



SUCCESSION

- Married daughters of deceased cannot be discriminated.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE 308 OF 1994

IN THE MATTER OF THE ESTATE OF RUKUNGA KAIMATHIRI (DECEASED)

SAMSON KIOGORA RUKUNGA PETITIONER

VERSUS

ZIPPORAH GAITI RUKUNGA OBJECTOR

JUDGMENT

The deceased, Rukunga Kaimathiri when he died, left surviving him the following beneficiaries.

- | | | |
|-------------------------------------|---|-------------------------|
| a) <i>Dr. Kem R. Kimathi</i> | - | <i>son</i> |
| b) <i>Malakia Nacii</i> | - | <i>Married</i> |
| c) <i>Anastacia Mukami</i> | - | <i>Daughter married</i> |
| d) <i>Dominic Mutwiri Rukunga</i> | - | <i>Son</i> |
| e) <i>Samson Kiogora Rukunga</i> | - | <i>Son</i> |
| f) <i>Michael Muthamia Rukunga</i> | - | <i>Son</i> |
| g) <i>Kaimuri Mbau</i> | - | <i>Daughter married</i> |
| h) <i>Consolata Ntibuka</i> | - | <i>Daughter married</i> |
| i) <i>Jennifer Mwari</i> | - | <i>Daughter married</i> |
| j) <i>Felix Mwirigi Mwongera</i> | - | <i>Grandson</i> |
| k) <i>Daniel Koome Mwongera</i> | - | <i>Grandson</i> |
| l) <i>Stanley Kiruki Kaimathiri</i> | - | <i>Son</i> |
| m) <i>Christine Kambura Muthuri</i> | - | <i>Married daughter</i> |
| n) <i>Charles Nkunja Rukunga</i> | - | <i>Son</i> |
| o) <i>Pielina Nchoga Mwongera</i> | - | <i>Daughter-in-law</i> |

He died intestate. His estate complies of the following properties:-

1. *L.R. No. Abothuguchi/Igane/835.*
2. *L.R. No. Nkuene/Mitunguu/23*
3. *Plot No. 22A Mitunguu*

4. **Plot No. 3A Mitunguu Market**

5. **Plot 3B Mitinguu Market**

6. **Plot No. 29 Ucheru Market**

The petitioner, Samson Kiogora (Kiogora) filed an application for confirmation of grant which received the protest from Consolata Ntibuka (Consolata). Consolata was the daughter of Zipporah Gaiti deceased. As it can be seen from the list of beneficiaries above, the deceased in this estate left surviving him daughters and sons. He in his lifetime was married to more than one wife but only one survived him namely, Zipporah Gaiti, now deceased. The proposed mode of distribution suggested by Kiogora made no provision for daughters of the deceased. Consolata's protest was on the ground that although she was at one time married, in 1981 she got divorced and returned to her deceased father's land. More specifically she stated that she lived on what was her deceased mother's portion of land on *L.R. No. Abothuguchi/Igane/835*. She had further stated that she lives in the house that belonged to her late mother and cultivates the rest of her late mother's portions of land. Kiogora in his testimony confirmed that Consolata lives and cultivates a portion of that land. Both the witnesses of Consolata and Kiogora confirmed that Consolata was at one time married to a man called Njogu with whom they were blessed with two children. The children are called Geoffrey Kimathi and Viginia Ngugi. Those children of Consolata are now adults. All the witnesses did confirm that Consolata does not now reside with Njogu. Kiogora however stated that Consolata often visits Njogu and that their son Geoffrey lives with Njogu his father. The issues that I find that need my determination in this matter are two. The first issue is, whether Consolata is entitled to inherit her deceased father's estate. The second issue is who is the owner of the stone house, the house with the iron sheets and the timber kitchen. On the first issue, Kiogora justified his failure to award any part of the deceased property to Consolata because she is married to Njogu albeit that she is not living with him. Consolata's case on this issue is that she got divorced and since 1991 she has lived on the deceased property which was earmarked for her late mother. In my view, the law as it is now, it matters not, whether a daughter of the deceased is married or not when it comes to consideration of whether she is entitled to inherit her parent's estate. Article 60 (f) of the Constitution of Kenya 2010 provides for elimination of gender discrimination in respect of land. That Article provides as follows:-

“60 (1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles-

- a)
- b)
- c)
- d)
- e)

f) elimination of gender discrimination in law, customs and practices related to land and property in land.”

Kiogora is forbidden not only by that Article from discriminating against Consolata because of her marital status but is also prohibited by Article 27 of that Constitution where it provides:-

1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

3) ***Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

4) ***The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social original, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

5) ***A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

I lay emphasis on (3) (4) and (5) of that Article. Marital status of Consolata is not a basis to deny her right to inherit her deceased father's estate. In answer to the first issue identified above therefore, I respond in the positive. On the second issue, Kiogora stated that the stone and iron sheet houses and the timber kitchen were constructed by Doctor Kimathi one of the deceased sons. Doc Kimathi was said to reside in USA but occupies the stone house when he is in Kenya. Kiogora stated that Doc Kimathi built those houses for his step mother Zipporah Gaiti, deceased. It will be recalled that Zipporah Gaiti deceased was the mother of Consolata. Kiogora said that Consolata occupies the timber house. PW2 Tabitha Rukunga who described herself as the sister to Consolata stated that the house belonged to Doc Kimathi. She however did not elaborate on that ownership. Doc Kimathi did not attend the hearing of this case but swore an affidavit supporting the distribution suggested by Kiogora. In the affidavit where he supported that distribution Doc Kimathi did not mention those houses. The court accepts from the evidence adduced that Doc Kimathi built those houses but built them for his step mother Zipporah Gaiti deceased. The building and giving them to Gaiti deceased Doc Kimathi ceased to be the owner of those houses. Those houses belonged to Gaiti deceased at the time of her death. The evidence before court is that Consolata lived with her mother when she returned to her deceased father's property in 1981 until the death of her mother Gaiti in the year 2004. I therefore make a finding that the stone house, the iron sheet house and the timber kitchen ought rightly to be inherited by Consolata. I also make a finding that Consolata is entitled to inherit land where those structures are. I therefore order that the grant be confirmed as follows:-

1. **L.R. NO. ABOTHUGUCHI/IGANE/835 be shared equally by the following:-**

- a) ***Dr. Kem R. Kimathi***
- b) ***Stanley Kiruki Kaimathiri***
- c) ***Charles Nkunja Rukunga***
- d) ***Consolata Ntibuka shall get her share of land on Abothuguchi/Igane/835 where the stone house, the iron sheet house and the timber kitchen are situated.***

2. **L.R. NO. NKUENE/MITUNGUU/KITHINO/23**

- a) ***Michael Muthamia Rukunga*** – ***2 acres***
- b) ***Domenic Mutwiri Rukunga*** - ***2 acres***
- c) ***Samson Kiogora Rukunga*** - ***2 acres***
- d) ***Pielina Nchoga Mwongera*** -
- e) ***Felix Mwirigi Mwongera*** - ***2 acres jointly***
- f) ***Daniel Koome Mwongera*** -
- g) ***Stanley Kiruki Kaimathiri*** - ***2 acres***
- h) ***Charles Nkunja Rukunga*** - ***2 acres***
- i) ***Dr. Kem R. Kimathi*** - ***2 acres***

3. **PLOT NO. 22A MITUNGUU to go to Muthamia Rukunga and Domenic Mutwiri.**

4. **Plot No. 3A Mitunguu to be registered in the name of Samson Kiogora Rukunga ½ share and Pielina Nchoga Mwongera, Felix Mwirigi Mwongera Daniel Koome Mwongera to get the ½ jointly.**

5. **Plot No. 3B Mitunguu Market to go to Stanley Kiruki Kaimathiri and Charles Nkunja Rukunga.**

6. *Undeveloped Plot No. 29 at Ucheru Market to be registered in the name of the said Dr. Kem R. Kimathi.*

7. *There shall be no orders as to costs.*

Dated, signed and delivered at Meru this 17th day of February 2011.

MARY KASANGO

JUDGE