



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU**

Civil Appeal 35 of 1997

EJIDIOH NJIRU MBINGA.....APPELLANT

VERSUS

MARY MUTHONI MBINGA.....1ST RESPONDENT

PIA WANJIRA MURIUKI.....2ND RESPONDENT

JUDGMENT

The appellant had filed a suit by plaint in the lower court against the Defendants now Respondents. He sought declaration that certain plots was held by his mother first Respondent in trust for him and that the transfer of the same to 2nd Respondent is null and void. And an order that the said plots to be registered in the name of Appellant.

In reply the defendants/Respondents stated that the plot 1157 did not exist and there is no subject matter in this suit. Further more the first Appellant states that she inherited Plot No. 1157 aforesaid from her husband in her own right. She denied existence of any trust in relation to that plot.

Second Defendant has Title Plot No. 1893. Evidence shows that the deceased father of Appellant had two wives. The land he left was divided among the two houses. The first Appellant inherited plot No.1157. The 1st Respondent subdivided the said plot into two equal portions namely plot No. 1892 registered in her name and 1893 registered in the name of his sister 2nd Appellant. The appellant claims 3 acres of his mothers land leaving his mother with only ½ acre. He and his witnesses insisted that the sister, Muthoni was not entitled to inherit land from the father's estate. The first Respondent was clear in her evidence she gave Appellant a portion of her land which the Appellant refused to take. His sister Muthoni was given a portion and she obtained Title Deed. She said to the Appellant "**You are not the only child**". The appellant maintain the same attitude in this appeal. He invoked the law of Trust, sections 35, 37 of Succession, Section 83, and also *Cotran* comments on Kikuyu Customary Law that only unmarried daughters are given a piece of land on inheritance. They proposed appellant to take mother's share given to the second Respondent.

For the Respondents, Counsel referred to Section 40 of the Act. He submitted customary laws do not apply after the enactment of Succession Act.

A surviving widow with children is granted by law a life interest of the whole residue of the net intestate estate of her husband with power of appointment of any part or all the net intestate to any child or children. She may with consent of all other Co- trustees and in case of land with courts permission sell any portion for her maintenance. Therefore the first Respondent the widow, does not hold property in trust for the appellant. However the widow's interest will terminate on her remarriage or on her death.

On the first and second ground of appeal the Trial Magistrate was right to hold that appellant could take what the widow would decide to give to him and that there was no trust existing in his favour.

On ground three the widow, had a right to allocate to 2nd Respondent a piece of land which was thereafter registered as hers *Ngariama/Ngiriambu/1893*. The remaining grounds namely 4, 5, challenged the legality of the transfer of Plot No. 1893 to the second Respondent. The second Respondent is a sister of the Appellant. He contends that she is or has been married but the Trial Magistrate held that the fact of her marriage in this case was “*neither here nor there*”.

I would like to point out that the succession Act does not discriminate children by gender or marital status. Furthermore under the comment in *Contrans “Restatement of Customary Law”* which the appellant relies upon simply states:-

“Daughters do not normally share in the inheritance. They live with their mother until they are married. If however a daughter remains unmarried she may be allocated a piece of land.....”

This custom of disinheriting daughters’ (female child) is repugnant to the current jurisprudence. There is a concerted effort in international law to ensure there is no discrimination by ground of gender. Kenya is a signatory to General International Treaties which clearly demand that all customs and laws which discriminate against person on ground of gender must be discarded and the equality of female persons with their brothers is guaranteed. See the :-

1. Universal declaration of human rights.
2. Convention on the Elimination of all forms of Discrimination against Women (CEDAW) which was ratified by Kenya on 9/3/1984.

The courts are required under the Judicature Act Cap laws of Kenya not to follow customs that are repugnant. It is my view that the customary law of Kikuyu people which discriminate upon her is repugnant.

I am not therefore persuaded that the second respondent should be deprived of the land she has been allocated by her mother so that it can be given to her brother and I find no fault in the decision of the Trial Magistrate. There is some evidence that the Appellant was allocated some portion of land which he rejected. In the circumstances, I find the appeal has no merit and the same is dismissed with costs to the Respondent.

Dated this 2nd day of March, 2006.

J. N. KHAMINWA

JUDGE