



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Succession Cause 431 of 2005

IN THE MATTER OF THE ESTATE OF CHEGE NJUGUNA (DECEASED)

JUDGMENT

This judgment is delivered in a contested petition for a Grant of Letters of Administration Intestate filed on 9th January, 2006 in relation to the Estate of Rufus Chege Njuguna, late of Nakuru, who died intestate on 26th April, 2004, leaving his widow and eleven (11) children surviving him. The deceased was also survived by a grand-daughter mothered by one of the deceased's daughters who appears to have predeceased the intestate herein. Of the 11 living children of the deceased are seven adult daughters and four adult sons. The value of the estate is stated in the Summons for Confirmation to be approximately Kshs.1,790,500.00 comprising of the following assets:

- 1. A parcel of land at Maili Saba. (described as a small plot)**
- 2. Land parcel No.I.R. 42694/1 (approximately 25 acres)**
- 3. Shs.90,500.00 held with the Co-operative Bank of Kenya Account No.0110026219800.**

The family of the deceased has been embroiled in this succession dispute since 25th August, 2005 when the widow, Eunice Wanjiku Chege filed a citation against the four sons of the deceased, James Karanja, Paul Njuguna, David Ndungu and Timothy Kubai Chege, notifying them of her intention to petition for a Grant of Letters of Administration Intestate in respect of the deceased's estate, if they did not do so within 15 days of the service of the citation upon them. The four having failed to comply, their mother proceeded to petition for the Grant. The four sons then filed objections to the making of the Grant and on 7th April, 2006, they filed a Cross-Petition and Answer to their mother's petition in which they brought in, as a beneficiary, the deceased's 7th daughter Zaphida Kabura Karanja, whom they claimed to have been deliberately excluded in the mother's petition. They also specified the value of the Estate as follows:

- a) Plot in Maili Saba.....Kshs.150,000.00**
- b) L.R. No.6746/13.....Kshs.10,400,000.00**
- c) Money in Account No.0110010219800... Kshs.88,178.30**

The objectors' main objection at the time of filing the Cross-Petition, was that the petitioner was not in a position to administer the Estate alone due to her advanced age. This issue was however amicably resolved and a Grant obtained by consent of all concerned and issued to the mother, Eunice Wanjiku Chege and James Karanja Chege, the 1st Objector, on 13th October, 2006.

The confirmation of the above Grant has now been impeded by a dispute as to how the Estate should be distributed, with the mother (1st Administrator) proposing in her Summons for Confirmation and all the six daughters consenting, that the Estate be distributed as follows:

- 1. The monies in the bank be shared equally among all the beneficiaries after payment of legal fees.**
- 2. That the Maili Saba plot be sold and the proceeds of sale be shared equally by all the beneficiaries.**
- 3. That the Land parcel No.L.R. 42694/1 be subdivided into 12 equal portions and distributed to “all the children”**

In an Affidavit of Protest sworn by the first objector and filed on 19th July, 2007, the 1st Objector faults the Consents filed by Rahab Wangai Chege and Mary Wambui Kuria on the ground that the two were out of the country when the Consents were purportedly signed. The deponent also faults the signatures by Esther Kimani, Alice Waithira and another by Eunice Wanjiku, yet there appears to be no Consent Form filed by the said Eunice Wanjiku.

On 26th May, 2008, Directions of the court were taken by the parties by consent, that the Summons for Confirmation of Grant be determined by way of affidavits on record and submissions to be filed. Only the petitioner had filed submissions at the time the matter was mentioned for purposes of taking a date for the judgment.

The protester proposes that the Maili Saba plot be given to Rahab Wangari Chege and the deceased's grand-daughter Eunice Wanjiku since the former has taken care of her since the death of her mother Jane Njambi. He proposes that the money in the bank account be given to the mother absolutely “**after payment of any accruing land rates**” As for the main asset, which the protestor cites as L.R. No.6742, measuring approximately 25 acres, the 1st objector proposes that the same be subdivided and shared equally among the four sons of the deceased and their mother, leaving out the daughters, for reasons that they are

“.....all married and have their own homes and are therefore not entitled to inherit from (my) deceased father's estate.”

In the submissions filed for the petitioner, her counsel states that she accepts the proposal that the monies in the bank account and the Maili Saba plot be distributed as proposed in the Affidavit of Protest. After considering all the evidence and arguments herein, as contained in the affidavits filed, as well as the petitioner's submissions, I find that there is no need to send the parties back to re-negotiate the distribution of the estate as proposed in paragraph 17 of the Affidavit of Protest. It is highly unlikely that such negotiations would bear any fruit given the circumstances herein.

As rightly pointed out by the petitioner's advocate in the submissions filed herein, the only ground that the objectors raise against their sisters inheriting the estate is that they are daughters (female children) of the deceased and married. This clearly goes against the provisions of Section 29 of the Law of Succession Act (Chapter 60 of the Laws of Kenya) which defines dependants as including “**the children of the deceased**” without any gender connotation. Although the notion that girls should not inherit their father's estate is based on customary beliefs of certain communities in Kenya, the same has no legal footing in view of the enactment of the Law of Succession Act which, as rightly submitted by counsel for the petitioner, constitutes the Law of Kenya in respect of and having universal application to all cases of intestacy or testamentary succession to the estates of deceased persons dying after the enactment thereof and to the administration of their estates, save in matters relating to agricultural land, crops or livestock as would be specified by the Minister through gazette. The court has not been furnished with any evidence of such exclusion in this case. Such is not the case herein and the protestors have not proved any custom as would allow the dis-entitlement of their sisters to the deceased's estate. Moreover the Court of Appeal in the case of **Rono Vs. Rono [2005] 1 KLR 538** (cited by the petitioner herein) was quick to state that, even where a court in its discretion, would consider a possibility that girls in a

particular family may be married, that should never be a determining factor in deciding on the distribution of an estate.

I agree with the petitioner herein that in as far as the protestors' proposed mode of distribution seeks to exclude the daughters of the deceased from inheriting their father's estate, purely on the basis of gender and status, when such exclusion is, by implication, outlawed by the Law of Succession Act, the same is discriminatory and contrary to the provisions of Section 82(2) of the Constitution of Kenya which states that:

“Subject to subsections (6) (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law...”

Sub-section (6), (8) and (9) of section 82 of the Constitution do not apply to the facts this Succession Cause. Under sub-section (3) of Section 83 “***discriminatory***” is defined as:

“affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe.... creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject to or are accorded privileges or advantages which are not accorded to persons of another such description.” (underlining by this court).

Furthermore, the proposed mode of distribution goes against the letter and spirit of The United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (hereinafter referred to as “The Convention”) to which Kenya became a signatory on 9th March, 1984 binding itself to take necessary measures geared towards eliminating discrimination against women, including and not limited to the area of economic and social life, whereby discrimination has been defined under Article 1 of the Convention as follows:

“...the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which have the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”(underlining by this court).

The Judiciary, being the 3rd arm of the Kenyan Government and the custodian of justice and freedom, has a major role to play in ensuring that the State's undertaking and obligation under Article 2 of the Convention are realised. Under paragraphs (a), (b), (c), (d), (e) and (f) of Article 2 the State is mandated:

(a) To embody the Principle of the equality of men and women in the national constitution and other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of the non-discrimination principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (changes and underlining by this court).

(d) To refrain from engaging in any act of discrimination against women and to ensure that public authority and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;

(f) To take all appropriate measures including legislation, to modify or abolish existing

law, regulations, customs and practices which constitute discrimination against women;.....”

There can be no argument that Kenyan courts are not only capable but also obligated to uphold and enhance the principles of non-discrimination by rejecting any argument and/or proposal made with a view to according unfair and discriminatory treatment to individuals and instead passing decisions that promote equal justice. Such was the situation in the Court of Appeal judgment in the case of **Wambugi Vs. Kimani [1992] 2 KAR 292** (cited by counsel for the Applicant) where His Lordship Justice Hancox, when considering decisions in which married women were held to be entitled to property ownership under Section 17 the Married Women Property Act 1882, stated as follows:

“In my view, judges who were making these pronouncements, albeit in a divorce suit recognised the changed status of women generally and basing myself on those observations, which I regard as of general application, and on my own view of the section, I would hold that a custom which is discriminatory in its effect so as to bar women from inheritance, is repugnant to ordinary notions of justice and that this court should not be guided by it.”

In view of the above, I am of the considered view, therefore, that fair and equitable justice will be done herein by having the Grant issued on 13th October, 2006 to Eunice Chege and James Karanja Chege confirmed at this stage and the deceased's Estate distributed as follows:

- 1) The deceased's widow, Eunice Wanjiku Chege to inherit the monies held in the deceased's account No.00110020219800 – Co-operative Bank of Kenya from which she will pay the costs of the petition.**
- 2) Land parcel No.426941/1 to be subdivided into 12 equal portions of 2 acres each to be distributed to the widow, the deceased's seven daughters and four sons, with the remaining 1 acre being inherited by Eunice Wanjiku, whom I consider to be entitled to her late mother's estate, in accordance with Section 41 of the Law of Succession Act.**
- 3) The Maili Saba plot to be given Eunice Wanjiku absolutely.**

The curving out of the respective portions to be done by the District Surveyor who will ensure that the status quo presently representing the occupation of the parcel by the family members is maintained, with the widow's portion encompassing the main house.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAKURU this 10th day of March, 2009.

M. G. MUGO

JUDGE