



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.6 OF 2010

IN THE MATTER OF THE ESTATE OF:

JAMES WAITHAKA NDUTURU DECEASED

AND

JAMES WAITHAKA NDUTURU APPELLANT/RESPONDENT

AND

FRANCIS NGUYO KARUERESPONDENT/APPLICANT

RULING

By an application dated 11th May 2012, the applicant FRANCIS NGUYO KARUE moved the honourable court to review and set aside judgment and decree issued on 16th March 2012 and that the honourable court be pleased to re-distribute land parcel MAGATU/RAGATI/70 equally between the children of the deceased as per **Section 38** of the **Law of Succession**.

The application was supported by the annexed affidavit of the applicant wherein it was deponed that the honourable court decreed that Land Parcel MUGUTU/RAGATI/70 measuring 4.2 acres which is the only land parcel forming the late KARUE MUGO alias KARWE's estate be divided into two equal portions according to the two houses of the deceased as per the Kikuyu Customs Law and that he was aggrieved by the said judgment.

It was deponed that the first house only has one beneficiary that is the family of the late NDUTURU KARUE while the second house has three beneficiaries namely: FRANCIS NGUYO KARUE's family, DUNCAN KARUE and BENTETA NZELANI MURIUKI's families. It was deponed that the said customary law is discriminatory since it denied the parties equal right to property as provided for under the constitution and therefore a sufficient ground to review the court's judgment of 16th March 2012.

A further affidavit was filed on 18th December 2013 wherein the appellant deponed that he had withdrawn the notice of appeal which he had filed and that the application was properly before the court under the provisions of **Order 42 of Civil Procedure Rules**. It was further stated that the customary law should not be the basis for denying the applicant and his siblings equal enjoyment of his late father's estate.

In response to the said appeal the respondent filed a replying affidavit sworn on 23rd February 2012 in which it was deponed that having filed a notice of appeal the applicant can not now file an application for review. It was deponed that the applicant has not discovered any new information or evidence that was not within his knowledge and that the deceased died on 5th November 1974 so his estate is crowned by

customary law.

Submissions

On behalf of the applicant it was submitted that the same had withdrawn his notice of appeal and therefore this application or review under **Article 40 (2)** of the **Constitution** which provides that:-

“Parliament shall not enact a Law that permits the state or any person-

- a. **to arbitrary deprive a person or property of any description of any interest in, or right over any property of any description; or**
- b. **to limit, or in anyway restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in Article 27 (4)....”**
- c.

It was submitted that **Article 27 (4)** provides that the state shall not directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. It was submitted that whereas he agreed with the judgment of the court that his father died way back in 1974 and his estate governed by Kikuyu customary law, his question was whether the provision of **Section 2 (2)** of the **Law of Succession Act** in so far as it allows the application of Kikuyu customary law operating then on the division of a deceased estate are constitutional.

It was submitted that currently the land as demarcated has each and every family residing on a portion of the land equal to the other which the court's judgment seeks to upshot with the only beneficiary of the estate of WANJIRU KARUE getting 2.1 acres while those of WANGU KARUE will have to subdivide 2.1 into two portions.

On behalf of the respondent it was submitted that the application does not meet the threshold for review since the issues raised were within the knowledge of the applicant at the time when the appeal was heard. It was submitted that on the authority of **In the matter of the Estate of Philisiah Wambuki Kiguru (deceased) Nairobi High Court Succession Cause No.989 of 1994**, the applicant has not demonstrated that there was discovery of new evidence and because of that therefore the application has failed to meet the threshold for a review.

It was submitted that the deceased died before enactment of the **Succession Act** and as per **Section 2 (2)** the applicable law was Kikuyu Customary Law as the only proviso do the same in **Section 5 (3)** of the **Judicature Act**. If it is repugnant to justice and morally. It was submitted that if there was an error in the way the law was interpreted and applied that would not be agreed for review but an appeal see **In the matter of the Estate of the late James Waithaka Kinyanjui (deceased) Nairobi High Court Succession case No.3154 of 2003**.

Background

The applicant petitioned for grant of letters of administration in respect of the Estate of KARUE MUGO alias KARWE MUGO in Karatina Resident Magistrate's court Succession Cause No.52 of 2008 in which the court held that the suit property be shared in four equal portions. Being aggrieved the respondent filed an appeal to the court which the court held that the applicable law in respect of the Estate herein was Kikuyu Customary Law. The deceased having died on 5th November 1974 as per the provisions of **Section 2(2)** of the **Law of Succession**.

According to the evidence tendered before the trial court, it was confirmed that the suit land was subdivided into two as per the provision of Kikuyu Customary Law in respect of the two houses. The court allowed the appeal and ordered that the land be divided into two and shared between the two houses.

Being aggrieved the applicant filed a notice of appeal which he withdrew before filing the application for review with the only ground being that the mode of distribution as ordered by the court will result in some beneficiaries getting substantially larger shares of the land than other beneficiaries.

In his submission the applicant has stated that **Section 2 (2)** of the **Law of Succession** is unconstitutional as it prevents him from equal enjoyment of property.

From his submission it seems that the applicant would like this honourable court to declare a provision of the Statute unconstitutional and therefore the question to be answered is whether the same can be declared unconstitutional in an application for Review?

I take the view that if the applicant has problem with the application of the provision of **Section 2 (2) of Succession Act** then the same ought to have filed a constitutional petition which would have been served upon the Hon. Attorney General for the court to determine whether **Section 2 (2)** of the **Law of Succession** is unconstitutional.

Be that as it may **Article 11** of the **Constitution of Kenya 2010** recognizes culture as the foundation of the nation. **Article 44, (2)** provides that a person belonging to a cultural or linguistic community has a right with other members of the community as to enjoy the person's culture.

The Sixth Schedule of the Constitution on transitional and consequential provision at **Article 7 (1)** provides that all Laws in force immediately before the effective date continue to be in force and shall be constitutional with alterations adaptations, qualifications and exceptions necessary to bring it into conformity with the constitution.

It is therefore clear to my mind that the **Section 2 (2)** of the **Law of Succession** continues to be in force and I see nothing unconstitutional with the said provision.

The applicant has not submitted to the court any new and important matter of evidence which was not within his knowledge neither has he pointed out any error on the face of record. If the court was wrong in his judgment herein then as per the decision of Dulu J in **In the matter of the estate the late James Waithaka Kinyanjui supra** his best cause of action was filed an appeal.

I therefore find no merit on the application for review herein dated 23rd May 2012 which I hereby dismiss with cost tot he respondent.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

J. NGAAH

JUDGE.

In the presence of

:----- for Appellant/Respondent

----- for Respondent/Applicant