



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Succession Cause 303 of 1998

ANDREW MANUNZU MUSYOKA (DECEASED)

RULING

On 9.12.98, the 4 applicants herein, Reuben Musilu Kamunzyu, Preston Mutinda Kamunzyu, Benard Musyoka Kamunzyu and Agness Mueni Kamunzyu filed a petition for letters of administration in respect of the estate of the late Andrew Kamunzyu, who died on 14.8.98. They described themselves as sons and wife of the deceased on Form Probate and Administration 5. The following beneficiaries were listed in the said Form P&A 5

1. Reuben Musilu Kamunzyu
2. Preston Mutinda Kamunzyu
3. Bernard Musyoka Kamunzyu
4. Ms Monica Kamunzyu
5. Muya James, grandson of deceased and
6. Agness Mueni Kamunzyu

The matter was gazetted in Gazette Notice No. 1732 of 1.4.99. Grant of Letters of Administration was made by the court on 7.5.99. On 9.11.99, Susan Mbinya Kaminzyu who describes herself as the daughter of the deceased filed summons for revocation and annulment of Grant of Letters of Administration intestate under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. The grounds upon which her application was made were that the grant was obtained fraudulently by making false statements and concealing some material matters; That the proceedings to obtain grant were defective and that the temporary grant which was about to be confirmed was obtained by means of untrue allegations of facts essential on a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. The objection was filed by Mulwa and Mulwa advocates for the objector. The Petitioners/Respondent filed a reply to the application. Affidavit sworn by Preston Mutinda and grounds of opposition in which he states that the application was filed after 7 months of grant of letters of Administration and therefore the applicant was guilty of inordinate delay and that the application offends provisions of Rule 44 of Probate and Administration Rules; that the application is premature and that the applicant is not a dependant of the deceased and therefore the application is fatally defective. The grounds and affidavit were filed on 24.5.00. V.V. Mule Advocate came on record for the Respondents on 29.5.01 and on 17.5.01 the parties consented to having the matter disposed of by hearing viva voce evidence.

The objectors, (PW1) case opened on 12.2.04 when Susan Mbinya the objector (PW1) gave her evidence and called three other witnesses. She recalled that the deceased who was her father had two wives. The 2nd wife is Agnes Mueni Kamunzyu, the 4th Respondent, and that she belonged to the 1st house where they were born 9 children, 5 daughters and 4 sons of whom 2 are deceased. She is the eldest in her mothers house and is not married. She cohabited with one Shadrack Kimatu for 2 years, 1962-1963 They have lived apart since then. She worked in Nairobi from 1964 to 1995 when she retired. She had bought some land which she built a house. The brothers did not inform her when they went to take out letters of administration and she never saw it in the Kenya gazette. Her late sister was not married and her son who has been listed as a beneficiary but PW1 is not included and wishes to be included in the list of beneficiaries. She recalled that she lived with Shadrack at Tawa and he then took her to his rural home and stopped to support her. They had 3 children but she got another later after she left Shadrack's home. She denied that Shadrack ever paid any dowry for her. Since her retirement she has lived in a plot bought with assistance of her father and that is about 1 kilometer from her father's home. She denied changing her names in her identity card in order to suit this application.

Michael Mwei (PW2) is a cousin to the deceased as their fathers were brothers. He testified that the 1st house, to which the objector belongs had 9 children, 5 girls 4 boys. One boy and one girl have since died. He further stated that 2 girls were unmarried, and they include Susan the objector He recalled that the objector lived with one Shadrack for 2 years 1962-63. He stated that if dowry had been paid in respect of PW1, he would have been involved as the deceased used to call on him and he did take part when 2 of the deceased's daughters got married. He related to court how dowry is paid amongst the Kamba and said that unmarried ladies are entitled to inherit from their fathers estate if not married.

In cross examination, PW2 said that if a child dies before dowry is paid, the child may be buried at the man's home if he agrees to pay dowry. He could not tell if shadrack asked for permission to bury their child who died and then pay dowry later.

John Kinyasi Musyoka said that he is a cousin of Susan Mbinya as their fathers are brothers. He corroborated PW1 and 2's evidence that PW1 and one of her sisters are not married but two others are married. He stated that Susan cohabited with a man in 1962, got one child. He denied that any dowry was ever paid. He said that PW1 lives on a small plot which was bought by her father.

Reuben Musilu (DW1) is a younger brother of PW1. He said that when they filed their petition, they listed all beneficiaries but excluded PW1 because she is married. He said that she got married to Shadrack in 1962 and they got 6 children but two died. He said that dowry was received from Shadrack in 1962. In 1964 Susan left her children with the grandmother and went to Nairobi. She bought land when working and upon retiring, went to settle on this land. Though he claimed that the father had told them not to include PW1 in the list of beneficiaries, he had not deposed to it in his affidavit. He denied that goats were returned to shadrack when he was 16 years old. He agreed that Shadrack and DW1 do not live together and he has never seen Shadrack go to PW1's house.

Steven Mututu Mutisya (DW2) testified as an expert on Kamba customary law. He said that a marriage is contracted when goats of "**Ntheo**" are paid to the girls parents and that even if dowry is not paid "**Ntheo**" has to be paid and concludes a marriage. He said that if a woman leaves the husbands home with children and one dies the body has to be taken back to the man's home for burial. Similarly, if the woman dies when at her parents home, the body has to be taken back to the husbands home if "**Ntheo**" had been paid. A lady can only inherit from her fathers estate if she divorces her spouse by returning "**Mbui sya ulee**" – where goats are returned to the husband by the woman.

DW3 Alex Dick Katona told the Court that he is a cousin to Shadrack Kimatu Munyao and he knows that PW1 is the wife of Shadrack because he is one of the young men who were asked to take goats to PW1's home as dowry in accordance with Kamba customs. He was accompanied by two other boys but there were no elders. He testified that though Shadrack and PW1 are separated, they are not divorced and if PW1 dies, she will be buried at Shadrack's home and therefore PW1 is not settled to any land from her fathers estate.

The court has considered all the evidence that was adduced by all the parties, the submissions by counsels and authorities cited. The objector (PW1), PW2 and 3 all denied that Shadrack ever paid any dowry to the deceased to signify PW1's marriage to Shadrack. DW2 Steven Mututu who was called as an expert on Kamba customary law said that for a marriage to be concluded, "Mbui sya Ntheo" (goats) had to be taken to the girls home and a ceremony followed, where one of the goats was slaughtered. DW3 also said that the ceremony was to be attended by elders from both the girls and man's home. DW3 denied that he was accompanied by any elder, when they took the goats to the deceased's home to pay dowry but that he was with other boys. If DW3 was not accompanied by any elders as per DW2's evidence, then it means that no marriage ceremony was concluded in accordance with Kamba customary law. The denial by DW2 that elders were involved in the payment of dowry goes to fortify the objector's case that no dowry was ever paid and indeed doubts are now raised as to whether any was paid.

It is not in issue that Andrew Kamunzyu, the objectors father died intestate. In my view the following are the issues for consideration by this court.

1. whether the objector was married at the time of deceased's death
2. whether customary law should apply in the distribution of the deceased's estate or is it the law of succession Act cap 160 Laws of Kenya
3. Is the objector a beneficiary and therefore entitled to the deceased's estate.
4. who pays the costs.

The deceased died on 9.12.98 whereas the Succession Act which was enacted in 1972 became operational by legal notice no. 93/81, published on 23.6.81. Section 2(1) of the Act provides as follows:-

2(1) Except as otherwise expressly provided in the 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 or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the Administration of Estates of these persons."

From the above provision; there is no doubt that the Law of succession Act applies to the administration of the deceased's estate as deceased died after the Act was already in operation the question is when can customary law apply, because that is the law that the petitioners are invoking. Section 3 of the judicature (Cap 8 of Laws of Kenya) provides the manner in which African customary Laws can be applied by the courts. Section 3(2) of the above Act provides as follows:

"The High court, the 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 as 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 justice without undue regard to technicalities of procedure and without undue delay."

The parties in this case are subject to kamba customary law but it is apparent that applicability of Kamba customary law in this case will be limited in that it should not be inconsistent with the law of succession Act on repugnant to justice and good morality.

Under Section 32 and 33 of the Law of Succession Act the Minister will gazette areas where the said Act will not apply. In legal notice NO. 94/81 made on 23/6/81, the Minister specified the various Districts in which the provisions are not applicable. Machakos District where the deceased hails from is not included in the said Districts.

The evidence on record is that PW1 has not lived with her alleged husband since about 1964. With the help of her late father, she bought a plot near her home and that is where she is settled and lives with her children. It is over 40 years since the two lived together. The argument that PW1 would be buried in

Shadrack's land if she died is irrelevant. PW1 needs land on which she can live and till.

Kamba customary law which the applicants intend to apply in distribution of deceased's estate would discriminate against PW1 if she is a married lady for she is presumed to be entitled to her husband's estate. In my view, the Kamba Customary law is discriminatory on account of sex and yet section 40 of the law of succession Act under which distribution would be done does not differentiate between a male or female child, named as unmarried. The deceased had two wives and therefore distribution of his estate would have proceeded under Section 40 of the Law of succession Act. It provides as follows: 40(1) ***“where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”***

This section clearly provides that all children whether male or female are beneficiaries and should have a share in the deceased's estate, unless the objector (PW1) opts not to get a share in the father's estate as most married ladies do. She is perfectly entitled to deceased's estate just as DW1 her brother is entitled.

Section 29 of the law of Succession Act defines who a dependant is. A dependant means:

(a) a wife or wives or former wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”

Again this section clearly shows that whether married or not the objector (PW1) would still be entitled, to her father's estate as a child of the deceased. Again this section does not differentiate between female or male children. PW1 is a dependent of the deceased in terms of the above provision.

The Kenyan constitution which is the primary law of the country outlaws any law that is discriminatory. Section 82(1) of the Constitution provides **“..... No law shall make any provision that is discriminatory either in itself or its effect”**

Section 82(3) defines discriminatory 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 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 accorded privileges or advantages which are not accorded to persons another such description.”

The same section under subsection (4) seems to take away the same protection where it provides as follows:

“Subsection (1) shall not apply to any law so far as that law makes provision

(a).....

(b) with respect to adoption marriage, burial divorce, devolution of property on death or other matter 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 any matter to the exclusion of any law with respect to that in the case of other persons or

(d) whereby persons of a description maintained in sub section (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 justifiably in a democratic society.

Does this mean that the objector will then have no recourse? I think not, because Kenya subscribes to international customary laws and has ratified several international covenants and treaties. Kenya subscribes to the international Bill of Rights which is the Universal Declaration of Human Rights (1948) and the covenant on economic social and cultural rights and the covenant on Civil and political rights. In 1984 Kenya also ratified the convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and Article 1 defines discrimination against women as follows:

“Any discrimination or restriction on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, engagement 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 other field”

In 1992 Kenya also subscribed to the African Charter of the Human Rights and Peoples Rights (Banjul Charter (1981). In Article 18, the charter enjoins member states thus

“..... ensure the elimination of every discrimination against Women and also ensure the protection of rights of the women and the child as stipulated in International declarations and conventions”

International law is applicable in Kenya as part of our law so long as it is not in conflict with the existing law even without specific legislation adopting them. In the recent case of **MARY RONO V JANE RONO and WILLIAM RONO CA 66/02** Justice Waki employed International instruments in a succession cause where the daughters claimed to have been discriminated against on account of their sex.

From the above I do find that the kamba customary law is discriminatory in so far it seeks to deny PW1, her right to her fathers estate. That law is repugnant to justice and good morals and It would not be applicable in this case. The applicable law is the law of succession Act and Section 40 of the said Act makes provisions for distribution of the deceased’s estate to the houses according to the number of children in each house and includes a wife as a unit if still alive. There is no discrimination of such children on account of sex.

I have considered the authority cited by counsel **P&A Cause No. 203/98 Estate of Mutio Ikonyo V Peter Mutua Ngui** where Justice Mwera held that the objector was not entitled to the deceased’s estate because she was a married woman. The above decision is not binding on this court and I do beg to differ with that decision in light of the decision in MARRY RONO case (above) by the Court of Appeal and which is binding to this court. The objector is a beneficiary of the deceased’s estate and I do order that objector be included in P&A Form 5 as a beneficiary to Deceased’s Estate. Each party do bear their own costs since the parties are family.

Dated at Machakos this 15th day of December 2005.

R. Wendo

JUDGE