REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 706 OF 2000

IN THE MATTER OF THE ESTATE OF PRISCILLA WAIRIMU KAMAU (DECEASED)

RULING

The late Priscilla Wairimu Kamau (deceased) died intestate on 3rd July 1992. She was survived by George Gatharia Kamau (petitioner), Elizabeth Kamau Munyinyi unmarried daughter, Beatrice Wanjiru Nganga and Grace Njeri Kamau married daughters respectively.

The grant of Letters of Administration was issued to the petitioner on 30th October 2001 and subsequently confirmed on 2nd December 2003 whereby the properties of the deceased namely:

Kiambaa/Ruaka/923

Kiambaa/Ruaka/926

were vested upon the petitioner absolutely.

The petitioner's application for confirmation of the grant was supported by a consent in form 37 which was allegedly signed by

Elizabeth Kahaki Kimotho

Beatrice Wanjiru Nganga and

Grace Njeri Kamau dated 22nd August 2003.

It is on that basis that the grant of Letters of Administration was confirmed on 19th May 2004.

Elizabeth Kamau Munyinyi filed an application for revocation of the grant on the grounds that the grant was obtained by the petitioner by presenting a forged consent.

The applicant has detailed her complaints in the affidavit dated 19th May 2004 and her two sisters, Beatrice Wanjiru and Grace Njeri both swore an affidavit that was filed in court on 12th July 2004 in support of the applicant. They too claim their signatures were forged and they were not consulted by the petitioner when he applied for grant.

The petitioner did not inform the applicant and his two other sisters when he applied for Letters of Administration. They did not sign the consent form P & A 37 and 38 and the grant was issued and confirmed in favour of the petitioner through false misrepresentation.

On the other hand the petitioner opposed this application and relied on his affidavit sworn on 24th June 2004. The gist of the matters deposed to that affidavit can be summarized as follows.

1) That the petitioner being the only son of the deceased had the priority to apply for the grant of Letters of Administration as the ultimate heir.

2) Secondly the petitioner argued that the applicant is a married woman who has no claim over their mother's estate; moreover the applicant was given 1 acre from her father's estate as a gift inter vivos. She was given title No. Kiambaa/Ruaka/642.

3) Thirdly the petitioner obtained a letter from the Assistant Chief of Ndenderu sub-location confirming that the deceased was survived by the petitioner and three married daughters.

Counsel for the applicant also relied on the provisions of Section 33 of the Law of Succession to support his submission that the deceased estate should be determined according to the Kikuyu Customary Law.

In this regard he further relied on the Court of Appeal authority in the case of John Ndungu Mubea vs Milka Nyambura Mubea C.A No. 76 of 1990 and in particular the reference of the text by Eugene Contran Restatement of African Law of Succession at page 8

> **"Inheritance under Kikuyu Law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son may get slightly larger share. In a polygamous household, the distribution is by reference to the house of each wife, widow, though not entitled to an absolute share of the estate, have a right of use during their lifetime of a portion of land and certain movables. Daughters are normally excluded, but also receive a share if they remain unmarried. In the absence of sons, the heirs are the nearest partrilineal relatives of the deceased namely father, full brother, half brothers and parternal uncles"**

According to the petitioner, and this pattern of inheritance prescribed above he is the only one entitled to inherit the deceased parcel of land.

Counsel for the applicant also relied on another decision by the High Court in Succession Cause No. 1351 of 1989 the estate of Mbura Gachira, whereby Aluoch J held

> **"I know the Act does not go as far as to define "Children" for the purposes of this Section, but I am unable to find that daughters who are already married can be read into that definition.**

I see the reasoning behind this to be the fact that such daughters have already formed their family units and houses by **virtue of their marriage. If I were to bring them into their mothers house, for the purposes of inheritance under Section 40 then I would be saying that they are entitled to inherit twice, that is from their mother's "houses" and their "own houses" created by their marriage. This could not have been an intention of the legislature, because it would give married daughters unfair advantage over other people in terms of inheritance"**

Hence counsel for the petitioner argued that his clients case should be based on the above reasoning.

I have carefully considered both decisions against the provisions of the Law of Succession. In reference to the Court of Appeal decision, I wish to distinguish the facts and state that, the Court of Appeal was dealing with issues of the deceased children who were born out of a customary law type of union which was contracted when the deceased had contracted a statutory marriage which was still existing. That case is different from the present one.

As regards the decision of the High court, the issue the court was determining was in regard to a polygamous household. In any case, I am not bound by that decision as I understand the provisions of Section 38 which govern this estate to refer to the deceased children differently as follows:

Firstly, the deceased estate, being a parcel of land in Kiambu District of the Central Province is not the agricultural land that is excluded from this Act under Section 32 and 33 of the Law of Succession. Therefore the reference to Sections 32 and 33 of the Act is of no consequence.

Secondly the deceased estate falls within the provisions of Cap 160 and in particular Section 38 which provides how the intestate estate of a deceased who left a surviving child or children but no spouse should be administered.

The estate should devolve upon the surviving children equally, their marital status or gender notwithstanding. With tremendous respect, to counsel for the petitioner, the law does not distinguish the deceased children on the basis of their gender or marital status. I cannot apply the principles of customary law in the face of a statute law.

In any event the applicant herein claims that she is not married and this preposition is supported by her two sisters, and in my humble view there is nothing if a daughter is married, as even the petitioner is married, besides an unmarried daughter can inherit the parents property and subsequently get married what happens to the property so inherited.

I therefore find no justification in excluding the applicant from claiming her mother's estate. I am satisfied that the grant was obtained by means of untrue allegations that the applicant is married and that she had consented to the grant.

I accordingly revoke the grant that was issued on 30th October 2001 and confirmed on 2nd December 2003 and all the consequential transactions effected through the said grant. I direct that another grant be issued to both the applicant and respondent who shall be at liberty to apply for confirmation either jointly or singularly upon seeking consents of their sisters.

The applicant shall have the costs of this application. It is so ordered.

Ruling read and signed on 29th April 2005.

MARTHA KOOME

JUDGE