



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: VISRAM, KOOME & ODEK, JJ.A.)
CIVIL APPEAL NO. 248 OF 2009

ERASTUS GICHINGIRI MUHORO.....APPELLANT

VERSUS

GERISHON GICHINGIRI MUHORO

JOSEPHAT KAHUNYO MUHORO

JACKSON KANYUIRO MUHORO.....RESPONDENTS

CONSOLIDATED WITH

CIVIL APPEAL NO. 298 OF 2010

GERISHON GICHINGIRI MUHORO.....APPELLANT

VERSUS

JOSEPHAT KAHUNYO MUHORO

JACKSON KANYUIRO MUHORO

ERASTUS GICHINGIRI MUHORO.....RESPONDENTS

(Appeal from the judgment of the High Court of Kenya at Nyeri (Makhandia, J.) dated 26th March, 2008

in

H.C. Succ. Cause No. 327 of 1996)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court at Nyeri, *Makhandia, J.* (as he then was),

dated 26th March, 2008, in **H.C. Succ. Cause No. 327 of 1996**. Arising from that Judgment, two appeals were filed; **C.A. No. 298 of 2010**; Gerishon Gichingiri Muhoro is the appellant **and C.A. No. 248 of 2009**; Erastus Gichingiri Muhoro is the appellant. During the hearing, both appeals were consolidated with the consent of the parties as they relate to same subject matter, that is, the determination of the heirs and the respective shares of the beneficiaries of the estate of the late Washington Muhoro alias Muhoro Mweru (deceased). The holding file remains **Civil Appeal No. 248 of 2009**.

[2] The deceased died intestate on 30th November, 1974, before what is today the **Law of Succession Act, Cap 160** became operational. Sometimes in November, 1996, Gerishon Gichingiri Muhoro, the appellant in **C.A. No. 298 of 2010**, petitioned for the grant of Letters of Administration. He named the following as survivors of the deceased:-

1. **Gerishon Gichingiri Muhoro born 1939**
2. **Josphat Kahunyo Muhoro born 1943**
3. **Jackson Kanyuiro Muhoro born 1949**

The following were indicated as the assets of the deceased: -

- i. **L.R. Title No. Kirimukuyu/Thiu/262.**
- ii. **¼ share Plot No. 127 Karatina Township (Proprietorship in common).**
- iii. **½ share in Plot No. 53 Karogoto Market (Proprietorship in common).**
- iv. **450 ordinary shares with Nation Printers.**
- v. **Money at Kenya Commercial Bank all total estimated value of the Assets Kshs. 3 Million.**

[3] Citation to accept or refuse the grant of Letters of Administration was issued to Josphat Kahunyo Muhoro and Jackson Kanyuiro Muhoro on 2nd December, 1996. On 3rd June, 1996, Josphat Kahunyo Muhoro filed a replying affidavit to the said citation and indicated his objection to the grant being issued to the petitioner because he left out another parcel of land namely **KIRIMUKUYU/THIU/SK6/355**, measuring about 3.9 acres which was registered in the name of the petitioner as trustee for himself and his two brothers. The respondent asked that the said parcel of land be considered as the deceased's estate and it be shared among the 3 sons as part of the deceased's estate.

[4] Sometimes in January, 1999, Erastus Gichingiri Muhoro filed an objection on his behalf and his brothers James Kahunyo Muhoro, Paul Kihara Muhoro and Titus Ndiritu Muhoro whom he claimed were omitted as beneficiaries of the deceased's estate. On 10th December, 2002, the parties agreed that the grant of Letters of Administration be issued to the petitioner, Gerishon Gichingiri Muhoro, the citee, Josphat Kahunyo Muhoro, and the objector, Erastus Gichingiri Muhoro. It was also agreed that the issue of distribution of the deceased's estate be resolved by way of oral evidence.

[5] On 13th November, 2003, Erastus Gichingiri Muhoro, sought to have the grant confirmed. He proposed that **Title No. Kirimukuyu/Thiu 262** be shared equally among Gerishon, Josphat and Jackson. Whereas, Erastus, James, Paul and Titus should share equally the one half share of **Plot Nos. 127 Karatina** and **53 at Karogoto Market**. Money in Kenya Commercial Bank Karatina Branch be shared equally by all.

[6] Jackson and Josphat were not happy with the proposed mode of distribution. They filed an Affidavit of Protest against the proposed distribution. They claimed that Gerishon was not entitled to inherit any part of the deceased's estate as he had inherited **Parcel Number Kirimukuyu/Thiu/SK 6/355** from the deceased during his lifetime. They also contended the objectors that is, Erastus, James, Paul and Titus were not entitled to inherit any part of the deceased's estate as they were strangers or imposters.

[7] Both the protest and the application for confirmation of the grant were heard by Makhandia, J. After considering and analyzing the evidence for and against the proposed mode of distribution of the deceased's estate, the learned Judge concluded in a pertinent portion of the judgment as follows:

“My take on this based on evidence on record is that indeed the deceased gave the piece of land to the Petitioner in his lifetime. In paragraph 4 of the affidavit in support of the petition for Letters of Administration Intestate, the petitioner has stated that he was born in 1939. In his evidence in chief, he stated that he bought the subject piece of land in 1955. That means he was only about 14 years. I doubt very much that at that age the petitioner would have had the capacity and resources to buy the subject piece of land. He could not have been a successful businessman then. Further, this was during the state of emergency and it is doubtful whether at his age he would have been in a position to buy land. He was underage. Further, the petitioner never offered any evidence as to who sold him the pieces of land. All he said was that he could not recall the people from whom he bought the pieces of land that were later to form Kirimukuyu/Thiu/252. He never tendered any sale agreement regarding the subject piece of land. Neither did he call any witnesses to back up his claim. Neither did he show by evidence how he effected payments of Kshs. 860/= to the owners the pieces of land he was buying. To me, the evidence of the petitioner regarding the purchase of Kirimukuyu/Thiu/252 is simply incredible. I do not believe it. I have, therefore, come to the conclusion that the petitioner received a share of his father's estate during the lifetime of his deceased father and is, therefore, not entitled to a share in Kirimukuyu/Thiu/262 on account of his inheritance. Small wonder that he has never developed this parcel of land or any portion thereof. Indeed, under cross-examination by the protestor, he exclaimed “I have not developed the Kirimukuyu shamba as I have my own...””

Flowing from what I have so far stated, it should be obvious that the objectors are not entitled to a share of the deceased's estate. That the petitioner is only entitled to a share of the estate limited to plot numbers 127 Karatina town and 53 Karagoto, 450 shares in Nation Printers and Publishers Limited and the money held in Kenya Commercial Bank Limited, Karatina Branch. Accordingly, the grant should be confirmed on the following basis:

- i. LR No. Kirimukuyu/Thiu/262 to be shared equally between Jackson Kanyuiro Muhoro and Josphat Kahunyo Muhoro.***
- ii. Plot Number 127 Karatina Town to be shared equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.***
- iii. Plot Number 53 Karogoto to be shared equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.***
- iv. Money in an account with Kenya Commercial Bank Limited Karatina Branch, to be shared equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.***
- v. The value of the 450 shares in Nation Printers and Publishers Limited to be apportioned equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.***

This being a family dispute, it is not proper nor appropriate to order costs against either of the parties. Accordingly, there will be no order as to costs”.

[8] Being aggrieved by those orders, Erastus Gichingiri appealed in ***Appeal No. 248 of 2009***, relying on the following 8 grounds of appeal:

- 1. That the learned Honourable Judge erred in law and in fact in holding as he did that since the Appellant/Objectors' mother was divorced and had gone away with her children, she severed her and her children's links with the deceased's family and they could not, therefore, stake a claim in the estate.***

2. *That the learned Honourable Judge erred in law and in fact in holding that the evidence of complete severance of relationship between the deceased's family and the objectors' and their mother is buttressed and manifested by the fact that the Objectors' mother was denied the right to be buried in the deceased's land coupled with failure by the Objectors to attend the burial of their deceased father.*
3. *That the learned Honourable Judge erred in law by failing to hold that the objectors were dependants of the deceased within the meaning of Section 29 (1) of the Succession Act (Cap 160) of the Law of Kenya.*
4. *That the learned Honourable Judge erred in law by failing to exercise the discretion of the court under Section 27 of the Succession Act, (Cap 160), Laws of Kenya and further failing to qualify the objectors under Section 28 of the Succession Act, (Cap 160) Laws of Kenya.*
5. *That the learned Honourable Judge erred in law by contravening Section 83(3) and discriminating the Objectors as not being dependants of the deceased.*
6. *That the learned Honourable Judge erred in law by applying customary laws which were repugnant to justice and morality contrary to Section 3(2) of the Judicature Act.*
7. *That the learned Honourable Judge erred in law by not according to the Appellant/Objector opportunity to be heard and adduce his evidence before court contrary to the rule of natural justice and thereby arrived at a wrong decision.*
8. *That the learned Honourable Judge in law and fact in distributing the deceased's estate as he did without first hearing the Appellant's case.*

[9] Similarly, Gerishon Gichingiri Muhoro, filed an appeal against the same orders in *Civil Appeal No. 289 of 2010*, in which he raised the following 4 grounds of appeal to wit: -

1. *That the learned Honourable Judge erred in law and in fact in holding as he did that the appellant was not entitled to a share in KIRIMUKUYU/THIU/262.*
2. *That the learned Honourable Judge erred in law in fact in holding that the appellant had received his share of the deceased's estate during his father's lifetime.*
3. *That the learned Honourable Judge erred in law by failing to hold that the Appellant had personally bought KIRIMUKUYU/THIU/252 and, therefore, did not form part of the Deceased's estate.*
4. *That the learned Honourable Judge erred in law by discriminating the Appellant and giving a title share of the deceased's estate than the Respondents.*

[10] It would seem when the two appeals were filed, both appellants, that is, Erastus and Gerishon were represented by Mr. Kioni of Sichangi & Company Advocates. However, during the hearing of the appeal, Mr. Kioni appeared for Erastus, while Mr. Ombongi appeared for Gerishom and Mr. Mathaiya appeared for the respondents. In his address to us, Mr. Kioni faulted the trial Judge for relying on Kikuyu Customary practices or law that allegedly provided that once a wife was divorced customarily and she went away with children, the said children are not entitled to inherit the estate of their deceased father.

[11] Counsel argued that it was indisputable that the deceased herein died before the *Law of Succession Act* came to effect. Thus, *Section 2(2)* of the *Act* was applicable and it provides:-

“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”.

According to Mr. Kioni, the application of customary law is qualified by the provisions of **Section 3(2)** of the **Judicature Act** that provides:

“(2) The High Court, the Court of Appeal 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”.

[12] Mr. Kioni further argued that the Judge erred by finding the provisions of Kikuyu Customary Law that disinherits children of the deceased was outdated but he nonetheless went ahead to uphold it notwithstanding it was also repugnant to justice and morality and inconsistent with both the **Children’s Act** and the provisions of the **Law of Succession**. Counsel further submitted that the scenario that was covered by the Text book by **Engine Contran** on Kikuyu Customary Laws was different from the scenario in this instant case because the case in this matter was one of a divorced woman as opposed to a case of a widowed woman who goes away with her children after the death of her husband. Moreover, the Judge was faulted for relying on a single witness who was not an expert in Kikuyu Customary Law.

[13] Mr. Ombogi, learned counsel for Gerishon, the appellant in **C.A. No. 298 of 2010**, associated himself with the submissions by Mr. Kioni and added that his client was also disinherited of his rightful share in a parcel of land **Title No. Kirimukuyu/Thiu/262**. It was argued that Gerishon purchased his own parcel of land thus, the Judge erred in holding that Gerishon was given the parcel of land **Kirimukuyu/Thiu/253** as a gift *inter vivos*.

[14] The appeals were opposed by Mr. Mathaiya, learned counsel for the respondents. He submitted that it was Gerishon who through an act of conspiracy invited Erastus and his brothers to join in the Succession Cause so as to deprive Josphat and Jackson who were the lawful beneficiaries of the estate of the deceased.

[14] Gerishon was found by the trial Judge to be an unreliable witness. Counsel supported the holding by the trial Judge that the Text on the application of Kikuyu Customary Law was good law. The mother of Erastus was divorced in 1968, went away with her children and settled in Nanyuki. Gerishon invited Erastus to join in the succession out of sheer spite of the respondents. Even the mother of Erastus was not buried on the deceased’s parcel of land. The deceased died when the Kikuyu Customary Law was the one applicable and the Judge was right in upholding it in the judgment. On the issue of whether Gerishon was disinherited, counsel submitted that he was given land by the deceased *inter vivos*. The Judge rightly disregarded the evidence that Gerishon could have had resources to purchase land when it was registered in his name, he was only 14 years old.

[15] This is a first appeal, that being so we have a duty to re-evaluate the evidence and make our own independent conclusions with the usual caveat that we did not see or hear the witnesses testify and give due regard to that. See the case of ***Mwangi v Wambugu*, [1984] KLR 453**:

“A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

[16] The learned trial Judge elicited four issues for determination and we think those same issues persist in this appeal, although we shall add one more issue arising from this appeal:

- i. *Whether the objectors were the children of the deceased.*
- ii. *Whether they are entitled to inherit from the estate of the deceased.*
- iii. *Whether the petitioner was given land parcel Kirimukuyu/Thiu/252 during the deceased's lifetime and, therefore, not entitled to a share in Kirimukuyu/Thiu/262.*
- iv. *Should the deceased's estate be distributed?*

Another issue that arises from this appeal in addition to the above is:

- v. *Whether Erastus and his brothers were disinherited through the application of Kikuyu Customary Law. In other words was the application of Kikuyu Customary Law that excluded children of a divorced wife from inheriting their father's estate repugnant to justice and morality.*

[17] The trial Judge found as a fact that the deceased was at one time married to Jedidah Wairimu the mother of Erastus, James, Titus and Paul.

This is what the Judge said in his own words:

“Much as the protestors vehemently denied the fact that their father had married Jedidah Wairimu, on the evidence and considering the circumstances obtaining then, I am prepared to accept that the objectors' mother was once married to the deceased. I cannot see how the objectors being strangers would out of nowhere stake a claim to an estate they knew nothing about. One objector, Erastus Gichingiri Muhoro was even by consent appointed as a joint administrator of the estate of the deceased by Justice Juma, on 10th December, 2002, with the Petitioner and 2nd Protestor. If indeed the objectors were strangers as claimed by the protestors, how come they consented to one of them being appointed a joint administrator? I would have expected that they would have objected to high heaven. Further, there is no evidence that the objectors made attempts to have the remains of their mother Jedida Wairimu buried on the deceased's land. Towards this end, they went to court. However, although they were denied the order, nonetheless, I believe there (sic) that must have been a basis of that suit. It must have been based on a relation past or present between the objectors, their mother and the deceased. Certainly, the objectors were not mad men who only woke up one day and decided that they should bury the remains of their mother in the land of a stranger by the name of the deceased. Why could they not have done so in another person's land? Further, if they had no place to bury their mother, I would imagine that they would have done so in a public cemetery where their brother had been buried previously. This was also as a result of their mother trying to have her son presumably sired by the deceased buried in the deceased's land. These overtures were rebuffed when after hearing the case between deceased and the objectors' mother on the issue by the District Officer as well as the Chief of the area, they ruled that their mother having been divorced by the deceased, her son could not be buried in the deceased's land.

On the basis of the foregoing, I am prepared to hold that indeed, the deceased had married the objectors' mother and they had children”.

[18] The Judge specifically found Erastus and James were the deceased's children; that their mother went away with them when they were toddlers in 1968 after she was divorced by the deceased. The Judge found on a balance of probabilities that Paul and Titus were not children of the deceased. Having so held, the Judge relied on the evidence of James Mugo Gatheru, PW 2, who testified that under Kikuyu Customary Law, once a wife is divorced customarily and goes away with children, the said children are not entitled to inherit the estate of their deceased father. The Judge made reference to a Treatise by Eugene Contron *“Restatement of African Law Volume II”*. The Law of Succession where the learned author stated: -

“...if the widow had children by her deceased husband and she takes the children with her, they do not inherit the property of their deceased father. If, however, the children remain with their family, they inherit his property on the ordinary way”.

[19] On the outset, the treatise refers to a widow as opposed to a divorced woman. Secondly, we agree with the submissions by Mr. Kioni that the evidence of PW 2 cannot be taken as an authority in Kikuyu Customary Law as he was not testifying as an expert witness in the Kikuyu customs. The deceased died in 1974 and the Kikuyu Customary Law is what was applicable under **Section 2(2)** of the **Law of Succession Act**. However, the grant of Letters of Administration of the deceased estate was sought in 1996 under the current Act thus; the administration of the deceased’s estate was to be in accordance with the Act as far as possible.

[20] The place of customary law in our jurisprudence has been discussed in a long line of authorities. It gained prominence in the well known case of **Otieno v Ougo & Another, 2008 1 KLR 9 & F** page 948, where it was observed: -

“The place of customary law as the personal law is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and common law in a matter of personal law? First of all, if there is a clear customary law on this kind of a matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way, these two great bodies of law for that is what they truly are, complement each other. They may be different but the way to operate them is to use them as complimentary to each other without conflict as laid down in Section 3 of the Judicature Act (Cap 8)”.

[21] A lot of water has now gone under bridge, we have the Law of Succession that recognizes the children of deceased those from divorced wife or wives are all regarded as children of the deceased. The **Children Act, 2001**, also prohibits discrimination of a child; **Section 5** provides:

“No child shall be subjected to discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection”.

[22] Those noble principles refer to children but we have considered them in the context of a child under the Law of Succession. The repealed Constitution of Kenya also outlawed discrimination and although we may not refer to the **Constitution of Kenya 2010**, which came into operation later, the principle of non-discrimination is further emphasized. The principle is now a non-derogable right otherwise known as *Jus cogens*. It was argued that the text from the treatise by **Eugene Cotran** referred to children of a widow not a divorced woman. Be that as it may, we find the conclusion by the Judge of what constituted Kikuyu Customary Law was not backed by sound evidence. PW 2 was by no means an expert in Kikuyu Customary Law. The practice of disinheriting children of a divorced wife who go away with their mother is not documented anywhere, there was also no evidence that this practice was notorious. See **KWACH, J.A.** in the case of **Wambugi w/o Gatimu v Stephen Nyaga Kimani, 1992 2 KAR 292**, where the Court discussed extensively the application of customary law vis vis **Section 3(2)** of the **Judicature Act (Cap 8)** as follows:

“The former Court of Appeal for East Africa in the case of Kimani v Gikanga, [1965] EA 735 held that where African Customary Law is neither notorious nor documented, it must be established for the court’s guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinions adduced by the parties”.

[23] We think we have said enough to demonstrate the trial Judge erred by holding that Erastus Gichingiri Muhoro and James Kahunyo Muhoro whom he found were deceased's children were barred from inheriting the deceased's estate as they went away with their mother when she was divorced. As regards Paul and Titus, we agree with the findings of the Judge that there was no evidence that they were deceased's children. Having so found, we find there is merit in **Appeal No. 248 of 2009**.

[24] We now move to the second issue of whether Gerishon was also discriminated when he was denied a share in **Title No. Kirimukuyu/Thiu/262**, which was allocated to his two brothers to his exclusion. We have considered the evidence on record, regarding the ownership of **Kirimukuyu/Thiu/355**, which is registered in the name of Gerishon from the first registration in 1960's. There is undisputed evidence that when the title was registered in the name of Gerishon, he was aged 14 years.

[25] The protestor's witnesses contended that it was the property of the deceased and he caused it to be registered in the name of Gerishon and, therefore, it ought to be considered as a gift *inter vivos* which should be taken into account under the provisions of **Section 42** of the **Law of Succession Act**. Of course Gerishon who had the special knowledge of how and when he acquired the aforesaid title bore the burden of proving that the title did not belong to the deceased. The Judge found the explanation offered lacking in credibility. It is the Judge who saw Gerishon testify and for this reason we agree with the findings of the Judge. This is further for reasons that Gerishon was at the time aged 14 years and he could not explain the source of funds he used to buy the land or the persons from whom he purchased it from. Thus Gerishon was not subjected to differential treatment as alleged. The court considered that he had already benefited from the deceased. For the aforesaid reasons, we agree with the Judge and find no merit in **Civil Appeal No. 298 of 2010**, which we order dismissed.

[26] Having found Erastus and James were children of the deceased, what share of the estate should be allocated to them? It is indisputable that Erastus and James never lived with the deceased thus they never depended on him. They stayed away, and they were invited by Gerishon to participate in the succession cause. On the other hand, the protestors have been living on the deceased's estate, they have probably developed it and that is where they have their vested interest. The Court is given discretion when determining matters under the Law of Succession to ensure ends of justice. This is also underscored as the overriding objective in the administration of justice under the **Constitution** and the **Appellate Jurisdiction Act**; the courts are enjoined to take a broad view of justice.

[27] In this regard, we have taken note that the protestors may have settled on **Kirimukuyu/Thiu/262**, and therefore, it will not be in the interest of justice to interfere with their occupation. We have also taken into consideration that during the lifetime of the deceased, they depended on him while Erastus and James never depended on the deceased at all. For those reasons, the order that renders itself just in the circumstances is that Erastus and James do share with the others the two plots, money in the bank and shares equally.

In the upshot, we allow the appeal in **Civil Appeal No. 248 of 2009**, set aside the orders made on 20th March, 2008, and substitute thereto with the following orders:

1. **LR NO. KIRIMUKUYU/THIU/262, be shared equally between Jackson Kanyuiro Muhoro and Josphat Kahunyo Muhoro.**
2. **Plot No. 127 Karatina Town, Plot No. 53 Karogoto, money with Kenya Commercial Bank Karatina Branch and 450 shares at Nation Publishers be shared equally between Gerishon Gichingiri Muhoro, Jackson Kanyuiro Muhoro, Josphat Kahunyo Muhoro, Erastus Gichingiri Muhoro and James Kahunyo Muhoro.**
3. **This being a family matter, each party should bear their costs of this appeal.**

Dated and delivered at Nyeri this 7th Day of April, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a
true copy to the original.

DEPUTY REGISTRAR