REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO 1757 OF 1999

IN RE ESTATE OF WARUI (DECEASED)

JUDGMENT

The succession matter before me is for revocation of grant. The applicant is related to the deceased as a nephew. He is represented by M/s Kirubi, Mwangi Ben & Co Advocates. The respondents are related to the deceased as daughters. They are represented by M/s P K Mureithi & Co Advocates. Briefly, Hirigo Warui, a male adult died in Gacharageini sub-location in Kenya aged 78 years old. This was on the 7th of March 1970. He died intestate and prior to the commencement of the Law of Succession Act cap 160 Laws of Kenya. His wife had died prior to him. He was nonetheless survived by four daughters.

On the 13th of August, 1999 almost 29 years later the four daughters took out letters of administration intestate for the estate of their father. These letters were issued and confirmed by Kuloba, J on the 30.11.99 and 5.5.2000 respectively.

The effect of this was that the deceased estate LR Loc 19/Gacharageini/ 682 was apportioned and registered equally amongst the four sisters. On the 2nd of October, 2000 by an application dated 21st of September 2000, one Hirigo Ndegwa of PO Box 75 Gacharegini claimed that the letters of administration obtained by the four sisters was so done fraudulently by making of a false statement and concealing of a material fact namely; The four sisters are all married daughters of the deceased and were never dependent on the deceased. That his father and the deceased were brothers. The deceased was therefore his uncle. The deceased estate consisting of the land parcel Loc 19/ Gacharageini/682 had all along been in his occupation. This therefore makes him a dependent of the deceased. The four sisters were fully served and in reply stated that Hirigo Ndegwa was never a dependant of their father. He never at any time lived on the land belonging to their father but has all along lived on land parcel Loc 19/Gacharageini/675 that belongs to his own father.

They further relied on section 38 of the Succession Act cap 160 that reads:-

“where an intestate has left a surviving child or children but no spouse, the net estate shall subject to the provisions of section 41 and 42 devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.” The issue therefore arose as to whether the grant should be revoked. I require to explain briefly how the procedure of revocation is first heard. Once summons for revocation of grant has been field, the Registrar of the High Court of Kenya in charge of probate issues form P & A 70 requesting the applicant to appear before the hon judge at a time set for orders as to whom should be served with the application. In this case the applicant was given the dates of 21.9.2000 and appeared before Rawal, J she directed that the administrators be served. Under rule 44 (3) the hon judge

would direct what persons to be served with the application; their addresses and names. The mode of service would also be specified. The hon judge would also direct that form P & A 68 be served on such parties. This is a notice requiring that an affidavit be filed in answer to the application for revocation of grant stating whether they support or oppose the same and the reasons thereof.

The parties appear in Court at a date specified in form P & A 68. The judge would read the pleadings and would proceed to determine the matters and make a finding as to whether the grant should be revoked or not. In this case, the parties agreed that I should determine this matter from the reading of the pleadings. I ruled on the 19th of December 2000 that I required the advocates to submit to me on point of law touching the following questions:-

"which law is applicable where the deceased died prior to the commencement of the Act. See section 2 (2) of the Law of Succession Act cap 160". The parties were given one month in which to prepare and make their submissions. It is unfortunate that Mr P K Mureithi did not address himself fully to this matter. He relied on section 2 (2) of the Law of Succession Act. Mr Kirubi on the other hand was able to provide authorities (belatedly) whereby showing that the estate should have been distributed according to Kikuyu customary law. Section 2(2) of the Law of Succession cap 160 reads:-

"The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administrator of their estate shall commence and proceed so far as possible in accordance with this Act".

This basically means to my mind that once the Law of Succession Act was enacted, then the procedure for filing for a succession cause would be as per the Act. The distribution of the estate on the other hand would be subject to "the written laws and customs applying at the date of death". The deceased died on the 7th March 1970. The law applicable then was the Kikuyu customary law. This law provides that if the deceased is survived by a spouse or spouses together with children, his estate is divided equally amongst the respective houses. See the case of *Mbathi v Mbathi* [1976] KLR 120 and *Reinstatement of African law and the Law of Succession* by Mr Justice Cotran.

According to Kikuyu customary law, the general principle given is that Kikuyu law of inheritance is patrilineal, namely the equal distribution of a man's property amongst his sons. The share amongst the house therefore referred to the widow of each polygamy home. The widows would have life interest. The daughters are normally excluded if they are married. Unmarried daughters are given a part of the share of the estate.

It is in dealing with a similar case to this (except that the same referred to a polygamous house), that the Court of Appeal in the case of: *John Ndungu Mubea v Milka Nyambura Mubea* CA 76/90 Established that the deceased died in 1978 prior to the Law of Succession.

It recognized the two houses of the deceased whereby the first house consisted of the widow No 1, six sons and six daughters (married). The second house consisted of one son and ten unmarried daughters. The wife No 2 had since died in 1976. Those entitled to the estate according to the Kikuyu customary law is that the widow of each house gets an equal share of the property irrespective of the number of children a daughter who remains unmarried may be allocated a piece of land.

"On death or subsequent marriage, [the land] normally reverts to the heir out of whose portion the land was given. The illegitimate children may inherit the land" None of the married daughters received any share of the estate.

It is on this basis, I am made to understand the applicant's submissions that none of the four daughters are entitled to the estate. They are all married and even if they were given the share of the estate it must revert back to the heir out of whose portion the land was given. Mr Mureithi brought up the part that the "patrilineal" pattern actually refers to a brother but not a nephew as is in this case. The applicant is therefore not entitled to the estate. Further the deceased left no one to survive him except the four daughters according to the line of consanguinity. The actual brother and father to the applicant had shown

no interest in the matter.

Despite this, the Kikuyu customary law had undergone some changes due to society according to Harris J in the case of *The Matter of the Estate of Stephen Mbuthia* HCCC 1289/74 whereby he commented on Justice Cotran recognizing that

"African customary law is in a fluid state, that changes occur due to various factors such as education, the influence of religion and social and economic advancement and that the volume (a reinstatement of African Law) should not be taken to be a once-and-forall- statement."

He went further to state that he was

"entitled to and should take judicial notice of the relative increase in the degree of emancipation of the young generation of women which has become prevalent .. such as education employment and ownership of property and the leaning toward equality of rights, privileges and obligations as between sexes indicated in the Constitution of [the] country and apply these in the consideration of the question of the right of unmarried sisters in the distribution or inheritance of the property of the deceased father."

He held i*nter alia* that the children are entitled to inheritance through their widows houses including the daughters (unmarried in equal shares). Gichuhi J (as he then was) in the case of *Muthami & others v Mwaniki* HCCC CA at Nairobi 267/80 analyzed the Law of Succession Act cap 160 and the customary law prior to the enactment. After the enactment the effects of customary law for persons who have died.

In that case he states:-

"The deceased died intestate in 1975. At that time he was subjected to customary law on intestacy applicable

to members of the Kikuyu tribe which they belonged…Due to the provisions of the Succession Act the administration of the estate shall commence or proceed so far as possible in accordance with this Act."

This section 2(2) actually means that the administration of the deceased estate being overtaken by events. The residue estate being administrated in accordance with Succession Act cap 160.

In this particular case there was only one house. Each child is entitled to a unit. The distribution has been done in accordance to section 38 of the Law of Succession Act. Women are therefore entitled to inherit their father's properties even when they are married under the Succession Act.

I would therefore agree with Mr Mureithi and the above authority by achuhi J that the distribution under customary law is in line with the Act. Namely, where there are no male survivors; no parents, the surviving children (daughters/married) are entitled to the estate as this keeps the distribution of the estate according to customary law but proceeds as far as possible in accordance to the Act. I hereby refuse to revoke the grant and dismiss this summons with costs to the respondents. I thank the advocate for the applicant for his research on the authorities.

Dated and delivered at Nairobi this 25th day of January, 2001

M.A. ANG'AWA

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JUDGE