



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 136 OF 1992

IN THE MATTER OF THE ESTATE OF M'IKIARA M'NGOJI alias KIARA NGOJI (DECEASED)

MARK NYOMOO M'IKIARA.....PETITIONER/PROTESTOR

VERSUS

CELINA MUGITO.....OBJECTOR

JUDGMENT

1. **M'IkiaraM'Ngoji (the deceased)** died on 22nd October 1980. On 19th August 1992, Mark NyamooM'Kiara petitioned for letters of administration citing LR No. ABOTHUGUCHI/GAITU/57 as the deceased assets and Paulina KathambiMbijawe and Mark NyamooM'Kiara as his dependants.

2. On 1st September 1992 Celina MugitoM'Ikiara, daughter of the deceased herein filed an Objection claiming that the petitioner had the intention of disinheriting her as he did not inform her of this cause.

3. On 6th May 2010, this court revoked the grant issued to the Petitioner and ordered that a fresh grant be issued to the Objector. In her summons for a restraining order and confirmation of grant filed on 8th May 2010 the objector averred that the deceased estate comprised of LR ABOTHUGUCHI/GAITU/57 and ABOTHUGUCHI/ KARIENE/1079. The deceased was survived by the following;

1. Margret Kanyai -Daughter (married)
2. Esther Kinaau -Daughter (married)
3. LucitaMaiti -Daughter (married)
4. Celina Mugito -Daughter (unmarried)
5. MbijaweMuthamia -Son (deceased)

4. Further that the deceased bequeathed land parcel number ABOTHUGUCHI/KARIENE/1038 to Mbijawe Muthamia who in turn left it to his son Mark Nyomoo. Accordingly, the Objector proposed the estate to be distributed as follows;

A. ABOTHUGUCHI/GAITU/57 measuring 13 Acres

- i. LucitaMaiti - 3.83 Acres
- ii. Celina Mugito - 5.23 Acres
- iii. Mark Nyomoo - 3.93 Acres

B. Kaarine Land Parcels

- i. Celina Mugito -ABOTHUGUCHI/KARIENE/1079
- ii. Mark Nyomoo - ABOTHUGUCHI/KARIENE.1038

5. On 28th June 2010 Mark Nyomoo M'Ikiara filed an affidavit of protest where he claimed that the objector's proposal is not fair since she granted herself the prime share of the deceased estate. He disputed the claims that ABOTHUGUCHI/KARIENE/1038 formed part of the deceased estate and argued that his father was the only son of the deceased therefore he was entitled to all of his father's land. He proposed the following as his mode of distribution according to Kimeru Customary Law;

ABOTHUGUCHI/GAITU/57 – Mark Nyomoo M'Ikiara Whole

ABOTHUGUCHI/KARIENE/ 1079- Mark Nyomoo M'Ikiara Whole.

6. This protest was heard vide viva voce evidence. **PW1 MARK NYOMOO** testified and told the court that the deceased was his grandfather who raised and educated him. He grew up in his grandfather's home and eventually got married there. Celina was first married to John Gituma and thereafter she had four children with Geoffrey. In 1992 after the death of his grandmother, Celina moved to plot 57. Further Peter Thurania and George Kiogora were present when the deceased gave him the land. During his testimony he was shown the green card to Parcel 1038 which showed that Mbiriwiwe Ikiara was the owner of the parcel. PW1 additionally stated that he cultivates the land at Gaitu and that his mother uses parcel number 1079.

7. **PW2 George Kiogora Imanyara** testified and told the court that he was the neighbour of the deceased in Gaitu and is familiar with his family. PW2 was called by the deceased who asked him to care of the protestor. Additionally the deceased told him that his daughter were cultivating the land and should be allowed to do so until they are satisfied then the land would go to the protestor. Later the protestor was given the title of the land by his grandmother and after her passing Esther and Celina moved into her house.

8. **PW3 Peter Thurania** testified and told the court that the deceased herein is his uncle. He recalled the deceased saying that the land was for the protestor after his daughters were tired of cultivating it. The deceased however did not say anything about the Kariene farm. PW3 additionally stated that Celina was married two times.

9. **PW4 Paulina Kathambi** testified and told the court that the protestor is her son and the Objector is her sister in law. The deceased has land in Gaitu and not in Kariene since the land at Kariene belonged to her husband. She was living at Kariene with her husband while the deceased lived at Gaitu. She stated that the protestor lives at Gaitu as he went there when he was a young boy. She was also aware that the deceased gave the land to the protestor and does not deny the fact that Selina cultivates the land.

10. **AW1 Lucita Maiti** testified and told the court that the deceased is her father. The deceased estate comprised of land at Kariene and Gaitu. The land at Kariene is utilized by PW4. The deceased had given part of the land at Kariene to her deceased brother and that the land at Gaitu is still in the name of the deceased. It is her prayer that that the land is distributed to them as proposed by the objector as her other two sisters are deceased.

11. **AW2 Selina Mugito** testified and told the court that she has 4 children but she is not married. During her testimony she presented the green cards that showed the deceased owned land at Gaitu and Kariene. She confirmed that the protestor lives at Gaitu with her and that the deceased gave the protestors father land at Kariene which she lays no claim on.

ANALYSIS AND DETERMINATION

12. Distribution of this estate is the issue in controversy.

13. But, before I delve into the issue of distribution this court has noted that the deceased herein died in 1980 before the commencement of the Law of Succession Act, cap 160 of the laws of Kenya. Therefore customary law is applicable to this case. **In the Restatement of African Law** by Eugene Cotran, *The Law of Succession* at pg 34 it is stated that in Meru Customary Law daughters do not inherit land.

14. From the argument coming through it is clear that discrimination based on gender and marital status has reared its ugly head again. From the Meru Customary Law, a daughter is disadvantaged in inheritance simply because she is a woman. If she gets married she is disinherited completely. However, developments in international law sowed new relief; all forms of discrimination against women were shoved aside. And state parties began to provide within their legal and judicial systems that discrimination of women is prohibited by law. The decision in **RONO vs. RONO [2008] 1 KLR 803** was opened new understanding. In particular, the opinion by Waki, J.A., who said that:-

“Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two International Human Rights Covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966). In 1984, it also ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women in short “CEDAW”. Article 1 thereof defines discrimination against women as:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field”.

15. Also in the case of **Mwongera Mugambi Rinturi & another v Josephine Kaarika & 2 others [2015] Eklr** the Court of Appeal stated bluntly that;

“It would appear from the totality of the submissions made before us and the stance adopted by the appellants all through

this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratrix of the estate. That much was clear from Mr. Kioga's resort to Meru Customary Law which stipulated, as captured by Dr E. Cotran in his Restatement of African Law: Vol 2 Laws of Succession at p30;

"Daughters receive no share of the estate. In the absence of Sons, the heirs are the nearest paternal relatives of the deceased, namely father, full brothers, half-brothers and paternal uncles".

With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority of Kenya's communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents' inheritance and may boldly approach to claim it. What RONO –VS- RONO (Supra) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010. See also GRACE WACHUKA –VS- JACKSON NJUGUNA GATHUNGU [2014] eKLR. We have already noted that Mr. Kioga did concede, as he had to, that one cannot exclude daughters. We have also adverted to the irony of his then asserting in the same breath, that Florence should nevertheless have been excluded."

16. Having said that, I turn back to the facts of the case and the applicable law. The protestor seems to rely on the Meru customary law to disinherit the daughters of the deceased. That will not happen in the watch of the Constitution. I reject his arguments and claims that he is entitled to the whole estate.

Dependant

17. The record reveals that it is an undisputed fact that the protestor was raised by his grandfather at his home in Gaitu. Section 29 of the Law of Succession Act provides:-

"For the purposes of this part, "dependant" means-

a)

b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

18. Bearing this in mind and for the purposes of this suit, the protestor was a dependant of the deceased and therefore entitled to a share of his estate.

Distribution

19. Moving forward, in distribution Section 38 of the Law of Succession Act is a relevant guide; it states;

"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."

20. Notably, the distribution of the estate proposed by the Objector did not leave out the Protestor as alleged. In the circumstances of this case, although the protestor is a dependant, there is nothing to show that he should receive a share equal to that of the daughters of the deceased. His deceased father was bequeathed by the deceased of parcel number 1038. Lucita Maiti agrees with the distribution proposed by the objector. Hence, I find the distribution proposed by the Objector to be fair and reasonable. Accordingly, I order that the estate of the deceased shall be distributed as follows;

I. ABOTHUGUCHI/GAITU/57 measuring 13 Acres

i. LucitaMaiti - 3.83 Acres

ii. Celina Mugito - 5. 23 Acres

iii. Mark Nyomoo - 3.93 Acres

II. ABOTHUGUCHI/KARIENE/1079 - Celina Mugito Whole

21. This being a succession matter there will be no order as to costs.

Dated, signed and delivered in open court at Meru this 11th day of February, 2019.

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F. GIKONYO

JUDGE

In presence of

Kithinji for Gichunge for protestor

Muchiri for Kariuki for Administrator

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F. GIKONYO

JUDGE