



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 48 of 1997

*IN THE MATTER OF THE ESTATE OF SOLOMON NGATIA KARIUKI (DECEASED)*

*Between*

ISABELA WANGARI SOLOMON.....PETITIONER

*And*

DAVID MWANGI NGATIA.....OBJECTOR

*And*

MARY MUMBI MURIITHI.....PROTESTOR

J U D G M E N T

**Solomon Ngatia Kariuki** hereinafter referred to as “*the deceased*” died on 25<sup>th</sup> July, 1987 aged about 80 years. He was survived by **Isabella Wangari Solomon, David Mwangi Solomon, Isaiah Kamunya Solomon, Lucy Wangari Solomon, Joseph Wachira Solomon** and **Mary Mumbi Muriithi** all adult sons and daughters of the deceased. The estate of the deceased consisted of **Thegenge/Karia/1265, 1266 and 1267** respectively hereinafter referred to as “*the suit premises.*”

On 24<sup>th</sup> February, 1997, **Isabella Wangari Solomon** hereinafter referred to as “*the petitioner*” petitioned for the grant of letters of administration intestate with regard to the estate of the deceased. However **David Mwangi Ngatia** hereinafter referred to as “*the objector*” objected to the petition. On 16<sup>th</sup> September, 2002 however, **Justice Juma** (*as he then was*) made an order appointing both the petitioner and objector as joint administrators of the estate of the deceased. He further directed that the issue of distribution of the estate of the deceased be decided by way of viva voce evidence.

On 16<sup>th</sup> February, 2006 the objector filed an application seeking the confirmation of grant. In the affidavit in support of the application, he proposed that the three respective suit premises be distributed as follows:-

- (a) **Thegenge/Karia/1265 to Isaiah Kamunya Solomon – absolutely.**
- (b) **Thegenge/Karia/1266 to Joseph Wachira Solomon and David Mwangi Ngatia in equal shares.**
- (c) **Thegenge/Karia/1267 to Isabella Wangari Solomon and Lucy Wangui Solomon in equal shares.**

The petitioner was not amused by this proposal. Accordingly on 26<sup>th</sup> June, 2006 she banged in an affidavit of protest opposing the application for confirmation of grant. She claimed that the objector was not entitled to any portion of the deceased estate as he had been given land by the deceased in his lifetime which he had sold. To her therefore the deceased's estate ought to be shared as follows:-

**Thegege/Karia/1265 to Isaiah Kamunya – absolutely**

**Thegege/Karia/1266 to Joseph Wachira Solomon and Isabella Wangari Solomon – absolutely**

**Thegege/Karia/1267 to Lucy Wangari Solomon – absolutely**

On 17<sup>th</sup> June, 2008, **Mary Mumbi Muriithi**, a daughter of the deceased whom I will hereinafter refer to as "*the protestor*" also filed an affidavit of protest. She claimed that when the deceased passed on she was staying with him on the suit premises but after his death the other siblings ganged up and chased her away claiming that she was a married daughter. She deponed that though they claimed that she was married, she had in fact divorced her husband since 1969. Accordingly she was entitled to a share of the estate to the extent of 0.25 acres which is a quarter of the whole estate. In response to this affidavit, the petitioner swore a replying affidavit in which she claimed that before their father passed on he had categorically stated that the protestor should not get any part of his estate.

The hearing of the cause then commenced before me. The petitioner's case was that she was the daughter to the deceased and a sister to Isaiah, Joseph, David and Lucy. She testified that the entire estate of the deceased should be inherited by the foregoing minus David, the objector. It was her testimony that the objector was not entitled to a share of the estate because he had been given his share by the deceased in his lifetime which he had in turn sold to one, **Isaac Githuthu** in 1984 and bought another parcel of land at Gatarakwa. The petitioner went on to state that she had in her possession a document in writing expressing the deceased's wishes as to how his estate should be shared upon his death. In fact the document had been authored by the objector. That document was tendered in evidence. As for the protestor, the petitioner too maintained that she was not entitled to inherit a portion of the estate of the deceased as she was present during the meeting and declined to be considered as a beneficiary of the estate as she was married.

Cross-examined by **Mr. Kariuki**, learned counsel for the objector, she claimed that the objector should not inherit a portion of the deceased estate because he was given his share by the deceased in his lifetime which he sold to **Isaac Githuthu**. That the deceased called a family meeting whilst in hospital where he was ailing and told them of his wishes to have the suit premises shared among the four of his siblings only.

Cross-examined by the protestor, the witness stated that the protestor was present at the meeting in the hospital. Thereafter she went back to where she had been married where she still resides to date. That since the protestor was married, she was not entitled to inherit a portion of the deceased estate.

The 2<sup>nd</sup> witness called by the petitioner was **Charles Kariuki**. He testified that the deceased was his maternal uncle. Initially the deceased had 6 acres of land. He sold an acre and the other acre he gave to the objector thereby leaving behind 4 acres. On 1<sup>st</sup> November, 1986, the witness was present at the hospital when the deceased expressed his wishes as to how the 4 remaining acres should be shared among his children. Those wishes were reduced into writing and he is the one who did so. The deceased subdivided the suit premises into one acre each and gave out to **Kamunya**, and **Wachira** and ½ acre each to the petitioner as well as **Wangui**. He left an acre though to himself. The objector had already sold his portion to **Isaac Githuthu** and could therefore not give him any more land from his estate. As for the protestor the deceased did not give her any land as she was a married daughter.

Under cross-examination by **Mr. Kariuki**, the witness reiterated that the deceased signed the minutes of the meeting regarding his wishes that had been reduced in writing. Indeed there was a tape recording of the proceedings that was recorded by **Kamunya**. He maintained that the deceased's signature of the proceedings of the meeting was genuine and not a forgery. That the objector's portion of land was sold

by the deceased on his behalf. Cross-examined by the protestor, the witness confirmed that he was indeed present at the hospital.

The third witness called by the petitioner was **David Gitonga**. He testified that the deceased was his brother. He confirmed that he was present when the deceased stated as to how his estate should be distributed upon his death. That it should be shared equally among his four children namely **Gathaiya, Wangari, Wachira** and **Lucy**. The objector was not entitled to a portion of his estate as she had sold one acre given to him by the deceased in his lifetime. Thereafter he moved out of the homestead, bought land elsewhere whereat he has settled: As for the protestor, she could not inherit the deceased's estate as she was married. Cross-examined by **Mr. Kariuki** the witness stated that what the deceased said was recorded by **Mr. Kariuki**. The deceased appointed the petitioner to take care of the estate. Finally he stated that the deceased sold the objector's acre of land on his behalf. That marked the close of the petitioner's case.

It was then the turn of the protestor to testify. She stated that the deceased was her father and that the petitioner was her sister whereas the objector was her brother. She claimed that she was entitled to inherit part of the deceased estate her marriage notwithstanding. She only claimed 0.25 acres of the suit premises as a daughter of the deceased.

Cross-examined by **Ms Mukuha**, learned counsel for the petitioner, she conceded that there was a hospital meeting by members of the family. However she could not attend the same as she was sick. She also conceded that she was aware that the deceased had said that she should not inherit a portion of his estate as she was a married daughter. However she disagreed with that proposition as she was his daughter and therefore entitled to inherit the deceased's estate just like her other siblings. She was also aware that the objector had demanded his portion of land from the deceased in his lifetime which he was given and later sold. The objector again manipulated the deceased to sell an extra one acre and he was given the proceeds therefrom which he used to buy a motor vehicle.

Cross-examined by **Mr. Kariuki**, the protestor testified that she was aware that the deceased sold a portion of land on behalf of the objector to a neighbour by the name **Githuthu**. That it is the objector who cheated the deceased to part with land which he sold and used the proceeds thereof to buy a vehicle and another piece of land at Gatarakwa measuring 20 acres. The protestor then closed her case.

Thereafter I proceeded to hear the objector's case. It was his case that the deceased was his father and had six children, **Wangari, Mumbi**, himself, **Kamunya, Wangui** and **Wachira**. That the deceased had 4 acres of land at the time of his death. He had sold 2 acres prior to his death. **Thegenge/Karia/1263 & 1264** were all sold on 6<sup>th</sup> August, 1984 to **Isaac Samson Githutha**. He refuted claims that the deceased expressed his wish during a meeting in a hospital. As far as he was concerned nothing was recorded at the hospital. Nobody took down any minutes and whatever was said at the meeting was recorded in a tape recorder. He denied having authored anything at the hospital at the request of the deceased. The document introduced in evidence with his signature thereon was therefore a forgery. However he conceded that he never reported the forgery to police. He also conceded that he had bought 20 acres of land at Gatarakwa but he did so with his own resources. That the deceased was a generous person who used to give them money if approached. He wanted the estate distributed as per his application for confirmation of grant. That the deceased had said that the protestor should not get anything from his estate as she was married. He confirmed nonetheless that the tape recording of the conversation at the hospital was recorded by their paternal uncle Kamunya.

Under cross-examination by **Ms Mukuha**, the objector testified that he bought his land from Gatarakwa land buying company for Ksh.3,600/= from his earnings as an employee of marshals but had no documents to back up his claim. He also admitted that it was around this time when he bought the said piece of land that the deceased had sold 2 acres of his land. He denied however that the deceased then gave him Ksh.40,000/= from the proceeds of the sale which he utilized to buy the Gatarakwa land. He claimed that his brothers and sisters had ganged up against him because he was the deceased's favorite child. He went on to admit that the deceased burnt in his house. It was an accident though as he had left him alone in the house. He was at the time aged 85 years. The objector then closed his case.

Counsel for the petitioner and objector then informed the court that they wished to file and exchange written submissions. The court was not averse to the idea. The protestor however opted not to file any submissions but to leave everything to court. Subsequent thereto respective written submissions were filed which I have carefully read and considered.

It is common ground that the identification and share of all persons and or beneficiaries entitled to the estate of the deceased has been ascertained and determined. Ideally those entitled to share in the estate of the deceased are all his children namely, **Isaiah Kamunya Solomon, Joseph Wachira Solomon, David Mwangi Ngatia, Isabella Wangari Solomon, Lucy Wangui Solomon and Mary Mumbi Muriithi**. However the point of departure is that all the other siblings do not want their bother, the objector and their sister, the protestor, to inherit allegedly because the objector was given his inheritance by the deceased in his lifetime which he disposed off and used the proceeds thereof to buy 20 acres of land at Gatarakwa. That being the case he cannot again claim a share of the estate of the deceased. As for the protestor, she was a married daughter of the deceased. Accordingly she ought not to inherit the estate of the deceased as she will likely or presumably inherit where she is married. So that the critical question to be determined in this dispute is whether or not the two are entitled to inherit the estate of the deceased alongside their other siblings.

Starting with the objector, there is common ground that as their father ailed away at the hospital, he summoned a family meeting. At the said meeting he expressed his wishes as to how his estate should be distributed upon death. All the children of the deceased save for the protestor attended the said meeting. According to all the other children, the deliberations of that meeting were reduced in to writing by the objector at the request of the deceased. However according to the objector, much as there was such meeting, the deliberations were never reduced into writing by him. However the deliberations were recorded by a tape recorder. He claimed that his signature on exhibit being the agreement over land parcel between **Solomon Ngatia** and his children that was tendered in evidence and signed by all the children of the deceased save the protestor was a forgery. If that be the case how come he has not taken any action against those behind the alleged forgery. By his own admission, he knew about his forged signature during a family meeting sometime ago at which he disowned the same. However he has never reported the alleged forgery to the police for appropriate intervention. Going by the animosity exhibited in court during the hearing of this cause between the objector on one hand and his brothers and sisters on the other, if indeed what the objector is alleging were true, he would not have at all hesitated to take up the matter of his forged signature with the police for appropriate sanctions. I have looked at this exhibit dated 16<sup>th</sup> May, 1985 and the translation thereof and I am satisfied that it is not a forgery. There would have been no reason at all for the others to gang up with the deceased against the objector so as to come up with the agreement. Afterall the deceased was live and as the objector wanted this court to believe, he was still his favourite son. In that agreement, the deceased dished out to each of his sons an acre of land and to his two daughters ½ an acre each.

A year or so later there was then a meeting at the hospital on 1<sup>st</sup> November, 1986 when the deceased apparently made his last wishes regarding his estate known. All the parties herein agreed somehow that those deliberations were turned into a permanent record. Whereas the objector's sisters and brothers agree that the proceedings were tape recorded and subsequently reduced into writing, the objector is however of the view that they were merely tape recorded. I choose to believe the story of the objector's brothers and sisters. PW1 testified to the existence of the written document so was **Charles Kariuki** a cousin to both the objector and his brothers and sisters. So was PW3, **David Gitonga**, a brother to the deceased and an uncle to the combatants herein. They stated candidly that they were present at the meeting. They were not challenged on this evidence by the objector. Indeed I have perused the said proceedings and noted that the names of these witnesses are featured among those in attendance at the meeting. The objector did not seriously challenge the holding of the said meeting and or attendance. To my mind these were independent witnesses. They had nothing to gain by falsely testifying on behalf of the objector's brothers and sisters and against him. The two witnesses are related to all the parties in this dispute. There is no basis laid that would lead me to believe that these two witnesses ganged up with the objector's brother and sisters to fix him by giving false testimony. The objector's only challenge to this document is that it is a forgery since what transpired at the meeting was according to him only recorded and not reduced into writing. However he has not adduced any other evidence to back up this claim.

Indeed it is a bare allegation. From this exhibit, a total of eleven people attended the meeting. Excluding the deceased and his children, there were other five people who attended the meeting who could have backed up the objector's claim if it was true. At least two of them supported the petitioner's contention. How come the objector was unable to pull to his side the other three or any one of them. Yes there may be contradictions as to who tape recorded the proceedings and or who reduced the same in writing. To my mind these contradictions are inconsequential. I have no doubt at all that the meeting was held and the proceedings tape recorded as well as reduced into writing. Arising from the foregoing I am inclined to believe that the proceedings of that meeting were reduced into writing as well, a copy whereof was tendered in evidence. From the translation of exhibit 3 I have no doubt that the document is genuine and fully captured the wishes of the deceased. If it was otherwise, and since it sought to disinherit the objector and if indeed it was a forgery as the objector would wish us to believe he would not have taken it lying down. He would have contested it immediately he was made aware of its existence long time ago. I believe he would have involved the police in the matter if indeed it was a forgery.

In that document, it is expressly stated that the protestor could not inherit a portion of the deceased's estate because he had already been given one acre by the deceased in his lifetime which he sold to **Isaac Githuthu**. All the witnesses who testified including the petitioner, **Charles Kariuki**, **David Gitonga** and the protestor all agree that the objector was indeed given an acre of land by the deceased in his lifetime which he later sold to **Isaac Githuthu**. The objector himself did not seriously challenge this allegation. He was content with alleging that he could not have sold the acre given to him by the deceased as the land was still registered in the deceased's name. However the unchallenged evidence on record is that the objector prevailed upon his father to sell on his behalf an acre of land that he had given to him. So that what seems to have happened is that the deceased at the request of the objector sold an acre of land he had set aside for the objector and handed over the proceeds thereof to the objector which he later used to buy 20 acres of land at Gatarakwa as well as a motor vehicle. Indeed the objector himself conceded under cross-examination that it was around the same time that the deceased had sold an acre of his land that he also purchased his land at Gatarakwa. The inference here being that the money that the deceased received from the sale must have been passed to the objector by the deceased which he used to buy the Gatarakwa land. Indeed the objector does not deny receiving money from the deceased for that purpose. However, he claimed that the deceased was a generous man and would easily give out money to his sons if asked. The question that automatically arises is how come the deceased, was only generous to the objector? That he was his favourite son! I do not buy that contention. To my mind, the objector could buy his Gatarakwa land at this point in time would seem to easily tie with the testimony of the petitioner and her witnesses that indeed the deceased at the urging of the objector sold an acre of his land and gave the proceeds thereof to the objector. It was the evidence of the objector, that in buying the land at Gatarakwa he had used his own resources. That he took a loan at his place of work (marshalls). However he was unable to tender any documentary prove of this assertion. He did not seriously deny the fact that the deceased sold at his urging an acre of his land to **Isaac Githuthu**. If it was otherwise, why couldn't he have availed the said **Isaac Githuthu** to come and back him up in his claim that he had nothing to do with the acre of land sold to him by the deceased. Afterall he is a neighbour.

All said and done, I am of the view that indeed the objector was given his inheritance by the deceased in his lifetime which he sold to **Isaac Githuthu** and used the proceeds thereof to buy a 20 acre farm at Gatarakwa. Accordingly he is not entitled to inherit the remaining estate of the deceased.

How about the protestor? There is no gainsaying that she is a daughter of the deceased. However the deceased did not want her to inherit part of his estate as she was a married daughter. The petitioner, her witnesses and the objector too are of the same view. However is that the law?

The Law of Succession Act does not discriminate between the female and male children or married and unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification of this rather archaic and primitive customary law demand appears to be that such

married daughters should forego their father's inheritance because they are likely to enjoy the inheritance of their husband's side of the family.

It should however be noted that when the Law of Succession Act came into force in 1981, it ousted the application of customary law in inheritance disputes, save for a few narrowly defined exceptions. Those exceptions are inapplicable to the circumstances of this case however. In any event if we were to invoke and enforce such a custom it will fly in the face of the provisions of *section 3* of the Judicature Act which bars expressly the application of customary law in circumstances where it would be repugnant to justice and morality and inconsistent with an Act of parliament. That view was echoed and reiterated by the court of appeal in the case of **Rono V Rono (2006) eKLR**. In any event it is not also lost on me that Kenya as a country is a signatory of numerous international instruments and covenants that expressly forbid discrimination based on gender. One such instrument is of course the convention for the elimination of all forms of discrimination against women (**CEDAW**). To uphold the protestor's father's, brothers', sisters', petitioner's and objector's decision to disinherit her merely because she was married will not only be repugnant and or repulsive to justice and morality but will also be tantamount to abrogating the international instruments on discrimination that Kenya as a country is a signatory to. I refuse to endorse such outright discriminative piece of customary law. It is my considered view that a daughter whether married or not is entitled to inherit his father's estate as a daughter. It matters not that she is married and that she may inherit as well from her husband's side. If the enactors of the law of Succession Act had not intended such result, they would have specifically stated so in the Act. To deny a daughter inheritance merely because of her marital status is being naive and flies in the face gender equity and equality. We shall not be in sync with the modern trends in the world.

I note that the protestor is only asking for 0.25 acres of land out of the entire estate of the deceased. She is not asking much. Infact she is very considerate. I cannot deny her what she has herself asked. I note that the deceased when distributing his estate to his sons and daughters, retained an acre for himself. Accordingly I would direct that the protestor's 0.25 acres be carved out of this one acre if it is still in existence.

In the end the grant shall be confirmed in terms of the affidavit of protest dated 28<sup>th</sup> March, 2006 and filed in court on 26<sup>th</sup> June, 2006 by the petitioner subject to the addition of the protestor, **Mary Mumbi Muriithi**, who will get 0.25 acres from an acre of land which her father had retained for himself when he distributed his estate in his lifetime. However if the said piece of land is not available, then the protestor's portion of 0.25 acres shall be excised from all the three land parcels namely **Thegenge/Karia/125, Thegenge/Karia/126** and **Thegenge/Karia/1267**. The petitioner, objector and protestors being siblings, I will not make any order as to costs.

*Dated and delivered at Nyeri this 28<sup>th</sup> day of November, 2008.*

**M.S.A MAKHANDIA**

**JUDGE**