



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 232 OF 2007

In The Matter Of The Estate Of M'Mugwika M'Maitethia(Deceased)

M'RINCHUNI M'MUGWIKA..... PETITIONER

Versus

NKANATA MUGWIKA

JOYCE NGIRI M'MUKIRI

CATHERINE KARTWITHA MAINGI.....PROTESTORS

JUDGMENT

[1] M'MUGWIKA M'MAITETHIA ("the deceased") to whom this Succession Cause relate, died in 1954. The petitioner petitioned for the letters of administration where he stated that the deceased was survived by:

1. M'Maingi Mugwika - Son

2. M'Rinchuni Mugwika - Son

3. M'Nkanata Mugwika - Son

4. Loice Ngiri M'Mukiri - Daughter

5. Mrs. Eunice M'Mworia - (Deceased with three children James Kathurima, Faith Kiramba and Stellah Nkirote)

And he listed the asset of the deceased to be:

i. LR. NO. NTHIMBIRI/ABONYAI/196 ("the estate")

[2] Grant letters of administration were issued on 19th February 2008 to the petitioner who made an application for confirmation on 24th November 2008. However, an affidavit of protest sworn by Nkanata Mugwika on 13th July 2009 was filed. The protest was supported also by the 2nd and 3rd protestors. The protest is on the fact that the petitioner proposes to distribute the estate among only two children of the deceased and the petitioner's son who is not a beneficiary of the estate. They argued that, during their father's lifetime they were all cultivating on the estate. But in 2007 the petitioner assaulted the members of the family of M'Maingi M'Mugwika and forced them all out of the estate. He went ahead to threaten the 1st and 2nd protestor and so they stopped cultivating. They had banana trees, coffee, nappier grass and other crops which the petitioner uprooted and damaged of which they reported to the police.

[3] The petitioner in his replying affidavit sworn on 29th November 2010. deposed that the deceased left behind three land parcels: **NTHIMBIRI/ABONYAI/196, 163 and 86**. Land parcel No. 86 and 163 were given to Andrew M'Rithara and M'Nkanatha M'Mugwika respectively. That is why he did not include M'Nkanatha in the distribution of the estate. When M'Maingi was alive he sold his share of the estate to Mbaya M'Rinchuni (**'RM - 01'**). Mbaya was in possession and cultivating on the share belonging to M'Maingi. As for the 2nd protestor she is married and comfortable. That this issue has already been adjudicated upon by clan elders and already settled in conformity with the distribution he proposed that is equal distribution among himself, Mworia M'Mugwika and Mbaya M'Rinchuni.

Viva voce evidence

[4] *Viva voce* evidence was adduced. **PW1 Loice Ngiri M'Mukiri** told the court that the estate be shared amongst the deceased's 5 children including her as she wants a share as well. Mbaya should not get a share from the estate as he is not a beneficiary. She averred that she is not aware of any agreement between M'Maingi and Mbaya. She refuted the allegation that clan elders distributed the estate or that the deceased had any other land. When their brothers died the petitioner chased away his brother's children and cut them with pangas which led to court cases. The family of M'Nkanata Mugwika stays on his own land which he purchased himself. He knows M'Ruthara M'Mugwika as he is her step brother but he is not entitled to anything. Their father has one shamba which was shared into two representing each house.

[5] **PW2 Catherine Karwitha maingi** tendered her statement dated 10th April 2018 as evidence. She stated that she is representing Maingi Mugwika who was her father (*P Ex I*). She asserted that their family is not aware of the allegations made that her father sold his share to the petitioner's son. Their father used to tell them whatever he does with his land and he did not inform them of the sale or exchange neither is she aware of LR.RUIRI/TUTWA/2341. In 2006 they were using the suit land but the petitioner beat and chased them away. After they reported they were charged with damage to property but were acquitted.

[6] **PW3 Japhet Kigunda Nkanata** adopted his statement dated 10th April 2018 as his evidence in chief. He is representing his father the late Nkanata Mugwika who had filed the protest and passed on before its determination. He corroborated what had been stated by **PW1** and **PW2**. He ascertained that land parcel Nthimbiri/Abonyai/163 is not part of the estate as his father acquired it out of his own efforts. His father was of age during adjudication and he gathered his own land which was registered in his name. The deceased never left any wishes or will of how his estate ought to be distributed. The meeting held on 21st September 2006 was one of the meetings they used to have whereby they used to visit one family at a given time and it was a welfare one. The issues that are said to have been discussed about the land were never discussed and they did not sign the purported minutes thereto. There was no agreement on the issues which are said to have been discussed and it is the petitioner and his witness who can explain the source of the said minutes. Charles Mburugu who is said to have chaired the meeting on that day is not a member of their clan. The said minutes should be disregarded and the elders had no legal capacity to decide on how the estate was to be shared out.

Petitioner's case

[7] The petitioner gave a sworn testimony and called one witness. **DW1 M'Rinchuni Mugwika** adopted his statement filed on 28th August 2017 as his evidence in chief. He told the court by reiterating what he had stated in his replying affidavit. **DW2 Charles Mburugu** adopted his statement filed on 28th August 2017 and he told the court that he hails from the same clan as the petitioner and protestors. The deceased had a big piece of land which he divided amongst his sons. M'Nkanata and M'Rithara each owned a piece. There was one parcel which was left under the deceased's name which is in contention. They held a meeting on 21st September 2006 which he chaired and it was decided how it should be divided. The distribution proposed by the petitioner was as agreed in the clan meeting. He is shocked that the protestors have gone against the agreement which is an afterthought.

[8] The petitioner's witness statement of M' Ikiugu M'Kirera filed on 28th August 2017 was tendered in as his evidence in chief. He stated that in 1952 – 1954 the deceased gave land to Nkanata Mugwika and other sons. Nkanata refused to move to his portion and the deceased sent clan elders to go and inform him to go to his portion; he obliged and moved. He cannot seek for another portion as he cannot benefit twice.

Submissions

[9] Parties also filed written submissions in support of their respective standpoints. The protestors reiterated what they had stated. They avowed that the petitioner failed to show that Mkanata was provided for by the deceased; none of his witnesses substantiated his claim. They beseeched the court to disregard the said sale agreement between M'Maingi Mugwika and Paul Mbaya as M'Maingi's could not sell his share as it had not been ascertained. Neither did he take the parcels of land alleged. Loice should get a share and not be discriminated against as she is entitled to an equal share.

[10] On the other hand, the petitioner submitted and restated his position that his mode of distribution was only in accordance with the wishes of the deceased

ANALYSIS AND DETERMINATION

Issues

[11] From the record, evidence and submissions by the parties, issues that emerge for determination by the court are:

- a. *Whether the deceased provided for M'Nkanata in his lifetime by giving him land parcel number Nthimbiri/Abonyai/163,*
- b. *Whether M'Maingi Mugwika and Loice Ngiri are entitled to a share in the estate; and*
- c. *How the estate should be distributed.*

Of gift inter vivos

[12] Did the deceased provide for M'Nkanata in his lifetime by giving him land parcel number Nthimbiri/Abonyai/163? When a claim for gift inter vivos is made in a probate and administration cause, it is only for purposes of bringing such property into account in determining

the share of the net intestate estate finally accruing to the child, grandchild or house which benefited from the gift from the deceased. It is not *per se* a determination of ownership of the said property. In any event, in law, such property is not estate property but of the donee. See section 28 and 42 of the Law of Succession Act below:-

28. Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-

- (a) the nature and amount of the deceased's property;***
- (b) any past, present or future capital or income from any source of the dependant;***
- (c) the existing and future means and needs of the dependant;***
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime; [underlining mine for emphasis]***
- (e) the conduct of the dependant in relation to the deceased;***
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***
- (g) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.***

42. Previous benefits to be brought into account

Where

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,***
that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

[13] Therefore, the court simply makes a finding whether there was or there was not a gift *inter vivos* by the deceased to a beneficiary for purposes of section 28 and 42 of the Law of Succession Act. According to the green card presented on LR.NO Nthimbiri/Abonyai/163 it shows that the property belongs to M'Nkanata s/o M'Mugwika. However, the petitioner alleges that this piece of land was gifted to the donee by the deceased and is part of the estate. The protestors allege that the registered owner bought it. I expected the Petitioner to lay evidence in court showing the land was given by the deceased as gift *inter vivos* so as to bring it within the ambit of section 42 of the Law of Succession Act. I have looked everywhere in these proceedings and nothing shows that LR.NO Nthimbiri/Abonyai/163 was a gift *inter vivos* by the deceased to M'Nkanata s/o M'Mugwika. I therefore find the said land is not a gift *inter vivos* by the deceased.

Entitlement of M'Maingi Mugwika and Loice Ngiri

[14] The second issue is whether M'Maingi Mugwika and Loice Ngiri are entitled to a share of the estate. M'Maingi Mugwika is said to have entered into an agreement with Paul Mbaya where by M'Maingi gave his 3 acres of the estate to Paul Mbaya in exchange for of parcel **NO. RUIRI/TUTUA/2341, KIIRUA/NKANDO/2342** and Kshs. 180,000/-. I see a challenge of sale agreement or exchange of land; this falls within the ambit of ELC and not this court.

[15] The concern for this court is the claim by the 2nd protestor, Loice Ngiri that she wanted a share of the estate of the deceased by virtue of her right as the daughter of the deceased. The petitioner asserted that the sister should not get a share as; the customs of the Ameru did not permit it, that she never complained for all that time, now she is married and comfortable. According to Meru customary law the estate of a deceased person was divided amongst his sons. Daughters were not allowed to inherit. These arguments portend discrimination of women on the basis of gender and sex. It is not lost to this court that there were bad times in the heavily patriarchal African society; that the natural fact of being born a daughter disinherited you. Persistence of these patriarchal did not make the work of courts any easier. And, judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance became long and painful. The courts, relying on the constitutional architecture of our nation at the time, i.e. before 2010, only delivered pin-prick thrusts and rapier-like strokes against these persistent patriarchal biases. But, things changed when nations started to embrace international principles on elimination of all forms of discrimination against women. In Kenya, the case of **RONO vs. RONO [2008] 1 KLR 803** could not have come at a better time; it delivered a downright bludgeon-blow on these discriminatory practices against women in inheritance. Now, I am happy that the said judicial expressions found place in the Constitution of Kenya, 2010. Many cases- and the number is rising by the day as courts implement the Constitution- state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination. More specifically I am content to cite the proclamation by the Court of Appeal in the case of **STEPHEN GITONGA M'MURITHI vs. FAITH NGIRAMURITHI [2015] eKLR** that:-

'Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased

irrespective of gender and whether married and comfortable in their marriage or unmarried...’

[16] Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- and not all of a particular gender- but male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution. The Ameru tradition has been put to test within the context of the Constitution and the Law of Succession Act. I am aware that the deceased died in 1954. That notwithstanding, the Law of Succession Act provides in Section 2 (2) that:

“(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.”[Underlining mine]

[16] And in light of the Constitution, 2010 under Article 27 (1) read together with Article 60 provides for equality of every person before the law and elimination of gender discrimination in customs and practices even on matter related to land and property in land. Therefore, since as long as Loice wants a share of the estate she should not be stopped from doing so on the basis of a customs that promotes discrimination of women on the basis of gender, sex and status. The Constitution has eliminated such discriminatory customs.

[17] The petitioner stated that distribution of the estate was settled by clan elders. He presented witnesses to support this. **PW3** agreed that there was a meeting on that day but stated that issues to do with the estate land were never dealt with. From the minutes presented there is absolutely on lawful basis for conclusion reached. In any event, I am of the view that issues of the sale agreement and ownership of LR NO. NTHIMBIRI/ABONYAI/ 163 could not be determined by them as they did not know the deceased as they were born much later. In addition, they disregarded the 2nd protestor based on customary law without any lawful basis.

[18] From the foregoing, I find the protest to be valid and merited. The daughters are entitled to the estate of their father in equality with the sons. Hence, the estate of the deceased shall be distributed equally amongst his children as follows:

Land Parcel No. NTHIMBIRI/ABONYAI/196

- 1. Estate of M’Maingi Mugwika - Son**
- 2. M’Rinchuni Mugwika - Son**
- 3. Estate of M’Nkanata Mugwika - Son**
- 4. Loice Ngiri M’Mukiri - Daughter**
- 5. Estate of Mrs. Eunice M’Mworia - (Deceased with three children James Kathurima, Faith Kiramba and Stellah Nkirote)**

The Grant is accordingly confirmed

Dated, signed and delivered in open court at Meru this 8th day of October, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mrs. Ntarangwi advocate for Protestor

M/s. Nyaga advocate for Ondari for Petitioner

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F. GIKONYO

JUDGE