



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

SUCCESSION CAUSE 53 OF 1998

**IN THE MATTER OF THE ESTATE OF HARRISON GACHOKI
ALIAS RUKWARO GACHOKI -DECEASED**

EUNICE WAIRIMU RUKWARO)

ELSIE MURUGI RUKWARO).....PETITIONERS

VERSUS

DORCAS WANGUI RUKWARO)

CYRUS WANG'OMBE RUKWARO)

JOES KAMUNYA RUKWARO).....OBJECTORS

PETER WACHIRA RUKWARO)

J U D G M E N T

The late Harrison Rukwaro Gachoki (hereinafter referred to as the deceased) died on 30th May 1997. Eunice Wairimu Rukwaro and Elsie Murugi Rukwaro (hereinafter referred to as the 1st and 2nd Petitioners) petitioned for letters of administration to the estate. They caused appropriate citation under rule 21 of the Probate and Administration Rules to be served on Dorcas Wangui Rukwaro, Cyrus Wang'ombe Rukwaro, Elijah Gakuu Rukwaro, Joes Kamunya Rukwaro and Peter Wachira Rukwaro who duly entered appearance. The petitioners thereafter obtained temporary letters of administration and after 6 months applied for confirmation of the grant proposing that the estate of the deceased be distributed equally amongst his 3 houses as represented by the 2 petitioners and Dorcas Wangui Rukwaro (hereinafter referred to as the 1st objector). This was contested by the 1st objector and Cyrus Wang'ombe Rukwaro, Joes Kamunya Rukwaro and Peter Wachira Rukwaro (hereinafter referred to as 2nd, 3rd and 4th Objectors respectively) who maintained that the deceased had expressed his will and distributed his properties prior to his death and therefore the properties should be distributed in accordance with the deceased's wishes.

Seven witnesses testified in support of the objectors whilst four witnesses testified for the petitioners.

Briefly the evidence for the objectors was that the deceased married the 1st objector in 1967. By this time the deceased who was previously married to the two petitioners had separated with them, though the deceased remained with the children of the marriage. The 1st objector lived with the deceased until He died. Their union was blessed with 6 sons who included 2nd, 3rd and 4th objectors and one daughter who was married by the time of her father's death.

Prior to the deceased's death sometime in 1980 the deceased sub-divided his land known as

Tetu/Kihunyo/6 into 9 portions each with a separate title. The deceased then distributed the 9 parcels of land amongst the 1st objector's 5 adult sons, the 1st petitioner's 2 sons and the 2nd petitioner's unmarried daughter. Each was shown his parcel and they put up houses planted trees and coffee and started cultivating the land although all the sub-divisions remained registered in the deceased's name. The deceased directed that the 9th portion which was where the 1st objector had his house should go to the 1st objector's minor son, Reuben Gikonyo. A few months before his death, the deceased instructed his nephew Daniel Mwangi Kamunya (P.W.5) to write down how He wanted his properties distributed including the above mentioned distribution.

The deceased then summoned elders including Joel Ngunjiri Justus (P.W.4) a church elder. The deceased also summoned his children and the 1st objector. He then instructed P.W.4 to read out what He had directed P.W.4 to

write down on how his property was to be distributed. The deceased then signed what had been written and the elders and P.W.5 also signed.

The 1st objector maintained that the two petitioners having deserted the deceased in the 1950's had no right to inherit the deceased, and that the estate should therefore be distributed in accordance with the wishes of the deceased.

Both the petitioners maintained that although they separated with the deceased, their marriages were never dissolved. They even used to visit the deceased. The 1st petitioner attended the deceased's funeral though 2nd petitioner could not attend the funeral as she was unwell.

After the deceased's death, clan elders held a meeting and distributed the deceased's property amongst his 3 widows. The meeting was attended by Jackson Kiragu Nderitu a nephew of the deceased who was the vice chairman (P.W.4). It was also attended by Sila Gitahi (D.W.3) a friend of the deceased. Both maintained that the deceased had not distributed his property prior to his death nor had He expressed any wishes as to how He wanted the properties distributed. The clan members wrote down their decision as to how the properties should be distributed and the same was produced in evidence. The Petitioners were however not satisfied as the clan members did not distribute the properties equally. They therefore filed this petition.

It is apparent from the evidence that both the petitioners deserted the deceased and were not living with him as husband and wife as at the date of the deceased's death. The date as to when the petitioners left their matrimonial home was not established as the objector claimed it was in the 1950's after the emergency whilst the petitioners claimed it was after independence. Whatever the case it is obvious that the deceased having died in 1997 the petitioners and the deceased had been separated for a period of at least 30 years. The

petitioners' maintain that their marriage was still subsisting as the same was not dissolved and they occasionally visited and attended functions, and that in the case of 1st petitioner dowry in respect of her married daughter was paid to the deceased thereby rendering recognition to the fact that the marriage was still subsisting.

The issues for determination therefore includes the following:- ·

- ***What law governs the administration of the deceased's estate?*** ·
- ***Did the deceased leave a will, distribute his properties or express his wishes prior to his death as to how He wanted his properties to be distributed?*** ·
- ***Are the Petitioners wives or dependants of the deceased?***

Are they entitled to inherit the deceased? If the deceased distributed his properties prior to his death,

have the Petitioners been adequately provided for?

- *Were the clan elders entitled to distribute the estate of the deceased?*
- *How should the estate of the deceased be distributed?*

It was common ground that all the parties to this succession dispute belong to the Kikuyu community. Indeed the deceased is alleged to have contracted all his 3 marriages under the Kikuyu customary law. Notwithstanding this the administration of the deceased's estate fell within the provisions of section 2(1) of the law of Succession Act as the deceased died on 30th May 1997 after the commencement of the law of Succession Act. The succession to the deceased's estate is therefore governed by the law of Succession Act (Cap 160 Laws of Kenya).

Although Section 32 and 33 of the Law of Succession Act provides for the application of customary law in respect of succession to agricultural land and livestock for certain gazetted areas (See L.N. 94 of 1981) the deceased's agricultural land and livestock were not within the gazetted areas and these sections do not therefore apply to his estate. That is to say that Kikuyu customary law is of no application to this estate.

The objectors maintained that the deceased had already distributed his land and made his wishes known as to how He wanted to have his properties distributed and that He even caused this to be reduced into writing and He signed the same in the presence of witnesses. This was however denied by the Petitioners who claimed the deceased neither distributed his properties nor expressed his wishes as to how He wanted the same done and that is why the clan members met after his death and distributed his properties.

It is noteworthy that the clan elders were purporting to exercise their rights to distribute the property under Kikuyu Customary Law. First as already stated kikuyu customary law was not applicable to the deceased's estate, secondly, even if it was, there was no proof of the customary law that the clan elders were purporting to apply as no evidence was called in support of the same. I concur with the submissions made by the Petitioner's counsel that the clan elders acted in contravention of section 45(1) of the law of Succession Act which provides:

45(1) Except so far as is expressly authorized by this Act or by any written law or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose of, or otherwise inter meddle with, any free property of a deceased person.

The clan elders had no authority to distribute the properties of the deceased under any written law, nor did they have any grant of representation. Their purported distribution of the estate was of no legal effect.

I have considered the evidence of the witnesses as concerns the contention that the deceased had already distributed his land and made his wishes known. It is evident that the Petitioners were not staying with the deceased and could not therefore be in a position to swear positively that the deceased did not express any wishes regarding the distribution of his properties. This leaves the evidence of D.W.3, 4 & 5. However D.W.3 was only a friend to the deceased. He admitted that the deceased used to conduct his affairs alone, thereby accepting that he was not really a confidant of the deceased and may not therefore have known all the deceased's affairs.

D.W.4 testified that the deceased was his paternal uncle, he did not however seem to be very close to his uncle's family as he admitted that he could not recall the names of the children of the deceased. He admitted that the deceased had sub-divided his land but maintained that they dismissed the allegation that the deceased had distributed his land to some of the children, because the green card for the sub-divisions was still in the deceased's name. I find that this witness did not have any close association with the deceased. I do not think He had any special knowledge of the deceased's affairs. He only came to play a role after the deceased's death as a clan elder. He cannot therefore swear positively that the deceased did not express any wishes as to how He wanted his properties distributed.

Similarly D.W.5 only appears to have got involved in the deceased's affairs after his death. He claimed the deceased was his uncle, but did not know all the children of the deceased nor did He know where they have built. The fact that he was not even privy to the fact that the deceased had sub-divided

his land into 9 parcels speaks volumes about his association with the deceased.

On the other hand the objectors have established that the deceased sub-divided his land Tetu/Kihuyo/6 into 9 portions prior to his death in 1994. Although the deceased remained the registered proprietor of all the 9 sub-divisions, I am satisfied by the evidence adduced by the objectors that the deceased physically – allocated his 8 sons and 1 unmarried daughter the 9 parcels of land. It is noteworthy that 2 of the sons and the unmarried daughter are children of the petitioners and none of them came to testify to deny the fact that the deceased had distributed land to them as alleged. Moreover the 1st Petitioner did admit in her evidence that her two sons and the 2nd Petitioner’s unmarried daughter were each living on land which was shown to them by their father and each had built thereon.

I have further considered what the deceased is alleged to have caused to be written and attested by him (i.e. Pexh. II and III). I believe and accept the Objector’s evidence that these documents were written under the deceased’s direction and that he signed it in the presence of witnesses. The documents do not however qualify to be a will as the deceased did not identify all his property and clearly state who was to inherit, what nor did the deceased identify any executor. The documents are a clear confirmation that as at that date the deceased had already distributed land to his children and therefore makes reference to this in the documents. It is indeed a manifestation of the deceased’s wishes.

It is evident that the deceased did not provide any land for any of the petitioners, he did however provide for their children.

Although the petitioners maintained that they were still “wives” of the deceased as their marriage had not been dissolved, A separation of 30 years is surely a long time. Having deserted the matrimonial home for such a long period and having failed to provide the corresponding conjugal rights to the deceased, the deceased cannot be blamed for having intentionally left out the petitioners in his distribution. The petitioners are indeed “dependants” as defined under Section 29 (a) of the Law of Succession Act, however, by virtue of their conduct the Petitioners have disentitled themselves from inheriting the deceased. The estate of the deceased cannot therefore be distributed according to the houses, but ought to be distributed to the children of the deceased and the 1st Petitioner. In Re the Estate of Harrison Gachoki alias Rukwaro Gachoki (Deceased)

I do therefore allow the objection and rule that the deceased’s estate be distributed in accordance with the wishes expressed by the deceased to his family which is as follows:-

Tetu/Kihunyo/234 – John Ngari Rukwaro

Tetu/Kihunyo/235 – Peter Wachira Rukwaro

Tetu/Kihunyo/236 – Nancy Wanjiku Rukwaro

Tetu/Kihunyo/237 – Cyrus Wang’ombe Rukwaro

Tetu/Kihunyo/238 – Reuben Gikonyo Rukwaro

Tetu/Kihunyo 239 – Elijah Gakuu Rukwaro

Tetu/Kihunyo/240 – Stephen Wang’ombe Rukwaro

Tetu/Kihunyo/241 – Samuel Mburu Rukwaro

Tetu/Kihunyo/242 – Joel Kamunya Rukwaro

Ewaso/Nyiro OIpejeta Block 1/588 to Dorcas Wangui Rukwaro.

Plot No.73 Ihururu Market)

Shares in E. A. Breweries)Peter Wachira Rukwaro Shares in HFCK)
Shares in Standard Bank) Dorcas Wangui Rukwaro
Shares in ICDC Investment Company Limited)
Shares in Muhotetu Farmers)
Shares in Co-operative Bank)
Shares in Kenya Commercial Bank)
Cash in Standard Bank) Reuben Gikonyo Rukwaro Cash in Post Bank Account
)
ICFA (KGGCU) Account No. 1200/40)
Nyeri District Co-operative Union Limited)

i direct that the grant be confirmed in the above terms. I make no orders at to costs.

Dated, signed and delivered this 13th day of October 2005.

H. M. OKWENGU

JUDGE