



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 48 of 1983

IN THE MATTER OF THE ESTATE OF RUTERE MUGUNA (DECEASED)

ELIZABETH KARUA M'RUTERE PETITIONER

VERSUS

JOSHUA M'IKIUGU KUURA.....1ST OBJECTOR

PAUL THURANIRA2ND OBJECTOR

M'MAGIRI KUURA.....3RD OBJECTOR

RULING ON DISTRIBUTION.

1. The objectors herein, Joshua M'Ikiugu Kuura, Paul Thurania and M'Magiri Kuura in their objection to the making of a grant of representation to the Petitioner, Elizabeth Karua dated 5.10.1983 claim that:

“(a) That the petitioner is not entitled under Kimeru Customary Law or any other law to inherit the deceased properties.

(b) That at the time of the deceased death the petitioner had deserted the deceased for other eight (8) years, as from the year 1960 to 1968.

(c) That the petitioner had been divorced by the deceased.

(d) That the so called brothers in the petition of Elizabeth Karua are not actual brothers.

(e) That the petitioner is not at all covered by the law of succession cap. 160 laws of Kenya.”

2. I note however that on 1.8.1986, letters of administration were in fact issued to Joshua Kiugu Kuura and Julia Mukwanjeru and the two on 19.2.1987 sought to have that grant confirmed. Before that

application could be heard, an order was made on 10.3.1989 referring the dispute as to distribution to the District Officer, Central Imenti. The dispute was heard as ordered and an award filed in court which was read out on 20.11.1992. The Petitioner, Elizabeth Rutere, by an application dated 17.12.1992 sought to set aside that award and on 1.8.2002, Mulwa J. set it aside and ordered that the dispute as to **“the deceased’s estate which also includes land”** should be heard by **“a court of competent jurisdiction which is best placed to grasp the issues.”**

On 30.5.2005, the hearing commenced before Onyancha J. and was concluded by me on 8.4.2007. I gather from the evidence on record and from submissions by counsel that the issue to be determined is; who is the legitimate person to inherit the deceased’s land? The objection to letters being issued was dealt with and to my mind is no longer an issue in contention.

3. The evidence for the party I shall call the **“objectors”** is this; that the deceased, M’Rutere M’Muguna died sometime in 1968. He had no sons but had 5 daughters namely Kithika, Marigoki, Nyoroka, Kanugu and Maiti who are all married. It is their case that Elizabeth Rutere, the **“petitioner,”** was initially married to the deceased but was divorced. The objectors who are all brothers claim that the deceased was raised by their father, Kuura, as a son and that during the gathering and demarcation of land, he was treated as Kuura’s first born son and so it was that when Kuura died, the land was registered in the names of Rutere Kuura, the deceased. It is their case that the reason for this was that although the deceased biological father’s name was Muguna, Rutere preferred the names Rutere Kuura but according to the register for parcel number Abothuguchi/Katheri/610, the first registered owner was Rutere Kuura and title issued to him on 16.8.1963 when he also changed his name from Rutere Kuura to Rutere Muguna.
4. As to their claim to the land, the Objectors state that the land was held by Rutere in trust for them as the land was clan land passed on from their grandfather and the registration in Rutere’s name was for that purpose, he being like the first son of Kuura, their father. That the Petitioner having been divorced under Meru customary law and her daughters all married away, then it is only them who are entitled to the land in equal shares but were prepared to give 2 acres to her.
5. The Petitioner’s case is this; that her husband was Rutere Muguna, the deceased and that she lives on the land parcel in dispute together with her daughter, Maiti, and that her late husband was the sole proprietor of the land. She denied that any of the Objectors had any property on the land save that the 1st objector had put up a small house on it after the deceased had died. She denied the allegation that she had been divorced and this evidence was supported by Robert Gikunda, her neighbour on the suit land. She was clear that she was the only one together with her daughters who are entitled to the deceased’s estate.
6. I have read the elaborate submissions by advocates appearing and should if necessary advert to them along the way.
7. Firstly, the Objectors have raised the issue that the Petitioner was divorced in 1958 and cannot claim the deceased’s estate. It is their other claim that the divorce was pursuant to Meru Customary Law but that is as far as they went. It is my view that the claim was baseless and no evidence to support it was tendered before this court. It is not in doubt that the deceased died in 1968 or thereabouts but to say that he divorced 10 years prior and not prove it is another matter altogether. I am aware that each Kenyan community in their own unique way have customs and rules that govern marriage, separation and even divorce. In the present case, not one aspect of Meru customary law relating to divorce has been placed for consideration and to that extent the allegation that the Petitioner was divorced is nothing more than hot air and is best dismissed as much.
8. Secondly, and having held that the Petitioner is the lawful wife of the deceased, I should quickly dispose of the issue of a trust allegedly held over the suit land. I am alive to the holding in Mbui Mukangu vs Gerald Mutwiri Mbui C.A. 281/2000 that where a trust arose from the possession and occupation of the land by the Respondent, then he was entitled to continued occupation of the land

but not necessarily to ownership thereof until his father, the trustee died.

9. In the instant case, it is not in doubt that the 1st objector has 10 acres of land in Kibirichia and that he has some workers who live in a house on the deceased's land. No other objector has anything on that land and all evidence points to the fact that when the deceased was alive he refused to allow them any rights over his land (according to the 1st objector). Further and according to M'Inoti M'Mbooi, the 1st Objector entered the land after the deceased died and put up a house. It was his evidence that **"if Elizabeth had sons, she can get land but because she had only daughters they have been married and they cannot come back to take the land (sic)"**
10. From the evidence on record, what I gather is that because she has no sons, Elizabeth by custom, should not inherit her husband's land and that his closest male relatives should do so and in this case the Objectors have styled themselves as such. The question is, are they entitled to the land for that reason or even for the reason that the deceased held the land in trust for them? I should dispose of the first question by stating that although customary law is applicable to the deceased's estate by fact of his having died before July 1981, nonetheless as is the law in s.2(2) of the Law of Succession Act, **"the administration of [the] estate shall commence or proceed so far as possible in accordance with [that] Act"**. This being the case I do not see that any custom that discriminates women generally because they are women or because they have no sons or because they have married daughters only has any place in our legal system. As was held in Rono vs Rono C.A. 66 of 2002, such discriminatory practices offend the provisions of s.82(1) as read with s.82(3) of the Constitution as well as International Human Rights instruments and should be outlawed in any event. In fact in the instant case and by dint of s.32 and s.33 of the Law of Succession Act, customary law does not apply in respect of the administration of agricultural land which is the status of the deceased's land. In the end therefore the customary law relied on by the objectors has no meaning or effect and is of no help to their case.
11. On the second aspect above, agreeable customary law trusts do exist and are not barred by the rights conferred by s.27 and s.28 of the Registered Land Act. As was said by Khamoni J. in Gathiba vs Gathiba [2001]2 EA 242 a decision approved in Mbui Mukangu (supra)

"The position as I see it is therefore as follows: Correctly and properly, the registration of land under the Registered Land Act extinguishes customary land rights and rights under customary law are not overriding interests under section 30 of the Registered Land Act. But since the same registration recognizes trusts in general terms as is done in the proviso to section 28 and section 126(1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya, generally, have the concept or notion of a trust inherent in them where a person holding a piece of land in a fiduciary capacity under any of the customary laws has the piece of land registered in his name under the Registered Land Act with the relevant instrument of an acquisition, either describing him or not describing him by the fiduciary capacity, that registration signifies recognition, by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land Act because, according to the proviso to section 28 of the Registered Land Act such registration does not "relieve a proprietor from any duty or obligation to which he is subject as a trustee."
12. In the case before me it is said that the deceased was a trustee and was registered as such but try as I may, I see no evidence of such a trust. In fact the evidence before me and before the elders tribunal was based on the fact that the petitioner as a woman with no sons cannot inherit her husband's land. The issue of trust was conjured up to clothe the real issue with some measure of decency and legality. I have said that the main thrust of the objector's case has no bearing and similarly the second limb of it has no basis. All evidence points to the fact that the deceased from the first day had no trust that he was bestowed. Upon especially on behalf of the objectors as beneficiaries.

13. He may have inherited land as the son of Muguna from Ringera but he had no trust that he held for the sons of Kuura who clearly had and have their own land. That he never acknowledged such a trust in life and that the objectors accepted his decision is quite telling. It is even more telling that the 1st objector did not enter the land until the death of Rutere. The 2nd and 3rd objectors did not in life and long after death claim the land. They entered the fray in 1983, some 15 years after the death of the deceased and even then only rode on the back of the 1st objector. It is in fact interesting that the 1st objector claims half the land to the surprise of the 2nd objector. In any event all evidence leads to the opposite of a truly acceptable customary trust and I find that the claim is misguided and driven by greed rather than a legitimate claim for land duly deserved.

14. Having then disposed of the twin issues raised by the objectors, it follows that s.35(1) of the Law of Succession Act applies. It provides as follows:

“Subject to the provisions of section 40, where an interstate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:

- a. **The personal and household effects of the deceased absolutely; and**
- b. **a life interest in the whole residue of the net intestate estate:**

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person”.

15. The entire estate therefore comprised in land parcel number Abothuguchi/Kithirune/610 shall be distributed to the Petitioner as the sole surviving spouse of the deceased in this case to hold for life but if she re-marries the estate shall automatically devolve to her surviving daughters whether married or not. The objectors claim is dismissed accordingly.

16. The nature of this matter necessitates that the objectors pay the petitioner the costs of the objection proceedings.

17. Orders accordingly.

Dated signed and delivered this 29th day of May 2007

Isaac Lenaola

Judge

In presence of

Mr. Kariuki Advocate for Petitioner

Mr. Mwanzia holding brief for Mrs Kaume Advocate for Objector

Isaac Lenaola

Judge