REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 278 of 2000

IN THE MATTER OF THE ESTATE OF M'IBUATHU M'ILULA……DECEASED

JOEL MITHIKA M'IBUATHU…….RESPONDENT/PETITIONER

V E R S U S

MARGARET CIOMAUA M'IBUATHU…….....APPLICANT/OBJECTOR

R U L I N G

1. The deceased herein, M'Ibuathu M'IIula died intestate on 22.7.1976 and left behind the as his survivors the following, his widow, Margaret Ciomaua and the children of his polygamous marriage;

The House of the 1st wife Rael Kooru (deceased)

(a) Joel Mithika - son

(b) Joyce Muthena - Married daughter

(c) Paulina Kaka - Married daughter

(d) Mary Kangai - Married daughter

The House of his 2nd wife of Margaret Ciomaua

(a) Regina Karambu - Married daughter

(b) Martha Kathure - Married daughter

2. Joel Mithika, the original Petitioner, instituted this Cause and obtained a grant to administer the estate and inherit it solely, he being in his view, the only person so lawfully entitled to it as the only son of the deceased. The grant was later revoked on the application of Margaret Ciomaua and reissued in the joint names of the two of them. The only issue left was one of distribution because contrary to the desires of Joel Mithika, the Law of Succession Act has specific provisions on how the estate of a polygamous intestate person who like M'Ibuathu M'Ibula died prior to 1.7.1981 can be distributed. The relevant law is therefore s.2(2) of that Act which provides as follows:-

"**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 commences or proceed so far as possible in accordance with this Act".

3. Before turning back to the application of that law, initially there was disagreement as to what properties were comprised in the deceased's estate but I note that in their affidavits on distribution there is now agreement that the following are the properties left for distribution;

(a) Land Parcel No. Njia/Buri-e-Ruri/976

(b) Land Parcel No. Njia/Buri-e-Ruri/2161

(c) Land Parcel No.Njia/Buri-e-Ruri/2497

(d) Plot No. 563, Akirang'ondu Land Adjudication Section

(e) Plot No. 17A Muringene Market Adjudication Section

(f) Ksh.60,000/- held by the Public Trustee.

4. It is also agreed that the married daughters of the deceased have expressed no wish, so far as I can see, to have any share in the estate and that only Joel Mithika and his step-mother have expressed any interest in benefiting from it.
5. Returning to the law, no party has attempted to explain the basis under the Act or under customary law for their varying proposals. Joel Mithika has urged this court at paragraph 4 of his Affidavit sworn on 30.7.2007 to vest "**the larger estate of the deceased"** on him because he is "**the only son**" and the "**the objector will not be able to manage the same due to her age**." Margaret Ciomaua has not explained why the estate should be shared equally between her and Joel. My understanding is that where an intestate like the deceased in this case leaves behind a widow, a son and married daughters who have no interest in the estate, then because at the time of his death, the estate was deemed to be subject to Kimeru Customary Law with s.2(2) of the Act also being applicable. It is a matter of common notoriety that succession in Kimeru is dependent on the number of houses that a deceased polygamous man had. However, it is also true that by dint of s. 2(2) above, the administration of his estate shall proceed so far as practicable under the law of Succession Act. This is what led Justice E. Cotran to write as follows:-

"**The Law of Succession Act has brought in substantial changes to the Customary Law rules of intestacy. The position of the widow has been much enhanced and there is now no distinction between sons and daughters. The Act adopts the Commission's (i.e. the Commission on the Law of Succession) recommendations that the law of intestacy should be based not on a system of fixed shares but on the idea of a discretionary trust"**

See E. Cotran case book on Kenya Customary Law, 1997**.**

6. The comments by the learned Judge flow directly from the statement at page 47 paras 151 and 152 of the Report on Commission on the Law of Succession that:

In customary law, on the other hand, the matter is complicated by the rules of division amongst the "*houses*" **by which there is an equal division amongst the "***houses*" **irrespective of the number of children in each "***house*"**. We believe this rule to be highly unfair and discriminatory.**

We have considered the possibility of applying to the estate of a polygamist the same rules of intestacy that we have recommended for a monogamist. This would mean that the life interest given to the widow would have to be shared by the several widows and the power of appointment exercisable by the widows jointly. Much as we would have preferred to have similar rules for monogamous and polygamous households, we do not think that it would be practicable to have several widows sharing a life interest and a power of appointment. Human nature being what it is,

each widow is bound to prefer her own children and such a system is bound to lead to disputes and endless litigation."

7. In the present dispute and with that background in mind, the proposal by Joel is as follows: (at paragraph 5 of his Affidavit aforesaid)

"**(a)NJIA/BURI-E-RURI/2497 measuring 0.50 Hectares**.

"(i**) One acre be registered to Margaret Ciomaua M'Ibwathu.**

(ii) The balance to be registered to Joel Mithika M'Ibwathu.

(a) NJIA/BURI-E-RURI/976 measuring 1.1 hectares be registered to Joel Mithika M'Ibwathu.

(b) NJIA/BURI-E-RURI/2161 measuring 0.44 Ha be registered in the names of Joel Mithika M'Ibwathu.

(c) Plot No. 563 Akirangondu Adjudication Section be registered in the names of Joel Mithika M'Ibwathu.

(d) Plot No. 17A Muringene be registered in the names of Joel Mithika M'Ibwuathu

(e) Ksh.60,000/= be shared as follows:-

-Ksh.20,000/= Margaret Ciamaua M'Ibwathu

-Ksh.40,000/= Joel Mithika M'Ibwathu

8. The proposal by Margaret on the other hand is as follows (at para. 2 of her affidavit sworn on 17.10.2006.

"**(a) land parcel No. Njia/Buri-E-Ruri/976 measuring about 1.1 hectares to be shared equally by Margaret Ciomaua M'Ibuathu and Joel Mithika M'Ibuathu.**

(b) Land parcel No. Njia/Buri-E-Ruri/2161 measuring about 0.44 hectares to be shared equally by Margaret Ciomaua M'Ibuathu and Joel Mithika M'Ibuathu.

(c)\Land Parcel No. Njia/Buri-E-Ruri/2497 measuring about 0.5 hectares to be shared equally by Margaret Ciomaua M'Ibuathu and Joel Mithika M'Ibuathu.

(d) Plot No. 563, measuring about 0.13 hectares, Akirangondu land Adjudication Section to be shared equally by Margaret Ciomaua and Joel Mithika M'Ibuathu.

(e) Plot No 17A Muringene Market to be subdivided into two halves and one half be transferred to Margaret Ciomaua M'Ibuathu and the other half to Joel Mithika M'Ibuathu.

(f) Money, approximately Ksh.60,000/= transferred to Public Trustee from deceased bank account with KCB be equally shared by Margaret Ciomaua M'Ibuathu and Joel Mithika M'Ibuathu".

9. Looking at the two proposals, it seems to me that Joel's proposal is actuated more by ego that as the only male in the family he ought to have a lion's share of his estate and yet as Justice Cotran stated above, Margaret, as a widow has a much more enhanced position than is conferred by both the Act and customary law. In any event, the discrimination of women merely because they are women has been held to be unconstitutional and against all relevant International Treaties and Instruments. For effect, I should quote the powerful statement made by Waki J.A. in **Mary Rono vs Jane Rono** and Another, **C.A. No. 66/02** where the learned Judge stated as follows:-

"The Law……

The manner in which courts apply the law in this county is spelt out in section 3 of the Judicature Act Chapter 8, Laws of Kenya

application of African Customary Laws takes pride of place 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……"

The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect. That is section 82(1). In section 82(3), it defines discrimination as follows:-

"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 connexion, political opinion, 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"

That provision has not always been the same with regard to discrimination on grounds of sex. "Or sex" was inserted in a relatively recent constitutional amendment by Act No. 9 of 1997. In the same section however, the protection is taken away by provisions in section 82(4) which allow discriminatory laws, thus:-

"Subsection (1) shall not apply to any law so far as the law makes provisions-

(a) …….

(b) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(c) For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

(d) Whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons for any other description, is reasonably justifiable in a democratic society."

Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribed to international customary laws and has ratified various international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two international human rights covenants; the covenant on economic, social and cultural rights and the Covenant on civil and political Rights (both adopted by the UN general Assembly in 1966). In 1984 it also ratified, without reservation, the Convention on the Elimination of All Forms of Discrimination Against Women, in short, 'CEDAW". Article 1 thereof defines discrimination against women as.

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

In the African context, Kenya subscribes to the African Charter of Human and People' Rights, otherwise known as the Banjul Charter (1981), which it ratified in 1992 without reservations. In article 18, the charter enjoins member States, inter alia to:-

"….ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions."

It is in the context of those international laws that the 1997 amendment to section 82 of the constitution becomes understandable. The country was moving in tandem with emerging global culture, particularly on gender issues. There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states:-

"**It is within the proper nature of the judicial process and well established functions for 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 constitutions, legislation or the common law."**

That Principle, amongst others, has been reaffirmed, amplified, reinforced, and confirmed in various other international for a as reflecting the universality of human right inherent in men and women. In Longwe vs International Hotels 1993 (4 LRC 221), justice Musumali stated:-

"…**ratification of such (instruments) by a nation state without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty Convention in my resolution of the dispute."**

A clear pointer to the currency of that thinking in this country is in the draft constitution where it is proposed that the Laws of Kenya comprise, amongst others;

"**Customary international law and international agreements applicable to Kenya."**

I have gone at some length into international law provisions to underscore the view I take in this matter that the central issue relating to discrimination, which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws which Kenya has ratified, will also inform my decision".

10. I have set out the statement above in extenso because the law does not bear out Joel's thin veiled attempt at disinheriting his step – mother only because she is too old or in fact because she is a woman with no son but only married daughters. I say this because he instituted the present proceedings, obtained the grant of letters of administration, confirmed it, transferred the three prime parcels of land to himself exclusively and it only took the orders of Sitati J. made on 31.1.2006 for his actions to be reversed. That is not the conduct of a son who now calls himself the "**only son**" who wants to take care of the whole family. My firm view is that the law and the facts bear out Margaret's proposal as the more reasonable one.
11. The grant is therefore confirmed as prayed for in the Application dated 17.10.2006 but Margaret's interests in all the properties shall be for life only. Costs incurred shall be borne individually by each party.

12.Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 31ST . DAY OF OCTOBER 2007

ISAAC LENAOLA

JUDGE

In presence of

N/A Advocate for the petitioner

Mr. Mburugu Advocate for the Obejctor

ISAAC LENAOLA

JUDGE