



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE 320 OF 2007**  
**IN THE MATTER OF THE ESTATE OF MUGO WANDIA (DECEASED)**

**JUDGMENT**

The late Mugo Wandia passed away on the 17<sup>th</sup> January 1976. Jessy Kariuki Mugo the petitioner herein petitioned for the grant of letters of administration in respect of his father's estate on 18<sup>th</sup> July 1994 before the Principal Magistrate's Court in Nyahururu. In the affidavit in support of the petition for letters of administration he named himself only as the survivor of the deceased and the property of the deceased as at the time of his death is plot No. 17/Ol Kalou Central. The letters of administration intestate was issued on 23<sup>rd</sup> January 2004. There is no explanation why the matter took over ten years before the grant was issued. The grant was confirmed on 9<sup>th</sup> September 2004. According to the certificate of confirmation of a grant the petitioner is entitled to the deceased's property as the sole heir. On 11<sup>th</sup> May 2007 Mary Wanja Mugo (hereinafter referred to as the applicant) filed the summons for the revocation of the grant on the grounds that the grant was obtained through concealment of material facts. The applicant is the daughter of the deceased. She was not informed by the petitioner when he petitioned for letters of administration before the Nyahururu Court. The petitioner also did not disclose to the court that the applicant and her three children depend on the deceased's parcel of land namely plot No. 17 Olkalou Central. Directions were taken on how this matter should be heard on 26<sup>th</sup> September 2007 where the court directed that the summons for revocation be determined by way of submissions. Further directions were given on 3<sup>rd</sup> March 2008 that the matter be heard on the basis of viva voce evidence by an expert be adduced if available. The matter was fixed for hearing on 23<sup>rd</sup> February 2009. Parties requested to be allowed to file written submissions which they filed and adopted for hearing and determination of this matter.

According to the petitioner the applicant is a married daughter who is not entitled to inherit the estate of her father. Moreover when the deceased's father died the petitioner continued to pay the settlement fund trustee loans and the applicant did not make any contribution. Counsel for the petitioner submitted that the deceased died on 17<sup>th</sup> January 1976 and his estate cannot be determined according to the provisions of Cap 160 which came into force on 15<sup>th</sup> July 2001 long after the death of the deceased. The applicable law is the customs applying at the time of the deceased's death which are Kikuyu Customary Law. Counsel put forward the case of the estate of Kamuki Mwehi HC Succession Cause No. 2825 of 1999 where it was held that Kikuyu Customary Law would apply in respect of an estate of a deceased who died before the enactment of Cap 160. The restatement of African Law Vol. 2 by Eugene Cotran at page 8 the learned author has given an opinion that:

***“Inheritance under Kikuyu customary law is patrilineal. The pattern of inheritance is based on the equal distribution of mans property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried.”***

Counsel also made reference to Civil Appeal No. 76 of 1998 Mary Wanja Gichuru vs. Esther Watu Gachuhi where the Court of Appeal held that:

***“It is a matter of notoriety amongst the Kikuyus that an unmarried daughter who becomes a mother must inform her father of the name of the father of the child so that her father would take necessary steps to preserve the rights of his daughter and her son. It is unthinkable that an unmarried daughter remaining in her father’s house would give birth to five children. This only goes to show that Esther must have been married and it is settled law that under the Kikuyu custom land is inherited by sons. It is a patrilineal society.”***

In the same judgment the Court of Appeal cited with approval the opinion expressed by the late President Jomo Kenyatta in his book **Facing Mount Kenya** at page 29:

***“After some time the family began to increase. Let us imagine that each wife had three sons and perhaps some daughters. But as female children do not take part in the ownership of land, we will leave them out, because, having no system of spinsterhood in the Gikuyu Society, women do not inherit land on their father’s side; they play their part in the family or clan in which they marry.”***

On the merit of the application counsel for the petitioner petitioned that the revocation of the grant is brought under **section 68 and 44 (1)** which are the wrong provisions of the law. Moreover the applicant did not exhibit a valuation report to show that the value of the deceased’s estate is in excess of Kshs 100,000/=. He therefore urged the court to dismiss the application with costs.

On the part of the applicant counsel submitted that it is not in dispute that the applicant is a daughter of the deceased. There is no reason why she should have been omitted in the list of beneficiaries. The applicant has denied that she ever married in her further affidavit sworn on 21<sup>st</sup> December 2007. It is deponed that she has always lived on the deceased’s parcel of land all her life with the three children. She is blind and derives her livelihood from this parcel of land. The applicant should not be discriminated merely on the basis of her gender. That is the spirit of the provisions of Cap 60. The children of the deceased are not given differential treatment on the basis of gender.

On the allegation that the petitioner paid the loan to the settlement fund trust he ought to have laid a claim as a creditor and not to assume the total ownership of the suit premises. Counsel urged this court to grant the prayers, revoke the grant and all consequential transfers effected by virtual of that order.

The deceased died in 1976. The letters of administration in this case was applied on 18<sup>th</sup> July 1994 but it was not issued until 10 years later on 23<sup>rd</sup> January 2004. Although the law provides that the estate of persons dying before the commencement of this Act are subject to written laws and customs applying at the date of death, the administration of their estate are supposed to proceed as far as possible according to Cap 160. According to the provisions of **rule 26(1) of the Probate & Administration rules Cap 160**;

***“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”***

The applicant is a daughter of the deceased therefore she was supposed to be notified by the petitioner when he petitioned for the letters of administration. The grant was confirmed on 9<sup>th</sup> September 2004 and the petitioner transferred the title to himself on 29<sup>th</sup> December 2004. Under section 48 of the Law of Succession Act the magistrate’s court has jurisdiction to deal with the estate of the deceased whose gross value does not exceed 100,000/=. It is a matter of general knowledge that any land in Kenya which is more than one acre cannot be worth 100,000/-. On this ground also the grant issued to the respondent

renders itself for revocation. Counsel for the petitioner submitted that the application is bad in law. I have looked at the defect. The defect is not fundamental. It has only invoked the wrong provisions of the law i.e. section 68 instead of section 76 of the Law of Succession. That defect does not go into the jurisdiction of this court. In any event under the provisions of section 47 of the Law of Succession and Rule 73 of the P & A rules this court is empowered to make any order as may be necessary for ends of justice and to prevent the abuse of the court process.

At this point I find there is merit in the application by the applicant seeking the revocation of the grant. The issue of distribution of the deceased's estate should be determined after the parties have filed a fresh summons for confirmation of the grant. On this issue of distribution formidable opposition was put forward by counsel for the petitioner on the grounds that the petitioner who is a Kikuyu by tribe is not entitled to inherit her father's estate. What I am able to deduce from the evidence before me is that the applicant is blind, unmarried, a single-mother of three children who derive their livelihood from their father's parcel of land. The petitioner alleges that the applicant was married but left her matrimonial home. Be that as it may it is evident that she has been living at the deceased's land. No evidence was adduced despite directions having been given on the Kikuyu Customary Law. Decisions were cited on the restatement of customary law and text which were written over 30 years ago that Kikuyu Customary law is patrilineal and women are not supposed to inherit. Customary Law is not static, should not be repugnant to justice and morality or inconsistent with any written law. See the provisions of **section 3(2) of the Judicature Act:**

***“3(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”***

The petitioner had a duty to adduce expert evidence on Kikuyu customary law to establish that the applicant is not entitled to her father's estate. In the absence of such evidence I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the Judicature Act. Besides the Judicature Act there is the constitution of the Republic of Kenya. Under section 82 of the Constitution discrimination on the basis of sex is prohibited. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable. It would also go against the reasonable expectation by the applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya amongst other countries under the United Nations is party to several human rights conventions and treaty which prohibit discrimination against women. Key among them is the Universal Declaration of Human Rights especially Article 1 and the Convention on all forms of discrimination against women (CEWDA). It is for those reasons that at this day and age when the Government has made a lot of efforts to eradicate poverty and embrace equitable policies and programmes of development a court of law cannot pronounce a judgment that goes against that spirit. The applicant is entitled to a share of her deceased father's estate even if he died in 1976 and his property was distributed in the year 2004.

However from the material before me it is not prudent to determine how the deceased's land will be distributed between the applicant and the petitioner for reasons that the acreage of the property is not indicated and it is not known to me. The number of people who derive their livelihood from the deceased's land is also not indicated. For the moment I will invoke the grant that was issued before the Nyahururu Principal Magistrate on 23<sup>rd</sup> January 2004 and confirmed on 9<sup>th</sup> September 2004. The original grant be returned to court for cancellation. The consequential transfer of plot No. 17/OI Kalou Central is also cancelled and the title of the deceased's property should revert to the deceased's name. A new grant be issued jointly to Jessy Kariuki Mugo and Mary Wanja Mugo who will be at liberty to apply for the confirmation and distribution of the deceased's estate. The applicant shall have the costs of this application.

It is so ordered.

**Judgment read and signed on 20<sup>th</sup> day of May 2009**

**M. KOOME**

**JUDGE**