



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

P&A CAUSE NO. 683 OF 2010

IN THE ESTATE OF THE LATE ANTHONY MUTONGA NDOLO (DECEASED)

ZIPPORAH NDUKU HATCHER.....1ST ADMINISTRATOR/PROTESTOR

VERSUS

JOICE MUTONGA NDAVI2ND ADMINISTRATOR/RESPONDENT

RICHARD MUNYAO MUTONGA.....2ND ADMINISTRATOR/RESPONDENT

RULING

1. The 2nd and 3rd Administrators filed summons for confirmation of grant dated 20th April, 2018 and supported the same with an affidavit containing the proposed schedule of distribution of the one asset of the deceased namely **LR. No. Machakos/Mua Hills/116**.

2. The 1st Administrator/Protector herein filed an affidavit of protest sworn on 16/05/2018 in which she raised her objection to the co-administrator's schedule of distribution more particularly the inclusion of one Agnes Ndoti who was an **"iweto"** (woman to woman kamba marriage) to the Protectors late mother Esther Mwelu Mutonga. It was the Protectors case that the children of the said **"iweto"** are not direct children of the deceased herein and who cannot be ranked in the same category as the real children of the deceased. As far as the Protector is concerned, the said **"iweto"** is entitled only to one share out of which she should share with her children who should not be allowed to rank higher in priority with the widows and children of the deceased. She proposed that the property due to her mother be divided into four portions and that the children of Agnes (**"iweto"**) should claim under her.

3. Parties agreed by consent to have the statements of witnesses adopted without calling their makers. It was also agreed that written submissions be filed.

4. Learned Counsel for the Protector/Applicant submitted that according to Kamba customs an **"iweto"** can only inherit from her 'woman' husband but not from the husband of her "woman" husband and therefore she can only get one share from the mother of the Protector and which she should then share with her children. It was further submitted that the children of the **"iweto"** are termed as grandchildren to the family. Learned Counsel sought reliance in a publication on Gender and Languages in Sub-Saharan Africa, Tradition and Change by Catherine Wawesu Kitetu and Angelina Nduku Kioko where the issue of an **"iweto"** is described in pages 36 as follows:-

"On the surface, the marrying woman, the mwaitu, becomes husband to the iweto, but a deeper traditional conceptual meaning was that the daughter was a daughter in law of the older woman that is was married to her imaginary ghost son.

..... the female husband calls her wife "ng'a" a term a kamba woman traditionally uses to refer to her son's wife."

It was also submitted that the children of the **"iweto"** should not inherit property from their "father" while their mother is still living who should inherit directly then leave them for her children who are customarily grandchildren of the deceased. Counsel sought reliance in Section 3(2) of the Judicature Act which provides as follows:-

"The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African customary Law in Civil Cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and without undue delay."

Finally it was submitted that based on the statements of the three clan elders versed in Kamba Customary Law the children of the **"iweto"** should claim inheritance from the woman who had married her. The case of **Re Matter of Musau Ngau (deceased) [2008] eKLR** was relied upon where Lenaola J (as he then was) held that a child of an **"iweto"** ought to claim inheritance through the woman husband of the

“iweto”.

5. I have considered the evidence of the protestor and the rival statements of witnesses. I have also considered the submissions of the learned counsels for the parties herein. It is not in dispute that the deceased herein had two wives namely **Joyce Mutonga Ndavi** and **Esther Mwelu Mutonga**. It is also not in dispute that the second wife namely Esther Mwelu Mutonga was not blessed with male children and who resorted to marrying a woman (a woman to woman marriage) by the name of **Agnes Ndoti Muindi** who by Kamba customary laws became an “iweto”. It is not in dispute that the said “iweto” bore several male children. It is also not in dispute that the second wife has since passed on and that the only asset belonging to the deceased is **LR. No. Machakos/Mua Hills/116** measuring approximately 40 hectares. It is also not in dispute that the parties herein wish that the said property be shared equally between the two houses. The only issue for determination is whether the children of the “iweto” should rank in priority together with the children of the 2nd wife of the deceased.

6. The protestor has maintained that the children of the “iweto” should not rank in priority with her and her sisters and she is of the view that the children of the “iweto” should claim under their mother Agnes Ndoti Muindi and to that extent she proposes that the half share in **Machakos/Mua Hills/116** due to second house should be shared equally between herself and her two sisters plus the said Agnes Ndoti Muindi so that the children of Agnes Ndoti Muindi should claim under her.

The clan members called by the Protestor and the Respondents appear to differ on the rights of children of an “iweto”. Whereas Harrison Kituli John and Julius Mbuvi Wambua from Aambua and Atangwa clan respectively maintain that the children of an “iweto” are treated as children of the man of the home and they acquire his name as their surname and are treated equally with any other children of the main woman and have an equal right to inherit property of the man of the house while on the other hand Charles Muinde, Benedict Mwaniki and Joseph Mutisya Mug'alika all of 'Euani ma Mbuthu' clan maintain that Agnes Ndoti Muindi “iweto” was a wife to Esther Mwelu Mutonga and thus the children of the “iweto” are not children of the deceased herein but are children of Esther Mwelu Mutonga but they rank lower in priority to children of the deceased and Esther Mwelu Mutonga. They added that the “iweto” herein can only have a share of the property by herself or through a nominee who will act on her behalf.

7. The Protestor produced a booklet on Akamba Clans Governing Council of Elders Constitution 2013 edition. I have perused the same but it is scanty save that at page 21 thereof the issue of woman to woman marriage (“iweto”) is recognized. As the clan members called by the parties herein have given conflicting views and opinions, it is necessary to look for other references regarding the issue of woman to woman marriage in African Customary Law. The application of African Customary Law by the courts is found in Section 3(2) of the Judicature Act which provides as follows:-

“The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African Customary Law in Civil Cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities or procedure and without undue delay.”

The Protestor herein has sought reliance on Kamba Customs as she has produced an Akamba Governing Council of elders Constitution 2013 Edition (booklet) and called three clan members to back her case. The Respondents on the other hand have also called two clan members to support their stand point. Hence I find the parties are subject to African Customary Law and affected thereby. In this case the Kamba Customary Law is the one to be resorted to in order to resolve the dispute between the parties. Lady Justice Nyamweya **in the matter of the estate of Muthengi Mulungu Masyuko (deceased) [2017] eKLR** was faced with a case involving a woman to woman marriage under Kamba customs (“iweto”). She held as follows:-

“... an iweto marriage under Kamba Customary law is described in Restatement of African Law Volume is the Law of Marriage and Divorce (1968) by Eugene Cotran at page 26 as follows:-

WOMAN TO WOMAN MARRIAGE. Where a husband dies leaving a childless widow who is past child – bearing, the widow may marry a wife (iweto) by giving ngaswya to her family in the usual way. The widow then selects a man (mutuany) from her late husband's relatives to have sexual intercourse with her wife and any children resulting from such cohabitation are regarded as the children of the widow and her deceased husband. This form of marriage can also take place during the lifetime of a husband where the wife is barren or has not produced male children.

It is therefore apparent that whether or not the 5th Objector was married as a second wife or in an iweto marriage, her children are considered children of the deceased and are therefore beneficiaries.”

The “iweto” in the present case Agnes Ndoti Muindi filed her statement dated 18/09/2018 and gave a detailed account of how she came to be married by the second wife to the deceased. She confirmed meeting the said second wife and the deceased herein way back in 1978 when they visited her parent's home to ask for her hand in marriage. She confirmed that dowry was paid to her parents and went on to bear five sons who now live on the deceased's parcel of land. The second wife could have given her version of the iweto marriage but is now deceased and hence the evidence of the iweto must be considered. In any event the protestor in her evidence confirmed that indeed her mother had married Agnes Ndoti Muindi (iweto) and further confirmed that the children of the iweto bear the name of the deceased and that they had assisted their mother to educate the children of the “iweto”.

8. After considering the evidence from the rival clan members and the above cited authority, I am satisfied that the children of Agnes Ndoti Muindi (iweto) should be regarded as the children of Esther Mwelu Mutonga and the deceased herein. Hence they must rank in equal priority with the Protestor and her sisters. The Iweto's children who had adopted names of the deceased have grown and been maintained by the deceased as his own children. No wonder that currently they have established their homes on the deceased's land. The protestor who had also participated in educating these children of the “iweto” cannot now turn around after the death of Esther Mwelu Mutonga and disown them. This cannot be justified. Further since the Kamba customs recognize the fact that that the children of an iweto are deemed children of the woman who married the iweto and therefore they together with the protestor and her sisters children of the second house and that being

the case they are entitled to benefit from the estate of the deceased. At the time the **iweto** was married into the home, the Protestor and her sisters were already married off and already had a head- start in life as compared to the **iweto's** children. The proposed mode of distribution by the 2nd and 3rd administrators is therefore reasonable and resonates well with the provisions of Section 40 of the Law of Succession Act on intestate estate of a polygamous marriage.

9. In the result, I find the Protestor's protest lacks merit. The same is dismissed. The Administrators are directed to fix a date on priority basis for the beneficiaries to appear and endorse the distribution approved by this court. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at **Machakos** this **9th** day of **October, 2019**.

D. K. Kemei

Judge