



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.131 OF 2013

In the Matter of the Estate of M' Turuchiu M' Mwirichia (Deceased)

JOYCE KABITI M' TURUCHU.....PETITIONER

Versus

DAVID M' NTIRITU KIAMBI.....OBJECTOR

JUDGMENT

[1] By a Summons for Confirmation of Grant of Letters of Administration Intestate dated 5th April 2015, the Petitioner sought to distribute the estate property namely, **L.R Kibirichia/817** as follows:

- 1. Nancy Kathambi M'Turuchu.....1 Acre**
- 2. Naomi Karwirwa M'Turuchu.....1 Acre**
- 3. Jennifer Kaburo M'Turuchu.....1 Acre**
- 4. David M'Ntiritu Kiambi.....2.4 Acres**
- 5. Jacob Muriithi Kibunja.....1 Acre**
- 6. Joyce Kabiti M'Turuchu.....1.1 Acres**

[2] The foregoing proposed mode of distribution was, however, vehemently opposed by the Protestor herein David M' Ntiritu Kiambi through an Affidavit in Protest to the distribution dated 17th November 2015. In the affidavit, the Protestor deposed *inter alia* that except the Petitioner with whom they lived together in the estate property, all the other sisters of his father were married and lived with their husbands away from the estate property. He further averred that the family members including their father had subdivided the land with clear boundaries on the ground and each of the two was given their respective shares; to date, he has been using this share. He stated that their father had settled them with his aunt, the Petitioner and her siblings which included; Joyce Kabiti, Moses Muthuri, Ken Githinji, Faith Kanja and Jane Mwendwa. He, however, further deposed that the family does not know one Jacob Muriithi Kibunja whom the Petitioner has brought as a dependant; the said Jacob Muriithi Kibunja has never lived on the deceased estate and was unknown to them. Consequently, he urged the court to distribute the estate of the deceased as per the specific settlement and as per the surveyor's report which was the true position on the ground.

[3] When the matter came up for hearing on 12th July 2016, it was agreed that the matter be canvassed by

way of written submissions. Both parties filed submissions which I will consider below. The Petitioner submitted that on 8th April 2015, she was given the go ahead to file a mode of distribution by the court with which she complied and proposed the estate to be distributed in the manner I have indicated above. She submitted further that, the court also directed the Objector to file his proposed mode of distribution within a period of 7 days but he defaulted. She defended her proposal to be fair for it provided for all beneficiaries who were related to the deceased as his daughters except Jacob Muriithi Kibunja and the Protestor herein who were grandsons of the deceased. She complained that the Protestor's views and proposals on distribution seem to be based on the beliefs in the patriarchal family tree which excluded daughters whether married or not from inheriting directly from their fathers. And, due to the refusal by the Protestor to consent to the mode of distribution presented by the other beneficiaries, it was only tenable that the estate be distributed equally amongst all the beneficiaries irrespective of their sex, for the law does not distinguish between male and female children neither does it discriminate against married and unmarried children. She could not understand how he could reject such a generous proposition by the other beneficiaries that the Protestor be awarded a share that is over double of what other beneficiaries are getting.

Protestor insisted on distribution based on survey report

[4] On the other hand, the Protestor insisted that the distribution be in accordance with the manner the dependants are settled on the ground; a fact shown in the Geoland Survey report. He took a swipe at the Petitioner for bringing a stranger into the estate, i.e. Jacob Muriithi Kibunja. Again, the Protestor accused the Petitioner of having left out distribution some of the siblings of the Protestor namely Ken Kithinji, Moses Muthuri, Jane Mwenda and Faith Kanja.

DETERMINATION

[5] I have carefully considered the rival submissions by the parties and the proposed modes of distribution by the parties. One thing calls for immediate settlement here, and that is; that despite averments by the Protestor, the material on the record shows that Jacob Muriithi and the Protestor are grandsons of the deceased. I will, however, revisit this issue later. Of great legal significance are the constitutional arguments on the right to inherit. The Petitioner argued that the proposal by the Protestor was tainted by patriarchal beliefs and attitude that women should not inherit land from their fathers. She stated that all the beneficiaries in her proposed mode of distribution are daughters of the deceased except the Protestor who is said to be a grandson of the deceased; and so they are entitled to inherit their father's estate regardless of whether they are married or not. She even wondered how the Protestor could reject such generous proposal which is giving him a share which is more than double of what each other beneficiary is to get. Accordingly, because the Protestor has rejected the said offer, the Petitioner sees no any other way except distribution of the estate equally amongst all the beneficiaries.

[6] The above recapitulation of arguments on gender in the law on succession brings me to the point where I feel I should restate the position of the law as has come through from the Court of Appeal and dictated by the Constitution of Kenya, 2010. Today, it will be pretentious for any person to say he is or act ignorant of the fact that discrimination of any person on the basis of gender or status is prohibited discrimination under the Constitution of Kenya, 2010, because; other than abundantly clear provisions of the Constitution, the chain of judicial decisions on discrimination on the basis of gender or status are equally clear. As a matter of fact, traditional societies practiced and allowed discrimination of women because of their gender and this was also manifest in inheritance laws. But one bold decision of the Court of Appeal in **Rono v Rono & Another, 2008 1 KLR (G & F) page 803**, in particular the opinion by Waki, J.A., changed all that and brought in new dawn that loathed any form of discrimination against women. The said judge gallantly stated that:-

“Kenya subscribes to international customary laws and has ratified various international covenants and treaties. In particular, it subscribes to the International Bill of Rights, which is the Universal Declaration of Human Rights (1948) and two International Human Rights Covenants: the covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights (both adopted by the UN General Assembly in 1966). In 1984, it also

ratified, without reservations, the Convention on the Elimination of All Forms of Discrimination Against Women in short “CEDAW”. Article 1 thereof defines discrimination against women as:

“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field”.

But on 27th August, 2010, the above judicial pronouncement found expression in the Constitution and courts of law have continued to reinforce these gallant provisions of the Constitution in succession cases. For instance, in the case of Douglas Njuguna Muigai v John Bosco Maina Kariuki & another [2014] eKLR the court stated that:-

Thankfully, under the Constitution of Kenya 2010, all these rights are enshrined and they cannot be derogated against, they are jus cogens. The general rules of international law also form part of the Law of Kenya. See Article 2(5) of the Constitution. The yoke and burden of discrimination should not be worn by the female gender anymore, the Constitution set it apart.

In the same case the judges of Appeal had this to say about specific sections in the Law of Succession Act:

“...we are of the view that the provisions of Section 35(b) and 40 are discriminatory against Jerioth and the female gender. The Legislature should consider those sections for amendment. Our findings on this issue are not at all novel as shown below the State is obligated under Article 27(b) of the Constitution to take such legislative measures. To illustrate that Section 35(1) (b) and the proviso thereto provides for a differential treatment of a widow and a widower, this is what it states;

“(b) a life interest in the whole residual of the net intestate: provided that if the surviving spouse is a widow, that interest shall determine upon re-marriage to any person.”

A plain reading of the above proviso is that a widower (a male) can remarry without losing the enjoyment of the ‘life interest’ of the spouse’s estate while the widow (a female) loses her life interest upon re-marriage. It goes without saying that this is against the letter and spirit of the Constitution.

[7] **I will cite** other cases including the case of Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others [2015] Eklr where the Court of Appeal stated bluntly that;

It would appear from the totality of the submissions made before us and the stance adopted by the appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratrix of the estate. That much was clear from Mr. Kioga’s resort to Meru Customary Law which stipulated, as captured by Dr E. Cotran in his Restatement of African Law: Vol 2 Laws of Succession at p30;

“Daughters receive no share of the estate. In the absence of Sons, the heirs are the nearest paternal relatives of the deceased, namely father, full brothers, half-brothers and paternal uncles”.

With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority of Kenya’s communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to

claim it. What RONO –VS- RONO (Supra) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010. See also GRACE WACHUKA –VS- JACKSON NJUGUNA GATHUNGU [2014] eKLR. We have already noted that Mr. Kioga did concede, as he had to, that one cannot exclude daughters. We have also adverted to the irony of his then asserting in the same breath, that Florence should nevertheless have been excluded.

[8] And others such as the case of Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR where the Court of Appeal categorically held in a pointed manner that:

The Appellant's complaint against the above mode of distribution is that it failed to take into account the clear principles of law enshrined in section 38 and 40 of the Law of Succession Act.

Cap 160 Laws of Kenya. 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. Section 40 on the other hand enjoins the inclusion of a surviving spouse as an additional unit to each house hold of a polygamous deceased. 12. Applying the above principles to both the learned trial Judges' reasoning and distribution, it is our finding that the learned trial Judge fell into an error when he failed to accord equal distribution to all the children of the deceased in violation of section 38 of the Law of Succession Act by discriminating against the married daughters of the deceased. See Rono versus Rono & another [2008] 1KLR (G&F) 803.

[9] I think I have justified the statement I made earlier that:

Today, it will be pretentious for any person to say he is or to act ignorant of the fact that discrimination of any person on the basis of gender or status is prohibited discrimination under the Constitution of Kenya, 2010, because; other than abundantly clear provisions of the Constitution, the chain of judicial decisions on discrimination on the basis of gender or status are equally clear.

The echoes of the law above is the reason I set out to give some selected decisions on this matter as they are pointedly relevant to what I am about to say next.

[10] I turn back to the facts of the case and the applicable law. The record shows that the Protestor's proposal leaves out all the female children of the deceased except the Petitioner. That is a substantial question of law. Similarly, I note that the Protestor kept on accusing the Petitioner of omitting some of his siblings namely: Ken Kithinji, Moses Muthuri, Jane Mwendwa and Faith Kanja. But, a close look at the Protestor's proposal he has deliberately omitted out Jane Mwendwa and Faith Kanja who are of female gender. This goes to render credence to the contention by the Petitioner that the Protestor is discriminating the beneficiaries on account of gender/sex based on his purely patriarchal beliefs or biases. Accordingly, as there is no agreement on distribution, I will fall back to the law and the Constitution. It would appear that the deceased left no surviving spouse but left surviving children. Therefore, Section 38 of the Law of Succession Act CAP 160 of the Laws of Kenya is the relevant guide on this distribution. The said section provides as follows:

38. Where intestate has left a surviving child or children but no spouse

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.

In light of section 38 of the Law of Succession Act the estate should be distributed equally among all the children of the deceased. But, at this point, and before I make give my final decision on distribution, it is appropriate for me to fulfil my promise; to revert to the fact that the Protestor and Jacob are grandsons of the deceased. The two grandsons are not, therefore, children of the deceased in the sense of Section 3 (2)

of the Law of Succession Act which defines child/children as follows:

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

However, grandchildren who are dependants in the sense of section 29 of the Law of Succession Act have the right to inherit the estate of the deceased. I note that the Petitioner in her proposed mode of distribution included the Protestor and proposed that he should get 2.4 acres in Land reference No. Kibirichia/Mboroga/817. The Protestor on the other hand proposed that the distribution to be according to the settlements of the dependants as per Geoland Survey Report. However, other than stating that he lives on the land during the lifetime of the deceased- and this fact is admitted by the Petitioner- the Protestor did not prove that he had been given the specific portion of land he is occupying or any portion of the estate property by the deceased as a gift inter vivos or testamentary. I want to make it clear that, mere living on or occupation of estate property is not proof of bequest by the deceased of the estate property to the person in occupation. In the absence of proof, I find that the deceased did not bequeath any portion of his estate upon the Protestor. Again, there was no proof whatsoever that the deceased excluded or lawfully excluded his daughters from inheriting his estate. Therefore, this estate is purely intestate which I shall distribute in accordance with the law. But, I will treat the fact that he lived on the land- I suppose also with the deceased- as evidence of dependency for which he will be entitled to inheritance in equality with all the other children of the deceased under section 38 of the Law of Succession Act. In my understanding of the law of succession, occupation of a larger portion of the estate property by the Protestor does not afford him priority over or entitlement to a bigger share in the intestate estate of the deceased than the other beneficiaries of the estate. Such occupation will not attain the vitality of overriding or higher interest against the other beneficiaries as it would in an ordinary claim against the owner of the property. I, therefore, agree with the submissions of the Petitioner in that regard. But, there is nothing to show that **Jacob Muriithi Kibunja** was a dependant of, although he was a grandchild of the deceased. Nothing shows that the deceased had taken him into his family or was being maintained by the deceased immediately prior to his death. I will not, therefore, consider him as a beneficiary of the estate of the deceased. I also find the same in respect of the other grandchildren being proposed by the Protestor; they are not beneficiaries of the estate of the deceased and will not share in the estate property. Accordingly, in all fairness, I order and direct that the entire estate property namely Land Reference No. Kibirichia/Mboroga 817 shall be shared equally among all the beneficiaries irrespective of sex, to wit:-

1. Nancy Kathambi M'Turuchu

2. Naomi Karwirwa M'Turuchu

3. Jennifer Kaburo M'Turuchu

4. David M'Ntiritu Kiambi

5. Joyce Kabit M'Turuchus

[11] This being a succession matter there will be no order as to costs.

Dated, signed and delivered in open court at Meru this 6th day of September 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Muthamia advocate for respondents

Counsel for applicant – absent

Applicant – present

F. GIKONYO

JUDGE