REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 1263 of 2000

IN THE MATTER OF THE ESTATE OF LERIONKA OLE NTUTU – (DECEASED)

RULING

The late Lerionka Ole Ntutu, was admittedly a Masai by tribe and had several wives and children. It is also undisputed that he had educated many of his daughters who are exposed to the modern trends of Kenya.

That is the reason, they have filed the objection to the proposed distribution of the estate wherein their brothers – step brothers have contended that this estate, as per law, is governed by the Masai customary law of succession which does not recognize the rights of the daughters to inherit the estate of their fathers.

Thus the issue before me is whether the applicable law in respect of the estate herein, so far as the daughters of the deceased are concerned, is Masai customary law or Law of Succession Act (cap 160) hereinafter referred to as '**the Act**'.

It can not be disputed that as per the provisions of the Act, the children include sons and daughters and the Act does not discriminate between female and male children of the deceased. It is now well established under our jurisprudence that there cannot be any discrimination also between the married and unmarried daughters. It is evident that as per all our customary laws, the married daughters were not entitled to inherit the estate of their deceased father.

I must mention that most of the customary laws (predominantly Kikuyu customary law), recognized an unmarried daughter as a son and allowed her equal rights along her brothers to inherit.

This is the background of our custom and social values, which at the prevalent period of time was probably socially just.

With the advent of the Act, the aforesaid differential treatment between the married and unmarried daughters is also abolished.

In my considered view, the Act as a whole has not discriminated between the male and female children and I have not been shown that the Commissioners while drafting the Act had this differentiation in their mind and hence section 2 (2) and section 29 (a) of the Act. It stipulates:

"**2 (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act".**

"**29 For purposes of this part, "*dependant*" means-**

(a**) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death"**

With this background in my mind, I shall now deal with the issue on hand.

Mr. Kilukumi, the learned counsel for the executor submitted that the Commission headed by Cotran J., which drafted the Act, had observed and thereupon recommended to exempt certain areas of our country from the operation of the provisions of the Act.

Their reason for such exemption is captured in paragraphs 72 to 74 of their report.

They have definitely stated however, that the Act should apply universally to those assets like registered lands, stocks and shares, motor cars etc.

They opined interalia that there are certain people of the country who "**are not ready for or not willing to accept a new law and they will almost certainly ignore it."** But on the heels of the above statement they have said i.e.

"**on the other hand a total exclusion in an area might possibly result in hardship to the heirs of those few people in the area who may have modern types of property for which customary law does not cater, such as the successful businessman in a small township.**"

In an attempt to compromise with these two situations, Sections 32 and 33 of the Act were recommended and enacted, to viz:

"**32. The provisions of this part shall not apply to –**

(a) agricultural land and crops thereon; or

(b) livestock, situated in such areas as the Minister may, by notice in the Gazette, specify.

33. The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be."

By legal Notice No.94 of 1981, Gazetted on 23rd June, 1981 the Minister specified various districts in which those provisions are not applicable, and the list therein does include Narok District wherein the deceased was a resident and his estate is situate. Thus it cannot be disputed that Sections 32 and 33 of the Act applies to the district and land situate thereon.

Mr. Kilukumi reluctantly relied on the case of **Mwanthi versus Mwanthi and another (1995 -98) 1 EA 229**, wherein the Court of Appeal held that the Kikuyu customary law applied to the estate and the married daughters can not inherit the estate of a deceased kikuyu father. I have carefully perused the said authority and do note that the deceased in that case died after the Act came into operation. That pertinent fact was not considered by the court. Moreover the said judgment omitted to take into considerations very relevant provisions of law stipulated in Section 2(1) of the Act: namely,

"**Except as otherwise provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.**"

In absence of the consideration by the Court of Appeal of the aforesaid legal provision, which ought to have been applied to the estate of the deceased, as well as in absence of any evidence that the provisions of Section 32 of the Act did not apply to the estate, I would, with utmost humility and respect, deny to accept the finding made in the said case.

In any event and in alternative, I would find that the facts of the said case are different than those of this case.

I may add, that I used the word 'reluctantly' advisedly when I stated that Mr. Kilukumi so cited the said authority, as in his view also the authority cannot be applied to the present case.

I shall make similar observation as regards the decision of **John Kinuthia Githinji versus Githua Kiarie and Others (*unreported*) C.A. No.99 of 1988.**

It cannot be gainsaid that the Court of Appeal since those two cases have made decisions which contradict the findings made in the aforesaid two cases and which are progressive and can rightly be considered as Bench mark ones.

I shall cite the case of **Mary Rono vs. Jane Rono and William Rono C.C.A. No.66 of 2002.**

The Court of Appeal held in the said case.

"**The manner in which courts apply the law in this country is spelt out in Section 3 of the Judicature Act Chapter 8, Law of Kenya. The application of African Customary Laws takes pride of place (*sic*) in Section 3(2) but it is circumscribed** thus:-

'…… ***so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law……..*"**

Basing its support on the said provision of the Judicature Act, the Court then went ahead and applied international law, international covenants and treaties in the judgment which are ratified by Kenya. It relied mainly on (a) Declaration of Human Rights (1948), (b). The Covenant on Economic, Social and Cultural Rights (c) Covenant on Civil and Political Rights and (d) Covenants on the Elimination of All Forms of Discrimination Against Women (CEDAW). The cited article 1 of CEDAW with approval, stipulates:

"**Any distinction, exclusion or restriction made on the basis of sex which has 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."**

The court went further and cited with approval the African Chapter of Human and People's Rights otherwise known as the Banjul Charter (1981) and ratified by Kenya in 1992 without reservation.

Article 18 thereof was cited: namely;

"…. **Ensure the elimination of any discrimination of rights of woman and the child as stipulated in international declaration and covenants."**

The court cited principle 7 of the Banglore Principles on the Domestic Application of International human Rights Norms, to get support to apply the International covenants and treaties, which states:

"**It is within the proper nature of the judicial process and well established functions of national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitution – legislation or the common law."**

However, the Court of Appeal in **Rono's case (*supra*)** did not have to deal with the issue of conformity between Section 82 (3) and 82 (4) of the constitution, vis-à-vis sections 32 and 33 of the Act.

Section 82(1) of the Constitution prohibits the enactment of any laws which are discriminatory.

Section 82(3) defines discrimination as under

82(3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

Mr. Kilukumi while agreeing on the principle and spirit of the non-discrimination enshrined in Constitution, emphasized on the provisions of Section 82(4) which according to him protects or approves the laws as regards devolution of property on death or any other matters of personal law.

I do note that the said proposition seemingly makes that exception. But if one goes to the history of amendment in section 82(3) which included the words "***or sex***", in my view the spirit of Constitution cannot be perceived to be one as has been submitted by Mr. Kilukumi.

Kenya has ratified all the international covenants and treaties before the said amendment was made in the Constitution. Section 82(a) of the constitution was enacted along with the original provision of Section 82(3) which did not include discrimination on the ground of sex, and after the passage of several treaties and covenants and their ratification, it was found necessary to make the amendment to include prohibition of discrimination on the basis of sex. In the circumstances, one can safely presume that the said amendment was found to be necessary after Kenya was exposed to international laws, its values and spirit. Kenya was aware of the discriminatory treatment of women in all aspects of customary and personal laws. Hence Kenya knowingly and rightly took a bold step to eliminate the discrimination of all manners and types against women. That is where the country's aspiration has reached and has rightfully intended to stay.

Other courts in the country and the world have taken great leaps in the jurisprudence of interpretation of the laws and constitution. The courts have strived to enlarge the scope and meaning of laws and constitution so as to be in tandem with the growing social, economic and cultural aspirations.

The courts have left far behind the restrictive approach to the interpretation of the constitution propagated in El-Mann's case (1969 E.A. 357).

In my considered view, the courts should not be any more following the old school of thought articulated by Sir Francis Bacon who said that "**Judges must be like lions, but yet lions who sit at the feet of the throne**."

Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. I would not like to discard as the court of Appeal did in R.M. and another vs. A.G 2006 e KLR even after taking a strict interpretation, the possibility of the court adopting broader view or using the living tree principle of the interpretation of Constitution where they are "**amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation.**"

Thus in my opinion, the provisions of Section 82(4) (b) of the Constitution was not and cannot have been made so as to deprive any person of their social or legal right only on the basis of the sex. Finding otherwise would be derogatory to human dignity and equality amongst sex universally applied. I shall add that taking the view otherwise shall definitely create imbalance and absurd situation.

I shall, without any reservation find that even if provisions of Section 32 do apply to Uasin Gishu area and even if Masai customary law would be applicable to the estate, the customary law which shall abrogate the right of daughters to inherit the estate of a father cannot be applicable as it shall be repugnant to justice and morality. (Section 3(2) of the Judicature Act).

Even if I am wrong in finding what I have found, which in my view I am not, I agree with the

submissions made by all the learned counsel of the objector daughters, that the asset of the estate, on which they have lodged their claim is not covered under Section 32 of the Act as the same is not an agricultural land and is a registered land which is excluded as per the report of the Cotran Commission.

Thus, I do find that the Objector daughters are entitled to inherit from the asset of the estate known as L.R. Narok/Cismara/Ochora Oirwua/24.

The costs of this proceedings be to the objectors.

Dated and signed at Nairobi this 19th day of November, 2008.

K.H. RAWAL

JUDGE

19.11.08