



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

PROBATE & ADMINISTRATION APPEAL NO. 5 OF 2018

IN THE MATTER OF THE ESTATE OF WANJAU KIMORI alias WANJAU S/O KIMORI (DECEASED)

VIRGINIA NJERI MUTURI.....APPELLANT

VERSUS

ALFRED MWANGI WANJAU.....RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate Hon. B. M. Ochoi delivered on 25/9/2018 in Mukurwe-ini

Principal Magistrate's Court Succession Cause No. 17 of 2018).

JUDGEMENT

Brief facts

1. The respondent in Mukurweni Succession Cause No. 17 of 2018 applied for confirmation of grant in which he would be the sole heir of the deceased's properties namely Land Parcel No.s GITHI/MUTHAMBI/xxx and GITHI/IGANA/xxx to which the appellant filed a protest that was heard fully and dismissed for lack of merit.
2. Being aggrieved with the decision of the Trial Court, the appellant lodged this appeal citing 3 grounds which can be summarised thus:- That the Learned Magistrate erred in law and in fact in by applying customary laws which are discriminatory, repugnant to justice and morality contrary to Section 3(2) of the Judicature Act.
3. This appeal was argued by way of filing written submissions.

The Appellant's Submissions

4. The appellant argues that by applying Kikuyu Customary law to the distribution of the deceased's estate, it amounts to discriminating against her because of her gender and marital status. This is contrary to the constitution in **Article 27(3) & (4) and Article 1 of the Convention on the Elimination of all forms of Discrimination (CEDAW)**, which Kenya has ratified.
5. The appellant relies on the cases of **In the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased) [2017] eKLR and Daniel Mwongera M'Iringo vs Lucy Karambu M'Ikiao [2017] eKLR** and submits that the mode of distribution should be equal between her and the respondent. If the court allows the respondent to be the sole heir of the deceased's estate, such distribution shall offend the rules of natural justice, equity and good conscience.
6. The appellant further submits that the trial court erred by upholding that under Kikuyu Customary law, married women were excluded from inheriting from their parent's estate. This view is contrary to **Article 2(4) of the Constitution** which provides that any customary law that is inconsistent with the constitution is void to the extent of its inconsistency. The appellant relies on the case of **Peter Karumbi Keingati & 4 Others vs Dr. Ann Nyokabi Nguthi & 3 Others (2014) eKLR** to buttress her contention. As such, the appellant urges the court to distribute the estate of the deceased equally between her and the respondent because no child has superior rights over the other.

The Respondent's Submissions

7. The respondent submits that the law applicable in the instant case is kikuyu customary law and not Section 40 of the Law of Succession Act because the deceased died on 23rd January 1970 and the Law of Succession Act became operative on 1st July 1981. The respondent relied on the following authorities to support his contention, **Eugene Cotran in Law of Succession; Wambugi vs Kimani (1992) 2 KAR 292; In the Estate of Kiiru Muhia (2002) eKLR; Philis Michere Mucembi vs Wamai Muchembi (2010) eKLR; James Waithaka Nduturu vs Francis Nguyo Karue (2014) eKLR ; In Re Estate of Kiguta Mukei (deceased) (2013) eKLR; In Re Estate of Kimayo s/o**

Shibeyi (Deceased) [2020] eKLR; Moses Mooke Loontasati vs Twaarari Ole Loontasati [2020] eKLR and In Re Estate of Nduati Mbuthia (Deceased) [2015] eKLR.

8. The respondent further submits that the constitution which came into force on 7th August 2010 cannot be applied retrospectively to govern the deceased's estate herein. Moreover, the constitution at the time allowed for discrimination in matters relating to devolution of property upon death in section 84 and to this regard, the learned magistrate did not act on a wrong principle by applying kikuyu customary law to the deceased's estate. As such, the respondent contends that this honourable court ought not to interfere with the holding of the trial court.

9. The respondent further adds that if the appellant felt aggrieved by the discriminatory nature of the Kikuyu Customary law, she ought to have filed a constitutional petition as regards the constitutionality of section 2(2) of the Law of Succession Act. As such, the respondent urges the court to dismiss the appeal because it lacks merit.

Issues for determination

10. After careful analysis, we humbly submit that the two issues for determination are:

- a) What is the law applicable in this appeal.
- b) Whether the appellant is entitled to a share of the estate.

The Law

What is the law applicable.

11. The Law of Succession Act came into force on 1st July 1981. **Section 2(2)** provides that when a person dies before the commencement of the act, the law applicable is customary law.

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions in 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 administrator of estates of those persons.

(2) The estates 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 administration of their estates shall commence or proceed so far as possible in accordance with this Act.

12. The Act applies to estates of deceased dying after the commencement of the Act. Estates of the deceased persons dying before commencement of the Act are subject to written laws and customs applying at the time of death. The administration of their estates shall commence or proceed so far as possible in accordance with the Act. Since the deceased died before the commencement of the Law of Succession Act the distribution of his estate is strictly governed by the applicable customary law.

13. The Court of Appeal in **Phillis Michere Mucembi vs Wamai Muchembi [2010] eKLR** where the deceased died before the commencement of the Act stated:-

“Section 2(2) of the Law of Succession Act clearly excludes the distribution of the estate of a person who died before 1st July 1981. Such property must be distributed in accordance to the Law of Succession that was in place before the Law of Succession was enacted.”

14. Similarly, in **Muthami & Others vs Mwaniki HCCA No. 267/80 Gachuhi J (as he then was)** analysed the Law of Succession Act and the customary law prior to the enactment of the Act. He stated that:-

“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.”

15. This position has also been asserted in various High Court decisions for instance **In the Matter of the Estate of Kiiru Mulua 'A' where Justice Rawal (as she then was)** held that the provisions of the Law of Succession Act do not apply to persons who died before the Act came into force.

16. The deceased herein died on 23rd January 1970. As rightly submitted by the respondent, the customary law applicable then was Kikuyu customary law in which married daughters do not inherit their father's estate. However, it is noteworthy that customary law has undergone some significant changes. **Harris J** in the case of **The Matter of the Estate of Stephen Mbuthia HCCC No. 1289 of 1974 commenting on Eugene Cotran's Restatement of African Customary Law** observed:-

“African customary law is in a fluid state, that changes occur due to various factors such as education, the influence of religion and social economic advancement and that the volume (a restatement of African Law) should not be taken to be a once and for all statement. He further stated that....”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, empowerment and ownership of property and the leaning towards the equality of rights, privileges and obligations as between sexes indicated in the Constitution of the country and apply this in consideration of the question of the right of unmarried sisters in the distribution or inheritance of the property of their deceased father.”

17. Customary law is not static, it should not be repugnant to justice and morality or inconsistent with any written law. Dr. Patricia Kameri Mbote observes the fact that customary law is fluid, flexible and dynamic makes it capable of gross manipulation by the main actors in it a position Mativo J agreed with and he states that many parties before the court tend to interpret the customs to suit their case. **In Re Estate of Ngamini Kirira (Deceased) [2016]eKLR**. I rely on the fluidity of customary law and find the words of Mativo J persuasive in that the respondent in the instant case would elect to choose customary law because it is more favourable to him.

18. Evidently, the previous Constitution did not have an express clause on discrimination in matters of ownership or distribution of property. However this country has been ushered into a new constitutional dispensation where discrimination is outlawed. Particularly **Article 27** provides:-

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

19. Article 27 outlaws discrimination on any ground including sex, marital status and culture. The respondent argued that the Constitution which came into force on 07/08/2010 cannot be applied retrospectively. However, it is my considered view that at this age and time, this court cannot apply customary law that is discriminative on grounds of gender. Kenya, like the rest of the world has moved from the stoneage when such discriminatory laws and customs were used to oppress one gender against the other. In my view the Constitution 2010 is applicable in this cause.

20. My reading of Section 2(2) of the Act is that nothing strictly prohibit applicability of the Act in cases of deceased persons who died before 1981. Even if it was to be interpreted to the contrary, any provisions of statute cannot take precedence over a Constitutional provision.

21. Consequently, the applicable law would be **Section 38 of the Law of Succession Act** which provides as follows:-

Where an intestate has left a surviving child or children but no spouse, the net intestate shall, subject to the provisions of Sections 41 and 42 devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

22. The above provision is in line with Article 27 of the Constitution for it refers to the distribution of the estate property as between the children of the deceased, without making any distinction between the male and female children or referring to their marital status. The spirit of the Constitution is that all citizens are equal before the law as stipulated under Article 27(3) of the Constitution.

23. I find that the magistrate erred in law and in fact in giving the deceased’s estate wholly to the respondent and denying the appellant her rightful share despite the provisions of Article 27 of the Constitution.

24. The judgement of the trial magistrate is hereby set aside and substituted with an order that the estate of the deceased comprising of Githi/Muthambi/xxx and Githi/Igana/xxx be shared equally between the appellant and the respondent.

25. A certificate of confirmation of grant to issue in those terms.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 15TH DAY OF JULY, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 15th day of July, 2021.