



IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 366 OF 2003
IN THE MATTER OF THE ESTATE OF JAMES MBUGUA MUCHUKU (DECEASED)

1. MARGARE NYAMATHWE KIBERA
2. JANE WANJIRU KURIA
3. LUCY NYAGUTHIE GATHURI
4. VIOLET WAMBUI
5. PAULINE NYAMBURA
6. WINNIE NJERI.....APPLICANTS

VERSUS

JOHANNES MBUGUA MUCHUKU.....RESPONDENT

RULING

The late **James Mbugua Muchuku** (deceased) died intestate on 1/4/2001. **Johannes Mbugua Muchuku** (now Respondent) petitioned this court for grant of letters of administration. In Form P & A5 and the chief's letter filed with the petition herein, the beneficiaries to the deceased's estate were named as follows:

1. **Loise Wangui James - Widow**
2. **Lucy Nyaguthie Gathuri – Daughter**
3. **Pauline Nyambura – Daughter**
4. **Violet Wambui – Daughter**
5. **Johannes Mbugua Muchuku – Son**
6. **Margaret Nyamathwe Kibera – Daughter**
7. **Ngugi Muchuku Kagwe – Son**
8. **Jane Wanjiru Kuria – Daughter**
9. **Winnie Njeri - Daughter**

Grant was issued to the Petitioner/Respondent on 8/12/2003 and confirmed on 21/1/2005. In the confirmed grant (**WNM III**), the deceased's properties namely;

1. **Nya/Matindiri/344**
2. **Nya/Matindiri/335**
3. **Nya/Matindiri/345**
4. **Nya/Matindiri/336**
5. **Nya/Matindiri/337**
6. **Nya/Matindiri/338**
7. **Account No. 428654 (Barclays Bank)**
8. **17 herds of cattle**
9. **30 sheep**

were vested in the Respondent to hold jointly in trust for **Loise Wangui**. Loise Wangui is the Respondent's mother and widow of the deceased. The application for confirmation was supported by the affidavit of the Respondent and a consent signed by **Ngugi Muchuku Kagwe, Violet Wambui Mbugua** and **Loise Mbugua** who were listed as the beneficiaries of the deceased's estate. The rest of the beneficiaries listed in Form P & A5 were not party to the consent.

On 26/1/2009, the applicant filed the application dated 18/3/2008 seeking the following orders;

- (1) The grant of letters of administration issued on 8/12/2003 and confirmed on 21/1/2005 be and is hereby revoked.**
- (2) Alternatively, the grant of letters of administration and confirmed grant issued on the above mentioned dates be altered and amended to describe the heirs/beneficiaries adequately.**
- (3) Costs of the application be borne by the Respondent.**

On 22/6/2009, the court directed that the application dated 18/3/2008 be heard together with the application dated 27/2/2006 which was already pending and which seeks similar prayers.

The grounds upon which the application is brought are found on the face of the application and the affidavit of **Margaret Nyamathwe Kibera** in which she depones that she was authorized to swear by all the other daughters of the deceased including Violet Wambui, who allegedly signed the consent. The applicants' complaint is that they were not party to the consent, the basis of the confirmation of grant even though all of them are adults. The Respondent did not consult them. The other ground is that the signature of Violet Wambui, on the consent was a forgery because on the date the consent was allegedly signed, the said Violet Wambui was not in the country. **Mr. Osiemo**, the Applicants' counsel urged that the Respondent cannot rely on Kikuyu Customary law because statutory law takes precedence over customary law and for that proposition, he relied on the court's decision in the **MATTER OF THE ESTATE OF PRISCILLA WAIRIMU KAMAU – SUCC CAUSE NO. 706 OF 2000**. Counsel also submitted that **Section 27(4)(5) of the Constitution** outlaws discrimination on grounds of gender or marital status, and the Respondent cannot purport to discriminate against the applicants on account of gender.

The Respondent filed a replying affidavit dated 24/6/2006 in which he claimed that the applicants were aware of the grant of the letters before 3rd March 2007 having made similar applications in 2006. He also contended that the grant was made in accordance with Kikuyu Customary law as the deceased had already made provision for the daughters before his death, whereby he subdivided Plot 45 Matindiri into 11 parcels (**JMM1**). He contended that the balance of the estate devolved to the sons and the applicants have no further claim after the distribution.

Thirdly, it was the Respondent's contention that the orders sought have been overtaken by events. He relied of **CA No. 123 of 1992 JULIUS WAINAINA MWATHI VS BETH MBENE MWATHI**, where the Court of Appeal held that the intestate succession of a deceased Kikuyu is governed by Kikuyu Customary law. He further urged that this matter is governed by **Section 82** of the old Constitution and discrimination does not apply to matters of marriage inheritance. He questioned why the application was brought after many years and there is a demonstration of lack of seriousness. He denied fraud because Violet has not sworn any affidavit. Lastly, he contended that there were similar applications on record which were not prosecuted and the current application is therefore incompetent and an abuse of the court process.

As to whether this application is res judicata or an abuse of the court process, it is the applicants' contention that this file went missing for about 2 years and they had to write to the Respondent's counsel seeking to have the file reconstructed and that is when the file resurfaced. It is not disputed that a similar application dated 27/2/2006, was still pending determination when the instant one was filed. However, on 22/6/2009, the court directed that the preliminary objection that had been filed by the Respondent be

heard within the main application and the two applications dated 27/2/2006 and 18/3/2008 be heard together. The Respondent cannot therefore claim that any other application remains pending. Two applications have been determined within this application. Besides, this application cannot be res-judicata because a similar application between the same parties has not been heard and determined on merit, there before.

The deceased died while domiciled in Kenya. Succession to his immovable and moveable property is therefore governed by the Law of **Succession Act Cap. 160 Law of Kenya** by virtue of Section 4 thereof. Since the deceased had one surviving spouse and children, the same will be governed by Section 35 of the Act. It provides in part;

“S.35(1)...(4)

(5) Subject to the provisions of Sections 41 and 42 and subject to any appointment of award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be originally divided away the surviving children.”

Under the above provisions, there is no discrimination of a deceased’s children based on sex. They are equal before the law and the estate is to be distributed in accordance with **Section 35, 41 and 42** of the Act. In the instant case, all the children of the deceased should have agreed on the distribution of the estate and this should be subject to any gifts or advancement that the deceased had made during his life time if any. The Respondent had no right to administer the estate single handedly with the consent of only two of the beneficiaries. The Respondent’s argument that the applicants are married women has no place in our law today and the decision relied upon of **JULIUS WAINAINA MWATHI** (supra) that Kikuyu Customary Law should apply because the deceased was a Kikuyu, has long been overtaken by events. This is because Cap. 160 requires that all children be treated equally and the Constitution which is the highest law of the land outlaws any law that is discriminatory of itself or in its effect. In **RONO VS RONO (2005) 1KLR 536**, the Court of Appeal invoked the International Instruments to which Kenya has subscribed and which prohibit discrimination on grounds of sex. The court also observed that the possibility that the daughters in a family may be married would only be one of the factors that may be considered in distribution but it is not a determining factor. The court held:

“1. The application of African customary law is governed by section 3(2) of the Judicature Act (Cap 8). The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect.

2. Even though Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated, current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law, even in the absence of implementing legislation.

3. Kenya has subscribed to international laws which make provisions against the discrimination of person on the grounds of sex, including the Universal Declaration of Human Rights; the Covenant on Economic, Social and Cultural Rights; the Covenant on Civil and Political Rights and the African Charter of Human and People’s Rights. It has also ratified the Convention on the Elimination of All Forms of Discrimination Against Women.

4. ...

5. ..

6. The discretion of the court in distributing the estate of a deceased person under section 27 of the Law of Succession Act must be exercised judicially or on sound legal and factual basis. The possibility

that the daughters in a family may be married would be one factor that may be considered and not a determining factor. In this case, there was no firm factual basis for finding that the daughters of the deceased would be married.”

Article 27 (4) and (5) of the Constitution outlaws discrimination on account of gender. The applicants have a right to the deceased's estate and even if they are married, it is upon them to decide whether or not they want a part of their father's estate. I find and hold that the Respondent acted in contravention of clear statutory provisions by excluding his sisters.

As regards the allegation of forgery of Violet Wambui's signature on the consent, it is the word of the applicants against the Respondent. If Violet signed the consent in support of the summons for confirmation, which is now questioned, there is nothing difficult with the said Violet coming up to say whether or not she signed it. The applicants have exhibited an authority signed by all other sisters including Violet Wambui in support of this application. In addition, there is annexure **WNW2**, from Violet Wambui Mbugua dated 2nd September 2005 denying having signed any document in respect of the deceased's estate. Doubt is raised as to whether Violet Wambui signed the consent.

From the foregoing, it is evident that the grant of letters of administration issued to the Respondent were confirmed irregularly because the Respondent did not disclose all the beneficiaries. The grant is hereby revoked to allow for all beneficiaries to be involved. Lastly, though there was no application for joinder of another administrator, I think it is only fair that another administrator be appointed by the applicants to act as a co-administrator with the Respondent to protect their interests. The petitioner will bear costs of this application.

DATED and DELIVERED this 4th day of March, 2011.

R.P.V. WENDOH
JUDGE

PRESENT

Mr. Osiemo for Applicants

In person - Respondent

Kennedy Oguma – Court Clerk