



SUCCESSION

- Ø *Articles 27 and 60 of the Constitution forbid discrimination.*
- Ø *Distribution*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE CASE NO. 206 OF 1995

IN THE MATTER OF THE ESTATE OF MBURUGU NKAABU (DECEASED)

JERICA GATWIRI M'MAGIRI.....APPLICANT

VERSUS

REBECCA MPINDA.....RESPONDENT

JUDGMENT

The deceased died intestate and in his lifetime he had three wives. At the time when this succession cause was filed, the first wife was deceased. There were only two wives that were alive when the succession was filed. Those who survived the deceased according to the petition before court were:-

Marieta Kainda mother of:-

- ***Rumano Kagarania – son***
- ***Kathiori Baranaba M'Murungi – son***
- ***Julius Kaimenyi M'Itwamikwa – son***
- ***Guantai M'Ikiome – son***
- ***Janet Kathure – daughter married***
- ***Denefina Kuri – daughter married***

Mukomeru M'Itwamikwa mother of: Joanina Karwitha Stephen daughter married."

The deceased had only one property namely, *Ntima/Igoki/1267*. The dispute before court is whether or not Joanina should inherit the deceased property. Joanina was the only daughter of Mukomeru. She is married. Mukomeru died on 5th July 1997. It seems that prior to her death a family meeting was held where it was agreed that she would inherit half an acre of the deceased property. By the time she died, the grant in this matter had not been confirmed and therefore the deceased property had not been distributed to her. The grant was finally confirmed on 29th January 1998 on the application of Romano Kagarania. Romano is the petitioner in this cause. In the mode of distribution provided in that application for confirmation, Mukomeru was not awarded the half acre that had been agreed. By the time the application for confirmation of the grant was heard and determined, Mukomeru had in any case died. Before her death, she had made a written *Will* dated 25th May 1997. In that *Will* she bequeathed her presumed share of half acre of the estate property to her daughter Joanina. Joanina by an application dated 17th November 1997 sought that the half acre of Mukomeru be vested and transferred to her. She based her claim on her mother's *Will*. Oral evidence was received to determine her right to inherit her mother's share. I do not wish it reproduce that evidence here for the reason that will become clear in this judgment. Save that I wish to state that it is accepted by all that Joanina had been cultivating the deceased property even during the lifetime of the deceased. It is because of that that the clan members decided that she be compensated with a goat in order for her to relinquish her claim to that portion. Joanina did not accept that compensation and todate she is still cultivating the half acre portion of land. My comment on the *Will* made by Mukomeru is that the half acre she bequeathed to Joanina was only her presumed interest in the deceased estate. She had no power to bequeath that property because it did not belong to her. Section 5 (1) of the Law of

Succession Act provides as much. It is in the following terms:-

“5 (1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by Will, and may thereby make any disposition by reference to any secular or religious law that he chooses.”

That section makes it very clear that a person is only entitled to dispose his or her free property by Will. Mukomeru did not have half acre in the deceased property capable of being bequeathed to Joanina. The word “bequeath” is defined in the Black’s Law Dictionary as:-

“To give property personal property by Will.”

In giving evidence the petitioner Romano stated that had Joanina been a man she would have been entitled to inherit from the deceased estate. That evidence is discriminative of Joanina on the basis of sex and marital status. Such discrimination is forbidden by Article 27 (4) of the Constitution. That Article forbids the discrimination of any person on the basis of any ground including race, sex, pregnancy, marital status amongst others. Article 60 (1) (f) specifically forbids discrimination on basis of gender in respect of holding, use and management of land. That Article provides:-

“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.”

On the basis of those provisions, Joanina is entitled to inherit her deceased father’s property. The constitution gives that right. I therefore grant the following judgment:-

1. **The grant issued to Romano Kagarania is hereby revoked.**
2. **A grant is hereby issued in the joint names of Romano Kagarania and Joanina Karwitha Stephen.**
3. **The grant shall be confirmed in respect of parcel number Ntima/igoki/1264 as follows:-**
 - (a) **Marieta Kainda – 0.50 acres**
 - (b) **Romano Karagania – 1.80 acres**
 - (c) **Kathiori Baranaba – 1.55 acres**
 - (d) **Julius Kaimenyi – 1.55 acres**
 - (e) **Guantai M’Ikiome – 1.55 acres**
 - (f) **David Kaaria – 0.25 acres**
 - (e) **Joanina Karwitha Stephen – 0.50 acres**
4. **Each party shall be awarded their share from the area they already occupy or cultivate.**
5. **The Deputy Registrar of this court is granted leave to sign any document on behalf of an administrator who fails to sign such documents which are necessary to bring into effect this judgment.**
6. **The inhibition on title number Ntima/Igoki/1264 is hereby removed to enable the transfer as per this judgment of that property.**
7. **There shall be no orders as to costs.**

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO

JUDGE