



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Succession Cause 1351 of 1989

MBURE GACHIRA DECEASED

J U D G M E N T

The two petitioners herein, Dominic M. Mbure and David Gachira Mbure, applied to be issued with Letters of Administration to the estate of their late father Mbure Gachira. However, their application was objected to by Miriam Mugure Gathee, daughter of the deceased Mbure Gachira and her Alice Wanjira Mbure, one of the deceased's wives, also now deceased. Her reasons for objecting to the issue of the grant were threefold

1. That the proposed administrators have failed to vote the objector in their petition.
2. That the proposed petitioners have failed to consider the estate of Alice Wanjiru Mbure, deceased as heir to the deceased's estate as she did not bear any sons.
3. That the objector is entitled to her mother's of the deceased.

One of the petitioners, David Gachira Ngunjiri, gave evidence in court, to the effect that his late father had 7 wives, and today, only 5 are alive, two have since died. He gave the number and sex of the children whom each wife had. The objector's mother Alice Wanjiru had 3 daughters who are all married.

He testified that the 5 surviving wives authorised her together with his step-brother Wilson Ndara, to apply for a grant of letter of Administration father's estate. However, the objector's mother's house was not represented at the meeting this was because all the 3 daughters in that household are married.

He testified further that all the 7 wives lived in one homestead with the deceased who had shown them their portions of land, before he died, otherwise land was registered in the deceased's name.

The petitioners have not dealt with land belonging to the objector's mother in anyway because of this objection by Miriam.

The petitioner's called an elder Solomon Kinothia, born in 1913, as a witness. He worked as a Magistrate in Kiambu African court, in Kikuyu. Also, he is familiar with Kikuyu customs.

He testified that according to Kikuyu customs, when a deceased has several wives, his properties are to be

inherited by his sons. That this applies to land too, which every wife inherits with her son. That the land would normally be divided equally between widows and their sons, and inheritance does not include daughters who are either married or unmarried. He referred to a kikuyu custom, "uramati," which means taking care of or looking after a home which is usually the task of the first born son in a home, not widows or daughters.

The objector, Miriam Mugure Gathee was the daughter of Mbure Gachira, by Alice Wanjiru, who died in 1985, leaving behind 3 daughters.

Miriam testified that her later mother, like all the other wives of Mbure Gachira, had her own piece of land which she used to cultivate, and upon her death, her step-brother now wanted to take.

Miriam asserted that she is entitled to her mother's piece of land because she was the one who looked after her late mother when she was ill until she died.

Miriam admitted on questioning that she is married and lives with her husband and children, but still her mother was entitled to inherit from her late husband Mbure, and now she is dead, she (Miriam) wants her portion of land which allows widows to inherit from their dead husbands.

At the conclusion of the oral evidence, the 2 learned Counsel filed written submissions which have now formed part of these proceedings. The objector's Counsel relied on the provisions of the Judicature Act Cap. 8 Laws of Kenya, at S.3(2), in his submissions, saying that any customary law that disinherits households without sons and treats daughters as second rate and appendages of sons and discriminates daughters merely on the basis of sex is repugnant to justice and morality in terms of the Judicature Act, and such discrimination has no place in modern Kenya.

The advocate submitted further that since the deceased land was registering presumably under the R.L.A any rights under customary law are extinguished upon registration. He relied on the case of *Esiroyo versus Esiroyo*, (1973) EA pg.388, and Elizabeth Wambui Wanjohi and others versus Official Interim & Liquidator (this authority was not provided).

The Counsel for the petitioner, on the other hand submitted that the law applicable here is the Succession Act, Cap 160 Law of Kenya, and Section 32 and 33 give guidance on how to deal with agricultural land.

His submission is that inheritance under Kikuyu Customary Law which does not allow married daughters to inherit land from their fathers estate.

The records show that the deceased died in 1980, however, the 2 petitioners, who are his sons petitioned for a grant of letters of Administration to his estate in 1989. The Law governing the administration of his state is the Law of Succession, Act, Cap 160, Laws of Kenya. Section 40(1) which was quoted by the objector's Counsel is relevant, in the distribution of estate the late Mbure Gachira because he was polygamous. However because of the evidence which I have recorded in this case I am taking this case a step further than Sec. 40 in posing the question, when the objector's mother Alice Wanjiru died, was her household still a "house", within the meaning of Sec. 40(1) of the Law of Succession Act?

The objector Miriam and her sister Beatrice, both are married. Presumably they were married as at the time their mother died, because there is nothing the contrary on record. Also missing from the record is the date when their other sister died.

Since the 2 girls were already married by the time their mother died, I consider that they had changed their status in law, which, means that they were longer part of their mother's house, because of their changed "status".

The Succession Act defines "house" as meaning, "a family unit comprising a wife and children of that wife".

I know the Act does not go so far as to define “children” for the purposes of this section, but I am unable to find that daughters who are already married can be read into that definition.

I see the reasoning behind this to be the fact that such daughters have already formed their family units and houses by virtue of their marriage. If I were to bring them into their mother’s house, for the purposes of inheritance under sec 40 then I would be saying that they are entitled to inherit twice, that is from their mother’s ‘houses” and their own “houses” created by their marriage. This could not have been the intention of the legislature, because it would give marriage daughters unfair advantage over other people in terms of inheritance.

I have read the definition of “child” or “children” in sec 3(2) of the Act, but I do not find included in that definition of child, a deceased’s daughter already married.

The above is the reasoning I am using in this case, in coming to the conclusion that the provisions of Section 40 of the Succession Act cannot apply to Alice’s “house” because the children she left behind upon death, do not qualify as “children” for the purposes of the section.

I do not find any of the cases quoted by the advocates to be relevant here because I have not decided this case on the basis of "rights under customary law". If I was using that reasoning then the authority of Esiroyo versus Esiroyo would be relevant, I suppose. However, I have restricted my decision to Sec. 40(1) of the Succession Act, which in my opinion is the relevant section since the deceased "had married more than once under any system of law permitting polygamous”.

For the reasons I have considered above, I find that the objection raised by Miriam Mugure, and her sister, to the petition by Dominic Mbure and David Gachira Mbure, has no merit, and I proceed to dismiss the same. However, because of the nature of these proceedings, I have decided that each party will pay their own costs.

Dated at Nairobi this 22nd Day of July, 1993.

ALUOCH (MRS)

JUDGE