



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 68 OF 1992
IN THE MATTER OF THE ESTATE OF THE LATE JOEL
NYOIKE MUGO (DECEASED)

BENSON NGANGA NYOIKE1ST
APPLICANT

ROSEMARY WAMUHU2ND
APPLICANT

VERSES

NYOIKE

MUGO.....RESPONDENT

JUDGEMENT

1. The deceased herein died intestate on 7th February 1980. He was a polygamous man having married three wives namely Salome Muthoni Nyoike, Susan Nduta Nyoike and Mary Wanjiku Nyoike and had seven, three and seven children respectively.
2. All the wives have since passed on. Most of his children have also died.
3. Justice Musyoka on 4th September 2014 revoked a grant issued on 29th September 1995 and directed a fresh grant to be issued.

4. This court granted grant to Joel Nyoike Mugo and Gladwell Wanjiku Nyoike on 6th February 2018.
5. Vide an application dated 2nd July 2018 Joel Nyoike Mugo sought to have it confirmed. His mode of distribution was objected to by Gladwell Wanjiku Nyoike vide her affidavit of protest sworn on 27th July 2018.
6. The matter after a long period in which the parties attempted a court annexed mediation failed to agree and subsequently the court directed that it be heard orally.
7. The Objector **Benson Nganga** the son to the deceased testified that his late father had three wives and owned parcel number Dagoretti/Ruthimitu/409 which he had divided among his three wives. He said that the land ought to be divided in the manner the deceased had done and not as proposed by the Applicant/ Administrator.
8. He denied that the deceased had divided it among his sons and that each of the wives had been buried in the respective portions shown and left by the deceased.
9. Equally the deceased children who had passed on were equally buried in their respective portions and thus the need to uphold the wishes of the deceased.
10. He further denied the contribution allegedly made by the other deceased brothers in paying out the liabilities of the estate as claimed including a loan facility at Kenya Commercial Bank.
11. The Objector as well denied that the deceased gave the third house some parcel of land in Limuru.

12. **Rosemary Wamuhu Nyoike** from the third house supported the Objector and relied on her witness statement on record. She said that each of the houses had their portion shown to them by the deceased and they had settled therein. Those who have passed on were each buried in their respective portions.
13. The Petitioner/Applicant Joel Nyoike Mugo the grand son to the deceased on the other hand testified that the deceased had already demarcated the land to his sons and not the daughters. That the third house had been given land in Limuru which measured 4.5 acres.
14. He was however on cross examination unable to produce evidence of the Limuru land.
15. He said that his father contributed to the acquisition of the land.
16. He therefore prayed that the land be shared out according to deceased wishes, that is to the boys only.
17. The parties were then directed to file written submissions which they complied.
18. The central theme of the Protestors submissions is whether the Kikuyu customary law was applicable in the circumstances.
19. He argued that the same although the deceased passed on before the enactment of the current Succession Act in 1981 does not qualify to have the estate decided in that manner.

20. He submitted that the proposal by the Respondents ran contrary to the principles laid down under Article 27 of the Constitution regarding non-discrimination on gender.
21. That it is not true that the deceased gave his sons only his estate and if that was the case the same was discriminatory and therefore ran foul the provisions of the Judicature Act as it was repugnant to justice and morality.
22. He prayed that the estate be divided among the three houses and at worst between the children as set out under Section 38 of LSA.
23. On the other hand, the Respondent relied heavily on the fact that since the deceased passed on prior to 1981 his estate must therefore be governed and distributed according to the Kikuyu customs where the deceased gives his property to the sons. This according to him was exemplified much earlier by the deceased and that they had been staying that way ever since.
24. The Respondent cited several authorities including the famous Eugen Cotran on "*Restatement of Customary Law.*"

Analysis and determination

25. I have perused the entire pleadings as well as the evidence on record provided by the parties. I have extensively gone through the submissions and the cited authorities. I have equally read the ruling of Musyoka j dated 4th September 2018.

26. I find that what is not disputed herein is that the deceased was polygamous with three wives and several children. He left behind one property namely Dagoretti/Ruthimitu/409.
27. Further all his three wives together with his children stayed on the above parcel. Those who have died including the deceased were buried on the land.
28. That the parties have each stayed on the various portions and farmed or did whatever business therein.
29. That there is no evidence so far presented that the third house was given some land in Limuru area or at all.
30. There was no evidence as well that either of the deceased children whether sons or daughters, dead or alive, in any manner contributed to the acquisition of the land or in payment of any liabilities whether to the banks or otherwise.
31. As a matter of fact, the record shows that Gladwell paid the KCB Loan indirectly when her assets were sold and the proceeds remitted to the bank. It is therefore not true that one Nganga nor the deceased serviced the same despite the default by Gladwell.
32. What I find germane also is that all the family members have each stayed on the above parcel of land without much dispute and I think the issue arose at the process of carrying out this succession proceedings.
33. What then is the law relevant to govern the estate herein?

34. I entirely agree with the Applicant that since the deceased died prior to 1981 the governing law ought to be the Kikuyu customary law.

35. Section 2(2) of Cap 160 provides that:

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

36. The rider however is that as long as it was not repugnant to justice and morality. This of course is found in The Judicature Act section 3(2) which states:

“ The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court 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.”

37. I also agree that the said Kikuyu customs though not much evidence was presented during trial was patriarchal in nature. In other words, it lays emphasis on the position of

the male child in the society. I presume because it was expected that the girl child would be married and will therefore inherit from her in-laws.

38. Looking at the manner and style suggested by the Applicant it will mean that the girls herein will be disadvantaged as they will not get any share out of their father's estate. The deceased girls who are alive will have therefore to fend for themselves whether they are married or not.
39. I respectfully do not think that it accords with Article 27(3) of our current Constitution on the question of discrimination. It goes on to state that:

“Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”
40. It actually leaves them desolate whether they are married or not and even their children who are deceased grandchildren will have to fend for themselves.
41. The same does not sit well with section 3(2) of the Judicature Act (supra). Any form of discrimination against anybody and for that matter other family members be it male or female by any law whether customary or otherwise is indeed repugnant to justice and morality.
42. More importantly the afore quoted article of the constitution insulates the Objectors in this case and oust

any discriminatory customs such as the one the Applicant is relying on.

43. While on this, I do not find any evidence that the deceased demarcated his land to his sons as the Applicant is claiming. It appears to me that by the time he passed on in 1980 his three wives, at least, those who had not predeceased him were each staying in their various portions, cultivating and carrying out their usual family activities.
44. It is not in dispute that they were each buried in their respective portions and have lived therein to date.
45. In essence if the deceased wanted to distribute the parcel to his sons, I believe he would have done so prior to his demise. He instead apportioned his wives their respective portions.
46. The rudimentary map produced by the Applicant cannot be relied upon as the same is unofficial and lack any professional input to say the least. If it was official then the Administrators by now ought to have registered it or have it produced herein by a professional surveyor.
47. In the premises I do not find it efficacious to rely on the Kikuyu customary law as prayed by the Respondent. On the contrary the applicable law is the Law of Succession Act cap 160.
48. Under the provisions of Cap 160 and Section 38 in particular such an estate would be distributed either to the

houses or children as the case might be. It goes on to state that:

“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.”

49. I find the proposal by Benson Nganga Nyoike in his affidavit sworn on 13th November 2020 reasonable and in accord with the Act. I however agree with him in the second limb of the proposal, namely, sharing out in terms of the units.
50. Since the widows have all passed away the best approach is to share it out to each unit based on the number of the children. Of course, if there was a surviving widow, she would have gotten a unit on her own.
51. Consequently, the property Dagoretti/Ruthimitu/409 be shared out as hereunder:-
 - (a) First house of Salome Muthoni Nyoike which has seven children seven (7) units
 - (b) Second house of Susan Nduta Nyoike with three children, three (3) units.
 - (c) Third house of Mary Wanjiku Nyoike seven children, seven (7) units.
52. The above apportionment does not discriminate on any of the deceased children whether male or female.

53. It is also noted that most of the deceased children have passed on and those surviving him are the grandchildren. To this end each of them shall get respective shares due to their units/mothers or fathers.
54. This position was well captured by the ruling of my brother Musyoka J, in his ruling on record dated 4th September 2014 alluded to above.
55. At the level of carrying out the survey exercise caution must be observed so that the capital investments placed there over the years by respective units shall not be interfered with as much as possible.
56. At the same time each of the units must remain as much as possible to the position left behind by the deceased.
57. The Administrators should therefore proceed to apply for the confirmation of grant in the manner directed above.
58. **In the premises judgement is hereby entered as hereunder:-**

(a) The land parcel number Dagoretti/Ruthimitu/409 shall be shared out among the units as directed under paragraph 51 above.

(b) The Administrators do apply to confirm the grant forthwith.

(c) Being a family matter costs shall be in the cause.

**Dated signed and delivered at Nairobi via video link
this 16th day of October 2025.**

H K CHEMITEI
JUDGE