

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCC. CAUSE NO.891 OF 2011

**IN THE MATTER OF THE ESTATE OF LIVINGSTONE KINUTHIA KINYANJUI alias
KINUTHIA KINYANJUI MURUA - DECEASED**

ANN NJOKI RUGU.....APPLICANT

VERSUS

WILLIAM KINYANJUI KINUTHIA.....1ST RESPONDENT

**LIVINGSTONE WAMAGATA.....
2NDRESPONDENT**

JUDGMENT

The deceased to whose estate these proceedings relate died on 21st December 2005. On 12th May 2011, the Respondents petitioned the court to be issued with a grant of letters of administration intestate. The Respondents listed all the children of the deceased, including the Applicant, who is the married sister of the Respondents. The only asset belonging to the estate of the deceased was listed as LR. No.Dagoretti/Thogoto/861. The grant was issued to the Respondents on 20th September 2011. The Respondents made an application to confirm the grant on 10th May 2012. The Applicant filed an affidavit of protest to the grant being confirmed. Her protest was on the basis that the proposal made by the Respondents regarding how the estate of the deceased ought to be distributed to the beneficiaries was not acceptable to her because she had been excluded from benefiting from the said distribution. In their proposal, the Respondents indicated that they intended to distribute the property comprising the estate of the deceased to the sons and the unmarried daughters of the deceased. The two married daughters of the deceased, including the Applicant were excluded. The Applicant is of the view that her exclusion from benefiting from the estate of the deceased was discriminatory because, as a child of the deceased, she was entitled to a share of the estate of the deceased. The Applicant stated that she was duped into signing the consent. It was her case that she expected, as a daughter of the deceased, to benefit from his estate.

In response to the affidavit of protest, the Respondents swore an affidavit whereby they explained that it was the decision by the family that the married daughters of the deceased be excluded from benefiting from the deceased's estate. They further stated that the Applicant had all along accepted the position taken by the family in that she participated in the meetings that were held by the family. She also signified her acceptance of the proposal adopted by the family by signing the consent to the proposed mode of distribution submitted to the court. It was the Respondents' assertion that the Applicant should not be allowed to resile from the fact that she had given her consent to the proposed mode of distribution. They were further of the view that the Applicant was estopped from reneging from the consultative and joint position taken by the family. They were of the view that they would be prejudiced if the subdivision proposed (which has already been implemented) was set aside to accommodate the Applicant. In the premises therefore, they urged the court to disallow the protest and confirm the grant in terms of the consent filed by all beneficiaries to the estate of the deceased.

Directions were taken before this court to the effect that the matters in dispute would be disposed of by counsel of the parties filing their respective written submissions. Thereafter, the parties were given an opportunity to highlight the said submission. The written submission were duly filed. The same were highlighted by Mr. Gichachi for the petitioners and by Miss Ogola for the protestor. This court has carefully considered the said submission, both written and oral. It has also read the affidavits filed by the protagonists in support of their respective opposing positions. The issue for determination by this court is

whether the Applicant is entitled to benefit from the estate of the deceased in the distribution of the same. There is no dispute that the Applicant is a daughter of the deceased. She is therefore a dependant of the deceased within the meaning of **Section 29(a)** of the **Law of Succession Act**. She is entitled to benefit during the distribution of the estate of the deceased unless she specifically renounces her right to be considered during such distribution.

In the present case, the Respondents explained that the Applicant was excluded because she is married. The Applicant is of the view that the fact that she is married should not be used by the Respondents to deny her the right to inherit her father's estate. This court is inclined to agree with the Applicant. **Section 29(a)** of the **Law of Succession Act** describes a dependant as "*a child*" of the deceased. It does not discriminate between male and female children of the deceased. Neither does it discriminate between married or unmarried children of the deceased. In particular, it does not discriminate between the married and unmarried daughters of the deceased. The proposal made by the Respondents regarding the distribution of the estate of the deceased is against **Article 27(1)** of the **Constitution** that requires every person to be given equal treatment before the law and further for such person to have equal right to protection and equal benefit of the law.

In the present case, the reasons advanced by the Respondents in excluding the Applicant from benefitting from the estate of her deceased father are discriminatory and untenable in law. The Respondents cannot import the principle of estoppel with a view to obtaining the objective of disinheriting the Applicant. Estoppel cannot be used as a basis to deny a dependant her right to inheritance. In any event, a dependant who has signed a consent is at liberty to withdraw the consent any time before the confirmation of grant. She can also withdraw the consent if it later emerges that the actual distribution was unfair or that the consent was not informed by all the material facts of the case.

In the premises therefore, this court upholds the protest by the Applicant. The court disallows the mode of distribution proposed by the Respondents. So as to obviate unnecessary litigation, this court directs that the Applicant inherits a **¼** of an acre from the suit parcel of land i.e. LR. No. Dagoretti/Thogoto/861. That portion shall be excised from the portions of land to be inherited by the four (4) brothers. Thereafter, the Respondents, as the administrators of the estate of the deceased, shall be at liberty to apply for the grant to be confirmed. Since this is a dispute involving family members, there shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2014

L. KIMARU

JUDGE