



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Prob & Admin Cause 137 of 1992

IN THE MATTER OF THE ESTATE OF MUSAU NGAU(DECEASED)

RULING

1. The late Musau Ngau died on 9.3.1998. He was the registered proprietor of L.R.Uthithi/Masii/189. He left behind his two widows, Kakuli Musau and Mutindi Musau. The latter has eight (8) children who are alive but Kakuli has one married daughter.
2. Letters of administration were issued to both Kakuli and Mutindi on 9.5.1997 and when they attempted to confirm that grant by their Application dated 22.2.2007, one Grace Wayua Kakuli filed an Affidavit of Protest on 11.2.2008. I heard evidence on that protest and it is as follows:-
3. Grace Wayua aforesaid was married to Kakuli Musau in the Kamba woman-to-woman marriage. This fact was admitted by all the witnesses who testified before me including Kakuli. Grace bore five children with a select man (in local parlance, such a man is called “*Mutuanya*”) and all the children grew up on the deceased’s land. The disagreement as to inheritance arose after Musau Ngau died and two propositions on Grace Wayua’s entitlement were placed before me;
 - i. that she should inherit a portion of title no. Uthithi/Masii/189 directly from the deceased. This view was taken by Wayua, and her customary law husband, Kakuli. The position would then be that she gets a portion at this stage of the proceedings.
 - ii. that Kakuli gets her share of the deceased’s land and transfers a portion to her customary law, wife, Wayua. This view is shared by Mutiso Mbungu, Wayua’s witness and Mutindi Musau, Kakuli’s co-wife.
4. I also note that on 20.10.2004, the Mbaa Muleetema clan met and agreed that the deceased’s land should be shared equally between Kakuli Musau, Wayua Kakuli and Mbutu Musau’s house. Mbutu was apparently a deceased wife of the deceased represented by Muendo Musau, her son.
5. Against the above issues is the law on the subject. In Restatement of African Law, Vol. 1 by Eugene Cotran at page 26, woman-to-woman marriages are recognized and in the case before me parties admit and accept the existence of Wayua’s woman-to-woman marriage to Kakuli. Once that is so, then under Kamba customary law, Wayua is in the same position as any wife; she can only inherit as a wife of her husband and not of her husband’s husband. In the instant case, Wayua cannot inherit as Musau Ngau’s wife because she is not his wife but his wife’s wife. This conclusion is clear to me from the whole purpose of a woman-to-woman marriage and also from the evidence of Muthoka Kitimba who forcefully stated as follows:-

“Wayua is supposed to inherit Musau’s property after Kakuli, her husband, has inherited that

property.”

Similarly Mutiso Mbungu said;

“I confirm that Grace Wayua is entitled to inherit from Kakuli.”

Mutindi Musau said;

“Wayua is entitled to inherit hr share through Kakuli because they were married traditionally”

6. That is the customary law as I see it and turning to section 40 of the Law of Succession Act, I have perused the Report of the Commission on the Law of Succession which led to the enactment of the Act and I do not see that woman-to-woman marriages were addressed but in a polygamous setting, section 40 applies squarely. In this case, the deceased’s widows are Kakuli Musau and Mutindi Musau. I see that although Mbutu Musau is mentioned, I have seen no claim whatsoever by her house and I do not know if they exist because Muendo Musau is mentioned in one document by elders of the clan which has been disputed. In the Affidavit sworn on 22.2.2007, and in proceedings before me it seems that there is agreement that the suit land should be shared out between the two houses that are existing and clear, i.e Kakuli’s and Mutindi’s. Wayua and her children belong to Kakuli’s house and yet again if I invoke section 40 aforesaid the division would be equal because together with Kakuli’s daughter and Wayua’s children, that household would be eight in number which is equal to Mutindi’s .

7. In the event, while confirming that Wayua is entitled to a share of Musau Ngao’s estate, she can only inherit through Kakuli and so my orders will try and secure her future in the following manner;

8. Title No. Uthithi/Masii/189 will be shared equally between Kakuli Musau and Mutindi Musau and out of Kakuli’s half share, a half thereof shall be registered in Wayua’s name for herself and her children to avoid any further friction on the subject.

9. The grant herein is confirmed in the above terms.

10. No order as to costs for reasons that the parties herein are members of the same family.

11. Orders accordingly

Dated and delivered at Machakos this **11th** day of **November 2008**.

Isaac Lenaola

Judge

In the presence of: Objector – present

Mr. Musila h/b for Mr. Kisongoa for Applicant.

Isaac Lenaola

Judge