



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 468 OF 2012

IN THE MATTER OF THE ESTATE OF ITINYAI NKANATA alias ITINYAI NKATHA (DECEASED)

RAEL NYOROKA MWIRIGI PETITIONER

-VS-

PETER MWITI..... OBJECTOR

J U D G M E N T

1. **ITINYAI NKANATA alias ITINYAI NKATHA (“the deceased”)** to whom this cause relate died on 10th July, 1980. On 16th July, 2012, the Chief of Mikumbune Location wrote a letter of introduction wherein he introduced those who survived the deceased.

2. On 5th July, 2012, **Rael Nyoroka Mwirigi (“the petitioner”)** a daughter of the deceased, petitioned for letters of administration of the estate intestate and set out the following as the survivors of the deceased:-

- a) Janet Nkanachi -daughter (married)
- b) Grace Ngiri -daughter (married)
- c) Lucy Karoki -daughter (married)
- d) Rael Nyoroka Mwirigi -daughter (married)
- e) Joanina Mwaromo Kiara -daughter-in-law
- f) Rachael Gaceri -granddaughter (married)
- g) John Kithinji -grandson
- h) Naomi Kagwiria -granddaughter (married)
- i) Peter Mwiti -grandson
- j) Ann Ngugi -granddaughter (married)

3. On 20th August, 2014, the grant was issued to the said Rael Nyoroka Mwirigi. On 16th March, 2016, the petitioner applied for confirmation of the grant. Thereafter, the court severally issued summons to the beneficiaries to attend court and shed light on the matter.

4. On 31st January, 2017, **Lucy Karoki, Grace Ngiri and Janet Nkatha** all being daughters of the deceased, attended court and renounced their interest in the estate. They informed the court that the estate should be distributed between the petitioner and the family of their late brother, **Joseph Kiara M’Itinyai**. The petitioner then informed the court that the deceased had divided the property into two, a portion to her and another to her said deceased brother. That, nevertheless, the entire property was being utilized by the family of the late **Joseph Kiara M’Itinyai**. The court then insisted that the widow of the deceased brother and the area chief do attend court.

5. On 13th March, 2017, the daughters of the deceased attended court together with the area Chief **Joseph Muriungi Kirima**. The Chief confirmed that the property was being utilized by two sons of the late **Joseph Kiara M’Itinyai**, viz, **John Kithinji and Peter Mwiti**. The parties then agreed to go to the Chief’s office to try and sort out the issue.

6. By a letter dated 28th March, 2017, the area Chief informed the court that the attempt at solving the matter had become a cropper due to the intransigence of **John Kithinji** and his Sister, **Anne Ngugi**. When the matter came up for mention on 27th November, 2017, **Peter Mwiti**, a grandson of the deceased informed the court that the family of the late **Joseph Kiara M'Itinyai** had documents to show that the petitioner was not entitled to inherit from the estate. The court directed him to file a Protest within 14 days and the matter be heard on 5th March, 2018.

7. On 5th March, 2018, **Peter Mwiti** filed in court a copy of the proceedings and Award in the **Meru Central District Land Dispute Tribunal Case No. 65 of 2004, Rael Nyoroka Mwirigi vs. Joseph Kiara Itinyai.**

8. In this regard, on 20th March, 2018, the court granted time to the said **Peter Mwiti** to file a Protest within 60 days and fixed the matter for hearing of the protest, if any, on 3rd July 2018.

9. On 14th May, 2018, **Peter Mwiti** filed an affidavit in which he stated that, the petitioner had filed a tribunal case against his father, **Joseph Kiara Itinyai** in 2004 which had been heard and determined. That the award of the tribunal was that the petitioner was to be shown where to build her house in case she left her matrimonial home. That no title was to be issued to her for the portion she was to be given.

10. On 3rd July, 2018, when the matter came up for hearing, **Peter Mwiti** failed to turn up for the hearing of his protest. The petitioner attended and testified in favour of the proposed distribution. She told the Court that the estate should be divided equally between her and her late brother, **Joseph Kiara**. She further stated that the estate should be divided between herself and her brother's children as Joanina Kiara (the widow) is now deceased. She requested that Joanina's name be struck out of the distribution list.

11. I have considered the entire record and the issue for determination is; ***whether the petitioner is entitled to a share in the estate and if so, how should the estate be distributed?***

12. **Section 2 of the Law of Succession Act (hereinafter "the Act")** provides: -

"(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. ..."

13. The deceased died on 10th July, 1980, before the commencement of the Act which came into operation on 1st July, 1981. In this regard, the succession of the deceased would be in accordance with the custom that he was subject to, that is, the Meru custom.

14. According to Eugene Contran, ***Restatement of African Law: 2 Kenya II Law of Succession***, (Sweet & Maxwell, 1969) at page 30, the estate of the deceased in Meru and Tharaka community was divided among the sons. The daughters and widows received no share from the estate.

15. However, the application of customary law is qualified by **Section 3(2)** of the **Judicature Act** which provide: -

"(2) 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 of procedure and without undue delay".

15. Further, **In re Estate of Mwangi S/O Ngamba Alias Mwangi Ngamba (Deceased) [2015] eKLR** the court held: -

"The coming into operation of the Constitution, 2010 radically changed the position, for the new law outlawed discrimination in all its forms. Article 10 of the Constitution, 2010, states the national values and principles. Article 10 (2)(b) includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, among the said values and principles. Article 27 of the Constitution, 2010, states the principle on equality before the law and the right to equal protection and equal benefit of the law. It also states that men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. There is also Article 2(4) of the Constitution, 2010, which states that any law, including customary law, which is inconsistent with the Constitution, 2010, is void to the extent of the inconsistency. Thus, any customary law that discriminates against women in inheritance is consistent to the letter and spirit of our constitution and therefore null and void."

16. I fully concur with the foregoing exposition of the law in the matter.

17. In this regard, I hold that the Meru custom that seek to disinherit women on account of gender cannot be applicable at this time and era for it goes against the principles laid down in Constitution of Kenya, 2010.

18. In any event, this matter was referred to a panel of elders on 19th July, 2004. A copy of the Award that was availed by the protestor

shows that, the elders decided that the property in question should be sub-divided into two equal portions, one portion to be registered in the names of Joseph Kiara and Mwititi Kiara while the other part was to be registered jointly in the names of Rael Nyoroka and John Kithinji Kiara. This court is not bound by the said Award. The Award did not disinherit the petitioner as contended by the protestor. Indeed it affirmed her contention that she was entitled to a share in the estate.

19. In matters succession, it is trite that the children of a deceased take priority in entitlement as opposed to grandchildren. Therefore, the grandchildren of the deceased cannot be entitled to a share of the estate unless they prove that they were being maintained by him prior to his death in terms of **Section 29 of the Act**. Alternatively, they may inherit the estate by dint of **Section 41 of the Act**. There was no evidence to support dependency under **section 29 of the Act**.

20. All the other children of the deceased renounced their interest in the estate except the petitioner and the family of the late **Joseph Kiara M'Itinyai**. In this regard, I am of the view and so hold, that the estate be distributed between **Rael Nyoroka Mwirigi** and the family of **Joseph Kiara M'Itinyai** as follows: -

L. R. Nkuene/U-Mikumbune/363

1. Rael Nyoroka Mwirigi - 0.45 ha

2. Rachael Gaceri

John Kithinji

Naomi Kagwiria - Jointly 0.45 ha

Peter Mwititi

Ann Ngugi

This being a family matter, I will make no orders as to costs.

It is so decreed.

DATED and DELIVERED at Meru this 16th day of July, 2018.

A. MABEYA

JUDGE