



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 27 OF 2015

(Formerly Kisii High Court Succession Cause No. 429 of 2009)

IN THE MATTER OF THE ESTATE OF JACOB GIMACHOMBE WAISA (DECEASED)

-between-

NYAMOHANGA GIMACHOMBE..... ADMINISTRATOR/PLAINTIFF

-and-

1. MWITA CHACHA GIMACHOMBE..... ADMINISTRATOR/DEFENDANT

2. PETER MAGOIGWA WEISE..... ADMINISTRATOR/DEFENDANT

3. MAGIGE GIMACHOMBE..... ADMINISTRATOR/DEFENDANT

JUDGMENT

1. This cause relates to the estate of **JACOB GIMACHOMBE WAISA** (hereinafter referred to as ***'the deceased'***) who died intestate on 17/08/2002. During his lifetime, the deceased married two wives, **Agnes Burure Gimachombe** (*still alive*) and **Marwa Waitara Gimachombe** (*now deceased*) respectively and was blessed with several children from each of the wives. The family of the deceased still lives on the parcel of land known as **NYABASI/BOMERANI/827** (hereinafter referred to as ***'the Land'***).

2. The deceased and Agnes Burure Gimachombe (hereinafter referred to as ***'the first wife'***) bore four sons namely: -

- a. Chacha Gimachombe
- b. Magoiga Gimachombe (dead)
- c. Magige Gimachombe
- d. Nyamohanga Gimachombe

3. The deceased and Marwa Waitara Gimachombe (hereinafter referred to as ***'the second wife'***) also bore four sons namely: -

- a. Weise Gimachombe
- b. Mwita Gimachombe

c. Waitara Gimachombe

d. Motigitu Gimachombe

4. Upon the demise of the deceased, one **Mwita Chacha Gimachombe** petitioned for the administration of the estate through **Migori Principal Magistrate's Court Succession Cause No. 248 of 2005**. This Petitioner is the first Administrator/Defendant in this cause. In his Petition, he described himself as a grandson of the deceased. A Grant of Letters of Administration Intestate was made to the said Mwita Chacha Gimachombe on 03/08/2005 and was confirmed on 15/03/2006 where the land wholly devolved to him.

5. Sometimes in July 2009, Nyamohanga Gimachombe, the now Administrator/Plaintiff and who is one of the children of the deceased, applied for the revocation of the Grant before this Court and this cause was born, so to say. Later, the parties entered a consent where the Grant issued to Mwita Chacha Gimachombe on 03/08/2005 was revoked and a fresh Grant was issued jointly to **Mwita Chacha Gimachombe, Peter Magoigwa Weise, Magige Gimachombe and Nyamohanga Gimachombe**.

6. Peter Magoigwa Weise then filed a Summons for Confirmation of the Grant dated 02/11/2015 and likewise Nyamohanga Gimachombe filed an undated Summons for the confirmation of the Grant on 19/01/2016. Upon the consensus of the parties, the twin Summonses for Confirmation were heard together by way of oral evidence and Nyamohanga Gimachombe was deemed as the Plaintiff whereas the other Administrators were deemed as the Defendants.

7. There is no dispute that the children of the second wife were separately settled by the deceased prior to his demise and that is why they did not take part in this cause. The dispute now relates to the children of the first wife and it is whether the land ought to devolve to the three sons who are alive or to four sons, the fourth one being Magoiga Gimachombe who died before marriage. The contention is allegedly based on a Kuria Customary Law.

8. That being the case, three issues for determination arise and are: -

a) The existence of that Kuria Customary Law;

b) If (a) above is in the affirmative, whether that custom is applicable in the circumstances of this cause;

c) How the land should devolve.

9. I will deal with the issues separately.

a) The existence of that Kuria Customary Law:-

10. The existence of customary laws within the traditional African set-up cannot be side-looked. In Kenya, the recognition of the existence of the various traditional customary laws is embodied in **Article 2(4)** of the **Constitution**.

11. The recognition aside, due to the unwritten nature of the customs, a party who intends to rely on any custom must prove it. The Court of Appeal in dealing with the issue of a party relying on customs expressed itself in the case of **Njoki -vs- Muteru (1985) KLR 874** in the following manner: -

“The existence of a custom must be established by the party who intends to rely on it...”

12. The Court of Appeal, differently constituted, reiterated that position in the cases of **Kimani Gituanja vs. Jane Njoki Gituanja (1983) eKLR** and in the case of **Joyce Atemo vs. Mary Ipali Imujaro (2003) eKLR** among many others.

13. But what is the custom in issue in this cause? There is no consensus on this. According to the Defendants, there exists a custom among the Kuria community that a son who dies before marriage can still have a family. In that case, the parents organize for and marry a 'wife' into their home and deem her as the 'wife' of their dead son. That 'wife' will lay with the brothers to the dead son and the children she gives birth to will be deemed as the children of the dead son. That way family names are guaranteed to be carried over to the next generations.

14. That was the evidence of **Peter Mwita Marwa (DW1)** who was the Area Chief for Nyabari Central Location and who had served for a total of 25 years in public service having been a sub-chief previously. The deceased lived within his area of work. There was also **Magoiga Gitura Ogeise** who testified as **DW2**. He was a son to a brother to the deceased. He was 77years old when he testified. **DW3** was **Peter Magoiga Waisi**, the second Defendant/Administrator herein and a son to the alleged 'wife' and the dead son.

15. The Plaintiff on his part denies that such a custom exists among the Kuria people. To him, a son who dies before marrying a wife cannot be deemed to have a family. It all but ends there. The Plaintiff called two witnesses. **PW2** was **Chacha Gimachombe Weisei**, a son to the deceased and a brother to the Plaintiff from the same mother, the first wife. PW2 corroborated the evidence of the Plaintiff and denied that there ever exists any such custom among the Kuria people. There was also **PW3**. She was the **first wife** and the mother to the Plaintiff, PW2, the late Magoiga Gimachombe among others. She was very elderly. PW3 admitted that such a custom exists among the Kuria people. She however denied that it so happened in this cause.

16. I have considered the rival positions. From the evidence of DW1 (a long-serving Chief from the Kuria community), DW2 (an elderly man also from the Kuria community) and PW3 (an elderly woman from the Kuria community and the first wife of the deceased as well), I find that indeed such a custom exists among the Kuria community. The first issue is hence answered in the affirmative.

b) Whether that custom is applicable in the circumstances of this cause:

17. Having found that the custom exists among the Kuria people, I will now determine its applicability in this cause.

18. The Defendants contend that pursuant to that custom, one **ESTHER KHOLERA** also known as **GATI CHACHA GIMACHOMBE** or **GATI MAGOIGA GIMACHOMBE** (hereinafter referred to as '**Esther**'), was married in the name of the late Magoiga Gimachombe and, through the brothers of the said Magoiga Gimachombe, gave birth to nine children namely: -

- a) Sabina Boke
- b) Esther Boke
- c) Sofia Boke
- d) Susan Boke
- e) John Robi
- f) Daniel Nyamohanga
- f) Samuel Waisi
- h) Samson Mtongori, and
- i) Peter Magoiga Waisi (the second Administartor/Defendant).

19. DW1 testified that the deceased approached and informed him of his wish to sub-divide the land into four portions to take care of the children of Esther who were in accordance to the Kuria customs, the children of his son the late Magoiga Gimachombe, but there was a problem. The problem was that the other children of the first wife, including the Plaintiff, were opposed to his proposed sub-division and they instead wanted the children of Esther not to have a share of the plot.

20. The deceased asked the DW1 to intervene and deal with the family disagreement. It was the testimony of DW1 that the deceased wondered why the other children of the first wife were against that Kuria custom whereas the same thing had happened to one of his children from the second house and all was well. The son of the second wife who died before marrying was one **Mwita Gimachombe** and one **Waigesa** was married on his behalf. The said 'wife', Waigesa, had children and the children were well known to be those of the late Mwita Gimachombe.

21. DW1 knew that history so well and indeed confirmed that the said Weigesa was still alive. He was also aware that Esther had died but had all along lived on the land and that her children save those married still live on the land.

22. DW1 referred the matter to the Clan elders who failed to reach a consensus with the family. He then advised the parties to refer the case to court.

23. DW2 also testified that indeed Esther was married on behalf of the late Magoiga Gimachombe and that she bore nine children, with the siblings of the late Magoiga Gimachombe, before she died. He confirmed that upon death, Esther was buried at the homestead of PW2.

24. DW3 was one of the children of Esther. He testified that he was aware that in accordance with the Kuria customs his 'father' was the late Magoiga Gimachombe although he knew his biological father to be the third Defendant/Administrator herein, Magige Gimachombe. He stated that he had been so informed by the deceased and that it was a well-known and settled matter in the Kuria community. He also stated that he was born on the land and has all along lived there with all his siblings and knew of no any other home but the on the land.

25. The Plaintiff took the contrary position. According to him, Esther was the second wife to his eldest brother PW2 and not a wife to the late Magoiga Gimachombe. That position was confirmed by PW2 himself when he testified before Court. PW2 stated that he was the one who married Esther as his second wife and all the nine children Esther bore were his children. He dismissed the allegation of Esther being a wife to the late Magoiga Gimachombe. PW2 reiterated that the children of Esther, being his own children, can only inherit from him and that he was prepared to settle all of them on his portion of the plot.

26. The elderly first wife could not recall who Esther was, but vehemently denied that Esther was married on behalf of her son the Magoiga Gimachombe. To her, the trouble-maker in the family is the first Defendant/Administrator.

27. The foregone is the evidence as presented by the parties and their witnesses. For the Defendants to benefit from that Kuria custom in this cause, they remain under a duty to prove that indeed Esther was married on behalf of the late Magoiga Gimachombe. The proof of that marriage is cardinal. **Section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya** makes it clear that: -

"107. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

28. I have carefully considered and evaluated the evidence on record. Whereas there is no dispute that Esther was married into the family of the deceased, there exists a contention as to who married her. According to the Plaintiff and PW2, Esther was the second wife to PW2. The Defendants hold that Esther

was a 'wife' to the late Magoiga Gimachombe. The Defendants however did not tender any evidence in such proof. Apart from their verbal testimonies before Court, there was absolutely no evidence pointing to the nature of the marriage and if all such requirements under the Kuria customs were fulfilled, when Esther was married, from which parents or even clan did she come from, whether dowry was paid or any consideration tendered, where Esther's matrimonial home was, among many other such issues.

29. On the other hand, PW2 states that he married Esther and had nine children with her before she died and he even buried her in his homestead as Esther was his second wife.

30. By placing the evidence of the Plaintiff and the Defendants side by side, this Court is persuaded that the Defendants cannot benefit from the Kuria custom in issue as they have failed to prove that Esther was married on behalf of the late Magoiga Gimachombe. This Court now finds that Esther was married to and was indeed the second wife of **Chacha Gimachombe Weisei**. That being the case, all the nine children Esther bore are the children of the said Chacha Gimachombe Weisei and not of the late Magoiga Gimachombe.

c) How the land shall devolve:

31. As stated elsewhere above, the deceased was married to the first wife and the second wife. Each of the wives had children. The second wife is also deceased and is survived by her children although it is not clear from the evidence if the deceased survived or was survived by the second wife. The first wife is still alive together with her three children.

32. It is also on record that the second wife and all her children were settled elsewhere by the deceased and that seems to be the reason they did not take part in this matter given that the estate only relates to the land. That leaves the land to the first wife and her three children.

33. That being so, the administration of the estate of the deceased is governed by **Section 35** of the **Law of Succession Act**, Chapter 160 of the Laws of Kenya. **Section 35(1)** of the Act provides as follows:

".....where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

a)The personal and household effects of the deceased absolutely; and

b)A life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person."

34. Legally speaking, the first wife has a life interest in the land and as such the land cannot devolve to her children until that life interest is determined. However, the first wife stated that the deceased had already demarcated the land into three portions, each for her three sons, and that each of the sons occupy a definite portion which is clearly marked by boundaries. She prayed that the land be sub-divided as such and that each of the three children do obtain a separate title deed. The Plaintiff and his two brothers echo the position taken by their mother, the first wife.

35. By taking the position of the first wife and her children and with a view to enable the early determination of the administration of the estate of the deceased, the following orders do hereby issue: -

a) The Fresh Grant issued on 23/09/2015 be and is hereby confirmed and the parcel of land known as NYABASI/BOMERANI/827 shall devolve to CHACHA MWITA GIMACHOMBE, MAGIGE GIMACHOMBE and NYAMOHANGA GIMACHOMBE.

b) To that end, the Migori County Land Surveyor shall sub-divide the land into three portions as occupied by the said CHACHA MWITA GIMACHOMBE, MAGIGE

GIMACHOMBE and NYAMOHANGA GIMACHOMBE and the Migori County Land Registrar shall issue three separate title deeds to each of them.

c) For avoidance of doubt, the entitlement, if any, of the children of the late ESTHER KHOLERA also known as GATI CHACHA GIMACHOMBE and also known as GATI MAGOIGA GIMACHOMBE to the land shall be limited to the portion registered in the name of CHACHA MWITA GIMACHOMBE who is their father.

d) The surviving widow to the deceased, AGNES BURURE GIMACHOMBE, shall continue to stay on the portion(s) of the land as before.

e) Each beneficiary shall bear his own costs of the sub-division and subsequent transfer and all parties to the Summonses for Confirmation shall bear their own costs of the Cause.

36. As I come to the end of this judgment, I wish to deeply apologize to the parties for the delay in the delivery of this judgment since the judgment was initially to be written by my Sister Judge, the Presiding Judge of the High Court at Homa Bay, who graciously stepped in for me when I was out of the station for some time. When I resumed duty, the Judge requested me to write the judgment as I had fully heard the matter, a request I could not turn down, hence the delay.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of June 2017.

A. C. MRIMA

JUDGE