



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 187 of 1995

IN THE MATTER OF ESTATE OF KINYAMU MUGAMBI....DECEASED

ELISEUS MBURA M'THARA.....PETITIONER

VERSUS

HARRIET CIAMBAKA.....1ST OBJECTOR

SAMUEL KIRIMI.....2ND OBJECTOR

JUDGEMENT

The Petitioner in this Cause Eliseus Mbuba M' Thara brought this Petition seeking Grant of Letters of Administration of the Estate of Kinyamu Mugambi sometimes in the year 1995, six years after the demise of the deceased. In his Petition, the Petitioner claimed to be the brother of the deceased. Two people namely Harriet Ciambaka and Samuel Kimimi Maregi, the 1st and 2nd Objectors respectively objected to the Petition by filing their respective Objections. Both Objectors claimed to be the brothers of the deceased.

When the parties took directions, they agreed to have the Cause heard by way of *viva voce* evidence. The matter was started afresh before me after the Judge who previously partly heard the case was transferred. Before I summarize the case of each of the parties, I wish to state facts that were not in dispute.

There is no dispute that the Petitioner and both Objectors are related to the deceased. The Petitioner and the 1st Objector admitted that they were not related to the deceased by virtue of the deceased being their brother as disclosed in the affidavits they filed in support of their respective cases. The parties adopted the Family Tree produced in evidence by the 1st Objector as a true reflection of the relationship between the three parties and the deceased.

According to the tree, the Petitioner is the son of Muturi Thara Njeru. In regard to the relationship between the Petitioner and the 1st Objector, the Petitioner's grandfather, Njeru M'Nthungu was the brother of the 1st Objector's father, Iguna M'Nthungu. That makes the 1st Objector an aunt to the Petitioner.

In regard to the relationship between the Petitioner and the 2nd Objector; the 2nd Objector is the son of Maregi Iguna Njeru. Maregi Iguna Njeru was the brother of Muturi Thara Njeru the father of the Petitioner. That means that the Petitioner and the 2nd Objector are first cousins being sons of brothers. That also means that both the Petitioner and the 2nd Objector are grandsons to the brother of the 1st

Objector's father. By extension both are the grandsons of the 1st Objector's uncle, her father's brother.

In regard to the relationship between the 2nd Objector and the deceased, both are sons of Maregi Iguna Njeru and therefore brothers. That means that the deceased was a nephew of the 1st Objector because, just as the 2nd Objector he was a son of the 1st Objector's first cousin. The deceased was a first cousin of the Petitioner because both were sons of brothers.

There is no dispute that the deceased was the registered owner of the land L.R. No. MAGUMONI/THUITA/133. Hereafter it will be referred to as the suit land. It is not in dispute that the land is three acres in size.

There was no dispute that the deceased died intestate. The 2nd Objector was clear in his evidence that despite asking his brother the deceased several times before he died who should inherit him, the deceased told him the Chuka elders knew.

It is not in dispute that the deceased was not married at any time during his lifetime. Secondly it is not in dispute that he was not survived by any children as he had no children of his own.

I have heard the Objectors' and the Petitioner's cases through viva voce evidence as the parties chose. After hearing each of the parties I can summarize their respective case as follows.

The Petitioner's case is that the suit land is ancestral land because it was acquired by his grandfather, the father of the 1st Objector. The Petitioner contends that the land was given to the deceased, his cousin in 1967 to be shared between him and the deceased. The Petitioner's case is that together with his brother Japheth Kamunju who did not testify, they utilize two acres out of the suit land. He stated that the 1st Objector utilizes only one acre out of the suit land and stated that he had no objection if she was given the one acre as her share. The Petitioner admitted that himself and the 2nd Objector had other land where they have put up their homes and where they live. He admitted that the 1st Objector had no other land.

The 1st Objector's case is that it was her father who owned two parcels of land, the suit land measuring three acres and L.R. No. MAGUMONI/MUKUUNI/86, hereinafter No. 86, measuring six acres. The 1st Objector contended that her siblings all died leaving her as the sole surviving child of her father. She contends that according to the Chuka peoples' tradition, daughters could not inherit land. That consequently her father who during the time of registration of land at Magumoni had the two parcels of land afore stated caused the suit land to be registered in the name of the deceased. The 1st Objector explained that the reason he gave the suit land to the deceased was for three reasons; one for being his nephew, the son of his brother; two, because the deceased was named after him and three daughters could not inherit land according to Chuka culture..

The 1st Objector contended that her father caused land no. 86 to be registered in the name of the father of the 2nd Objector his nephew, his brother's son. She said that eventually the land 86 was shared by the 2nd Objector and his brother GIKUNDI MAREGI (since dead) leaving out their brother the deceased since he had been given the suit land.

The 1st Objector's case was that she and her parents lived on the suit land with the deceased, and that her two parents are both interred on the suit land, just as is the deceased. She testified that she also buried her, late son on the same land and that no one objected to the same. The 1st Objector contends that her late father left his coffee on the suit land to her and she produced the Coffee Pass Book as proof she was the one receiving payments for coffee proceeds from the said land. She also contends that she has been living and utilizing two acres out of the suit land and that she had developed the two acres extensively by construction of houses, planting trees and food crops.

It was the 1st Objector's case that her father had given one acre of the suit land to the Petitioner where he

had planted coffee. She said that she was not opposed to him getting that acre of land. The 1st Objector contends that apart from the suit land, she did not own any other land.

The 2nd Objector's case was that the deceased was his brother and that he ranked in priority against the other parties for purposes of taking out the letters of Administration in this cause. The 2nd Objector's case is that since the deceased was not married it was he, the 2nd Objector and no one else who should inherit him. He also contended that since he had six children he alone and not with his late brother GIKUNDI MAREGI should get the suit land. The 2nd Objector in his evidence testified that he did not know how the deceased acquired the suit land. He admitted that he utilizes part of land No. 86 and his brother, GIKUNDI the other part. He also admitted that the 1st Objector had no other land. He admitted that he has never utilized the suit land. Finally he urged court to treat the petitioner and the 1st Objector as trespassers to the suit land.

The issues for determination are two:

1. Who should be appointed as the legal representative of the estate of the deceased Kinyamu Mugambi.

2. Who is entitled to the estate of the deceased Kinyamu Mugambi or alternatively how should the estate be shared.

I have set out the case for all three parties i.e. the Petitioner, the 1st and 2nd Objector. I have also set out the facts that are not in dispute. I will begin with the first issue for determination i.e. who should be appointed the legal representative of the deceased. The parties have filed their written submissions which were highlighted in court. I have considered these submissions as well as evaluated and analyzed the evidence adduced by each of the parties.

Mr. Isaboke for the Petitioner has not suggested who should be appointed the legal representative of the deceased. Mr. Nyamu Nyaga for the first Objector has urged the court to follow the Family Tree produced by the Petitioner and find that it is the 1st Objector who is entitled to be appointed the legal representative of the deceased. Mr. Nyamu Nyaga urged the court that the evidence before the court is clear by the Petitioner and 1st Objector that the suit land belonged to the father of the 1st Objector and he caused it to be registered in the name of the deceased who at the time was only 15 years old, because he could not register it in his daughter the 1st Objectors name since daughters did not inherit land, according to the Chuka tradition to which all parties belong. Mr. Nyamu Nyaga urged the court to find that due to the adverse interest the Petitioner and the 2nd Objector have over the suit property they cannot be trusted to administer the estate.

The 2nd Objector's submission was that the 2nd Objector is the one who should be appointed the legal representative of the estate of the deceased by virtue of section 39 of the Law of Succession Act. Mr. Riungu for the 2nd Objector urged that the 2nd Objector ranked in priority to the Petitioner and the 1st Objector for the reason the latter two did not fall within the sixth degree of consanguinity to the deceased.

In response to that argument both Mr. Isaboke for the Petitioner and Mr. Nyamu Nyaga for the 1st Objector urged to find that Section 39 of the Law of Succession Act does not apply given the history of the ownership of the land. S.39(1) and (2) of the Law of Succession Act (hereafter LSA) provides:

“39 (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

(a) father; or if dead

(b) mother; or if dead

((c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares;

or if none

(e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs

(a) To (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

I have considered the rival arguments by Mr. Isaboke, Mr. Nyamu Nyaga and Mr. Riungu for the parties. I have also considered the entire evidence adduced by the parties before this court. Having carefully considered all the above I do find that in the circumstances of this case it will defeat justice to apply the provisions of Section 39 of LSA. This is because for justice to be done to the case, one must consider a very pertinent issue of how the deceased came to be registered as the owner of the suit land. The 2nd Objector was very clear in his evidence that he had no idea how the deceased came to be registered as the owner of the suit land. He also had no idea how land No. 86 came to his father. He however, admits all the other facts including the relationships between all the parties in this cause and the persons who are in occupation of the suit land.

The deceased was a son of the 1st Objector's father's brother. The 1st Objector's evidence, which the Petitioner admits is that the deceased was given the suit land by the father of the 1st Objector for three reasons. First, because the father of the 1st Objector did not have a son. Secondly, the deceased who was a grandchild of the 1st Objector father's brother and therefore the son of the nephew of the 1st objector's father, had been named after him. Thirdly and more importantly according to the Chuka tradition to which all these parties belong a daughter could not inherit land therefore Iguna M'Thungu who had only one surviving child, Harriet Ciombaka Iguna, the 1st Objector, being a girl child he could not register the land in her name. He therefore registered his land in the name of the deceased who was his brothers grandson named after him.

It was also adduced in the evidence that the father of the 1st Objector also owned another land No. 86 which he had registered in the name of Maregi Iguna Njeru his brother's son which land was eventually registered in the names of Maregi's sons, Gikundi and the 2nd Objector. The deceased was also the son of Maregi Iguna Njeru but since he had been registered as the owner of the suit land he did not share in land No. 86.

Going by that history it is very clear that the suit land was only registered in the name of the deceased in order to keep it within the family, but that the one who has greater right to that land is the 1st Objector by virtue of the fact that it belonged to her father and she is the only surviving child of her father. That being the case Section 39 of the LSA cannot apply in disregard of the history which discloses original owner of the suit land, since so doing will deprive the 1st Objector of her right to own property and will also disinherit her.

Mr. Nyamu Nyaga cited several provisions of the Constitution which, I agree, apply to this case when looked at in the totality of the circumstances surrounding the Registration of the suit land in the name of the deceased. Mr. Nyamu relied on Article 2(4) of the Constitution stipulates:

“2 (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

The Chuka customary law that precluded daughters to inherit land from their fathers is inconsistent with the Constitution as will be demonstrated hereinbelow. This Article declares that the Constitution has supremacy over any law, including customary law which is inconsistent with it.

Mr. Nyamu Nyaga relied on Article 40(1) and (2), and 159(1) of the Constitution which stipulates as follows :

“40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(2) Parliament shall not enact a law that permits the State or any person—

(a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

I have examined all the legal provisions cited by Mr. Nyamu Nyaga and Mr. Riungu as against the evidence that was adduced before this court. I have already stated and will state it again that the Chuka customary law that provided that daughters cannot inherit from their fathers was discriminatory and repugnant to justice and morality. It resulted to acts like those of IGUNA M'THUNGU who instead of registering his pieces of land in his daughter's 1st objector's name, gave it away to the son and grandson of his brother for the simple reason that he did not have a son. For that reason the 1st Objector has had to go through the rigors of a trial to prove her right to the suit land as against her cousin's children who, daringly, claim the right to the property, one of them even daring to say that she is a trespasser and is not entitled to a single piece of the land.

It is the 1st Objector in whose name the land should have been registered in the first place and not the deceased and that is why section 39 of the Succession Act cannot be applied blindly in ignorance of the historical truth that the land was owned by the 1st Objector's father and that the only reason why he did not give it to the 1st Objector is because she was a girl and the customary law of the day did not recognize daughters right to property.

The 2nd Objector was adamant that since the 1st Objector was married and got children some within and some without that marriage she should not inherit the suit land even if it belonged to her father.

The law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person. It is therefore irrelevant that the 1st Objector was married at some point. What has been proved before this court is that she has been in occupation of the suit land since birth, and apart from the small period of time when she was married, she continues to occupy the land by living there and that land is her sole means of livelihood.

I have come to the conclusion that in this case the 1st Petitioner has a greater right to the suit property than the Petitioner and 2nd Objector. Even though she does not rank in priority to the deceased, she had a greater right prior to the registration of the land in the name of the deceased. To say she has no right over the suit land now is to enforce historical injustice of discrimination against her grounds of gender which she has suffered. I find that in spite of discrimination through customary law in the past she has a greater right to administer and also to share in the estate of the deceased.

In the alternative even if the father of the 1st Objector Miguna M'Thungu chose to have the suit land registered in the name of the deceased I find that a trust was created to the effect that the deceased would

own the land and hold it in trust for the 1st Objector. Had the deceased been married and gotten a family of his own then he would own half portion of the suit land and the other half would have held in trust for the 1st Objector. I find the trust existed because the 1st Objector together with her parents continued to live on the suit land and when the parents died they were interred on the suit land. The 1st Objector was also allowed to inter her deceased son on the said suit land. I find that under sections 27 28 and 30 of the Registered Land Act (now repealed). Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

27. In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

“28. In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-

- (a) the nature and amount of the deceased's property;**
- (b) any past, present or future capital or income from any source of the dependant;**
- (c) the existing and future means and needs of the dependant;**
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
- (e) the conduct of the dependant in relation to the deceased;**
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;**
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.**

30. No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 7 existed in favour of the 1st Objector.”

I find that a trust arose from the possession and occupation by the 1st Objector and also for the reason of the customary law recognizing the notion of a trust inherent where a person holds a piece of land in a fiduciary capacity for instance in this case where the father of the 1st Objector had the suit land registered in the name of the deceased in trust for his daughter who was the sole surviving beneficiary of his property. I am guided by the court of Appeal Case of Mukangu vs Mbui KLR (E&L) 622.

“However, since the same registration recognized trusts in general terms without specifically excluding trusts originating from customary law and since African customary laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Act with the relevant instrument of an acquisition either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act, of the consequent trust with the legal effect of transforming the trust with the legal effect of transforming the trust from customary law to the provisions of the Act because, according to the

proviso to section 28, such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee.” A trust arose from the possession and occupation of the land by Gerald which had the protection of Sections 28 and 30(g) of the Act.”

In the case of **Mukangu vs Mbui**, supra, the land dispute was between son Gerald Mbui and the father Mbui. The father wanted the court to make an order of eviction against his son, from the family land. The issue the court determined in that case was:

“Do sections 27 and 28 of the Registered Land Act confer such rights on Mbui as will entitle him to evict his son, Gerald, from the occupation and possession of the land.”

The court after considering several authorities from the same court concluded:

We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the registered land which although strictly it may not be an overriding interest under section 30(g), it nevertheless gives rise to a trust which is capable of protection under the Act. After passionately and extensively analyzing the concept of customary law trusts, Khamoni J. in Gachiba vs Gathiba Nairobi High Court Civil Case 1647 of 1984 (decided in January, 2001 and reported in [2001]2 EA 342) at page 368 stated

The position as I see it is therefore as follows: correctly and properly, the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interest under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126(1) of the Registered Land Act, without specifically excluding trusts originating from customary law, and since African customary laws in Kenya generally, have the concept or notion of a trust inherent in them where a person holding a piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registration Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not “relieve a proprietor from any duty or obligation to which he is subject as a trustee”

Gerald in this case, was in possession and occupation of the land with the consent and knowledge of Mbui since his birth in 1956. He has constructed a five-roomed permanent house and has planted coffee in the suit land. The Respondent is not ready to compensate him for those permanent developments. A trust arose from the possession and occupation of the land by Gerald which has the protection of sections 28 and 30(g) of the Act, unless there is an inquiry made which discloses no such rights, which would be superfluous in this case.”

The issue of customary trust has been the subject of many decisions in our courts. As the court of Appeal stated in the Mukangu case customary trust can arise out of possession and occupation of a family land by a family member and that such a trust is capable of protection under the registered land act that possession was upheld by the court of Appeal in M’Mwirichia and another versus M’Ikiugu and others Civil Appeal Case no. 95 of 2009 where it was held:

“Therefore, looked at either way – whether as an issue of inter-generational equity arising from ancestral land, or as a trust arising from rights under customary law, the conclusion is that the first appellant held the suit land in trust for the respondent and that he was not at liberty to dispose the same without the prior approval of the ultimate beneficiaries.”

In conclusion on this point I find that the 1st Objector and also the Petitioner are entitled to the portions of the suit land they have been in possession and or occupation of and or they utilize out of the suit land.

It has been shown that the 1st Objector utilizes 2 acres of the suit land. It has also been shown that the Petitioner utilizes one acre of the land. The Petitioner was claiming two acres of the suit land in order to share it with his brother Japheth. However, Japheth who is alive did not support the claim. I am not convinced that the Petitioner utilizes two acres. In any event he does not live there and also, it is the 1st Objector's father who allowed him to enter and use one acre out of the suit land. I find that what is established is that the 1st Objector occupies 2 acres of the suit land and is therefore entitled to the same while the Petitioner utilizes one acre and is therefore entitled to the same. In the result I will enter judgment as follows;

1.Harriet Ciambaka be and is hereby appointed the legal representative of the estate of the deceased Kinyamu Mugambi.

2.Harriet Ciambaka to share two acres out of LR. No. Magumoni/Thuita/133.

3.Eliseus Mbura M'thara to have one acre out of LR. No. Magumoni/Thuita/133.

4.Each party to bear their own costs.

Dated signed and delivered this 20th day of March, 2012

**J. LESIIT
JUDGE.**