



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 552 OF 2007
IN THE MATTER OF THE ESTATE OF H W K (DECEASED)
N N KI.....PETITIONER
VERSUS
J N M.....PROTESTOR
RULING

1. H W K died intestate on 13th June, 1981. She was survived by four children, namely; W K, N N, G K and M I who died on 20th February, 2007. The deceased's estate constituted of the 4½ acres parcel of land known as Nyandarua/Geta/[particulars withheld].
2. A grant of letters administration intestate was issued to N N K on 28th October, 2009. The summons for confirmation of this grant were filed on 16th June, 2010 and are yet to be determined. In that application, it was proposed that the entire estate should be given to the administrator absolutely. W K a daughter of the deceased, signed the consent to the confirmation of the grant on these terms.
3. J N M, the protestor, is a daughter of the late M. In her affidavit of protest filed on 8th July, 2010, she objected to the confirmation of the grant on the grounds that the surviving four children of the late L M I are entitled to a share of the deceased property. It was her evidence that after being divorced by her husband, their mother returned to the suit property where she lived and farmed until the Petitioner evicted her. She then rented a house in town where she resided until her demise. Her prayer to the court was that the children of L M be given that share which their mother could have inherited.
4. PW2 was the deceased's brother in law. He testified that to the best of his knowledge, L M never got married. She resided with the deceased on the suit property until she was evicted by the Petitioner. He was not aware whether L M had another parcel of land.
5. PW3 was the chief of the area where the deceased resided prior to her death. Prior to her death L M asserted her claim to the deceased's property and maintained that the deceased's wish was that she would retain the parcel of land that she occupied during the deceased's lifetime. In a meeting held on 29th September, 2003 before the panel of elders the Petitioner agreed that L M will be given 1 ½ acres from the suit land. PW3 who was in this meeting produced the minutes as **"PEX 1"**
6. The Petitioner was the only son of the deceased. He testified that their mother left him this parcel of land. He contended that the late M I was married and had been given a piece of land by her husband.

Even after separating from her husband, she continued to reside on the parcel of land that he had given her. He therefore proposed that the entire parcel of land should be given to him. DW2 W K supported the proposal that the Petitioner should inherit the entire land. She testified that she wished to honour her deceased's mother's wishes not to subdivide property.

7. The protestor filed her written submissions on 21st October, 2015. In those submissions, there was only one issue that was identified for determination in this case; whether the protestor and her siblings are entitled to a share of the estate. It was argued that under Section 41 of the Law of Succession Act, grand children are only entitled to the property of their grandparent when the parent is deceased as is the case. This position was restated by Musyoka, J in Nairobi Succession Cause No. 172 of 2007 **In the Matter of the Estate of Gathui Kamau Njango (Deceased)**.

8. It was submitted that this court, being one of equity, should be guided by section 41 and give the protestor and her siblings a share of the estate.

9. In the brief submissions filed on behalf of the Petitioner on 26th October, 2015, it was argued that as the deceased died in June, 1981, prior to the enactment of the Law of Succession Act in July 1981, his property should be divided in accordance with Kikuyu Customary Law. Under this law the property should be inherited by the Petitioner who is the sole surviving son of the deceased. He relied on extracts from Cotran, E. (1969) **Restatement of African Customary Law**, that inheritance under Kikuyu Customary law is patrilineal and the holding in **Karanja Kariuki V. Kariuki**, [1983] KLR 209 that upon the death of a father, his eldest son inherit the land. This rule of succession under Customary Law is indefeasible except in the case of disability arising from infirmity of body or mind or from any other cause or relinquishment by the eldest son himself.

10. Accordingly the claim by the Protestor has no merit and should be dismissed.

DETERMINATION

11. The deceased died intestate and was survived by four children. However, G K and L M I are now deceased. The Petitioner is the only surviving son of the deceased and the Protestor has filed this application on her own behalf and on behalf of the other siblings as children of the late L M I. W K, the other daughter of the deceased has relinquished her claim to the estate. Under **Section 38** of the **Law of Succession Act, Cap. 160** this property should have devolved to all the surviving children equally. The Protestors and her siblings would have inherited that share which their parent was entitled to by virtue of **Section 41**.

12. However, the deceased died in June 1981 before the commencement of the **Law of Succession Act** whose application is stated at **Section 2(1)(2)** 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 estate of deceased persons dying after the commencement of this Act and to the administration estates of those persons.

(2) The estate 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 estate shall commence or proceed so far as possible in accordance with this Act.”

13. The Act will only apply to the administration of the estate and only then as far as possible. The property should be distributed in accordance to the written laws and customs prevailing at the time which in the present case is the Kikuyu Customary Law.

14. It is notorious that Kikuyu Customary Law on inheritance is patrilineal. In his book **Restatement of African Law: 2 The Law of Succession**, Eugene Cotran observed that:

“Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest patrilineal relatives of the deceased, namely father, full-brothers, half-brothers and paternal uncles.”

15. The deceased was a widow. Eugene Cotran says at page 14 that according to the custom;

“The land over which the widow had rights of use during her lifetime, as well as any other land which she may have acquired privately, and her livestock and movables, are inherited as follow-

(a) In equal shares by her sons, including any sons which the widow may have had through a levirate union after her husband’s death; or

(b) In the absence of sons, by the deceased’s husband’s father, then full brothers, etc.....”

16. By virtue of **Section 3(2)** of the **Judicature Act** this customary law will only be applicable in so far as it is not repugnant to justice and morality or inconsistent with any written law. **Article 27** of the **Constitution** guarantees the right to freedom and equality and prohibits discrimination on among other grounds, the basis of gender or marital status. In **Erastus Gichingiri Muhoro V. Gerishon Gichingiri Muhoro & 2 others**, [2014] eKLR, the court of appeal held that this right is non-derogable and in the case of **Francis Muchiri Wairia V Alice Wangari Wairia & another**, [2011] eKLR the same court, although referring to the repealed constitution, held that any custom that is antithetical to this provision would be unenforceable.

17. The evidence was that L M was divorced and was residing on a portion of the suit land which she was given by the deceased. This was until she was evicted by the Petitioner. The Petitioner’s claim that she had an alternative parcel of land given by her former husband is negated by the fact that after being evicted she rented a house in town. The certificate of grant that was issued in PM Succession Cause No. 44 of 2009, **In the matter of the estate of the late N K W** showed that L M was given a portion of the Plot No. Nyandarua/Geta/[particulars withheld] which belonged to the deceased in that cause. This is however not proof of ownership and there is no evidence that she subsequently took possession of that property or was issued with title. What is certain is that for the substantial part of her life, she and her children resided with the deceased on the suit property.

18. In addition, during the family meeting with the elders on 29th September, 2003, the Petitioner agreed to give L M 1½ acres of the land. He did not dispute that he made this agreement on the terms indicated in it. He also did not offer any reason why he was not ready to honour it.

19. On the above evidence and taking into account the provisions of **Article 27** of the **Constitution** as well as **Section 3(2)** of the **Judicature Act**, I am satisfied that to hold it is only the Petitioner who is entitled to inherit the estate of the deceased solely because he is the only surviving son would be unjust. The Protestor and her siblings should be given the 1 ½ acre that their deceased mother used to occupy prior to her death and which the Petitioner himself agreed to give her.

20. Accordingly I order that the letters of administration issued on 28th October, 2009 be confirmed on the following terms

The property known as Nyandarua/Geta/[particulars withheld] will be divided as follows

(a) 1½ acres be given to the children of L M I to share equally.

(b) 2¾ acres be given to N N K;

21. W K who relinquished her claim will not be given any portion of the property. Being a family matter each party shall bear its own costs.

Dated, Signed and Delivered at Nakuru this 19th day of November, 2015.

A. K. NDUNG'U

JUDGE