REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 83 OF 1994

PETER KIRARA KURIA……1ST PETITIONER

GRACE WAIRIMU KURIA……..…..……..2ND PETITIONER

VERSUS

HANNAH NYAMBURA KURIA…….…..……OBJECTOR

JUDGMENT

The subject matter of this dispute is a parcel of land known as **Plot No. 320 MILANGINE SCHEME** measuring 20 acres or thereabouts. The said parcel of land was registered in the name of **Mbugua Wangunyu Kuria** (hereinafter referred to as *"the deceased"*) who passed away on 5th August, 1991.

The first petitioner, Peter Kirara Kuria is a son to the deceased and the second petitioner is a widow to the deceased. The objector is a daughter to the deceased and was aged 59 years in the year 2000.

The petitioners had initially been granted Letters of Administration of the estate of the deceased but the objector applied for revocation of the same saying that the petitioners had fraudulently excluded her from the succession proceedings and the same were revoked and fresh ones issued on 28th September, 1999 with the three parties hereinabove as the joint administrators of the deceased's estate. A dispute then arose regarding the distribution of the deceased's estate and in particular the aforesaid parcel of land.

According to the first petitioner, the said parcel of land (hereinafter referred to as *"the suit land"*) was supposed to be divided among the deceased's five sons and the second petitioner only as his daughters were married women and had no right to inherit any portion thereof.

He told the court that the objector was married in 1952 and her husband acquired a parcel of land measuring over 100 acres which they sold and bought another parcel of land in a place known as Gachura where they had built their home.

He further stated that in 1986 the objector tried to return to the suit land but the deceased refused to give her any share thereof and he chased her away. However, in 1990 the objector reported the matter to the area Chief and a meeting was called by the Chief and the deceased and all the parties attended and the objector was told not to interfere with the suit land. In cross examination, he told the court that the objector entered into the suit land by force sometimes in 1997 and occupied about one acre thereof together with her children. That one acre had been given to him by the deceased, he alleged. He said that he had personally contributed towards repayment of the loan given by the Settlement Fund Trustees for the purchase of the farm which loan had been given to the deceased. He denied that the objector had made any repayment of the said loan.

The second petitioner was the second wife to the deceased and told the court that the deceased had prior to his death said that the objector should not be allowed to cultivate the suit land or stay there because she was a married daughter and so urged the court to disallow the objector's claim.

In cross examination, she told the court that the first house had only one son, the first petitioner, and two daughters, the first born being the objector. On her part, she had four sons and one daughter. According to her, the deceased's family had decided that she gets two acres of the suit land and each of her sons also two acres then the first petitioner was to get 8 acres. She also said that she was not aware whether the objector had made any loan payment to the Settlement Fund Trustees on account of the debt that was outstanding against the suit land saying that she had been paying land rates to the local county council as well as servising the said loan but she did not produce any documentary evidence in proof thereof.

The petitioners called three witnesses in support of their claim and they all testified that the objector was not entitled to any share of the suit land on account of her marital status.

On the other hand, the objector stated that she was entitled to a share of the suit land because she was a daughter to the deceased and on account of the fact that she was the one who had been servising the loan that was granted to the deceased for the purchase of the suit land when their father was unable to repay the same and asked his family members including the petitioners to assist but they refused to do so. She produced some receipts in proof thereof – D. Exhibit 1. The total amount as shown in the five receipts is Kshs.4200/-.

She also produced as D. Exhibit 2 a receipt dated 1/3/90 for Kshs.2502.40 which she said was for payment of the final balance of the said loan which she claimed to have paid although the said receipt was issued in the name of the deceased. She denied having stolen the said receipts from her father and claimed that she was lawfully occupying about half an acre of the land which had been given to her by her father in 1964.

She said that she was married in 1962 and stayed with her husband for two years after which they separated and she went back to her father's land and her father showed her where she was to put up a house which she did and was living there with her children. She admitted that she had a parcel of land at Gachura which she personally purchased but that notwithstanding, she was still entitled to a share of her father's land.

Having summarised the respective claims of the parties to this dispute, I believe an appropriate starting point is to consider the applicable law; whether it is Kikuyu customary law since all the parties are Kikuyus or the Law of Succession Act Cap 160 of the Laws of Kenya. The petitioners were appearing in person and so they did not make any legal submissions and I believe for that reason the objector's learned counsel chose not to submit on the law also.

Section 3(2) of the Judicature Act Cap 8 of the Laws of Kenya states 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."***

However, the preamble to the Law of Succession Act clearly states that it was to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons and Section 2(1) of the Act provides as follows:-

> ***"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 or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons."***

The commencement date of the Act was 1983 and the deceased herein died on 5th August, 1991 and so in my view, since the dispute relates to intestate succession to the estate of the said deceased person, the applicable law is Cap 160. If the deceased had died before the commencement date of the said Act, the court would have been obligated to decide the dispute in accordance with Kikuyu customary law.

If the matter was to be determined by application of Kikuyu customary law, the cardinal principle of land inheritance is the observance of equality amongst the different households of the deceased. Also, under the said law, a married woman cannot inherit her father's land – see ***WAMBUGU W/O GATIMU VS STEPHEN NYAGA KIMANI (1992) 2 KAR 292.***

Cotran in his ***Restatement of African Law*** Volume 2 at page 8 observed that:-

> ***"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 a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried."***

The petitioners have based their claim on Kikuyu customary law in their contention that since the objector was a married daughter of the deceased, she was not entitled to inherit any share of the suit land even if her husband had died and she had gone back to her father's land and settled there. However, Section 40(1) of the Law of Succession Act does not discriminate between daughters and sons of a deceased person in matters of intestate or testamentary succession. It provides as follows:-

"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 estate 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."

Section 3 of the Act defines a "***house"*** to mean,

> ***"a family unit comprising a wife, whether alive or dead at the time of the death of the husband, and the children of that wife."***

It is not in dispute that the objector is a daughter to the deceased and that she was married but separated with her husband (who is now deceased) then she went back to her father's land and settled there. It is evident that there has been deep seated differences between the parties.

The suit land was purchased by the deceased through a loan advanced to him by the Settlement Fund Trustees. There were arguments as to who exactly between the deceased, the first petitioner and the objector serviced the loan but in my view, that is not important for purposes of determining this matter. The objector may have contributed towards repayment of the loan but that cannot entitle her to the entire parcel of land as she stated in paragraphs 4 and 5 of her petition. The suit land was for all intents and purposes owned by the deceased.

The suit land ought to be distributed amongst all the beneficiaries of the deceased's estate in terms of Section 40 of the Law of Succession Act that is, in the first instance, among the two houses according to the number of children in each house but also adding the second petitioner as an additional unit to the number of children.

The first house consists of the objector, Hannah Nyambura Kuria, Peter Kirara (the first petitioner) and Miriam Muthoni.

The second house consists of Grace Wairimu Kuria, Chege Kuria, Karanja Kuria, Amos Karuga Kuria, Shadrack Njenga Kuria and Hannah Nyambura. These are nine units.

The suit land should therefore be divided into nine equal units and each of the above named persons shall

be entitled to one. If thereafter the other two married daughters – Miriam Muthoni from the first house and Hannah Nyambura from the second house will choose to surrender their portions to their siblings it will be upto them.

With regard to the issue of costs, since this is a family dispute, the order that commends itself to me is that parties do bear their own costs.

DATED, SIGNED & DELIVERED at Nakuru this 26th day of November, 2004.

DANIEL MUSINGA

AG JUDGE

26/11/2004