



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 516 OF 2002

(In the matter of the estate of HEZEKIAH M'MWANDO- Deceased)

FELISTER WANJIRU NJERU.....PETITIONER

VERSUS

GITARI M'MWANDO.....1ST PROTESTER

SALOME RUGURU.....2ND PROTESTER

J U D G M E N T

The deceased Hezekiah M'Mwando died intestate on 8/8/1968 at Kathangari village in Embu District. The petitioner Felister Wanjiru Njeru filed this succession cause on 27/8/1996. In her petition for letters of administration she named the following survivors of the deceased.

1. Edward Gitari M'mwando
2. Felister Wanjiru Njeru
3. Lillian Kathaga
4. Salome Ruguru
5. Philis Wambu

She was issued with letters of administration intestate on 23/6/2000. On 30/11/2000 the 1st protestor filed his protest against the confirmation. He opposed the distribution of the estate wholly to the petitioner on the basis that the petitioner was married. He stated that the deceased was survived by himself, Salome Ruguru and Felister Wanjiru. The only asset of the deceased was land LR. No. Ngandori/Kirigi/14 measuring 7 acres. His two sisters, the petitioner and Salome are married and according to Embu customs married daughters are not entitled to inherit any share from the estate of the deceased.

The protestor called one witness PW2 who testified that he knew the deceased and his family and that the 1st protestor is the only son and rightful heir of the deceased. The two daughters Felister and Salome are claiming 2 acres from the land of the deceased and it was his opinion that they are not entitled to any share. The deceased's estate should be governed by Embu customary law which prohibits married daughters from inheriting.

PW3 who is a former Assistant Chief of Kibugu sub-location, testified that he knew the deceased and his family. He said that the Petitioner was married to one Njeru who had shown her a place to build her home on his own land. It was his evidence that being a married daughter she is not entitled to inherit from the deceased.

The 2nd protester Salome Ruguru stated that she is married with children and wanted a share of her late father's estate. She also told the court that her other sisters are married and are not interested in inheriting the deceased's estate. It was her evidence that by the time the deceased died in 1968, she had returned to her parents' home with her children.

The petitioner testified that the 1st protester is her brother and the 2nd protester is her sister. The deceased left a parcel of land Ngandori/Kirigi/14 which is registered in the joint names of the 1st protester and the deceased. Each of the proprietors owned 3½ acres which is not in dispute. She told the court that she was married to one Njeru but they parted ways in 1973. She returned to her parents' home and stayed there with the 11st protester whose home is situated on the same land. She claims a share of 2 acres from the deceased's land and was of the view that her sister the 1st protester should get the remaining 1½ acres. During the lifetime of the deceased, she had been shown where to build. The petitioner called two witnesses who supported her case.

DW2 told the court that she knows the petitioner and the two protesters. She was aware that the petitioner together with her children was returned to her father's home by the 1st protester. She recalls seeing the petitioner and the 1st protester in a car coming from Njeru's home and she was fetching water at the river.

DW3 told the court that the petitioner was his mother while the 1st protester was his uncle. He said that sometime in 1973 the 1st protester came for his mother and her children including himself and carried them in his car to his grandfather's home. From that time the family has stayed at the home of the deceased for many years. The 1st protester later chased them away from his home. The petitioner and DW2 now reside on the plot of the 1st protester without his permission.

The issues arising from this case are identified as follows:-

- (i) *Whether or not the distribution of the estate of the deceased should be governed by Kiambu customary law;*
- (ii) *Whether the petitioner's customary marriage to Njeru Karigi is still valid.*
- (iii) *Whether the petitioner, the 1st and the 2nd protester are entitled to inherit from the estate of the deceased.*

The petitioner in her submissions filed by Njeru Ithiga & Co. Advocates relied on 2 authorities supporting her claim that she was entitled to inherit from the estate of the deceased. It was her contention that the Kiambu customary law discriminates against married women and it is therefore repugnant to justice and morality rendering it inconsistent with the provisions of the constitution.

In the Nakuru High Court Succession Cause No. 320 of 2007 – In the matter of the estate of MUGO WANDIA (deceased) [2009] eKLR died in 1976. *The petitioner applied for letters of administration in 1994 without disclosing that the applicant was also a beneficiary of the deceased's estate prompting the applicant to file summons for revocation of grant. The petitioner argued that the applicant was a married daughter and not entitled to inherit from her father according to Kikuyu customary law. The court held that customary law should not be repugnant to justice and morality. The constitution prohibited discrimination on grounds of sex and the applicant was entitled to inherit from the estate of her deceased father even if he died in 1976.*

The marriage between the petitioner and her husband ended in 1973. It has been established that the 1st protester is the one who removed the petitioner from her husband's home after domestic disagreements

between the parties. It was also proved on the balance of probability that the petitioner stayed in the home of the deceased from 1973 to the time she was chased away by the 1st protester.

In the estate of RUKUNGA KAIMATHIRI – DECEASED [2011] eKLR the court held that married daughters should not be discriminated against in matters of inheritance.

The 1st protester alleged that the deceased estate was governed by Kiambu customary law at the time of his death. It is important to note that the protester did not call an expert witness to shed light on what Kiambu customary law provides in relation to inheritance by married daughters.

It was held by the Court of Appeal in the case of JOSEPH GITAU GITHONGO VS VICTORIA MWIHAKE MUNYA [2014] eKLR that the burden is upon the party who wishes to rely on customary law to prove to the custom in question.

Article 27 of the constitution provides as follows:-

Equality and freedom from discrimination

- (1) *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
- (3) *Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
- (4) *The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
- (5) *A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*
- (6) *To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*
- (7) *Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*
- (8) *In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*

In view of the provisions of Article 27(5) it is clear that even if Kiambu Customary law regarding inheritance was proved by the 1st protestor, it would still not apply for the reason that it discriminates against married daughters.

In the Court of Appeal case of ***AGNES KWAMBOKA OMBUNA VS BIRISIRA KERUBO OMBUNO [2014] eKLR*** it was held that Article 27 criminalizes any form of discrimination and that every person is equal in the eyes of the law and has the right to equal protection. The court further held that married daughters were entitled to inherit their deceased parents property.

Section 3(2) of the Judicature Act provides that:-

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

The foregoing provisions were explained in the Court of Appeal case of **JOHN GITATA MWANGI & OTHERS VS JONATHAN NJUGUNA MWANGI & OTHERS [1999] eKLR** where it was held that customary law is only applicable if not repugnant to justice and morality.

The deceased was survived by 5 children and no spouse. One of the children died and the other one is not interested in inheriting the estate leaving only three (3) beneficiaries. It is my considered opinion that Section 38 of the Law of Succession Act is applicable since Kiambu customary law cannot be invoked. The section provides:-

“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.”

It is not in dispute that the estate of the deceased comprises of 3.5 acres out of Ngandori/Kirigi/14. Over and above his share in the estate the 1st protestor will retain his half share out of Ngandori/Kirigi/14. The half share of the deceased measuring 3.5 acres is available for distribution.

In view of the above provisions of the law the net estate should be divided equally among the children of the deceased as follows:-

LR. NGANDORI/KIRIGI/14 (Half share)

1. Felister Wanjiru Njeru - 1.16 Acres
2. Gitari M'mwando - 1.16 Acres
3. Salome Gichuku - 1.16 Acres

The protestors will meet the costs of this cause.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF MAY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Ithiga for petitioner

Mr. Kathungu for Wairimu for 1st protestor

2nd protestor in person