



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**SUCCESSION CAUSE NO. 1 OF 1984.**

**IN THE MATTER OF THE ESTATE OF MICHAEL MAHIGA KHAMAKANGA (DECEASED).**

**AND**

**PHILIPH JOSEPHAT.....PETITIONER/RESPONDENT.**

**AND**

**MARY MAHIGA MUDIJIRE.....OBJECTOR/APPLICANT.**

**AND**

**PETER MUSASIA MAHIGA.....BENEFICIARY.**

**RULING**

**INTRODUCTION.**

1. The application for determination is the Notice of Motion dated 7<sup>th</sup> August, 2015. The objector/applicant seeks to be enjoined in this succession cause as one of the beneficiaries. The second prayer is not clear. The application is based on the grounds that other beneficiaries may proceed to sub-divide Plot No. KAKAMEGA/CHEKALINI/388 hence disinheriting her of her share of the deceased's estate.
2. The application is supported by the applicant's affidavit wherein she depones that she is a daughter of the deceased and a beneficiary of the estate of the deceased. She adds that she found her name had not been included in the succession cause after perusing and reading the ruling delivered on the 19<sup>th</sup> March, 2015. She therefore wants her name included.
3. Her application is opposed. PETER MUSASIA MAHIGA has sworn a replying affidavit sworn on 26<sup>th</sup> August, 2016. He depones that the succession cause herein was filed way back in 1984 and as such the applicant had knowledge of its existence and thus she cannot now claim to be included among the beneficiaries after the ruling. He depones further that the applicant has not demonstrated the reason for his delay in making the application. He adds that the application is defective since it does not show the provisions under which it has been made and ought to be struck out with costs.
4. In further affidavit dated 18<sup>th</sup> October, 2016, PETER MUSASIA explains that before filing of this succession cause, they had a meeting with all the children of the deceased including the applicant and that the confirmed grant was never challenged by the applicant nor was the ruling of this honourable court dated 19<sup>th</sup> March, 2015. He maintains that the chief's letter dated 9<sup>th</sup> March, 2009 was correct to the

extent of the list of beneficiaries save for the mode of distribution of the land parcel.

5. He adds that the chief's letter referred to by the objector/applicant has left out other beneficiaries and has altered the shares of other beneficiaries. He adds that the cause herein has already been determined and the determination was not challenged. He adds that the objector/applicant has not explained the reason for the delay in making the application herein and the application is meant to cause a delay in this cause. The application was canvassed orally.

**Issue for determination.**

6. The main issue for determination is whether to include the applicant/objector in this succession cause.

7. I find that even though the application herein was made 30 years after this cause was filed, the objector/applicant had the right to file the same. It seems the applicant/objector was left out of this succession because of her gender of being a woman. This is discrimination which is outlawed by our constitution in **Article 60 (1) (f) and Article 27.**

8. In Samson **Kiogora Rukunga vs. Zipporah Laiti Rukunga 2011 eKLR** the High Court at Meru held:-

*“..... in my view, the law as it is now, it matters not whether a daughter of the deceased is married or not when it comes to consideration of whether he is entitled to inherit her parents estate. Article 60 (f) of the Constitution of Kenya 2010 provides for elimination of gender discrimination in respect of land, marital status of a daughter is not a basis to deny her the right to inherit her father's estate.”*

9. Lady Justice Martha Koome **in the Estate Pricilla Wairimu Kamau [2005] eKLR** reaffirmed the provisions of the Law of Succession Act that daughter just like sons have equal rights to inherit their parent's property. She held:-

*“The law does not distinguish the deceased's children on the basis of their gender or marital status.”*

10. Post new constitution enactment decisions are embracing the user of the ratified conventions as our **Constitution Art 2 (6)** adapts ratified treaties as our law and especially on women's rights.

11. In the case of **ROSE W MAMBO & OTHERS VS LIMURU COUNTRY CLUB PET NO 2 OF 013**; the court in Nairobi cited and relied on the preamble and **Art 2 of CEDAW** to declare a by-law discriminatory to the women members of the golf club.

12. In the **NAI PET APPL NO 2 OF 2012 IN THE MATTER OF NATIONAL ASSEMBLY AND SENATE**

**ADVISORY OPINION CASE;**

13. The supreme court of Kenya had occasion to rule on gender equity principle under art 81 of the constitution of Kenya which states that;

*“Not more than 2/3 of members of elective public bodies shall be of the same gender”*

14. The court cited but did not rely on **CEDAW**. It observed that same instruments have been adapted to our law by virtue of **Art 2 (6) of Constitution of Kenya.**

15. In Tanzania, the case of **EPHRAHIM V. PASTORY, (1990) L.R.C. 757 [HC] (TANZ.)**, The Court found that the Constitution had explicitly incorporated **Article 7 of the Universal Declaration of Human Rights**, which prohibits discrimination against women, and noted that Tanzania had ratified

**CEDAW and the African Charter on Human and People's Rights**, both of which prohibit discrimination on the basis of sex.

16. I find therefore that the objector/applicant who is the daughter to the deceased has a right to the deceased's estate. Her application is therefore allowed in terms of prayer 1.

**SIGNED, DATED and DELIVERED at KAKAMEGA this 6<sup>TH</sup> day of DECEMBER, 2016.**

**C. KARUKI**

**JUDGE.**

**In the presence of:-**

.....**N/A** ..... **for the Petitioner.**

.....**Minisi** ..... **for the Objector.**

.....**In person** ..... **for the beneficiary.**

.....**Anunda** ..... **Court Assistant.**