

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

Succession Cause 760 of 1993

IN THE MATTER OF THE ESTATE OF KIRUTHO KIIRU (DECEASED)

RULING

The issue before me is whether the provisions of Laws of Succession Act (Cap 160 Laws of Kenya) do apply to the present estates.

It is agreed that the deceased died on 8th February, 1972. It is also indisputable that the Act came into force on 1st July, 1981.

As per sub-section 1 of Section 2 of the Act, the provisions of the Act shall apply to all cases of intestate or testamentary succession of the estates of the deceased persons dying after the commencement of this Act and to the administration of the estates of those persons.

Sub-section (2) of section 2 of the Act then makes provisions for the estates of the persons dying before the commencement of the Act. The said sub-section stipulates:

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

According to Mr. Kamonde the learned counsel for the house of Christina, 1st wife of the deceased, the words *emphasised by me* appearing in the said sub-section only apply to the commencement of Administration process and not to the actual devolution of the estate. He argued that, if it was not so, the earlier part of the sub-section would be rendered nugatory. He stressed that in absence of any written laws in respect of the estate of the deceased who was a kikuyu by tribe, his estate shall be devolved as per the Kikuyu customary law. It was submitted and not denied by the other side that as per the kikuyu custom the estate should be divided as per houses. The deceased left two wives and thus it was submitted that the estate be divided into two equal shares.

Ms Njoroge, the learned counsel for the second house of Naomi submitted that the estate be divided as per Section 40(1) of the Act because otherwise the distribution shall be unequal and not justified. She tried unsuccessfully to show that the second house contributed in brining back the estate property to the family. She relied also on the provisions of sub-section (2) of section 2 of the Act to support her contention that the last part of the said sub-section gives power to the court to distribute the estate as per Section 40(1) of the Act.

The customary Laws on succession have been embedded in our country and have been followed religiously until the commencement of the Act. There is nothing immoral or repugnant about those customs and in any event the Act itself has provided application of the customs in the estate of those person who died prior to the commencement of the Act.

The deceased herein died on 8th February, 1972 long before the Act came into force. The petition for grant of representation was filed on 29th June, 1993 in accordance with the provisions with this Act. Thus as per the provisions of Section 2(2) and as submitted by Mr. Kamonde, the proceedings commenced as per the provisions of this Act.

The provisions of Section 2(1) and (2) are self-explanatory and do not leave any doubt as to their meanings and purport. This court, in the premises, is bound by the express provisions of the law. The Parliament intended to apply the customs to the estate like the one before me. I cannot do anything against the wishes or wisdom of the Parliament.

The kikuyu customs on succession has no element of repugnancy or immorality in them. The upshot of the above is that I find that the present estate shall be governed as per the kikuyu custom existing at the time of death of the deceased.

The estate thus shall be divided between the two houses in equal shares.

I shall not make any order on costs, the parties being the family members.

Dated and signed at Nairobi, this 24th day of April, 2007.

K.H. RAWAL

JUDGE

24.4.2007