REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 196 OF 1996

(IN THE MATTER OF THE ESTATE OF EVAN MUTHUI S/O NYAMU)

GRACE WANJIKU WAHOME.........................1ST APPLICANT

MELCHISEDEK WANGONDU MUTHUI......2ND APPLICANT

-VERSUS-

NEZRON NDUNGU MUTHUI.................................PROTESTOR

JUDGMENT

Evan Muthui Nyamu died intestate in 1969 domiciled in Kenya and living at Tetu location in Nyeri County. He left behind ten children of equal gender.

On 23rd July, 1996, the elder son, James Wahome Muthui petitioned for grant of letters of administration of his estate with the blessings of his four brothers. As a matter of fact, apart from himself, his brothers are the only people he named as having survived the deceased. He also named the deceased's widow but she was indicated to be deceased as at the time of lodging the petition.

The omission of the rest of the deceased's children from the petition did not go unnoticed for on 30th April, 1997, Charity Thogori Muthui, one of the deceased's daughters, objected to the grant being made to the petitioner for the very reason that he had failed to disclose the rest of the deceased's children in his petition.

Nevertheless, on 12th April, 2017, some 20 years later, a compromise was reached to have the grant made in the joint names of the applicants; by this time, it would appear, the original petitioner had died.

By a summons dated 25th April, 2017, the applicants sought to have the grant confirmed; in the affidavit in support of the summons for confirmation of grant, they named the following as the deceased's children who survived him:

1. Hezron Ndungu Muthui
2. Isaac Wambugu Muthui
3. Melikisedeki Wangondu Evan
4. Hellen Njoki Muthui
5. Charity Thogori Muthui

Apart from his children, they also named the 1st applicant as having survived the deceased in her capacity as the deceased's daughter-in-law; I suppose she was the original petitioner's wife. With this list of beneficiaries, they proposed to have each one of them get 1.3 acres of land known as **LR. Tetu/Unjiru/369**, which was listed in the affidavit in support of the petition for confirmation of grant as the only net asset that comprised the deceased's estate.

The protestor, though named as one of the beneficiaries, was not satisfied with this proposed scheme of distribution of the estate and so he filed an affidavit of protest in which he, *inter alia,* listed four other children of the deceased who survived him but whom the applicants had omitted from their list. He proposed that the estate be distributed equally amongst all, rather than few, of the deceased's children.

For the record, the children he listed as having been omitted from the applicants' list are named as follows:

1. Rachel Wangechi Muchemi

2. Isabel Nyaguthi Mwathi

3. Agnes Wangari Wachira

4. Alice Wambui Nguthuru

In the absence of any dispute as to the number and identities of the deceased's children and the extent of his estate, it would not have been necessary to look beyond section 38 of the Law of Succession Act, cap.160 to find an ideal scheme for distribution of the deceased's estate. That section simply provides for devolution of the estate on the surviving child or, where there are more than one, upon each one of them in equal shares; it states as follows:

> **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 be equally divided among the surviving children.**

But the deceased died in 1969, more than ten years before the Law of Succession Act came into force and therefore, going by the provisions of section 2 of the Act, its application to the present circumstances is restricted though not completely ousted; I say so because as much as the Act applies to succession and administration of those estates of persons who died after the commencement date, its application is still open to *administration* of estates of persons who died prior to the commencement of the Act notwithstanding that such estates would be subject to the written laws and customs applicable at the time of the death; in its pertinent part, this provision of the law states 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.**
>
> ***(3) …***
>
> ***(4) …***

No written laws to which the deceased's estate could be said to be subject at the time of his death were proved; neither has any of the applicants' witnesses stood out as an expert in Kikuyu customs from which the deceased hailed or, at very least demonstrated by way of evidence that the scheme of the proposed distribution is based on Kikuyu customs that applied at the time of death.

The closest the applicants came to in establishing their case in this respect was the citation by their learned counsel of the Court of Appeal decision in **Kanyi versus Muthiora (1984) KLR 712** where the question of inheritance rights among the Agikuyu was discussed.

In that case, the respondent sued her step-mother, the appellant, claiming half of the land that comprised her father's estate; her claim was based on the inheritance rights of unmarried woman under Kikuyu customary law. Her claim succeeded in this court. Being aggrieved by the court's decision, her step-mother appealed on grounds that being the first registered owner, any claim based on the customary rights was extinguished; that the land was not held in trust and, that the court could not rectify the register, in any event.

In dismissing the appeal, the Court of Appeal held, *inter alia*, that according to Kikuyu customary law, land is inherited by sons to the exclusion of married daughters but that an unmarried daughter is entitled to inherit land. Where an unmarried daughter has no child then her inheritance is subject to life interest; however, if she has a child, though illegitimate, the child will inherit her share of the inheritance. Accordingly, so the court held, the respondent was entitled to absolute ownership of a share of her father's estate.

The point is, married women were disadvantaged when it came to inheritance of their fathers' estates; but even the unmarried ones would not inherit as much as their brothers. Simply put, discrimination based on sex and marital status was sanctioned in the Kikuyu customs in devolution of intestate estates. The Court did not find anything wrong in this custom and so applied it without much ado.

The decision was made almost 35 years ago and since then so much water has passed under the bridge the most notable development being the promulgation of the Constitution of Kenya that came into force on 27th August, 2017. Article 27 of the Constitution proscribes discrimination in any of its forms; it states as follows:

> **27. (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).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

With this kind of legal development, such decisions as the one in the ***Kanyi versus Muthiora*** case on inheritance have been rendered otiose and inconsequential; save for historical purposes, they have lost currency to the extent that it is impossible to argue in the present times that, by reason of cultural beliefs, a married woman is not entitled to his father's inheritance; or that though she may be so entitled, an unmarried woman can only get a fraction of what her counterpart male beneficiaries or brothers are entitled to.

It is acknowledged that African communities hold their customs with much regard and, by all means, their cultural roots and practices ought to be respected for their vital role in sustaining the fabric of our society; however, the society itself has proved to be dynamic in diverse ways part of which includes extricating itself from those practices that are now considered archaic. The change of attitude towards such practices has, to a greater degree, been influenced by such factors as legal development which has itself been shaped by mainly external influences that the society has embraced as more 'civilised'. Inevitably, what may have been accepted previously as culturally useful in days of yore is no longer of much value in the present dispensation; at worst, those practices are now considered as inconsistent with justice and morality and to the extent they are contra to the mother law, the Constitution, they have outrightly been proscribed; **Article 2 (4)** of the **Constitution** captures this notion more aptly; it states:

2. (1) …

(2) …

(3) …

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) …

It follows, therefore, that a custom or customary law, as the case may be, that tends to discriminate a person on the basis of sex, marital status or on any other ground whatsoever, is contrary to article 27 of the Constitution and, in particular, sub-articles (1), (2), (3) and (4) to the extent that it promotes inequality in the treatment of persons based on cultural dogmas. Such custom or customary law is, in the words of article 2(4), inconsistent with the Constitution and therefore invalid.

Besides relying on the Court of Appeal decision where the Kikuyu cultural dynamics influenced the inequal distribution of an intestate estate amongst the surviving children, the applicants, as noted, did not provide any proof that purported customs applied to the deceased's estate. But it matters not that they did not provide the necessary proof because even if they did, such customs would be inconsequential in the face of the clear constitutional provisions that I have made reference to.

In these circumstances, the Law of Succession Act remains the only alternative I can fall back to in distribution of the deceased's estate. As I mentioned earlier, the application of this law has not been completely excluded from the estates of persons who died prior to the Act's commencement date; section 2(2), as noted, is a window for the application of the Act to the estates of persons who predeceased it though it limits the application to *administration* of those estates only. However, in the absence of proof of any written law or customs that applied to an intestate's estate who died before the Act came into force, or even if they existed, that they are consistent with the Constitution, I do not see anything wrong in extending the application of the Act to succession to the intestate's estate as well. I am of the humble view that the application of the Act to succession to estates of persons who died prior to the commencement of the Act would be plausible for the same reasons behind the application of the Act to administration of those estates. More importantly, section 38 of the Act subscribes to equality which is the same principle that the Constitution espouses in article 27 thereof.

For the reasons that I have given, I am inclined to come to the conclusion that the deceased's estate shall be distributed equally amongst all his children, male and female, married and unmarried alike. For avoidance of doubt, the land known as **Title No. Tetu/Unjiru/369** shall be shared out equally amongst the following persons:

1. **Hezron Ndungu Muthui**

2. **Isaac Wambugu Muthui**

3. **Melikisedeki Wangondu Evan**

4. **Hellen Njoki Muthui**

5. **Charity Thogori Muthui**

6. **Rachel Wangechi Muchemi**

7. **Isabel Nyaguthi Mwathi**

8. **Agnes Wangari Wachira**

9. **Alice Wambui Nguthuru**

It is not contested that the 1st applicant is a widow to one of the deceased's sons; in that capacity, she will get his share.

I note, however, that most of the children did not testify; neither did they file any documents in support of the summons or the protest. It could be that some of them are not be interested in the estate; however, in the absence of any express and unequivocal renunciation of their right to inheritance, it wouldn't be right to proceed on the presumption that they do not want anything to do with the estate. The safer option is to give each one them their fair share since, in any event, they reserve the right to cede their respective shares to whomsoever they wish, either amongst the deceased's other children or beneficiaries, or to any other person; after all they have absolute rights over their respective shares.

Being a family dispute, I would rather parties bear their respective costs. It is so ordered.

Dated, signed and delivered in open court this 8th day of March, 2019

Ngaah Jairus

JUDGE