



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 647 OF 2006

MARGARET WAMBUI KING..’E.....PLAINTIFF

VERSUS

HANNAH WAIRIGIA KING’E.....1ST DEFENDANT

GABRIEL KIHARA KING’E.....2ND DEFENDANT

JOHN NJENGA KING’E.....3RD DEFENDANT

JUDGMENT

This suit commenced by way of Plaint dated **21st June 2006**, where the Plaintiff prayed for Judgment to be entered against the Defendants for:

- a. *A declaration that the Plaintiff is entitled to share or inherit land parcel No. **Ndumberi/Riabai/588**.*
- b. *An order for cancellation of Title Numbers **Ndumberi/Riabai/2441**, 2437, 2440, 2436, 2435, 2439 and 2438 and the same be re-instated to Original No. **Ndumberi/Riabai/588** for sub-division amongst the Plaintiff and the Defendants in equal shares.*
- c. *Costs of this suit.*
- d. Interest on (c) above at court rates.
- e. Any other or further suitable reliefs as the Court may deem just and expedient to grant.

The Plaintiff gave the family relation between the parties that she is the daughter of the 1st Defendant and sister to the 2nd and 3rd Defendants. Further, that the 1st Defendant is the 2nd wife of the late **King’e Kihara** alias **Benard Kinge Kihara** who died on **3rd March 1985**. It was her averment that the deceased was the registered proprietor of **Ndumberi/Riabai/588**, and upon his demise, the 1st and 3rd Defendants together with the deceased’s 1st wife, **Teresia Nungari Kinge** fraudulently and with the intention to disinherit the Plaintiff filed a Succession Cause - **Kiambu SRMCC No. 199 of 1985**. Subsequently, the said Petitioners were issued with a Grant of Letter of Administration and a Certificate of Confirmation of Grant dated **28th January 2002**.

The Plaintiff averred that following the Confirmation of Grant, the Petitioners caused **Ndumberi/Riabai/588**, to be sub-divided and transferred amongst the Defendants as follows: **Parcels 2441 and 2435** to the 1st and 3rd Defendant; and **Parcels 2437 and 2440** to the 2nd Defendant. It was her averment that she has never been married and has always resided on the property in a semi-permanent house where she lives with her children. Therefore, that being an unmarried daughter of the deceased, she is entitled to inherit the said parcel of land together with the Defendants in equal shares.

The Defendants filed their defence dated **15th February 2008** wherein they denied conducting themselves fraudulently or with the intention of disinheriting the Plaintiff as alleged. It was their contention that the Plaintiff was aware of the filing of the Succession Cause and also never challenged the letters of administration and confirmed grant. Further, the Defendants averred that the Plaintiff has declined to occupy a portion allocated to her by the 1st Defendant.

From the evidence of both the Plaintiff's and Defendants' witnesses, it emerged that the **Ndumberi/Riabai/588**, was the sole property of the deceased and after succession the same was divided equally amongst his two wives. The dispute is between the children of the 2nd wife (the 1st Defendant herein). She has **7 children; 3 boys and 4 girls**, including the Plaintiff. It is the Plaintiff's case that she was not allocated any portion of their share despite being unmarried and living thereon with her children. It is also her evidence that she was not aware of the succession proceedings until one of her brothers notified her to vacate Plot **2440** that she has been occupying to which he is now a registered owner. The Plaintiff testified that she conducted a search at the Lands Offices in Kiambu when she learnt that their share of the property had been sub-divided into **7 portions** registered in the names of her mother and brothers as follows:

Parcel 2439 – 1st and 2nd Defendants

Parcel 2436 – 2nd Defendant

Parcel 2437 – 3rd Defendant

Parcel 2438 – 1st and 2nd Defendants

Parcel 2439 – 2nd Defendant

Parcel 2440 – 3rd Defendant

Parcel 2441 – 1st and 2nd Defendants

On cross-examination, the Plaintiff testified that of the 4 sisters, only one is married and that the other two live on Plot 2441. The Plaintiff denied that she had ever been married or that dowry had been paid for her.

In support of her claim, the Plaintiff relied on Grant of Letters of Administration issued on 16th June 1986, and Certificate of Confirmation of Grant dated 28th January 2002 which were produced by **Joseph Mbuu Matu (PW2)** the **Executive Officer, Kiambu Law Courts**.

Grace Wanyungi Kinge (PW3) testified that she is the Plaintiff's half-sister. She testified that the Plaintiff has always resided on the property with her two children. It was her evidence that during the succession cause, her mother involved all her children whereas the 1st Defendant only involved her sons and thus the Plaintiff was not given a share. On cross-examination, PW3 testified that she knew that the Plaintiff was never married. Further that the Plaintiff was living in a permanent house on parcel **2440** to which the **3rd Defendant** (now deceased) is registered as owner and subsequently secured a loan. PW3 testified that the latter's action of taking a loan over the parcel whereas it was occupied by the Plaintiff was wrong.

Peter Wakaba Kihara (PW4) testified that he lives in his farm in Kiambu, and knows the parties herein since he and the Plaintiff's deceased father are half-brothers. It was his evidence that the Plaintiff is unmarried and that he was present at a function on 4th December 2005 where she paid dowry to her mother for herself. The import of the dowry, PW4 stated, was that the Plaintiff could now be given a portion of the property.

The **1st Defendant (DW1)** testified that she notified the Plaintiff of the Succession Cause and distribution of the property to which she did not object. It was her testimony that her portion of the property is what her four daughters including the Plaintiff will inherit. On cross-examination, DW1 admitted that no portion was registered in the Plaintiff's name but that there was no attempt to disinherit her. DW1 admitted that the Plaintiff has already built and was living on the portion that was later allocated to the 3rd Defendant.

The **2nd Defendant (DW2)** testified that the Plaintiff was aware of the succession cause and that she did not object to the mode of distribution. It was his evidence that the Plaintiff is supposed to inherit the 1st Defendant's portion. He testified further that the Plaintiff cultivates on the 1st Defendant's portion but her house is on the 3rd Defendant's portion. On cross-examination, DW2 admitted that the Plaintiff has a right to inherit her deceased father's property. It was his testimony that of the 7 portions, each of the 3 sons got 2 portions each whilst the 1st Defendant got 1 portion. DW2 reiterated that none of their sisters is registered as owners of any of the portions. In re-examination, DW2 testified that they sub-divided the property in accordance to how their father wished.

The **3rd Defendant (DW3)** testified that the Plaintiff was present when they filed a succession cause in Kiambu Law Courts and during the distribution of the property where he was given two portions, at which time the Plaintiff did not make any objections. It was his evidence that the Plaintiff lives on his portion (2440) initially with his permission but that she has since declined to move out. On cross-examination, DW3 testified that the portion in the 1st Defendant's name will eventually be transferred to the girls. Further that they merely followed their father's instructions in distributing the property.

Margaret Wairimu Riabai (DW4) testified that she was informed of the succession cause and that at that time she was married but divorced in the year 2000. **DW4** testified that she does not object to how the property is sub-divided. On cross-examination, DW4 testified that she was given a portion of land for purposes of cultivating but that her brothers and mother are the registered owners of the various portions. DW4 confirmed that she had no objection if the court were to give the Plaintiff title as prayed.

Wangui Kinge, (DW5) testified that she was given a portion to cultivate but that the title to the said portion is in the name of the 1st Defendant. It was her evidence that the Plaintiff utilizes the portion too. On cross-examination, DW5 testified that the 1st Defendant's property is ½ acre whereas that of their brothers is ¾ acres. It was DW5's testimony that though their father died intestate, the property was sub-divided in accordance with his wishes.

The matter was further canvassed by way of written submissions. On behalf of the Plaintiff, counsel submitted that it was the Plaintiff's entitlement to inherit from her father's property. Further that the documentary evidence reveals that all the portions in the name of the 1st Defendant is jointly registered in common with the other Defendants and therefore well out of reach of the Plaintiff upon the 1st Defendant's demise. It was counsel's submission that without title deeds to any of the portion, the Plaintiff would be deprived of the full use including securing a loan.

On behalf of the Defendants, counsel recapped the Defendants' witnesses evidence that it was agreed that the 1st Defendant would hold her daughters share of the property. Counsel further submitted that the Plaintiff ought to have sought a revocation of the grant and not approach the court vide a suit and thus urged the court to dismiss the same with costs.

The suit herein emanates from a Grant of Letter of Administration Grant and Certificate of Confirmation

of Grant in Kiambu CMCC No. 199 of 1985. The Plaintiff, by way of Plaint approached this court alleging that the Administrators of her deceased father's estate fraudulently applied for letters of administration and obtained certified grants following which they sub-divided the property completely disinheriting her. The Defendants on their part maintain that the Plaintiff was aware of the succession proceedings and distribution of the estate. In any event, they aver that the Plaintiff ought to have filed objection proceedings at the lower court or seek for revocation of the grant.

I have studied the court record since I inherited the file halfway through the hearing. The Defendants, at Paragraph 7 of their Replying Affidavit sworn on 27th June 2006 to the Plaintiff's application for temporary injunction did state that the Plaintiff was yet to apply for revocation/annulment of the grant. This application was, however, not heard. The court record shows that the matter proceeded directly to trial. The Defendants did not make a separate application or file a preliminary objection as to the manner in which the Plaintiff approached the Court. The Court did not also on its own motion refer the parties to the Family Division of the High Court to challenge the Grant confirmed by the Learned Magistrate. It would be grossly unjust if this court were to dismiss the suit, after sitting through trial, on the basis that the Plaintiff's manner of approaching this court is un-procedural. Some of the factors that informs this court's decision to adjudicate over the matter are that first, the dispute only interferes with one of the deceased's houses and secondly, the order leading to the sub-division of the property was issued by a Magistrate's Court which this Court has appellate jurisdiction over. Suffice to add, this court is called upon under Article 159 (2) (d) of the Constitution to administer justice without undue regard to procedural technicalities.

The facts of the case are not in contention. The 1st Defendant's household divided their share of the property where each son got 2 portions and their mother got a portion. It is also their evidence that it was agreed that the 4 daughters of the said household will get a share from their mother's portion, something that does not augur well with the Plaintiff. Both the Plaintiff's and Defendants' witnesses are relatives and they concurred on a number of issues. First, they all agreed that the Plaintiff has been living at home with her two children. Evidence from PW4 that there was a ceremony conducted on 4th December 2005 where the Plaintiff paid dowry to her mother. It is also common that 3 out of the four daughters of the 1st Defendant are living at home with their children and that only one is married. There are two questions that in my view are for determination by this court. First, is whether the Plaintiff is entitled to inherit in her father's property and secondly whether she is entitled to an equal share with that of her brothers.

The **Judicature Act at Section 3(2)** provides that this Court shall be guided by African Customary Law in civil cases...in so far as it is not repugnant to justice and morality or inconsistent with any other written law... The Kikuyu Customary Law provides that unmarried daughters are entitled to inherit their father's property. See **Kanyi VS. Muthiora (1984) KLR 712**, and **Joseph Gitau Githongo v Victoria Mwhaki Munya Civil Appeal No 227 of 2005 [2014] eKLR**. The Law of Succession Act does not discriminate between male and female children, or married and unmarried daughters of a deceased in matters of succession. See **In Re Estate of Solomon Ngatia Kariuki (deceased) [2008] eKLR**. Section 40(1) and (2) provides for situations such as in this case where the deceased died intestate and was polygamous. After the estate is divided amongst the houses, the net estate within each house shall be in accordance with the provisions in Section 35 – 38 where Section 35(5) provides that the property shall be equally divided among the surviving children. There is therefore no question, and I do so hold, that the Plaintiff is entitled to inherit from her father's property.

The second question is whether the Plaintiff is entitled to an equal share to that of her brothers. The subject of equality has been discussed over the years with courts expressing themselves on what they think is just. Whereas Sections 35 and 38 of the Succession Act provide that division should in equal portions, A common thread from these decisions is that the court should be let to exercise its discretion to consider factors that may be necessary and relevant in the distribution of an intestate estate. Omollo J. in the case of **Mary Rono v Jane Rono & another Civil Appeal Eldoret 66 OF 2002 [2005] eKLR** was of the view that division in equal portion would work an injustice ;

Particularly in case of a 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 the Act does not provide for that kind of equality. Musyoka J. in Re Estate of John Musambayi Katumanga – (Deceased) Succession Cause No Nai. 399 of 2007 [2014]eKLR was of the same view that *equal distribution does not work justice, especially in polygamous situations, where the youngest child of the deceased may be 1 year old while the eldest over 50 years. The infant no doubt would have far greater needs than the fifty year old, who would generally have received education and has probably been settled in life by the deceased. There cannot be justice in equal distribution in such case. The fortunes of one child may be better those that of the other – one could end up in a lowly job, say a driver or office messenger or nurse or nursery school teacher, with the other becoming a commercial pilot or the Chief Executive Officer of a blue-chip company. There would be no fairness in equal distribution in such a case. The law as currently framed does not do justice in such circumstance. Ideally, equal distribution should be the principle, with some discretion left to the court to consider the circumstances of each case.* Ngaah J. Virginia Wanjiku Kinuthia v Muthoni Kinuthia & another Succession Cause No. Murang'a 273 of 2013 [2014] eKLR opined that the court will also consider such other factors as a spouse's contribution towards acquisition of the estate.

The situation herein, however, is different from the circumstances cited hereinabove. Nevertheless, the guidance derived from the authorities is that this court should exercise its discretion in determining distribution of the intestate estate. The Plaintiff is unmarried with two children living on the property. There is no other property on which the Plaintiff can put up and fend for herself. This in my view is a factor that must be put into consideration in this instance. Further, whilst the Defendants aver that the daughters will get a share within the 1st Defendant's portion, I do agree as pointed out by counsel for the Plaintiff, that none of the portions is registered solely in the 1st Defendant's name. Portions 2435, 2438 and 2440 are all registered in the joint names of the 1st and 2nd Defendant. There is no guarantee therefore that the portions will eventually be transferred to the daughters. It is my considered view, that it is unjust for the sons to have two portions each living the daughters with no portion to them.

The acreage of the parcel allocated to the 1st Defendant was not stated. However, the same can be computed from the copies of the searchers availed by the Plaintiff. The total acreage for the parcel is 0.979 ha or 2.41916 acres derived from adding (0.073 + 0.073 + 0.073 + 0.19 + 0.19 + 0.19 + 0.19 ha). Having considered the provisions of the law and the guidance afforded to this court on division of the property equitably, I do exercise my discretion to divide the property as follows:

1. *1 acre shall be divided equally amongst the 3 sons;*
2. *1 acre shall be divided equally amongst the 4 daughters; and*
3. *The remainder 0.41916 to the 1st Defendant.*

The 1st Defendant shall be at liberty to gift any of her children during her lifetime or be subject to Succession upon her demise either by will or intestacy. I also do note that that one of the daughters has not featured at all in the proceedings, perhaps because she is married. I however do find that she is entitled to inherit from her father's estate on the basis that the Kikuyu customs that dictate that married women do not inherit from their father's property is now not only repugnant to justice and morality but also inconsistent with Article 27 of the Constitution, and the Law of Succession Act. See Kimaru J. in Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguithi & 3 others P & A No Nai.1140 OF 1990 [2014] eKLR.

This decision may have a potential effect on the facilities taken by the 2nd and 3rd Defendants for portions **2436 and 2440**. These facilities were taken in **2003 and 2004**, respectively and an update as to whether they are still in existence was not given. It is my considered view that the portions now to be allocated to the 2nd and 3rd Defendants shall be sufficient security for the said facilities in the event that that they are still in existence, considering that property does appreciate in value.

The decision of the court is as thus:

1. ***Portions 2435, 2436, 2437, 2438, 2439, 2440 and 2441 be amalgamated and subsequently sub-divided 8 portions to have 1 acre shared amongst the sons, 1 acre amongst the daughters and the remainder 0.41916 for their mother.***
2. ***The titles of the portions 2435, 2436, 2437, 2438, 2439, 2440 and 2441 are hereby cancelled and the registers hereby rectified to reflect order issued in 1 hereinabove.***
3. ***The property shall be divided in accordance to Order 1 hereinabove but in a manner that will ensure each member keeps the portion that their house, if any, falls.***
4. ***The Deputy Registrar of this Court is directed to serve this order upon Agricultural Finance Corporation and Family Finance Building Society (now Family Bank Ltd) for their action.***
5. ***This being a family dispute, I shall make no order as to costs.***

Dated, Signed and Delivered this **12th** day of **June,2015**

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff

None attendance for the Defendants

Hilda: Court Clerk

L. GACHERU

JUDGE

12/6/2015