



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

Prob & Admin Cause 179A of 1996

IN THE MATTER OF THE ESTATE OF LEAH NJERI THUO (DECEASED)

ESTHER W. THUO PETITIONER

AND

RAPHAEL W. THUO OBJECTOR

JUDGMENT

This is a dispute on the mode of distribution of Estate of the deceased LEAH NJERI THUO. Upon directions of the Court the hearing proceed by way of viva voce evidence.

The deceased who was married to the Late Ibrahim Waweru Thuo left the following Children surviving her:-

1. Beatrice Wanjiru
2. Raphael Waweru
3. Esther Wamboi
4. Ann Njoki
5. Margaret Mukina

born in the said order.

In the year 1968 or thereabout, the deceased was allotted the parcel of land known as Uasin Gishu Ngenyilel Settlement Scheme/442 by the Settlement Fund Trustees and was also given cows to graze the land. When the loan was paid, the deceased was issued with a title deed on 20th September 1983. The land measures 13.8 hectares which translates to 34.086 acres.

The Petitioner, Esther Wamboi Thuo applied for letters of Administration intestate to the Estate in 1996. In the Petition, she listed the following as the surviving beneficiaries to the Estate:-

1. Wanjiru Thuo

2. Waweru Thuo
3. Wamboi Thuo (Petitioner)
4. Mugina Margaret
5. Hannah Njoki

The affidavit in support of the petition sworn by the Petitioner is dated 16th April, 1996. The petitioner obtained the Letters of Administration and subsequently caused the property to be registered in her name alone.

The Objector took out objection proceedings and the said grant issued to the Petitioner was revoked /annulled and a fresh grant was issued to the Petitioner, the father of the parties Ibrahim Thuo Waweru and Raphael Waweru. The title deed was then deposited in Court for Safe Custody where it remains to date.

During the hearing there was an attempt by the Petitioner to prove that there existed an oral will in which her mother had bequeathed the entire land to her. She claimed that she lived with and had looked after and supported her mother throughout and the land was given to her in gratitude for all these. She also testified that she had contributed to the loan repayment to the Settlement Fund Trustees and the ultimate purchase of the land. She produced some receipts though they were in the deceased's name.

After considering the evidence on record and the submissions by Counsel, I do find that it is now an agreed fact that the deceased died intestate. She did not leave any written will. The alleged oral will was not proven. In any case, the Petitioner is bound by the Petition she filed on oath and in which she applied for letters of administration **intestate** and listed all the true beneficiaries of the Estate. She had left out the husband of the deceased and their father who was still then alive. This is probably because her father had always wished that the Petitioner gets the land in its entirety. There is evidence on record that he even purported to give the property to her as he believed that he was the owner when his wife died. He died the same year, 1996 and buried on the suit land.

In the written submissions, the Petitioner subtly accepts this position and agrees that the issue before Court is that of distribution.

In the light of the foregoing, the only question before me is the mode of distribution of the only assets of the Estate of the Late Leah Njeri Thuo.

The Petitioner proposes that the land be distributed as follows:-

1. Esther Wambui - 20 acres
2. Raphael Waweru - 7 acres
3. Beatrice Wanjiru - 2 acres
4. Anne Njoki - 2 acres
5. Margaret Muina - 2 acres

She claims a larger portion since she stayed with her mother, never got married and has 6 children. She claims that she looked after the mother and contributed to the acquisition of the same. She seeks an equitable distribution based on the law of Succession and Kikuyu Customary Law.

The Objector is the only son of the deceased. He contends that the Court ought to attach relevance to the customary Law and Culture governing and to which all the parties and the deceased ascribe, i.e

Gikuyu Customary Law. That this being a matrilineal disposition, it is not different in terms of application of laws on inheritance in Gikuyu Customary Law from the patrilineal disposition. He says that the basic dominant and invariable factor since time immemorial amongst the Gikuyu people was that the eldest male issue of the family received a bigger portion of land. This mainly was because the Gikuyu people considered the eldest son as the Custodian of that particular family. He stated that he also has 6 children. He proposed the distribution to be as follows:-

1. Raphael Waweru - 15.5 acres
2. Beatrice Wanjiru - 3 acres
3. Hannah Njoki - 3 acres
4. Margaret Mukina - 3 acres
5. Esther Wamboi - 10 acres

The other beneficiaries' position is as follows:-

Beatrice Wanjiru and Ann Njoki: - That in reference to Children, the Law of Succession Act does not distinguish between sons and daughters. That the definition of Child should be without reference to the Child's gender and marital status. That the Law of Succession does not make a distinction between married and unmarried Children in matters of Intestate Succession. They submitted that it would be discriminatory and unconstitutional to lock them out from getting their rightful share of the estate of the deceased. That under Kikuyu Customary Law, there is no clear cut law governing administration, distribution or succession of matrilineal properties. Recourse is therefore to the Law of Succession Act which does not give a distinction of a child on account of gender or marital status.

Margaret Mukina Thuo: - This is the youngest sibling who lives with the Petitioner. During her testimony, she said the Court ought to give all the land to the Petitioner and that she did not want anything for herself.

This Court has the discretion to distribute the land as it deems fair, just and equitable. I have considered all the evidence, facts and submissions on record. I have considered the demeanour of the witnesses and veracity of their evidence.

I see a torn, fractured and bitter family due to this dispute. Several members have sustained serious and permanent injuries, there was prosecution of Criminal charges and most of the beneficiaries were excluded from entering or using the land after the demise of their mother. The Court sympathizes with the entire family and hopes that they will endeavour to heal the wounds and hurt which has befallen them.

This Court however will not consider the allegations of assault, prosecution, conviction, acquittal or otherwise. These are matters for another forum. It is the duty of this Court to distribute the land in accordance with the Law pertaining to inheritance.

This is the distribution of the Estate of Leah Njeri Thuo, a Christian African Woman. She is a Kenyan of Kikuyu ancestry. She was married to a Kikuyu man. I have not been referred to any law that says that the matrilineal distribution of property under Kikuyu Customs and practice must follow or be a kin to that of patrilineal distribution.

However, this Court notes and takes into account that the deceased was a Kikuyu woman married to a Kikuyu man. She was proudly married to him upto her death. They lived together on the deceased's land. She was buried on the land. And when her husband died, he was buried on the same land as he did not have any assets himself. I also note that she took his name after marriage.

In the circumstances, I do hereby find and deem that the deceased accepted and respected Kikuyu Customary Law and practices. I see no evidence that she would not wish for her only son and the second eldest to be the head of the Thuo family. The deceased allowed her son to build his home on her land showing and proving that this land was deemed to be the family land of the Thuo Children as their father did not have any land of his own.

I will therefore take into account that under Kikuyu Customary Law, the eldest son would usually receive a larger inheritance than the others and in particular over the daughter/s.

I have taken into account that the Petitioner stayed back to look and fend for the mother and father. She tilled the land and did other business. She did not get married and had 6 Children who depend on her. Her Children stayed with the deceased and must have given her joy as a grand mother.

I do not find that there is sufficient evidence that the Petitioner paid or contributed towards the loan payment to Settlement Fund Trustees and the acquisition of the property. The property is in the name of the deceased and there was no partnership with anybody else.

I consider and hold that the Petitioner and her Children were dependants of the deceased having lived on the land with the deceased. They depended on the produce and income from the said land.

In the converse, I have also considered that the Petitioner enjoyed the use, possession and occupation of the land to the exclusion of rest of the beneficiaries except Mukina for over 10 years. She has tilled the land, harvested and applied the income to her own use and that of her Children. The other beneficiaries were ejected from the land and made persona non grata. The Petitioner also was left the animals and made use of the monies in the bank account.

I have considered and hold that it is irrelevant in this case that any of the female / lady beneficiaries were married or married before. All the beneficiaries are entitled to inherit from their mother.

Upon considering all the foregoing and doing the best I can, I do hereby distribute the asset of the Estate, L.R. No. Uasin Gishu/Ngenyilel Settlement Scheme /442 as follows:-

1. Raphael Waweru Thuo 12 acres
2. Esther Wamboi Thuo 10.086 acres
3. Beatrice Wanjiru 4 acres
- 4 Ann Njoki 4 acres
5. Margaret Mukina Thuo 4 acres

Since the title was irregularly registered in the name of the Petitioner and in exercise of this Court's powers under the Law of Succession Act and section 143 of the Registered Land Act, I do hereby order the revocation of the registration in the name of the Petitioner and rectification thereof so that it reverts to the Estate of the deceased Leah Njeri Thuo. The land be then Surveyed, distributed and registered in accordance with the above-mentioned distribution.

The Petitioner shall Comply with these Orders and facilitate all the implementations thereof.

In view of the emotive differences, I do hereby warn the parties that they must obey this order and keep the peace.

The Costs of the Survey, sub-division, and registration e.t.c. shall be borne by the Petitioner and Objector equally. Each party to bear his/her costs of these proceedings.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY 2008.

M.K. IBRAHIM,

JUDGE. 6/02/08
