants found that although they were daughters of the deceased by his 1st wife (widow) who was deceased, they were not entitled to inherit under Kikuyu customary law as they were married. The appellants were aggrieved by the judgment and filed this appeal whose grounds were that:-

(a) the learned magistrate erred in law and fact in finding that the respondent was legally married to the deceased;

(b) the learned magistrate erred in law and fact in finding that the appellants being married daughters of the deceased were not entitled to inherit any property from their father and neither were they entitled to inherit their mother's share of the estate; and

(c) the learned magistrate erred in law and fact in finding that the respondent and her illegitimate children were entitled to inherit the estate of the deceased.

2. The appellants were represented by Wanjao & Wanjau Advocates who filed written submissions as directed. The respondents were represented by Kituo Cha Sheria. In the lower court she was represented by Wachira Karani & Co. Advocates.

3. This being a first appeal this Court is entitled to reconsider all the evidence received in the lower Court, re-evaluate the same and reach its own conclusion, while keeping in mind that it neither saw nor heard the witnesses who testified before the magistrate (**SELLE V ASSOCIATED MOTOR BOAT CO. LTD [1986] EA 123**).

4. The undisputed facts of this Cause were that the deceased's first wife was Esther Wanjiru with whom he got the appellants who subsequently got married. Esther died in 1994. Before her death the respondent moved into this homestead. The respondent came with three children. These were Gerald Kinyua Gakuru, Grace Waithira Gakuru and Anthony Mwangi Gakuru. While living in the deceased's homestead she got a fourth child Esther Nyawira Gakuru. This child was fathered by the deceased and was named after Esther. The respondent's case was that she came into the home as the second wife of the deceased who paid dowry to her father Mugeru Kabitu (DW 2) in the presence of Rufus Thika (DW 3). The respondent testified that before the deceased died he changed the names of her identity card to include his and also changed his account at Kibirigwi Farmers Cooperation Society into their joint account.

5. According to the appellants, the respondent was brought by their mother to the home as a house help. She was not the deceased's wife. They, however, admitted that the respondent's last child was fathered by their deceased father .

6. The Court considered this evidence. It also considered that in the joint affidavit sworn by the appellants in protest against confirmation of grant filed on 24th September 1998 they stated that:-

“5. That the petitioner was only coming as a househelp but was later adopted as a daughter to help due to the incapacity of the deceased.”

Further, on 27th July 1998 the appellants had filed an affidavit that they had jointly sworn in which they had referred to the respondent as the deceased's **“2nd wife”**. It is also notable that in paragraph 4 of the affidavit the appellants swore that both the respondent and her children were all

“entitled to a share in the estate of the deceased....”

7. Lastly, the 2nd appellant called her husband Samuel Kamo Gatheru (PW 3) to testify. The record shows that he told the court the following:-

“The petitioner is Jane Njeri Kaguru. She was brought by my mother-in-law to assist the family as they were elderly and sickly. She then silently became like a wife. I am not aware of legal Kikuyu ceremony of marriage between her and the deceased. The petitioner came with three children to that home. She got the last born in that home. I support my wife's claim of part of the estate. They are entitled to a share of the land that would have gone to her mother....”

When cross-examined, he stated as follows:-

“We accepted her as a wife to the deceased. We can now say she is a wife to the deceased. The land should be shared between her and the two sisters.....”

I am satisfied that on the totality of the evidence the trial Court was right in reaching the conclusion that the respondent was the second wife of the deceased.

8. As to whether the respondent's first three children could inherit the estate of the deceased, it is clear that both the deceased and his first wife were in the home when she joined them to live there. She came as the deceased's second wife. She came with the children. Both the deceased and his first wife died leaving the children in the home. Under **section 3(2) of the Law of Succession Act (Cap 160)**, the deceased accepted the three children and voluntarily assumed permanent responsibility over them. In that case, the children rank equally with the appellants and can therefore benefit from the estate in the same right. It is notable that in the affidavit that I have made reference to in the foregoing, the appellants acknowledged that the respondent and all her children were entitled to inherit from the estate of their father.

9. The next question is whether the trial court was right in following Kikuyu customary law to disinherit the appellants on account that they were married daughters of the deceased. On this issue, I agree with the appellants. The deceased died in 1998, and the **Law of Succession Act** came into operation in 1981. Under **Section 2(1)** of the Act:-

“Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of the deceased persons dying after the commencement of this Act and to the administration of the estates of those persons.”

It follows that the **Act** applied to this estate. The Kikuyu customary law that was invoked by the trial Court had no application, and the reliance on it to disinherit the appellants was done in error. It is further noted that the estate was not subject to the provisions of **sections 32 and 33** of the **Act**. It is now trite that the **Act** does not discriminate against daughters, whether unmarried or married. They are entitled to inherit the estate left behind by their parents. In **MARY RONO –V- JANE RONO & ANOTHER, Civil Appeal No. 66 of 2000 at Eldoret**, the Court of Appeal held that it is not only repugnant but also goes against natural justice and good conscience to uphold a decision that discriminates against women on the basis of a custom that is not in line with the supreme law of the land. For the avoidance of doubt, **Article 27** of the Constitution of Kenya 2010 states as follows:-

“27 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law;

(2)

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate 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.

(5)

(6)

(7)

(8)”

10. After the findings above, it is now clear that both the appellants and the respondent and her children were all entitled to benefit from the estate of the deceased. Under **section 40(1)** of the **Act**:-

“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.”

The distribution of the estate grant that was confirmed to the respondent is set aside and in its place there shall be an order that Joyce Wambui Samuel, Hellen Wanjiru Ndegwa, Jane Njeru Gakuru, Gerald Kinyua Gakuru, Grace Waithera Gakuru, Anthony Mwangi Gakuru and Esther Nyawira Gakuru Shall Equally share land parcel Kiine/Ruiru/387, and Jane Njeri Gakuru shall, in addition, get 1/7 share of plot No. 15 that the deceased jointly owned with others at Kianjege market.

11. To that extent, the appeal is allowed. This was a family dispute and therefore each side shall bear its own costs.

DATED at NAIROBI this 22nd day of May 2015

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 28th day of May, 2015

W. MUSYOKA

JUDGE