REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.620 OF2012

IN THE MATTER OF THE ESTATE OF MWANGI S/O NGAMBA alias MWANGI NGAMBA-DECEASED

JUDGEMENT

Mwangi s/o Ngambaalias**MwangiNgamba** (herein after referred to as the deceased) died intestate in or about 1952 leaving the following persons entitled to his estate, namely;

i. *Esther Wanjiru Mwangi- Widow.*
ii. *Warigia Mwangi-Deceased daughter*
iii. *Josephine Mumbi Mwangi-Deceased daughter*
iv. *Godfrey Gichohi Mwangi-Son*
v. *Mercy WahuMwangi-Daughter-Married*
vi. *Lucy Wanja Mwangi- Daughter - Married*
vii. *Eustace Muriuki Mwangi-Son.*

On 21st of June 2012 the deceased's widow**Esther Wanjiru Mwangi**(herein after referred to as the Petitioner)took out citations citing a one **Godfrey Gichohi Mwangi** (hereinafter referred to as the objector) and stated that he had refused to sign consent to petition for letters of administration for the deceased's estate and in the said citation he was given **15** days to appear or accept the citation. Annexed to the affidavit verifying the said citation is copy of the consent duly signed by all the others persons who survived the deceased, namely;**Mercy Wahu Mwangi, Lucy Wanja Mwangi, Eustace Muriuki Mwangi** but the said **Godfrey Gichohi Mwangi** did not sign the said consent..

The protestor herein filed an appearance on 4th July 2012 and on 28th September 2012 the Petitioner herein filed Petition for letters of Administration to the deceased estate. The Petitioner states in the said Petition that she is the wife (widow) of the deceased. The Petition names all the above persons as the persons surviving the deceased. The only asset of the decease is shown as all that parcel of land known as **L.R. No Ruguru/Karuthi/110** measuring approximately **3.2** acres.

The said Petition was served upon the protestor on 29th September 2012and on 26th February 2013 the protestor filed an answer to the Petition in which he averred that the Petitioner had filed the Petition without his knowledge and insisted that he should be made the administrator to the deceased estate. His reasons were that the Petitioner is aged and is being guided by people with vested interests, that he was the right person to be appointed the administrator, and that he intended to file contemporaneously with the filing of the said answer a Petition to this court by way of cross-application for a grant of representation to the estate of the deceased.

The Petitioners Petition was Gazetted on 3rd May 2013 and on 22nd May 2013, the protestor filed an objection to making of grant claiming that he had superior right to file the succession and that the Petitioner was then aged 85 years and was driven by people outside the family and that he had the right to apply for the grant.

On 10th June 2013 the Petitioner herein filed an affidavit in reply to the said objection and in the said affidavit she said *inter alia:-*

i. *That she is widow to the deceased and the objector is her first born son and that the objector is not the only child and that she has other children.*
ii. *That she is capable of distributing the estate and that despite her age.*
iii. *That she is alive and there is no reason as to why her son should be appointedan administrator to her husband's estate when she is alive.*
iv. *That she is not taking advice from outsiders as alleged.*

The objection was dismissed on 15.11.13 by the Hon JusticeWakiaga for lack of merit and directed the objector to file a protest at the time of distribution.

The grant of letters of administration was issued to the Petitioner on 15th November 2013 and on 30th My2015 she applied for confirmation of the said grant. In her application for confirmation of the grant, she namedall the persons she had listed in the original Petition as the persons surviving the deceased. The protestor's name is listed among them.

She also listed the only property mentioned earlier and her proposed mode of distribution is as herself **i.e Esther Wanjiru Mwangi, Godfrey Gichohi Mwangi** and **Eustus Muriuki Mwangi** do share the said property in equal shares. The other persons listed earlier have duly signed the consent to the confirmation of the grant except the protestor herein who filed an affidavit of protest to the confirmation of the said grant. He was served with the said application on 11th July 20`14 as per the affidavit of service filed on 21stJuly 2014.

In his affidavit of protest to the confirmation of the grant, the objector states as follows:-

i. *He denies that he was asked to sign the consent and also denies having been served with the said application.*
ii. *He objects to the proposed mode of distribution because the Petitioner intends to sell the land and leave him and the deceased sisters' children destitute.*
iii. *His proposal is that he gets 1.2 acres, and a further 1.00 to hold in trust for his deceased sisters children, and Eustace Muriuki to get 1.0acres.*
iv. *He proposes that the Petitioner gets a life interest*

The Petitioner filed a Reply to the above affidavit and insisted that the deceased was her husband, that she is the next of kin and recalled that the protestors' objection was dismissed by this court on 12.1.2015.

I note from the court file their two affidavits sworn by a one **Wachira Gachira** and **Gathogo Nguru** in support of the protestor's position. These two persons are not parties in this case nor are they beneficiaries of the estate. They are strangers and in my view they cannot participate in the proceedings by filing affidavits. The most suitable and prudent option was for the protestor to annex the said affidavits to his affidavit as exhibits. I will ignore the said affidavits for being improperly on court record.

The protestor also filed another affidavit on 8.10.2015 in which he made allegations against his own mother touching on her marriage and insisted the deceased was not the biological father of all the children but the Petitioner denied the said allegations in her affidavit filed on 27.10.2015.

Both parties made written submissions. Counsel for the protestor reiterated that only three children were fathered by the deceased, hence were entitled to inherit the land. These are **Wairigia Mwangi**, now deceased, **Josephine Mumbi** who is also deceased and the objector himself. In his submissions the rest **Mercy Wahu, Lucy Wanja** and **Esustas Muriuki** were not issues of the marriage hence they were not entitled to inherit. Counsel submitted that the applicable law is Kikuyu customary Law.

Counsel for the Petitioner submitted that the Petitioner was never married to another person other than the deceased and that the Petitioner was the next of kin and urged the court to dismiss the protest.

According to the documents filed by the Petitioner, the deceased died in 1952. The law of Succession Act

came into operation on 1st July 1981.[1] This calls for the determination of the issue of which law applies to the deceased's estate in these proceedings.

The scope of the Law of Succession Act[2] is stated in Section **2** thereof. For avoidance of doubt, the said section states as follows:-

> ***"2(1)*** *Except as otherwise expressly provided in this 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 persons dying after the commencement of this Act and to the administration of estates of those persons.*
>
> ***(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."*

The effect of Section **2(1)** of the Law of Succession Act is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.

Section **2(2)** of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts **II, III, IV, V** and **VI** of the Law of Succession Act. The substantive law of succession for estates of the persons who died before 1st July 1981 is not to be found in Parts **II, III, IV, V** and **VI** of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.

The second part of Section **2(2)** of the Law of Succession Act states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the Law of Succession Act. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the Law of Succession Act. The said provisions in the Law of Succession Act governing procedures and processes in administration of estates are to be found in Part VII. Part VII of the Law of Succession Act applies universally to the estates of persons dying either before or after the commencement of the Act.

It is not in dispute that the deceased person the subject of these proceedings died before the Law of Succession Act came into force. Consequently, the substantive law governing devolution to his estate is that stated in Section **2(2)** of the Law of Succession Act – that is the written laws and customs in force as at the time of his death.

From the material before me the deceased person died intestate, for there is nothing on record to suggest that he died otherwise. The affidavits by the rival parties to the summons dated 23rd July 2004 do not suggest that he left any valid will, whether written or oral. As of the time of the deceased's death, estates of African Kenyans who died intestate were subject to customs of the community from which such African hailed, while the written wills of any African who had reduced his death wishes into writing were governed by the African Wills Ordinance of 1960. This position changed in 1981 when the Law of Succession Act came into force, for it ousted the application of African Customary law of intestate succession, except in respect of the estates of persons subject to Sections **32** and **33** of the Law of Succession Act.

The deceased herein are Kikuyu by ethnicity from the Nyeri County, and that the deceased was subject to

the Kikuyu customs which governed devolution of the estate of a person who died intestate. Unfortunately, the parties did not address the issue of the application of customary law sufficiently in their submissions.

Kwach, J.A. in the case of *Wambugi w/o Gatimu v Stephen NyagaKimani*[3]where the Court discussed extensively the application of customary law visvis ***Section 3(2)*** of the *Judicature Act*[4]statedas follows:-

> *"The former Court of Appeal for East Africa in the case of KimanivsGikanga[5] held that where African Customary Law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinions adduced by the parties".*

The place of customary law in our jurisprudence has been discussed in a long line of authorities. It gained prominence in the well-known case of *OtienovsOugo& Another*[6] where it was observed: -

> *"The place of customary law as the personal law is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and common law in a matter of personal law? First of all, if there is a clear customary law on this kind of a matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way, these two great bodies of law for that is what they truly are complement each other. They may be different but the way to operate them is to use them as complimentary to each other without conflict as laid down in Section 3 of the Judicature Act[7]".*

The Kikuyu customary law of intestate succession is well documented in such treatises as **Eugene** Cotran's *Restatement of African Law: Kenya II the Law of Succession*[8]and *Jomo Kenyatta's Facing Mount Kenya: The Tribal Life of the Gikuyu*, among others. It has also been restated in several judicial pronouncements, such as in *Kanyi vs. Muthiora.*[9]I am though conscious of the dynamism of African Customary Law and alive to the caution sounded by the Court of Appeal in *Atemo vs. Imujaro*[10] that the position as stated in the treatises may not be true today.

Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased. Where a male deceased person is survived by a widow and male and female children, the land devolves upon the sons with the widow being entitled to life interest. Daughters are not entitled to inherit, they play their part in the family or clan in which they get married, but it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.

The position stated above is no doubt discriminatory in favour of men and against women. This was however sanctioned by Section **82(4)** of the repealed Constitution. Section **82(1)** of the said Constitution stated that "*… no law shall make any provision that is discriminatory either of itself or in its effect*." Section **82(4)** of the said Constitution made a number of exceptions to Section **82(1);** it states that:

> *"… Subsection (1) shall not apply to any law so far as that law makes provision … (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."*

The coming into operation of the Constitution, 2010 radically changed the position, for the new law outlawed discrimination in all its forms. Article **10** of the Constitution, 2010, states the national values

and principles. Article **10(2)(b)** includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, among the said values and principles. Article **27** of the Constitution, 2010, states the principle on equality before the law and the right to equal protection and equal benefit of the law. It also states that men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. There is also Article **2(4)** of the Constitution, 2010, which states that any law, including customary law, which is inconsistent with the Constitution, 2010, is void to the extent of the inconsistency. Thus, any customary law that discriminates against women in inheritance is consistent to the letter and spirit of our constitution and therefore null and void.

The property the subject of these proceedings is land. In my view, the said land was not held under customary law tenure, but rather under statutory tenure for the same was registered under the Registered Land Act.

Succession to land held by Africans in the 1960s and 1970s was subject to two separate legal regimes. If the land was held under African Customary Law, that is if it was not registered under the Registered Land Act, its inheritance was subject to African Customary Law and the procedural law governing succession to such land would be the Magistrate's Courts Act[11], Jurisdiction on such matters was conferred on the District Magistrate's Court by Section 9 of the Magistrate's Courts Act.[12] Under Section 9 of the said Act, such a court had jurisdiction and power in proceedings of a civil nature where the proceedings concerned a claim under customary law. Section 2 of the Magistrate's Act defines claim under customary law to mean a claim concerning, among others, *intestate succession and administration of estatesso far as the same were not governed by any written law and land held under customary tenure.*

Procedure and practice with respect to matters handled by the magistrates' courts is set out in Section **15** of the Magistrates Courts Act. The said courts followed, and still follow, the principles of procedure and practice laid down by or under the Criminal Procedure Code[13]for criminal cases, and the Civil Procedure Act[14]for proceedings of a civil nature. This means that a claim to inherit under customary law, being civil in nature, must be brought under the provisions of the Civil Procedure Act and the Rules made thereunder.

By virtue of Section 2 of the Magistrates Courts Act, land held under the Registered Land Act could not fall under a claim under customary law, and a claim to inherit it could not be subject to Sections 2 and 9 of the Magistrates Courts Act. The law regulating succession by an African to such property was stated in Section 120(2) of the Registered Land Act[15] (Repealed} to the effect that the Land Registrar, after satisfying himself of the death of the proprietor of the land, was obliged to apply to the court for the determination of the heirs, and the court was to determine the persons entitled.

There are several judicial determinations on Section 120(2) of the Registered Land Act. The Court of Appeal in *KaranjaKariuki vs. Kariuki* ***[16]*** for example, stated that customary succession to land in areas where land was registered under the Registered Land Act were subject to the process set out in Sections 120 and 121 of the said Act. The process being that the land registrar upon being informed of the death of the proprietor of the land and that he had died intestate, applied to the relevant court to determine the matter on who was entitled to the law according to the Customary Law applicable to the deceased proprietor. The High Court had stated similarly previously in *Mbuthi vs. Mbuthi* ***[17]*** adding that the provision in Section 120 of the Registered Land Act did not preclude the taking out of letters of administration. Other pronouncements on Section 120 of the said Act are to be found in *Simiyu vs. Watambamala,* ***[18]*** *Njoroge vs. Mbiti* ***[19]*** and*Gathiba vs. Gathiba* **[20].**

I have carefully examined the several affidavits/documents filed by the Protestor and note that he has offered different reasons in virtually all the documents he has filed. In his notice of intended objection dated 25.2.2015, answer to Petition and Petition by cross-petition and affidavit in support thereof filed on 26.2.2013, the reasons given were that he is the right person who had capacity to be issued with letters of administration and cited the advanced age of the Petitioner as his second his cross-petition.

In his objection to making of grant filed on 22.5.2015, the protestor gave two grounds, namely, that he

has superior right and that the Petitioner is aged 85 years and alleged that she was being driven by people outside the family.

After the Petitioner applied for the confirmation of the grant, the protestor filed an affidavit of protest and alleged *inter alia* that the intention of the Petitioner is to sell the land and leave them destitute; he stated his preferred mode of distribution and stated that the Petitioner only gets a life interest, that *EustusMuriuki* gets *1.0* acres while himself gets *1.2* acres and another *1.0* acres be given to him to hold in trust for 3 children he has listed therein and on behalf of a deceased daughter. The ages said children has not been disclosed to the court.

More affidavits referred to earlier were filed by the objector, some by persons who are not parties to this case in which he introduced more and new allegations. This time he asserts that only three of the persons named are biological children of his father, that the rest were born at a time when his mother had allegedly left the deceased and was living with another man and that the distribution he proposes should only take care of the deceased children. He also talked of a meeting where distribution was allegedly agreed upon.

In my view, the protestor has not been consistent with his **grounds** as outlined above and he kept on changing and adding knew grounds any time he got a chance to file an additional affidavit and this raises more questions than answers. If at all, such grounds validly existed, why were thy not reflected in the first document filed in court. Why were the alleged children not mentioned earlier in his documents? The inconsistence in the information provided raises doubts on the truth and or genuineness of the allegations and I find it unsafe to attach any weight on the same.

On the contrary the Petitioner has been consistent in her presentation and more important even on the face of all that adversity exhibited by her son, she has routinely responded to the allegations in a more mature and convincing manner as reflected in all her affidavits. Above all, in her proposed mode of distribution she has listed the protestor, herself and *EustusMuriukiMwangi*as the persons who have been identified and beneficiary entitled to the deceased's estate and has proposed that the said land be shared among the three of them in equal shares. The affidavit of consent is signed by **Eustus Muriuki, Mercy Wahu** and Lucy Wanja but the protestor declined to sign the same.

No other family member including the alleged children whose age has not been disclosed has come up to complain or object to the proposed mode of distribution except the Protestor.

Having carefully considered the papers filed by the parties herein, the submissions by the counsels, the relevant law, I find that the protestor has not raised valid grounds and that his protest has no merit and that the same is vexatious and not made in good faith. I accordingly I order as follows:-

i. *That the protest by* ***Godfrey Gichohi Mwangi,*** *the protestor herein be and is hereby dismissed.*

ii. *That the grant of letters of administration made on* ***15th November 2015*** *to the Petitioner herein* ***Esther Wanjiru Mwangi*** *be and is hereby confirmed.*

iii. *Title number* ***Ruguru/Karuthi/110*** *measuring approximately* ***3.2*** *acres or thereabouts be shared* ***in equal portions*** *among the following* ***(i) Esther Wanjiru Mwangi, (ii) Godfrey Gichohi Mwangi*** *and* ***(iii) Eustace Muriuki Mwangi*** *as proposed as proposed in the affidavit of the said* ***Esther Wanjiru Mwangi*** *in support of the summons for confirmation of grant of latters of administration dated 24.5.2014 and filed in court on* ***30th*** *day of* ***May 2014****.*

iv. *No orders as to costs.*

Right of appeal 28 days

Dated at Nyeri this **27th** day of **November** 2015

John M. Mativo

Judge

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[1] See Section 1, Cap 160, Laws of Kenya

[2] Ibid

[3]{1992} 2 KAR 292

[4]Cap 8, Laws of Kenya

[5]{1965} EA 735

[6]{2008} 1 KLR 9 & F at Page 948

[7] Cap 8, Laws of Kenya

[8] Eugene Cotran, Restatement of African Law, Kenya, Sweet &Maxwel, 1968

[9]{1984}KLR 712

[10]{**2003KLR 435}**

[11] Cap 10, Laws of Kenya

[12] Ibid

[13] Cap 75, Laws of Kenya

[14]

[15]Cap 300. Laws of Kenya

[16]*{1983}KLR 209*

[17]{1976}KLR 120, (1976-80) 1 KLR 145,

[18]{1985} KLR 852

[19]{1986} KLR 519

[20]{E&L} 356