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

Succession Cause 616 of 1997

IN THE MATTER OF THE ESTATE OF PRISCILLA NDUTA GITWANDE – DECEASED

JUDGMENT

On the date when this application by Wairimu Ndolo for revocation of representation issued to Salina Wandia Njoroge was fixed for hearing, there was no representation by the aforesaid grantee. As the date of hearing was fixed in presence of both Counsel and no explanation was given to the court for absence of either the Administratrix/Respondent or her Counsel, I heard the application ex-parte. I further note that the cause is very old as that of 1995.

There are undisputed facts in this cause. They are:

1. The Administratrix Salina is a traditional wife of the deceased.

2. The Objector is the biological daughter of the deceased

3. The Administratrix although named the Objector in her petition for grant of representation, the Objector was not served with a citation, and claims that she being a daughter of the deceased, was better placed to obtain the grant of representation and that a part of the estate was sold by the Administratrix before she applied for title deeds.

4. The parties are Kikuyus by tribe.

From an earlier statement from the Bar Mr. Maragori the Learned Counsel for the Administratrix, it is divulged that the Objector and the Administratrix were given 4 acres each and each of other five children of the Administratrix was given 2 acres. It was agreed also that the purchaser was given 4 acres. This purchaser, as per the Petition filed, seems to be one John Mwangi Gutuandii. As per the petition filed she has mentioned only four children who were minor as at 1995.

It was also conceded by Mr. Maragori that parties should reconsider the distribution and in failure thereof the application be determined by oral submissions as facts were agreed.

I do here note that I have not seen any replying affidavit filed by the Administratrix.

With this background, I shall now consider the submissions by Mr. Nyaga the Learned Counsel for the Objector.

In his short submissions he contended that as per Section 38 of the Law of Succession Act (Cap 160 Laws

of Kenya) (hereinafter referred to as the Act). The only heir recognized is the objector who is a daughter to the deceased.

Section 38 of the Act stipulated and I quote:

"**Where an intestate has left a surviving child or children but no spouse, the net estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children**"

The definition of the wife in the Act includes spouse as defined in Section 2 of the Act as under:

"'**Wife' includes a wife who is separated from her husband and the terms 'husband' and 'spouse' 'widow' and 'widower' shall have a corresponding meaning."**

Section 2(1) of the Act stipulates and I quote:

"**2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate of testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."**

Mr Nyaga, relying on the aforesaid provisions of the Act, submitted that this estate has to be administered under the provisions of this Act as the deceased died on 20th April, 1994 after the commencement of this Act. He further added that the customs therefore have no application after the commencement of the Act. He stressed that the estate be wholly devolved upon the Objector being the sole surviving child of the deceased under Section 38 of the Act.

I must lament that I have not been assisted sufficiently as to the custom of the traditional wife as well as the circumstances under which the Administratrix had married the deceased and when and how she gave births of the four children she has mentioned in her petition.

I took shelter in the book of Reinstatement of African Law by Eugene Cotran. On page 13 of its first volume, a marriage between woman to woman is commented upon. I shall quote it wholly:

"**(c) WOMAN-TO-WOMAN MARRIAGE. Where a husband dies leaving a childless widow, who is past childbearing age, the widow may marry a wife. The widow pays *ruracio* to the family of the woman selected, and arranges for a man from her deceased husband's age-set to have intercourse with her.**

Children resulting from such intercourse are regarded as the children of the widow's deceased husband."

I shall stress the last observations to the effect that the children out of such marriage are regarded as the children of the widow's deceased husband.

I think that could be reason that there is no mention of customs as regards inheritance or succession in the estate of such marriage in Vol.2 of Cotran's book.

I also stress the fact that the objector is a biological daughter of the deceased and thus the present marriage does not satisfy the requirements of the custom to be recognized as a marriage accepted under the customary law.

However, in this case it is agreed that the Administratrix is a traditional wife and thus I shall have to determine whether the traditional wife can be included in the definition of 'wife' under the Act.

Obviously it cannot be denied that the marriage between her and the deceased is not a normal or

natural marriage. The issue then arises is whether the custom accepting the said marriage should be recognized and accepted by the court under the Judicature Act (Cap.8 of Laws of Kenya).

Section 3, sub-section (2) of the Judicature Act stipulates and I again quote:

"**The High Court, Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial without undue regard to technicalities of procedure and without undue delay."**

Is the marriage under consideration repugnant to justice or morality? And even if it is not so, whether the deceased was a childless widow and married the Administratrix to continue the progeny of her husband?

In my humble view if the marriage has no sexual connotation between the same sex and was contracted for social purposes as is evident from the observations of the custom in the book of Cotran, It may not be repugnant to the morality.

But in this case, unfortunately I do not have any facts as to whether the deceased was a widow before she contracted this marriage or the reason for such marriage but I definitely have the proof that the deceased was not childless. I do not think whether that child was a daughter should make any difference either under the Act as well as under the constitution.

It shall be thus difficult for me to accept the marriage between the deceased and the Administratrix as properly solemnized as per the tenets of the customary law.

I should not and cannot thus accept the validity of such marriage either under the Act or under the customary law.

The upshot of the above is that I declare that the Objector is the sole heir to the estate of the deceased.

I thus revoke the grant of representation made to the Administratrix and all subsequent proceedings before the SRM's court, Muranga, in Succession Cause No.1581/95.

The Objector is at liberty to file petition for grant of representation in the estate of the deceased.

There shall be no order as to costs.

Dated and signed at Nairobi, this 30th day of May, 2006.

K.H. RAWAL

JUDGE

30.5.05