



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 560 OF 2014
(SUCCESSION CAUSE NO. 77 OF 2010)
(LIMURU SENIOR PRINCIPAL MAGISTRATES COURT)

IN THE MATTER OF THE ESTATE OF JOSEPH KAMAU GATHUA Alias GATHUA
(DECEASED)

PHYLIS WANJIRU KAMAU.....
APPLICANT

VERSUS

WILFRED NDUNG’U KAMAU.....1ST
RESPONDENT

BENSON MWAURA KAMAU.....2ND
RESPONDENT

JACOB NJOROGE KAMAU..... 3RD
RESPONDENT

BENJAMIN GATHUA MWAURA.....4TH
RESPONDENT

RULING

This matter came up for ruling in this court on an *ex-parte* application made under the provisions of **Rule 63, 73 and 59 of the Probate & Administration Rules and Order 40(1)** dated 3rd July 2014 by way of summons by the Applicant whereas the court issued the following orders on the 17th of October 2014:

- a. An injunction restraining the respondents from interfering, disposing off, alienating or in any way interfering with the deceased estate and preservation of the estate L.R LARI/ BATHI/T. 60, 1058, 1059, 1060 and 1061 until the hearing and determination of the main application.
- b. Each party was to bear their own costs.

On an application dated 10th November 2014, the Respondents filed a joint affidavit in reply to the Applicants ex- parte chamber summons, stating that among the 7 sons of the deceased, 3 were given shares of land by their deceased father Joseph Kamau Gathua and the remaining 4 sons, 2 from each wife were the sole heirs of their mother’s share. It is also on record that ALL daughters of the deceased Joseph Kamau Gathua were ALL MARRIED UNDER CUSTOMARY LAW including the Applicant to Moses

Muiruri Mbau (Deceased).

The Respondents further urge the court to rely on customary law and the deceased will. They state that under kikuyu customary law a married woman cannot inherit from the father's estate.

On the 22nd of October 2015, the Applicant filed a written submission stating that she was not involved in the petition for grant of letters of administration by the respondents in **Limuru Senior Principal Magistrate Court Succession Cause No. 77 of 2010**. She stated that she was a person of the same degree and priority as the Respondents and as such ought to have been notified in the making of the grant contrary to **Rule 26(1) and (2) of the Probate and Administration Rules**. The Applicant submitted that the 3rd and 4th Respondents, who are grandsons of the deceased, are persons of lesser priority and rank lower to her.

The Applicant also submitted that the Respondents lied in **Limuru SPM's Court Cause No. 77 of 2010**, when they declared they were the only surviving children of the deceased.

The Applicant also avers that the Respondents lied in valuation of the subject matter and thus under **Section 48 of the Law of Succession Act**, the Magistrate lacked jurisdiction to issue a grant.

In a joint written submission filed on the 23rd day of October 2015, the Respondents stated the deceased had given a **verbal will** disposing some land to his sons. It is also submitted that the deceased made a **written will by drawing a sketch on 31st July 1970**.

An upshot of the respondents written submission is that the Applicant has been married and still occupies her deceased husband's property and thus she is incapable of claiming from their deceased fathers estate.

They further state that the Applicant misled the court by claiming she was not informed when the Respondents' petitioned for a grant.

ISSUES

The pleadings and submissions presented by the parties make clear that the key issues which this Court is called upon to determine in this case are the following:

1. What law is applicable to the deceased estate; whether the law applicable is Kikuyu Customary Law, or the **Constitution and the Law of Succession CAP 160** of the Laws of Kenya?
2. Is the Applicant a beneficiary of the deceased within the meaning of the applicable law?
3. Was the Applicant's consent sought before the filing for the letters of Administration and subsequently when the Grant was confirmed?

DETERMINATION

With regard to the 1st issue, the Law of Succession Act Cap 160 commenced on 1st July, 1981, the deceased died on 27th August 1981. The operative law is the Law of Succession Act Cap 160.

In the Act, a written Will shall comply with provisions of **Section 5 and 11 of the Act**. The present Will was not witnessed, read to beneficiaries after the deceased's death and was not relied on in filing the petition for grant of letters of administration intestate in Limuru Court. It is clearly an afterthought. The Oral Will is prescribed under **Section 9 of the Act**. The oral ought to have been made orally in the presence of 2 competent persons and the deceased's death to occur within 3 months thereafter.

Therefore, in the absence of a valid Will the deceased died intestate. The Applicant though married and now separated is a child of the deceased. She is a beneficiary of the deceased's estate under the **Law of Succession Act**. The Applicant has been residing and is still residing in the suit property. The applicant was not consulted, informed or her consent sought at the time the Petition for grant of letters of

administration was sought. The grant was therefore irregular invalid and illegal by concealment of material facts not being presented to the Court.

Under Section 76 (a) (b) & (c) of the Law of Succession Act, the grant issued on 28th July 2010 is revoked.

The other pertinent issue to be resolved is that under **Section 35 of the Law of Succession Act**, the beneficiaries and dependents of the deceased are the children of the deceased who inherit in equal shares in the absence of the surviving spouse(s).-

In the following cases, the issue of married female children of the deceased inheriting from the deceased's estate was upheld in spite of the tenets of Kikuyu customary law.

RE ESTATE OF SOLOMON NGATIA KARIUKI (DECEASED) [2008] eKLR page 8

“ The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person. All children of the deceased are entitled to stake a claim to the deceased's estate.”

RE ESTATE OF KEINGATI WAIHARO KEINGATI (DECEASED) P & A 1140 OF 1990

HON JUSTICE KIMARU held

“ With the promulgation of Constitution 2010 particularly Article 27 that prohibits discrimination of persons on their basis of sex, marital status or social status, among others, the time has now come for these discriminatory cultural practices against women be buried in history.”

COURT ORDERS

1. The Grant is revoked and a new grant issue to the Applicant and the 1st and 2nd Respondents.
2. The beneficiaries to agree on the proposed mode of distribution and file summons for confirmation of grant. Any opposing party shall file an objection with an alternative proposal to be heard and determined by the Court.
3. Each party to bear its own costs.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF MARCH, 2016

M.W. MUIGAI

JUDGE

In the presence of

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