



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**  
**CIVIL APPEAL NO.306 OF 2004**

**BETWEEN**

**MARTHA GUKIYA THUI ..... 1<sup>ST</sup> APPELLANT**

**AND**

**MARGARET WANGUI KINGORI.....2<sup>ND</sup> APPELLANT**

**KIBUGI HINGI..... 1<sup>ST</sup> RESPONDENT**

**WARIEGA HINGI ..... 2<sup>ND</sup> RESPONDENT**

**(An appeal from the judgment/order of the High Court of Kenya at Nyeri  
(Okwengu J.) dated 25<sup>th</sup> July, 2003**

**in**

**H.C.SUCCESS. CAUSE NO. 283 OF 1999)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the decision of the superior court (Okwengu J.) given on 25<sup>th</sup> July 2003, confirming the grant of letters of administration, intestate, issued to Kibugi Hingi, and Warega Hingi, for the estate of **Wanuna Hingi** *alias* Justus Wanuna who died on 21<sup>st</sup> May 1991. He was survived by two daughters, **Martha Gukiya Thui**, and **Margaret Wangui Kingori**, the appellants herein. Those who were issued with letters of administration, as aforesaid were the brothers of the deceased and they are the respondents in this appeal. The two and one Hannah Njeri Miguri, described in the petition for letters of administration as a sister in law of the deceased, also survived the deceased.

In her judgment Okwengu J. in pertinent part, held as follows:

“Both the protestors (the appellants herein) being married they would not be entitled to inherit the deceased’s land – whether bought by the deceased or family land. The deceased not having been survived by any sons or unmarried daughters, his rightful heirs are his two brothers as the two administrators who survived him. The widow of Migwi Hingi would not be entitled to inherit the deceased’s property as her husband did not survive the deceased. This therefore means that the two administrators and the widow of Migwi would each be entitled to their ¼ share which the deceased held in trust for them in land parcel Muhito/Njiruini/106 and in addition the administrators would be entitled to share the deceased’s ¼ share as well as land parcel Muhito/Njiruini/105 equally.”

The effect of the above decision was that both appellants, though children of the deceased did not get any share of their

father's estate. It is that decision which provoked this appeal.

Only one issue was argued in this appeal, namely whether the trial Judge was right in applying customary law in this matter to disinherit the appellants merely because they were married daughters. In coming to the aforesaid decision, the superior court was, apparently guided by the provisions of sections 32 and 33 of the Law of Succession Act, Cap 160 Laws of Kenya, (under the Succession Act.). Section 32, provides thus:

“32. The Provisions of this part shall not apply to –

(a) agricultural land and crops thereon or

(b) Livestock,

situated in such areas as the Minister may, by notice in the Gazette, specify.”

And **section 33**, above provides as follows:

“33. The law applicable to the distribution on intestacy of the categories of property specified in section 32, shall be the law or custom applicable to the deceased's community or tribe, as the case may be.”

The part referred to in **section 32**, relates to intestacy. It is quite clear that the trial Judge proceeded on the basis that all agricultural land is excluded from the application of the law on intestacy under the Succession Act. With due respect to her the application of the law on intestacy is excluded only in respect of agricultural land which falls within such areas as have been specified in a Gazette notice signed by the Minister for the time being responsible for administration of estates of deceased persons – And whether or not a particular agricultural land falls outside the provisions of part V, above, is a question of fact. The onus is on the party who alleges that part V does apply to a particular land to adduce evidence to show such land was Gazetted by the Minister concerned.

Neither the law of Succession Act, nor the record of the trial court, has any indication to the effect that the land in issue herein was Gazetted as required by **section 32**, aforesaid.

Besides, even assuming that the land in question was duly Gazetted, two important issues arise. The first issue, is whether it was the intention of Parliament to exclude the application of intestacy provisions of the Succession Act to all agricultural land. Customary law, is personal law and is meant to govern rights to land conferred by customary law or customary practices of the community or tribe where the land falls. What was in dispute here is registered land. It means the land had ceased to be governed by customary law in view of the clear provisions under the relevant law under which the land is registered. The land in dispute herein fell under the Registered Land Act, Cap 300 of the Laws of Kenya. As rightly pointed out by Mr. Kingori, for both appellants, **sections 28 and 29** of that Act provide that the land registered under the Act belongs to the registered owner absolutely. Customary claims are thus excluded. That being so, it would mean that **section 32 and 33**, must be read as being subject to the provisions of **section 3 (2)** of the Judicature Act, which provides that customary law will apply provided it is not repugnant to justice and morality, and is not inconsistent with any written law. The written law here is the Registered Land Act, which as stated earlier excludes customary claims over land registered under that Act.

The second issue, is whether, assuming, customary law applies, it would be just to deprive a child of a deceased person of her father's estate merely because she is a married daughter, and vest the estate in a brother of the deceased, so to speak, as a

windfall to him? We think that Parliament did not intend that customary law applies to agricultural land, on intestacy, regardless of the result its application will give rise to. **Section 3(2)** of the Judicature Act, provides as follows:

“ 3 (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 practicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice...” (Emphasis Supplied).

So although **sections 32** and **33** of the Succession Act appear to mandate the courts to apply customary law or custom, in the distribution of a deceased’s agricultural land on intestacy, the application of such law is not absolute. It has to be subjected to strictures under **section 3 (2)** of the Judicature Act.

Mr. Kiminda for both respondents referred us to **section 82** of the Constitution as overriding the provisions of **section 38** of the Succession Act, which appears to cover all children irrespective of gender and whether or not they are married. **Section 82 (1)** of the Constitution provides that:

“82 (1) Subject to subsection (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.”

**Section 82(4)** provides:

“82 (4) subsection (1) shall not apply to any law so far as that law makes provision –

- (a) with respect to persons who are not citizens of Kenya;
- (b) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
- (c) for the application in the case of members of a particular race or tribe of customary law with respect of any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
- (d) ...”

The above provisions of the Constitution do not affect the provisions of **section 3(2)** of the Judicature Act which makes provision as to the extent to which customary law shall apply.

The deceased left two parcels of land registered in his name. They were Muhito/Njiruini/105 and 106. Evidence was led to the effect that parcel 106, is ancestral land while parcel No.105, was bought either by the deceased alone or jointly with the respondents. Whatever the position was, what is not in dispute is that both parcels of law are registered solely in the names of the deceased. The respondents testified that parcel No.106, was registered in the name of the deceased as the eldest brother, to hold it in trust for himself and his three brothers. Mr. Kingori for both appellants raised an interesting point, but which we do not agree with, that the issue of trust ought not have been raised in succession proceedings. A grant of letters of administration relates to the net estate of a deceased person. A share of property held in trust is not part of the deceased’s estate, but a charge

over it and must be identified and excluded from distribution, to persons other than those beneficially entitled to it. The Proviso to **section 71** of the Succession Act provides thus:

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

We have said enough to show that the superior court erred in applying customary law without any proper basis, in absence of any Gazette notice to show the land fell in such an area in which customary law could be invoked. In the result we allow the appeal, set aside the judgment of the superior court dated 25<sup>th</sup> day of July 2003, and any consequential orders, and remit this matter back to the superior court to issue a confirmed grant in favour of both appellants to hold the two parcels of land as joint heirs in equal shares in terms of **section 38** of the Succession Act and if the respondents are entitled to any share by reason of any trust, their respective shares should be identified and be distributed to them. The appellants shall have the costs of the appeal and of the proceedings before the superior court.

Dated and delivered at Nyeri this 24<sup>th</sup> date of June 2010

**P.K. TUNOI**

.....  
**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**