



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 979 OF 2015

IN THE MATTER OF THE ESTATE OF PETER GITONGA KIOMA

alias GITONGA S/O KIOMA (DECEASED)

CHRISTOPHER MWANGI GITONGA.....PROTESTOR

VERSUS

PASKWERINA WACHUKA GITONGA

AUGUSTINE WAMBUGU GITONGA.....PETITIONERS/ RESPONDENTS

RULING

FACTS

1. The estate relates to the late Gitonga Kioma (deceased) who died intestate on the 6th June, 1976; the identifiable property comprising the estate of the deceased is the land parcel number Tetu/Muthuaini/350;
2. The deceased was polygamous and had two wives and was survived by ten (10) children from two house holds; the beneficiaries are as set out hereunder;

FIRST HOUSE

Paskwerina Wachuka Gitonga – daughter

Consolata Wangui Waithaka – daughter

Lucy Wandia Wanjiku – daughter

Christopher Mwangi Gitonga – son

Mary Wangari Kibaara – daughter

Francis Karoki Gitonga – son

Esther Muthoni Wachira - daughter

SECOND HOUSE

Augustine Wambugu Gitonga – son

Magdaline Nyaguthii Nderitu – daughter

Lucy Wandia Kamangu - daughter

3. The petitioners are Paskwerina Wachuka Gitonga and Augustine Wambugu Gitonga who petitioned for Letters of Administration to the deceased's estate and a Grant was issued to them; they subsequently filed for summons for the Confirmation of the Grant on the 24/05/2017

and therein proposed their mode of distribution;

4. The protestors on their part filed their Affidavit of Protest dated 16/10/2017 against the petitioners' proposed mode of distribution and therein proposed their own mode of distribution;

5. Directions were given on the 17/10/2017 on both the Summons for Confirmation of the Grant and the protest dated 1st November, 2007 that parties canvass the Protest by way of filing and exchanging written submissions limited to the provisions of Section 38 and 40 of the Law of Succession Act; hereunder is a summary of the parties rival submissions;

PROTESTOR'S CASE

6. The petitioners filed summons for the confirmation of the Grant; the application is dated 24/05/17 and therein they proposed the mode of distribution of the property known as parcel no. TETU/MUTHUAINI/350; that this parcel of land be divided into two portions as between the two houses;

7. The deceased was polygamous and had two wives who are both deceased; and he died intestate; the petitioners proposed that the portion for the first house be distributed to three individuals and excluded four beneficiaries from this said house; but all the beneficiaries in the second house were included in the distribution of the second portion;

8. The protestor opposed the proposed mode of distribution on the grounds that the distribution was not only discriminatory but also unfair; and that everyone ought to have been included in the distribution; their proposed mode of distribution was that the property be shared amongst the ten (10) children of the deceased;

9. The case law cited was **Nyeri Succ. Cause No.1035 of 2009**(Unreported); **Nyeri Succ. Cause 503 of 2013** (Unreported); and **Re; Estate of Ruth Nyakanini Rukwaro (deceased) [2016] eKLR**;

10. The protestor cited the applicable law as the Constitution 2010 and the Law of Succession Act but cited no specific Article or provision of the law;

11. He prayed that the Protest be allowed and that the estate be distributed as prayed in paragraph 11 of the Protest. **PETITIONERS' CASE**

12. In response the petitioners stated that the succession proceedings commenced by way of a Citation dated 18/0/2016 and all the beneficiaries were duly served pursuant to Rule 21 of the Probate and Administration Rules; none of the Citees entered appearance or filed any Petition;

13. The petitioners proceeded to petition for Letters of Administration and were issued with a Grant; and they then filed the application for confirmation of the grant dated 24/05/2017; therein they proposed their mode of distribution that the estate of the deceased be shared equally between the two houses as set out hereunder;

FIRST HOUSE

Paskwerina Wachuka Gitonga – unmarried daughter)

Christopher Mwangi Gitonga – son) – 1.733 Acres each

Francis Karoki Gitonga – son)

SECOND HOUSE

Augustine Wambugu Gitonga)

Magdaline Nyaguthii Nderitu) – 1.733 Acres each

Lucy Wandia Kamangu)

14. Their position was that the applicable law was Kikuyu Customary Law as the deceased passed on 6/06/1976 which was before the coming into operation of the Law of Succession Act;

15. Accordingly, the administrators proposed mode of distribution was in accordance with Kikuyu Customary.

ISSUES FOR DETERMINATION

16. Upon reading the proceedings and the rival written submissions this court has framed the following issues for determination;

(i) Whether Kikuyu Customary Law is applicable in distribution of the estate of the deceased;

(ii) Distribution of the estate;

ANALYSIS

Whether Kikuyu Customary Law is applicable in distribution of the estate of the deceased;

17. The basis of his protest was that the respondents/petitioners had excluded the married daughters of the first house in their proposed mode of distribution; and the protestor proposed mode of distribution was that the deceased's property be shared equally between the houses and also shared between his sons and daughters irrespective of the daughters marital status; whether married or unmarried they were still beneficiaries and entitled to a share in their deceased father's estate;

18. The petitioners contend that as the deceased died in 1976 before the advent of the Law of Succession Act therefore submitted that Kikuyu Customary law is the only applicable law in this instance; and relied on Section 2 of the Law of Succession Act which reads as follows;

“2. Application of Act

(1) 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.

(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.”

19. It is apparent that the respondents have a set mind in that the property should only be inherited by the sons of the deceased and unmarried daughters; and that the deceased being polygamous and having two wives who are both deceased; their demise notwithstanding the respondents propose that the division of the deceased's land be in two equal shares between the two houses as provided under Kikuyu Customary law;

20. The Law of Succession Act ('Act') indeed came into force in 1981 and its advent was indeed after the demise of the deceased herein who passed on in 1976; Kikuyu Customary Law as opposed to the Act may be applicable in this instance but in order for the customs and law to be applicable the same must not be inconsistent with any written law or found to be unconstitutional for being discriminatory against women;

21. The Kenya Constitution 2010 is a fundamental written law and is superior to Kikuyu Customary law and is applicable in this instance; Article 27 of the Constitution 2010 provides that every person is equal in the eyes of the law and before the law; and the Article goes further to state that there should be no discrimination on any ground including gender which encompasses marital status; the Constitution does not allow discriminatory rules and customs in matters of personal law, including inheritance;

22. There ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person;

23. From the submissions presented this court is satisfied that the failure by the respondents to include the married female siblings in their proposed mode of distribution is both discriminatory and unfair; and that the married daughters qualify as beneficiaries and are entitled to benefit from the deceased's estate;

24. This court is satisfied that Kikuyu Customary Law is inapplicable as it is found to be unconstitutional for being discriminatory against women; for this reason the Protest is found to have merit;

Distribution of the estate

25. This court being satisfied that the that the deceased's daughters regardless of their marital status qualify to be beneficiaries of the deceased's estate; the task left for this court is to determine the dispute on the distribution of the deceased's estate;

26. There is no dispute as to the property that comprises the estate of the deceased; it is also not disputed that the deceased was a polygamous man and had married two wives and that both are deceased; if any of the widows were still alive then in the circumstances the applicable law would have been Section 40 of the Act and distribution of the estate would have been subjected to and in accordance with that said provision of law;

27. In this instance there being no surviving spouse, the applicable section in these circumstances is found to be Section 38 which provides that the estate of the deceased be divided equally between the surviving children of the deceased; the section reads as follows;

“38. Where intestate has left a surviving child or children but no spouse

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

28. It is also an undisputed fact that the deceased was survived by ten (10) children; therefore the property known as Tetu/Muthuaini/350 shall be distributed equally amongst the ten (10) children of the deceased in accordance with Section 38 of the Law of Succession Act.

FINDINGS AND DETERMINATION

29. For the afore-going reasons this court makes the following findings and determination;

(i) This court finds Kikuyu Customary Law to be inapplicable as it is unconstitutional for being discriminatory against women; and finds that the daughters of the deceased irrespective of their marital status are beneficiaries and are entitled to benefit from the deceased's estate;

(ii) The respondents proposed mode of distribution is found to be unfair and discriminatory;

(iii) The Protest is found to have merit and it is hereby allowed;

(iv) The estate of the deceased shall be distributed in equal shares amongst the ten (10) children of the deceased; the Grant is hereby confirmed on the terms set out in paragraph 28;

(v) The parties are at liberty to apply;

(vi) Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 16th day of April, 2020.

HON. A. MSHILA

JUDGE