REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 180 OF 2006

RE ESTATE OF HELLEN MUTHONI KARANJA (DECEASED)

RAHABU WAMBOI ASHANJA.....PETITIONER

VERSUS

MOSES KARANJA GACHANJA.....OBJECTOR

JUDGMENT

1. Hellen Muthoni Karanja died intestate on 14th December 2003. It is common ground that she was survived by two children: Moses Karanja Gachanja (hereafter *the objector*) and Rahabu Wambui Ashanja (hereafter *the petitioner*). A third child, Joram Chege, is also deceased. Hellen left only *one* property known as Eldoret Municipality Block 15/ 418. The fulcrum of the dispute is whether the petitioner, having married under *Gikuyu* customary law, is entitled to a share of her mother's estate. There are some peripheral issues: whether the grant obtained by the petitioner was irregular or fraudulent; whether the deceased had left a will; and, whether the petitioner and objector are entitled to an equal share of the estate.
2. The petitioner obtained a grant on 24th July 2007. It was confirmed on 18th March 2009. On 29th May 2009, the objector filed a summons for revocation of the grant. The attack on the grant is five-pronged: that the grant violated *Gikuyu* customary law; that the grant was obtained by concealment of the fact (the fact the petitioner was married); that the petitioner was not a suitable administratrix of the estate because she professes the Islamic faith; that the consent of the objector was not obtained; and, lastly, that the objector is in occupation of the suit property. The petitioner denied all the allegations. She insisted that she is entitled to a share of the property.
3. The objector testified that he is in possession of the property. He stated that he never executed a consent appointing the petitioner as the administratrix of the estate. He stated that the petitioner only disclosed the objector's interest at the point of distribution of the estate. He said the petitioner was married under *Gikuyu* customs to one Joram Njoroge Gacheru, now also deceased. The petitioner contended that under the *Gikuyu* custom, the petitioner was estopped from inheriting her mother's property; that she is only entitled to inherit her late husband's property. Upon further examination, the objector conceded that there had been other proceedings before the area chief. The chief was of the view that the property be shared equally between the disputants. The objector disagreed.
4. The objector denied that the deceased had left a written will instructing the petitioner and objector to share the property equally. He said the alleged will dated 10th July 2003 was executed when his mother was hospitalized. He said the deceased could not write; but she could "read a little as she was a pastor". He was not sure whether the thumb print impression on the document was that of the deceased. Upon cross-examination, he agreed that the writing or signature on the consent for grant of letters of administration was his. On re-examination, he said that when he executed the

consent, he understood it to be a summons to attend court. He denied consenting to give the petitioner a half share.

5. The objector called one witness, John Maina Joel. At the time of his testimony, he was eighty three years old. He said he was conversant with *Gikuyu* customs. In his opinion, the property of a deceased should be distributed to persons still *living* in the homestead of the deceased. He opined that a married woman cannot inherit her parent's properties. He said that the *Gikuyu* customary marriage is sealed when dowry is paid and a goat known as *ngoima* is slaughtered for the bride. Thereafter, the daughter loses her rights to her father's or mother's estate. He confirmed that the petitioner was married to Joram Njoroge Gacheru and that all the rites of marriage had been performed. He insisted that the petitioner can only inherit her husband's properties. That marked the close of the objector's case.
6. On 9th February 2015, I took over the proceedings. The parties consented that the matter proceeds from the point it had reached. The petitioner relied on her witness statement dated 12th November 2013 as evidence in chief. She also relied on a bundle of documents dated 13th November 2013. The documents were admitted into evidence by consent. The petitioner lives in Munyaka. She testified that the deceased had three children: her, the objector and the late Joram Chege. Joram had been given land by the deceased before she died. Joram's estate has not expressed any interest in the remainder of his mother's estate. The petitioner said that her mother had two plots: one that she gave to the late Joram Chege; the other, which is the subject of this suit, was to be shared between her and the objector.
7. The petitioner did not deny cohabiting with Joram Njoroge. They had a child. In her witness statement, she alleged that full dowry had not been paid. Upon cross-examination, she conceded she was married. She said her late husband hailed from Njoro. She said her husband had no landed property. She said she later bought her own plot of land without any assistance from the objector. She testified that she assisted the deceased when the deceased became sickly. The petitioner said that the rental houses on the suit land were put up by the deceased. She conceded that the objector constructed a house and shop on the property during the lifetime of the deceased. She also confirmed that she never lived on the suit property. She only used to visit her mother there. She did not know who authored the document dated 10th July 2003. She conceded that the document from the Chief Kapyemit dated 2nd November 2009 was made during the pendency of the suit. She said that the objector executed the consent to the making of the grant at her advocate's office.
8. Her witness Mburugu Kungu was seventy seven. He relied on his statement dated 12th November 2013. He is a nephew to the deceased. He said that when the deceased fell sick, he used to assist her. On some occasions, the deceased would go without any food. He said he heard the deceased saying that one piece of her property should be given to the objector and one to the petitioner. There were no witnesses to the conversation. He never saw the document dated 10th July 2003. He said the rental houses in Mwiyenderi (the suit property) were put up by deceased. He said the objector constructed his house on the property when the deceased was still alive but unwell. He conceded that the objector also took care of the deceased. He said he did not know why deceased did not give the petitioner her share during her life time. In his view, there was no custom preventing a married daughter from inheriting her parents' estate. That marked the close of the petitioner's case.
9. Both parties have filed detailed submissions. The objector's submissions are dated 20th February 2015; those of the petitioner are dated 10th March 2015. I have considered the pleadings, witness statements, the oral and documentary evidence as well as the rival submissions. From the pleadings, evidence and submissions, the following broad issues arise for determination:

i. *Whether the petitioner, having married under Gikuyu customary law, is entitled to a share of her mother's estate.*
ii. *Whether the grant obtained by the petitioner was irregular or fraudulent;*
iii. *Whether the deceased had left a will; and,*
iv. *Whether the petitioner and objector are entitled to an equal share of the estate.*

10. I will deal first with whether the deceased left a valid will. The answer is in the *negative*. What

was presented as a will is a document dated 10th July 2003. It does *not* meet the formal requirements of a written will. It is only *attested* by *one* witness, Agness Muthoni Wandere. The latter was not called as a witness. Since the deceased died well after *three* months of its date, it does not also rise to the threshold of an *oral will*. See *Re Estate of Rufus Ngethe Munyua* [1977] KLR 137. There was no clear evidence that the deceased executed it or that the thumb print was hers. The objector claims the document is foreign. The deceased did not know how to write. The petitioner's witness, Mburugu Kungu, never saw the document. The petitioner herself conceded that she did not know who made the document. In a nutshell, there is a paucity of evidence that the deceased left any will. Doubt is removed completely by the petitioner's action before this court: the petitioner never submitted a will to probate.

11. For similar reasons, the document dated 3rd May 1987 annexed to the objector's deposition sworn on 29th March 2009 is not a will. It is not even executed by the deceased. I find the two conflicting documents to be self-serving. The one by the petitioner is favourable to her; that by the objector disinherits the petitioner. It is implausible that the deceased made two incongruous testamentary dispositions without any reference to the older document. I thus find that the deceased died intestate.
12. The next key question is whether a married daughter is entitled to inherit the estate of her parents. The answer is in the *affirmative*. Sections 26 and 29 of the Law of Succession Act do not discriminate between sons and daughters or even married daughters. See *Re Estate of Simeon Kuria Kamau* High Court, Eldoret Succession cause 218 of 1997 (unreported). First and foremost, there was conflicting evidence regarding the *Gikuyu* custom. Eighty three year John Maina Joel said he was conversant with *Gikuyu* customs. In his opinion, the property of the deceased should be distributed to persons still *living* in the homestead of the deceased. He was emphatic that a married woman cannot inherit her parents' estate once dowry is paid and a *ngoima* is slaughtered. On the other hand seventy seven year old Mburugu Kungu, the petitioner's witness, denied the existence of such a rule.
13. Section 3(2) of the Judicature Act provides that the High Court shall be guided by customary law so long as the custom is not inconsistent with any written law; or, repugnant to justice and morality. I have already referred to the inconsistencies in the evidence on the custom. The custom discriminates between the children of the deceased by *favouring* the sons. The custom is the antithesis of the Law of Succesion Act. By dint of section 2(1) of the Act, the Law of Succession Act has *universal* application in succession matters. The deceased died intestate on 14th December 2003, long after the Act had taken effect. To that extent, I decline the invitation to uphold the custom.
14. It follows as a corollary that the objector and the petitioner stand on an equal footing to inherit the property of the deceased. I am aware of the Court of Appeal decision in *Gituanja v Gituanja* [1983] KLR 575 holding that *among the Kikuyu, a woman has no rights over land except in the case of an unmarried daughter or widow who has a life interest*.
15. I would distinguish *Gituanja v Gituanja* (supra). The petitioner may have gotten married, but she did not inherit any land from her deceased husband. She said she bought her current plot of land from her own resources. There is no good reason why she cannot look up to her mother's estate for inheritance. I am fortified in that finding by the recent Court of Appeal decision in *Peter Karumba Keingati & 4 others v Ann Nyokabi Nguthi & 4 others*, Nairobi Civil Appeal 235 of 2014 [2015] eKLR. The learned judges had this to say-

"The arguments are based on many assumptions that are, in our opinion, prima facie questionable. Why is there an underlying and unstated assumption that in this day and age in Kenya, Kikuyu daughters will only marry in Kikuyu families from which they will inherit? Suppose they chose to get married into a community, any community in the world, where the rules of succession are completely the reverse of Kikuyu customary practices? Suppose they married, as happens every day, into families that have absolutely nothing to be inherited? Does a son inherit twice when he inherits from his father and his wife inherits from her family? Somehow the applicants have adeptly, if dubiously, framed customary practices as the paragons of equality and equity".

16. I will now turn to the issue of the validity of the grant. The grant in the present case has been confirmed. A confirmed grant may be revoked either by the court *suo moto* or by an application

made under section 76 of the Law of Succession Act. The section states as follows-

"76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c). that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate;or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

17.Section 51(2) of the Law of the Succession Act on the other hand provides as follows-

"51(2) An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed."

18.Rule 26 of the Probate and Administration Rules is also relevant. It states as follows;

"26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

2. *An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require"*

19. I will deal first with three of the grounds urged by the objector to revoke the grant. They were that the grant violated *Gikuyu* customary law; that the grant was obtained by concealment of the fact (the fact the petitioner was married); and, that the petitioner was not a suitable administratrix of the estate because she professes the Islamic faith. From my earlier findings on the rights of a married daughter to inherit her parents' estate, those objections fall by the wayside; they are devoid of merit. It also matters little that the objector is in possession of the suit property; what counts is whether he is entitled to it or to a part of it. The Law of Succession Act does not state that an administrator of an estate must profess a certain faith.
20. The fourth objection was more relevant: that the consent of the objector was not obtained. It seems clear to me that the objector at first consented to the mode of distribution. I say so in view of the evidence by the objector. He agreed that the writing or signature on the consent to making of a grant of letters of administration was his. On re-examination, he said that when he executed the consent, he understood it to be a *summons* to attend court. He denied consenting to give the petitioner a half share. I think it is a red herring. He executed the form of consent contained in the *P&A Form 38* in the presence of an advocate agreeing that the petitioner, who is her elder sister, would administer the estate. He is deemed to have understood its contents. The objector did not say he does not know how to read or write.
21. I have also studied the *P&A Form 5* filed by the petitioner on 25th July 2006. It disclosed the interest of the objector. It identified him by name. I cannot then say that the petitioner failed to comply substantially with sections 51, 76 of the Law of Succession Act or Rule 26 of the Probate and Administration Rules thereunder. Granted those circumstances, I am unable to find that the petitioner concealed some material facts or engaged in deliberate fraud. In the absence of fraud, the objector is estopped from resiling from his earlier consent and commitment. See *Re Estate of Njoroge Kimani* Murang'a High Court Succession Cause No. 433 of 2013 [2014] eKLR. The application to revoke the grant is thus without merit.
22. In the end, the prayer to revoke the grant is dismissed. Section 38 of the Act provides that *"where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children"*.
23. I have already found that the law does not discriminate between sons and daughters or even married daughters. From the words of the statute that I *underlined* above, there is only one direction that this matter can take. It is common ground that the petitioner and objector are children of the deceased. The siblings are entitled to an equal share of the net intestate estate. Their brother, the late Joram Chege had been given a property *inter vivos*; and his estate lays no claim to the remainder of his mother's estate. The only available property is thus Eldoret Municipality Block 15/ 418. I order that the property shall be shared equally between the petitioner and objector. The only direction I would add is that the objector's half portion should, as much as is practicable, be carved out from the area where he has constructed his house and shop.
24. Considering that this is a succession matter or family dispute, I shall make no order on costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 13th day of May 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Ngigi Mbugua for the objector instructed by Ngigi Mbugua & Company Advocates.

Mr. Rotich for Mr. Wanyonyi for the petitioner instructed by Kimaru Kiplagat & Company Advocates.

Mr. J. Kemboi, Court clerk.