



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 566 OF 2014

RE ESTATE OF KIMOTHO MUKIRIA (DECEASED)

ESTHER WAIRIMU GACHINGA.....ADMINISTRATOR

VERSUS

ANNE WAMBUI WAMAE.....PROTESTOR

JUDGMENT

1. Kimotho Mukiria (hereafter *the deceased*) died intestate in 1979. There is a contest between his *daughter* and *daughter in law* over inheritance of a piece of land known as Loc.11/Maragi/562 (hereafter *the suit land*)
2. A joint grant of letters of administration was issued to the disputants on 5th December 2014. The administrator lodged a summons for confirmation of the grant on 14th May 2015. She proposed that the suit land be shared equally between her and the protestor.
3. On 4th June 2016, the protestor filed an affidavit of protest. Her case is that the deceased was only survived by her late husband James Wamae Kimotho and their seven children named in paragraph 5 of the deposition. In a word, she deposed that the administrator was not entitled to any share of the land.
4. Learned counsel for both parties opted *not to lead oral evidence*. On 5th September 2016, learned counsel Mr. Mbutia informed the Court that "*the issue is a pure point of law....It can be canvassed by submissions*". The Court (*Waweru J*) then directed that the protested summons be determined by *submissions*.
5. The submissions by the administrator were filed on 3rd October 2016; those by the protestor on 31st October 2016. On 11th June 2019, I heard further arguments by learned counsel for both parties.
6. From the pleadings and submissions, the *key issue* for determination is whether the administrator, as a *married daughter*, is entitled to a share of her father's estate. Paraphrased, since her father died before the coming into force of the **Law of Succession Act** (hereafter *the Act*) should the estate be distributed under *Kikuyu* customary law?
7. I find that the following facts are admitted by both parties: Firstly, that *Kimotho Mukiria* (hereafter *the deceased*) died intestate in 1979. Secondly, that he was survived by two children, namely Esther Wairimu Gachinga (hereafter *the administrator*) and James Wamae Kimotho. The latter is also deceased. He was married to Anne Wambui Wamae (hereafter *the protestor*). Thirdly, the only asset is Loc.11/Maragi/562 measuring approximately 4.5 acres.
8. It is also not disputed that the administrator got married in the year 1966 well before the deceased died. She has not lived on the suit land since then. She and her children live elsewhere on her husband's land. Lastly, it is also common ground that the protestor also got married to the said James Wamae Kimotho in 1966; and, that she and her seven children have lived continuously on the suit land.
9. The **Law of Succession Act** only came into force on *1st July 1981*. Section 2 (1) of the Act expressly provides that it shall apply to the estates of persons dying *after* commencement of the Act. I thus readily find that the Act could *not* apply *retrospectively* to the estate of the deceased.
10. Section 2 (2) further provides that estates of persons who died before commencement of the Act are subject to the written laws and *customs* applying at the date of death. I thus find that the estate of the estate was governed by *Kikuyu* customary law.

11. The only question is whether the custom was *in conformity* with section 3 of the **Judicature Act**. Learned counsel, *Mr. Mbuthia*, submitted that in view of the Act and the **Constitution of Kenya 2010**, the custom was discriminatory and flew in the face of justice.

12. I am well guided by a long line of precedents including *Kimani v Gikanga* [1965] EA 375, *Apeli v Buluku* [1985] KLR 777, *Joash Ochieng Ougo & another v Wambui Otieno* [1987] KLR 364, *Wambugi Gatimu v Stephen Kimani* [1992] 2 KAR 292, *MWG v EWK*, Court of Appeal, Eldoret, Civil Appeal 20 of 2009 [2010] eKLR.

13. No evidence was led to suggest that *Kikuyu* customary law on intestate succession is repugnant to morality or justice. There is no such averment in any deposition. I also find that the mere fact that the property was registered under the **Registered Land Act** (now repealed) did *not* remove the estate from succession under the *Kikuyu* customary law. See *Mbuthi v Mbuthi* [1976] KLR 145.

14. I am alive that the **Constitution** is not *necessarily subject to the same principles against retroactivity as ordinary legislation*. I am also guided by the Supreme Court that in order to re-engineer the social order, a constitution must *look forward and backward, vertically and horizontally*. See *Samuel Kamau Macharia and another v Kenya Commercial Bank* Nairobi, Supreme Court, Application 2 of 2011 [2012] eKLR.

15. However, the **Constitution** did not throw customary law out of the window. The decision cited by learned counsel for the administrator in *Thui & another v Hingi* [2019] 1 KLR 11 related to a situation where two daughters of the deceased were being disinherited by their uncles (the brothers of their deceased father). The facts here are startlingly different: the administrator got married in 1966; nearly *thirteen years* before her father died. She and her children have *not* occupied the suit land since and live on another property belonging to her husband.

16. It is true that married daughters have a right to inherit their fathers' property. The circumstances here are peculiar and militate against the claim by the administrator. This cause was only lodged in 2014. The administrator has decided to reclaim a share of her inheritance *48 years* later. She is certainly not barred from making the claim. I note however that she got married in 1966 when the deceased was still alive. She has not lived on the land since then. She lives on other property belonging to her husband. It is not lost on me that her late brother James Wamae Kimotho and his family have lived on the suit land throughout.

17. I thus find that it would be *unjust* for the administrator to get a share of the land. The power and discretion of the court is not in doubt. See *Rono v Rono & another* [2008] 1 KLR (G&F), [2005] 1 KLR 538.

18. Having reached that conclusion, I order that Anne Wambui Wamae shall have a *life interest* over the whole of the property known as Loc.11/Maragi/562 to be *held in trust* for her seven children particularized in paragraph 5 of her affidavit sworn on 2nd June 2015.

19. The grant shall be *confirmed* in terms of this judgment.

20. Costs follow the event and are at the discretion of the court. In the interests of justice each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 6th day of February 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Mbuthia for the administrator instructed by J. N. Mbuthia & Company Advocates.

Mr. Odinga holding brief for the protestor instructed by Waiganjo Gichuki & Company Advocates.

Ms. Dorcas & Ms. Elizabeth, Court Assistants.