



IN THE HIGH COURT OF KENYA AT NAIROBI

P&A NO.1140 OF 1990

IN THE MATTER OF THE ESTATE OF KEINGATI WAIHARO KEINGATI (DECEASED)

**PETER KARUMBI KEINGATI.....
1ST APPLICANT**

**JOHN NGUGI KEINGATI
.....2ND APPLICANT**

**JAMES KARANJA KEINGATI.....
3RD APPLICANT**

**PHILLIP GITAU
KEINGATI.....4TH APPLICANT**

**SIMON GATHU KEINGATI.....
5TH APPLICANT**

VERSUS

**DR. ANN NYOKABI NGUITHI.....1ST
RESPONDENT**

**ELIZABETH NJERI MWATHA.....2ND
RESPONDENT**

**LUCY WANJIRU KANDU.....3RD
RESPONDENT**

**REGINA WAIRIMU GOKO.....4TH
RESPONDENT**

R U L I N G

The properties that comprise the estate of the deceased have not yet been distributed to the beneficiaries. The reason for the delay is that the Applicants have challenged the claim by the Respondents (the daughters of the deceased) to be included as beneficiaries of the estate of the deceased. Peter Karumbi Keingati, the 1st Applicant swore an affidavit on 27th March 2014 requesting the court to exclude the daughters of the deceased in the distribution. The 1st Applicant deponed that the Respondents, who are all married to wealthy husbands, should be excluded as beneficiaries of the estate of the deceased. The 1st

Applicant further deponed that under Kikuyu Customary Law, it is only sons of the deceased who can inherit his estate. He stated that the Respondents should wait to inherit from the estates where they are married. In paragraph 16 of the affidavit, the 1st Applicant stated as follows:

“That we would like this honourable court to exclude our married sisters from taking part in this proceedings, or from inheriting any part of our father’s estate both on the basis of African Customary Law that excludes married daughters from inheriting in their father’s estate and on the basis of the principle of non-discrimination and equality. We insist that if married daughters have to inherit, they ought to provide full disclosure of the properties that they own or likely to inherit in the clan or family where they are married.”

In support of the 1st Applicant, one Kibutha Wa Manyara swore a supporting affidavit. In the affidavit, he claimed to be an expert on Kikuyu Customary Law. He deponed that once a woman is married, she belongs to the family of her husband. In that regard, she cannot inherit the properties of her father once dowry has been paid and she has gone to live with her husband. He deponed that, in the context of the Kikuyu custom, once a woman is married, she is regarded as the daughter of her husband’s family and she and her children gain inheritance rights in that family by virtue of her marriage. He went further on and stated that such woman, once married, forfeits her right to inherit from her father’s estate.

The 1st Respondent, Dr. Ann Nyokabi Nguithi swore a replying affidavit in opposition to the position taken by the 1st Applicant. She deponed that, the Respondents, as daughters of the deceased stood on equal footing with the Applicants, the sons of the deceased, when it came to the inheritance of the properties that comprise the estate of their deceased’s father. She deponed that the fact of their marriage did not disqualify them from benefiting from the estate of the deceased. She took issue with the assertion by the 1st Applicant that because the daughters and their husbands were wealthy, they ought not to benefit from the estate of the deceased. She deponed that the fact that they are resourceful and hardworking cannot form the basis or excuse for them to be denied their rightful share from the estate of their deceased father. As regard to the question whether there was discrimination where the Respondents would also inherit property from their husbands’ families, the 1st Respondent swore that in a similar manner the sons of the deceased would benefit when their wives would inherit from their fathers. She deponed that the Kikuyu Customary Law cannot be selectively applied with a view to reaching a selfish end especially taking into consideration the fact that the Applicants had abandoned their traditional role to take care of their mother and instead left the responsibility to the daughters. She was of the view that the issue raised by the Applicants was merely diversionary and designed to cloud the real issue in controversy which is the distribution of the properties that comprise the estate of the deceased to the beneficiaries.

During the hearing of the dispute, this court heard oral rival submission made by Mr. Njiru for the Applicants, Mr. Kigotho for the Respondents and by Miss Kamau for the widow. Mr. Njiru submitted that the Applicants wanted the Respondents to be excluded from inheriting their father’s estate on the basis of the principle of non-discrimination. He invoked the provisions of **Article 11(1)** of the **Constitution** which recognizes culture as the foundation of the nation. He further submitted that **Section 33** of the **Law of Succession Act** recognized cultural properties. He stated that the court should recognize the dignity of customary law as provided by the Constitution. He acknowledged that customary law would not be applicable where it was at variance with the Constitution itself. He urged the court to invalidate **Section 3(2)** of the **Judicature Act** which did accord primacy given to Customary Law by the Constitution. As regards the matter in issue, he submitted that the deceased had seven (7) sons and four (4) daughters. Two of the sons are deceased. During his lifetime, the deceased had distributed his properties among his seven (7) sons. He had no intention of awarding portions of his estate to his daughters due to the fact that the four (4) daughters were all married during his lifetime. He submitted that the sons had agreed on the mode of distribution of the estate of the deceased among themselves. He stated that the four (4) daughters have now scuttled the proposed distribution because they also want to benefit from part of the estate of the deceased. It was the Applicants’ case that the daughters had no right to inherit from their father under Kikuyu Customary Law. He cited a quote at page 32 from the book written by Jomo Kenyatta “**Facing Mount Kenya**” where he stated that only an unmarried daughter was entitled to be given land to settle on.

In his view, the reason for the exclusion of the married daughters from inheriting from their father's estate was not discrimination. This is because the married daughters acquired rights to inherit from their husbands' families. The daughters would thus inherit twice if they are allowed to inherit from their father's estate. He urged the court to take into account the decision in Virginia Wambui Otieno's case where Customary Law was upheld. He also relied on the South African case of Nonkululeko Letta Bhe and 3 Others –Vs- Magistrate, Khayelitsha and 4 Others Case No.CCT 49 of 2003 where the Constitutional Court of South Africa held that Customary Law should be respected and not merely tolerated. He observed that the decisions made by the courts in the recent past had not endowed Customary Law with the respect that it deserves. The New Constitution anticipated that Customary Law would be given its due recognition. He submitted that the concept of marriage in the African setting was to unite families and clans. It created relationships. That is why the daughter who is married enters a special relationship which creates inheritance right. He urged the court to investigate what the daughters who are married would inherit from the other side. He submitted that it was not correct for a married daughter to be placed in the same footing as a son. In that regard, he relied on the Court of Appeal decision in Irene Njeri Macharia –Vs- Margaret Wairimu Njomo & Another Civil Appeal No.139 of 1994. He accused the married daughters of being like shylocks who were causing havoc in the administration of their father's estate. In the present case, he was of the view that the married daughters were well off and should not get anything from the estate of the deceased. He urged the court to make a finding that married daughters should only be entitled to inherit from their husbands' estates and not from their father's estate.

Mr. Kigotho for the Respondents urged the court not to be persuaded by the argument advanced by the Applicants. He submitted that the issue of inheritance is provided for under the **Law of Succession Act**. He stated that under **Section 3(2)** of the **Law of Succession Act**, a child is defined. That definition did not discriminate between a male and a female child. He explained that the Kikuyu Customary Law, in so far as it discriminated against female children of a deceased, could not be upheld by this court because it was contrary to **Article 27(3)** of the Constitution. For added emphasis, he submitted that **Article 27(5)** of the Constitution prohibits the discrimination of any person either directly or indirectly. In the present case, he submitted that the distribution of the properties that comprise the estate of the deceased should be in accordance with **Section 38** of the **Law of Succession Act**. He took issue with the entire basis of the Applicants' case which was to the effect that since the Respondents were married daughters of the deceased, they ought not to benefit from his estate. He submitted that the question as to whether the Respondents were married or not was not a pertinent issue for consideration by this court.

As regard the question whether married daughters would benefit twice if they inherited both from their fathers and from their in-laws, Mr. Kigotho submitted that the situation that applied to married women applied in equal force to married men. This is because sons, who got married, would also benefit from properties inherited by their wives from their fathers. He urged the court not to apply the Kikuyu Customary Law as postulated by the Applicants. This was because neither the Applicants nor the person who swore the affidavit in support of the Applicants' application were experts in Kikuyu Customary Law. He submitted that the Constitution, being the supreme law of the land superseded the Kikuyu Customary Law especially where the Customary Law blatantly discriminated against some of the children of the deceased on the basis of their sex. He urged the court not to penalize the married daughters for being industrious. If that was the case, then successful people will be denied an opportunity to inherit from their parents.

Miss Kamau for the widow, supported the Respondents' submission. She urged the court to uphold the Constitution. She explained that the Applicants, as the sons of the deceased, had neglected her. She was being taken care of by the Respondents. She submitted that the position the Applicants were advancing was repugnant to justice and morality.

This court has carefully evaluated the facts of this application. It has also considered the applicable law. This issue for determination by this court is whether Kikuyu Customary Law should be applied as craved for by the Applicants in the distribution of the properties that comprise the estate of the deceased. Mr. Njiru submitted that the position that hitherto applied where customary law was relegated to the backburner by the law changed when the **2010 Constitution** was promulgated. He submitted that **Article**

11(1) of the **Constitution**, recognized culture as the foundation of the nation and as cumulative civilization of the Kenyan people and nation. Parliament was required to enact legislation to recognize these cultural rights. He submitted that **Section 3(2)** of the **Judicature Act** was therefore unconstitutional in so far as it failed to recognize the pride of place that culture has in the setup of the legal system of Kenya. He further submitted that since the coming into effect of the **Constitution**, the Kikuyu Customary Law that specified the manner in which property was to be inherited ought to be upheld by the court. In that regard, he was of the view that the Kikuyu Customary Law that prohibited married daughters from inheriting their parent's property, had a constitutional underpinning and therefore ought to be upheld. On their part, the Respondents also relied on **Article 27(3)** of the **Constitution** to oppose the Applicants' application. They submitted that the position taken by the Applicants would lead to a situation where the Respondents would be discriminated upon on the basis of their sex.

This court takes the following view of the matter. Whereas **Article 11** of the **Constitution** recognizes culture as *“the foundation of the nation and as the cumulative civilization of Kenyan people and nation”*, it is this court's finding that the people of Kenya, as the framers of the **Constitution** did not anticipate that culture would form a basis for discrimination between the peoples of Kenya. In the present case, the Applicants want the court to apply **Article 11** of the **Constitution** to uphold their interpretation of Kikuyu Customary Law that favoured sons as compared to married daughters. This court is of the view that the Applicants have misinterpreted **Article 11** of the **Constitution**. That **Article** seeks to promote all the positive aspects of culture. This court does not think that **Article 11** can be used to promote a cultural practice that is negative, discriminatory and retrogressive. In the present application, the Applicants have argued that, the Respondents, as the daughters of the deceased, are not entitled to inherit the properties that comprise his estate on the ground that they were married. This court is in agreement with the Respondents that to reach such a finding will amount to discrimination of the Respondents which would be contrary to **Article 27** of the **Constitution** which specifically prohibits discrimination of any person on the basis of race, sex, marital status or culture. **Article 27(3)** of the **Constitution** specifically provides that *“women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”*

In the present case, this court does not see any reason why the **Law of Succession Act** should not be applied in the distribution of the estate of the deceased. In that regard, **Section 29(a)** of the **Law of Succession Act** recognizes *“children”* of the deceased as dependants. It does not state that such children are sons or daughters, either married or unmarried. The Kikuyu Customary Law, in so far as it discriminates between the male and female children of a deceased person is a retrogressive custom which cannot supersede the **Constitution** and the **Law of Succession Act**. This court agrees with the holding of Makhandia J (as he then was) in **In Re Estate of Solomon Ngatia Kariuki (deceased) [2008] eKLR** at page 8 where he stated as follows:

“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”

As regard to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would no discrimination. In any event, the decision by

a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution are the issues anticipated by **Section 28** of the **Law of Succession Act**. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the **Constitution 2010**, particularly **Article 27** that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.

In the premises therefore, this court finds no favour with the Applicants' application seeking to disinherit the Respondents. This court declares that the Respondents are dependants of the deceased in accordance with **Section 29(a)** of the **Law of Succession Act**. They are entitled to inherit the properties that comprise the estate of the deceased during distribution. The parties are ordered to file their respective proposals in regard to how the said estate shall be distributed to the dependants. They shall do so within thirty (30) days of the date of this Ruling. There shall be no orders as to costs.

DATED AT NAIROBI THIS 31ST DAY OF JULY, 2014.

L. KIMARU

JUDGE