



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MIGORI

SUCCESSION CAUSE NO. 451 OF 2014

(Formerly Migori Senior Principal Magistrate's Succession Cause No. 76 of 2012)

IN THE MATTER OF THE ESTATE OF NYACHO OJWANDO (DECEASED)

-BETWEEN-

THOMAS TITO NYACHAWO.....PETITIONER/DEFENDANT

-AND-

JUDITH AKINYI NDEGE.....PROTESTOR/PLAINTIFF

JUDGMENT

1. This judgment once again brings into focus a scenario where the **Law of Succession Act**, Chapter 160 of the Laws of Kenya comes into conflict with the **Customary Law** on inheritance by a daughter of a deceased who is married and lives with her husband elsewhere. The cause relates to the Estate of **NYACHO OJWANDO** (hereinafter referred to as '**the deceased**') who died on 13/09/1986. The deceased was survived by a son and a daughter who are the parties in this cause.

2. **THOMAS TITO NYACHAWO** (hereinafter referred to as '**the Petitioner**') petitioned for and was granted the administration of the deceased's estate by a grant issued on 05/02/2013 in Migori Senior Principal Magistrate's Succession Cause No. 76 of 2012 before that cause was transferred to this Court.

3. The Petitioner then filed a Summons for Confirmation of the Grant dated 16/03/2015 on 07/10/2015 and sought the confirmation of the grant and the eventual distribution of the deceased's estate which comprised of the property known as **KANYAMKAGO/KAWERE II/713** (hereinafter referred to as '**the Property**'). The Petitioner sought to distribute the property between himself, his three wives and their children.

4. When the application came up for hearing on 12/11/2015, **JUDITH AKINYI NDEGE** (hereinafter referred to as '**the Protestor**') raised concern on the proposed distribution of the estate complaining that she had been completely disinherited and sought for a share of deceased's estate. This Court gave time to the parties to discuss the matter as a family towards an amicably resolution. Three months later, the parties informed this Court that all was not well as there was no consensus on the issue. Indeed it is recalled that the Protestor informed the Court that she had sought for only a small portion of the property but that was also not forthcoming from the Petitioner. This Court then directed that the Summons for Confirmation be heard by way of oral evidence and the hearing was scheduled for 14/04/2016.

5. The full hearing was conducted on a single day. The Protestor availed two witnesses in support of her case whereas the Petitioner availed four witnesses.

6. From the evidence tendered before this Court, it appears that the dispute is a straight forward one. The Protestor's case is that she is entitled to inherit from the deceased who was her father just like the Petitioner notwithstanding the fact that she was married and had a family elsewhere. Her position was echoed by her two witnesses **DAVID ORWA OUMA (PW2)** and **GEORGE MAURICE OGUTU (PW3)** who were close family members. PW2's father and the deceased were brothers whereas PW3 was a son to the Petitioner. They were all of the view that the Protestor being a daughter to the deceased ought to inherit from the deceased since although married and settled elsewhere, her marriage was riddled with problems and it only remained logical to apportion even if it would be a small portion of the property for any future eventuality. And, with that evidence, the Protestor closed her case.

7. The Petitioner then testified and his testimony was firmly based on the Luo Customary Law on inheritance. He did not however deny that the Protestor was his sister; a daughter to the deceased. His position was very simply put: Since the Protestor was married and had established her family elsewhere, the Luo Customary Law, which both the Petitioner and the Protestor ascribed to, did not allow the Protestor to inherit from her father and that her inheritance was on her husband's side. On that score, the Protestor could not even think of an attempt to inherit from the deceased lest a curse will descend upon the Petitioner and his family.

8. The Petitioner reiterated the contents of his affidavit in support of his application and pointed out that going by the Luo customs he was the only beneficiary and he had already distributed the property as follows: -

- | | |
|-------------------------------------|--------------|
| a) Thomas Tito Nyachwawo | 2.2 Hectares |
| b) Rose Amimo Tito (First wife) | 7.0 Hectares |
| c) Tabitha Okech Tito (Second wife) | 6.0 Hectares |
| d) Sara Achieng Tito (Third wife) | 6.0 Hectares |

9. The testimony of the Petitioner was firmly restated and supported by four elderly witnesses from the Luo community. They are **IBRAHIM OLWAL NYARIKE (DW2)** aged 85 years old, **FABIANUS WASONGA ODONGO (DW3)** aged 75 years old, **JOSIAH OJWANDO NYAUCHA (DW4)** aged 70 years old and **ANDERNICUS OWILI ANGWA (DW5)** aged 74 years old. They all confirmed that according to the Luo Customary Law of inheritance, the Protestor was asking for the impossible and they feared a curse would befall the Petitioner if he acted contrary to the customs. The Petitioner then closed his case.

10. With the foregone evidence, the issue for determination by this Court is whether the Luo Customary Laws on inheritance should be applied as craved by the Petitioner in the distribution of the only property which forms the estate of the deceased. Whereas **Article 11** of the **Constitution** recognizes culture as *'the foundation of the nation and as the cumulative civilization of Kenyan people and nation'*, the framers of the Constitution who are the people of Kenya, did not anticipate that culture would form a basis for discrimination between the peoples of Kenya. The forms of culture anticipated to be promoted under the said Article 11 of the Constitution are those with positive aspects but not practices that are negative, discriminatory, oppressive or retrogressive.

11. In this cause the Petitioner holds that the Protestor, as a daughter to the deceased, is not entitled to inherit the property which comprises of the estate of the deceased on the ground that she is married. But upholding such a position will be tantamount to discrimination of the Protestor which in itself will be contrary to **Article 27** of the **Constitution** which prohibits any form of discrimination based on race, sex, marital status or culture. Indeed **Article 27(3)** of the **Constitution** specifically provides that *'women and men have the right to equal treatment, including the right to equal opportunities in political, economic,*

cultural and social spheres'.

12. **Section 29(a)** of the Act in recognizing '**children**' of the deceased as dependants does not classify those children as sons, daughters, married or unmarried. However that distinction happens to be in the Luo Customary Law on inheritance. To that extent therefore the Luo Customary Law on inheritance discriminates between the male and female children of a deceased person and as such it is a retrogressive custom which cannot supersede the Constitution and the law. This Court hence concurs with the holding of Makhandia, J. (as he then was) in *In Re Estate of Solomon Ngatia Kariuki (deceased) (2008) eKLR* at page 8 where he stated that:

'The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.'

13. I am in further agreement with Kimaru, J. when His Lordship addressed the alleged justification under the customary laws as to why married daughters ought not to inherit from their parents in the case of *Peter Karumbi Keingati & 4 others vs. Dr. Ann Nyokabi Nguthi & 3 others (2014) eKLR* in stating as follows:

'As regards to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account on the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that courts would grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.'

I say no more.

14. It is now for this Court to make a finding on how the deceased's estate would devolve by being guided by the **Constitution** and the **Law of Succession Act**. The deceased's ownership to the property was confirmed by the Certificate of Official Search dated 30/04/2012. That official search reveals a restriction in respect to 1.928 acres which portion was acquired by the Government of Kenya vide the Kenya Gazette Notice No. 2741 dated 21/09/1979. The rest of the property however remain in the deceased's favour. Since the parties did not tender any evidence to the effect that either the gazette notice or the acquisition of the 1.928 Acres was revoked, this Court shall, for the purposes of the confirmation of the grant in this cause, not consider the 1.928 acres as part of the deceased's estate.

11. There is no dispute that the Petitioner and the Protestor are children of the deceased. It is of importance to note that the two children of the deceased had different mothers. The Petitioner's mother was the first wife and the Petitioner was the only child to her mother. The Protestor's mother was the second wife to the deceased and had two other siblings who died leaving her alone. The mother to the Petitioner and the mother to the Protestor are now dead but **they both survived the deceased**. There is equally no dispute that both the Petitioner and the Protestor were born and raised up at the deceased's home which to date remains on the property at Kanyamkago in Awendo Sub-County of the Migori County in the Republic of Kenya. It is also not in dispute that the Protestor was married in Ndhiwa Sub-County within Homa Bay County in the Republic of Kenya where she currently lives with her husband and children whereas the Petitioner lives on the property at Kanyamkago with his three wives and children.

12. The state of affairs in this cause come under **Section 35(5)** of the Law of Succession Act, Chapter 160 of the Laws of Kenya (hereinafter referred to as **'the Act'**). That section provides as follows: -

'35.(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'

13. It is clear that the spirit under the above section of the law is equal distribution of the intestate estate amongst the surviving children of the deceased. That spirit of the law however remains the same even in cases where the intestate has left a surviving child or children without any spouse. **Section 38** of the Act states that:

"38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."

14. I have addressed my mind to the circumstances of this matter as well as the Constitution and the Act as a whole. As stated above this Court has taken steps to spearhead an amicable resolution of this matter among the parties but for the adamancy of the Petitioner. That therefore leaves this Court with the only option which is to apply the law. Indeed there is no difficulty in so doing.

15. Consequently the grant issued in this cause on 05/02/2013 to THOMAS TITO NYACHAWO is hereby confirmed and estate of the deceased shall be distributed as follows: -

a) Save for the portion measuring 1.928 acres which was acquired by the Government of Kenya and the area forming the homestead of THOMAS TITO NYACHAWO and his family, the remainder of the parcel of land known as KANYAMKAGO/KAWEREII/713 shall be equally apportioned between THOMAS TITO NYACHAWO and JUDITH AKINYI NDEGE.

b) The Migori County Surveyor and Land Registrar shall sub-divide the land known as KANYAMKAGO/KAWERE II/713 as in (a) above and issue two separate titles. One of the titles shall be in the names of THOMAS TITO NYACHAWO and the other title shall be in the name of JUDITH AKINYI NDEGE. For avoidance of doubt, the title to THOMAS TITO NYACHAWO shall include the area occupied by the homestead.

c) The Officer-in-Charge of Awendo Police Station shall provide security during the said exercise.

d) Each party shall bear its own costs of the distribution as well of these proceedings.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 12TH day of May, 2016.

A. C. MRIMA

JUDGE