



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO.366 OF 2003
IN THE MATTER OF THE ESTATE OF JAMES MBUGUA (DECEASED)

MARGARET NYAMATHWE KIBERA

JANE WANJIRU KURIA

LUCY NYAGUTHIE GATHURI

VIOLET WAMBUI MBUGUA

PAULINE NYAMBURA

WINNIE NJERI MUTHUI APPLICANTS

VERSUS

JOHANNES MBUGUA MUCHUKU RESPONDENT

RULING

The application dated 12/05/2011 seeks for orders to prohibit the respondents Johannes Mbugua Muchuku Kagwe from interfering and intermeddling with the assets of the estate of JAMES MBUGUA MUCHUKU (the deceased). The applicants pray that the respondents be prohibited from selling, alienating or in any way disposing of parcels **No.Nyahururu/Matindiri/338, 337, 335, 336, 345, 344 and 339** or any parcel forming part of the estate of the deceased pending the final determination of the shares of all the beneficiaries to the estate. Further, that the court declares any sale or alienation already commenced as null and void, and any title issued to be cancelled, and revert to the estate, pending redistribution. The applicants also pray that Johannes Mbugua Muchuku, be compelled to account for all the assets of the estate as at the time of the deceased's death and also to account for all the sums collected from the sale of about 1000 trees, quarrying activities and sale of assets belonging to the deceased's estate.

The applicants are daughters of the deceased and on 4/03/2011, the court issued orders revoking the grant which had been issued and confirmed in favour of the respondent. The respondent was ordered to surrender the same to court. Meanwhile the respondents have commenced selling the property known as **Nyahururu/Matindiri/338** and cutting and disposing off the trees. Unless the prayers are granted, the applicants will suffer irreparable loss and be discriminated against.

In response, the respondent Johannes has filed a notice of preliminary objection on grounds that the issue

of discrimination based on gender, which is forbidden by Article 27 (3) and (4) of the Constitution of Kenya, does not apply in this matter.

The court directed that the preliminary objection be argued first. The respondent submitted that since this matter begun before commencement of the Constitution of Kenya 2010, then invoking Article 47 of the same is like putting new wine into old skins. He sought to rely on the case of **Robert Kisiara Dikir & 3 others V OCS Keiyan GSU Camp and 3 others**. It is on this basis that he terms the application incompetent.

Mr. Murimi on behalf of the applicants submits that the preliminary objection is wholly confused as the application is premised on provisions of section 45 of the Law of Succession and Rule 49 of the Probate and Administration Rules, and provisions of the Constitution have not been invoked.

I confirm that the crux of the application relates to concerns raised by the applicants that there is intermeddling of the deceased's estate and they crave orders from this court so as to preserve the estate, pending distribution. That is provided under section 45 of the Law of Succession Act.

The applicants cited the provisions of Article 27 of the Constitution, in the body of the application because they believe they are suffering discrimination at the hands of the respondent on account of their gender. The right of women to inherit property was not introduced with the dawn of the 2010 Constitution. It indeed has always existed since July 1981 with the coming into force of the Law of Succession (Cap 160) at section 29 which does not segregate dependants on the basis of age. Apart from that even under the former Constitution, discrimination on grounds of gender was not allowed. The principle of gender discrimination is not an incompetent aspect, but citing the 2010 Constitution in a matter filed prior to its promulgation offends Schedule 6 sub-article 22 of the 2010 Constitution which provides that, all judicial proceedings filed before promulgation of the new Constitution are to continue and be determined under provisions of the former Constitution. Para 6 offends this provision, but that does not warrant the striking out of the entire application. What it calls for and which I hereby do, is to strike out para 6 of the application and the preliminary objection only succeeds in part.

Delivered and dated this 21st day of February, 2014 at Nakuru.

H.A. OMONDI

JUDGE