REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 409 OF 2014

IN THE MATTER OF THE ESTATE OF ANNAH BOERA ANGWENYI (DECEASED)

BETWEEN

JANE LISHINDU ANGWENYI.....APPLICANT

AND

JOHN ONTITA ANGWENYI.....PETITIONER/RESPONDENT

RULING

1. This matter relates to the estate of Anna Boera Angwenyi who died intestate on 13th February 2014. The deceased had three sons and five daughters. The deceased estate comprised two parcels of land: **Central Kitutu/Mwamosioma/1911** (Plot 1911) and 1/3 share in **West Kitutu/Mwagichana/79** (Plot 79). The grant of letters of administration were issued to John Ontita Angwenyi ("John") and confirmed on 9th February 2017. The two properties were to be shared between the 8 beneficiaries of the estate to be held in trust by John.

2. On 28th May 2018 Jane Lishindu Angwenyi ("Jane") filed an application for annulment of grant. After hearing the application, I did not find any reason to annul the grant as all the beneficiaries had been provided for. The only issue pending is one of sub-division of the deceased estate. I am now called upon to deal with that issue as the parties failed to agree on the sub-division of the estate.

3. Jane filed her proposal on 20th September 2018 in which she proposed that Plot Nos. 1911 and 79 be distributed in equal shares to herself, John and Prisca Masese Tumbo. On 29th November 2018, she filed a supplementary affidavit in which she deposed that the issues concerning the deceased land was discussed by the chief and elders and filed the chief's letter in that regard.

4. The Chief's letter filed on 1st April 2019, is a report a meeting held to discuss the distribution of the deceased estate. It concludes that deceased's 5 daughters should forfeit their right to inherit and the estate be sub-divided amongst the deceased's three sons; John, Alloys Tumbo Angwenyi represented by Prisca Masese Tumbo and Isaac Muma Angwenyi represented by Jane. The report concludes that Jane's portion be held by her children and not Jane for fear that she would dispose of the land.

5. John's case is that the sub-divisions have been done by a surveyor who has prepared mutation forms. He urged court to consider his proposed mode of sub-division as it has factored all beneficiaries to the estate including the objector.

6. I heard oral evidence from Jane (PW 1), her son, Evans Kangwana Angwenyi (PW 2) and John (DW 1). In her testimony, Jane complained that her sister in laws, who have been hostile to her, want to take her children's land from her. She supported the findings of the elder's meeting held on 15th March 2019. John's position was that Jane had been provided for just like all the survivors of the deceased who were all entitled to receive a share of the property.

7. As I understand, Jane position seems to be that only the sons of the deceased are entitled to benefit from her estate. The deceased died in 2014 when the ***Law of Succession Act (Chapter 160 of the Laws of Kenya)*** ("the ***Act***") was already in force. By virtue of **section 2(1)** of thereof, her estate was subject to the ***Act*** and since she died intestate the distribution of her estate was to be governed by **Part V** of the ***Act*** and more particularly **section 38** thereof. **Section 2(1)** of the ***Act*** excludes the application of customary law in matters of succession hence this court cannot accept the elders recommendation based on Abagusii customary law that married daughters of the deceased should renounce the right their inheritance. I would quote what Waki JA., stated in seminal judgment in ***Mary Rono v Jane Rono & Another*** **Civil Appeal No. 66 of 2002[2005]eKLR** on this issue:

> *The deceased in this matter died in 1988, while the Succession Act which was enacted in 1972, became operational by* ***Legal Notice No. 93/81****, published on* ***23.06.1981****. I must therefore hold, as the Act so directs, that the estate of the deceased falls for*

consideration under the Act. ***Section 2(1)*** *provides: -*

> ***"2.(1) Except as otherwise expressly provided in the 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."***
>
> *The application of Customary law, whether Marakwet, Keiyo or otherwise, is expressly excluded unless the Act itself makes provision for it. The Act indeed does so in* ***Sections 32*** *and* ***33*** *in respect of agricultural land and crops thereon or livestock where the law or custom applicable to the deceased's community or tribe should apply. But the application of the law or custom is only limited to" such areas as the Minister may by Notice in the Gazette specify." By* ***Legal Notice No. 94/81****, made on* ***23.06.1981****, the Minister specified the various districts in which those provisions are not applicable.*

8. Apart from being based on Abagusii customary law which is not applicable, Jane's position, supported by the elders, is contrary to **Article 27** of the **Constitution** which embodies the twin principles of equality and non-discrimination. Kimaru J., in ***Peter Karumbi Keingati & 4 others vs. Dr. Ann Nyokabi Nguthi & 3 others*** **[2014] eKLR** had occasion to deal with a similar matter and held as follows:

> *As regards to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents.*

9. Since the deceased died intestate, the starting point for distribution of her property is **section 38** of the ***Act*** which provides as follows:

> *38. 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.*

10. I also wish to point out that it has not been established that the deceased had already distributed her property before she died and if she did then her decision must now take into account the interests of all the other beneficiaries, particularly the daughters, who were not provided for. I have noted that two other people; David Mayaka Angwenyi and Julius Mayaka have been included in the proposal by John yet they were not named as liabilities in Form P & A5 and were not included in the certificate of confirmation of grant.

11. While I have sympathy for Jane's pleas, the law is not on her side hence I direct that the both **Central Kitutu/Mwamosioma/1911** and one third share of **West Kitutu/Mwagichana/79** be divided in equal shares among the 8 survivors of the deceased. The certificate of confirmation dated 9th February 2017 shall be rectified to read ***"one-third (1/3) share of West Kitutu/Mwagichana/79"*** and the properties shall devolve to each of the named beneficiaries in equal shares. The subdivision shall take into account where the parties have already settled.

12. Since this is a family matter the parties shall bear their own costs.

DATED and DELIVERED at KISII this 2nd day of MAY 2019.

D.S. MAJANJA

JUDGE

Jane Angwenyi in person.

Mr. Onchwangi instructed by Oguttu, Ochwangi, Ochwal and Company Advocates for the respondents.