



REPUBLIC OF KENYA



**In re Estate of Ikunyua Itunga (Deceased) (Succession Cause  
1 of 2000) [2024] KEHC 2313 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2313 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 1 OF 2000  
TW CHERERE, J  
FEBRUARY 29, 2024  
IN THE MATTER OF THE ESTATE OF IKUNYUA ITUNGA (DECEASED)**

**BETWEEN**

**ZIPPORAH KAJUJU ..... OBJECTOR**

**AND**

**ALEXANDER NDUMBA IKUNYUA ..... PETITIONER**

**RULING**

**Background**

1. Ikunyua Itunga (Deceased) died sometimes on 05<sup>th</sup> April, 1970. At the time of filing this cause, Alexander Ndumba Ikunyua (Petitioner/Respondent) filed chief's letter dated 10<sup>th</sup> December, 1999 and an affidavit in support of the Petition (Form P & A) which reveal that deceased was survived by the following:
  1. Salome Ikunyua - widow
  2. Grace K.G.Muthuri - daughter
  3. Edward Kinyua Itunga - son
  4. Harriet Karuru - daughter
  5. Alexander Ndumba Ikunyua - son
  6. Stanley Muriki Ikunyua - son
  7. Zipporah Kajuju - daughter
2. Deceased's estate was listed as comprising as LR. Nyaki / Kihoka/54.



3. Letters of Administration Intestate were issued to the Petitioner/Respondent on 08<sup>th</sup> May, 2000.
4. Subsequently by Certificate of Confirmation of Grant dated 07<sup>th</sup> December, 2000, the estate comprised in LR. Nyaki / Kihoka/54 was distributed equally to the following:
  1. Edward Kinyua Itunga
  2. Alexander Ndumba Ikunyua
  3. Stanley Muriki Ikunyua
5. By summons dated 18<sup>th</sup> October, 2023, Zipporah Kajuju (Objector/Applicant) seeks the following orders:
  1. Certificate of Confirmation of Grant dated 07<sup>th</sup> December, 2000 be revoked
  2. Cancellation of titles issued to Edward Kinyua Itunga, Alexander Ndumba Ikunyua and Stanley Muriki Ikunyua after subdivision of LR. Nyaki / Kihoka/54
  3. Letters of Administration be issued to Zipporah Kajuju (Objector/Applicant)
6. The summons is supported by an affidavit sworn by Zipporah Kajuju (Objector/Applicant) who faults her brothers for filing this cause secretly and for failing to provide for the daughters of the deceased namely herself Harriet Karuru and Grace Karambu (Deceased) whom she says has a family who should benefit from her share.
7. By his replying affidavit sworn on 30<sup>th</sup> June, 2023, Petitioner/Respondent opposed the summons mainly on the ground that the distribution was by consent and the state has been developed extensively.
8. I directed that the summons be disposed off by way of viva voce evidence to give parties an opportunity to fully ventilate their cases.

#### **Objector/Applicant's Case**

9. At the hearing. Objector/Applicant stated that she only learnt about the filing of this cause in the year 2000 but did not come to court since she did not have the means to hire an advocate and only moved the court after she was evicted by her brothers from her mother's house, in 2022, after the house was barricaded with pieces of timber where she had settled in 1993 after she divorced her husband.
10. Her first witness stated he became aware of this cause after Objector/Applicant was evicted from her father's land by her brothers. Her second witness Moses Kirima Muriira s/o Grace Karambu daughter of the deceased herein, stated that before she died, his mother Grace Karambu informed him that she was not interested in getting a share of her father's estate. He confirmed that Applicant/Objector lived on deceased's land until she was evicted in 2022.

#### **Petitioner/Respondent's case**

11. By his evidence, Petitioner/Respondent confirmed that Objector/Applicant is one of Deceased's 6 children whose names are contained in the chief's letter dated 10<sup>th</sup> December, 1999. He confirmed that Objector/Applicant was not provided for because deceased died before 1981.
12. It was further the Petitioner/Respondent's Case that that the estate had been subdivided and title deeds LR. Nyaki / Kihoka/2402, 2403 and 2404 issued respectively to Stanley Muriki Ikunyua, Alexander Ndumba Ikunyua and Edward Kinyua Itunga whom he said have extensively developed their portions and stand to suffer huge losses if the orders sought are granted.



13. His witness and sister Harriet Karuru stated that Objector/Applicant was a few days old when their father died. She additionally confirmed that Objector/Applicant returned home after divorcing her husband and lived in their mother's house but remarried but was entitled to a share of their father's estate.
14. His third witness Robert Muriithi a nephew of the deceased stated that daughters of deceased are entitled to their father's estate.
15. Stanley Muriki a son of the deceased confirmed that daughters of deceased were not provided for. He denied evicting the Objector/Applicant from their mother's house.

### **Analysis and Determination**

16. I have carefully considered the evidence and submission filed on behalf of both parties.
17. In support of her case, Objector/Applicant submitted that she was not aware and did not consent to the filing of the cause and the grant ought to be revoked. In support thereof, Objector/ Applicant relied on the case of *In re Estate of Evans Ngugi Wanjau(Deceased)*[2020] eKLR where the court held that lack of evidence to show that the applicant was aware of when the proceedings were filed was a sign of bad faith on the part of the 2<sup>nd</sup> respondent.
18. Objector/Applicant urged the court to find that the grant in this cause was obtained by concealment of the fact that she as the daughter of deceased was entitled to a share of her father's estate and ought to be revoked and in support thereof relied on *In re Estate of Evans Ngugi Wanjau(Deceased (supra)* where the court found that concealment of something material is one ground on which a grant can be revoked.
19. In support of the proposition that Objector/Applicant as a daughter of deceased was entitled to a share of her father's estate. Reliance was placed on Section 29 of the *Law of Succession Act* and the case of *Estate of Solomon Ngatia Kariuki – Deceased* [2008] eKLR; *Daniel Mwongera M' Iringo v Lucy Karambu M' Ikiao* [2017] eKLR and *Thomas Tito Nyachawo v Judith Akinyi Ndege* [2016] eKLR where the court reaffirmed that all the children of the deceased regardless of gender are entitled to stake a claim to the deceased's estate.
20. Concerning the issue that deceased died before the commencement of the Act in 1981 and that Objector/Applicant who is a daughter of the deceased is not entitled to a share of his father's estate under Meru Customary Law, it was submitted that any customary law that is discriminatory offends the provisions of Article 82 (1) and (2) of the *Constitution* and ought to be disregarded. Reliance was placed on *Elizabeth Karua M'rRutere v Joshua M'Ikiugu Kuura & 2 Others* [2007] eKLR.
21. Petitioner/Respondent contended that the applicable law to this cause was Meru Customary Law which did not provided for daughters nad on the basis of the holding in *In re Estate of Ng'ombe Wambiri (Deceased)* [2019] eKLR and *In re Estate of Peter Gathogo (Deceased)* [2020] eKLR where the court held that the *Act* did not apply to estates of persons who died before its commencement.
22. Petitioner/Respondent urged the court to find that Objecor/Applicant having known about the matter herein in 2003 slept on her rights and has not explained the delay in filing this summons.
23. I have carefully considered the evidence and submission by both parties and the issues for determination are as follows:
  1. Whether the *Law of Succession Act* Cap 160 is applicable to this cause
  2. Whether Objector/Applicant was aware of the filing of this cause



3. Whether the Certificate of Confirmation of Grant dated 07<sup>th</sup> December, 2000 ought to be revoked
4. Whether an order of cancellation of titles issued to Edward Kinyua Itunga, Alexander Ndumba Ikunyua and Stanley Muriki Ikunyua after subdivision of LR. Nyaki / Kihoka/54 ought to issue
5. Whether Letters of Administration ought to be issued to Zipporah Kajuju (Objector/Applicant)

### 1. Whether the Law of Succession Act Cap 160 is Applicable to This Cause

24. The deceased in this cause died in 1970 and a strict application of Section 2(1) as was stated in the persuasive decisions in *In re Estate of Ng'ombe Wambiri (Deceased)* [2019] eKLR and *In re Estate of Peter Gathogo (Deceased)* [2020] eKLR of the Act would mean that daughters of the deceased are not entitled to inheritance.
25. It was submitted for the Respondent that it is Ameru Customary Law that is applicable to the distribution of this estate.
26. Customary law has always, by virtue of its being unwritten, been treated as a question of fact which must be proven in court as a matter of evidence. Thus, despite being a source of law, customary law is treated differently from legislation, common law and equity which do not have to be proved in this way.
27. This principle was laid down by the Privy Council in the Ghanaian case of *Angu v. Attab* [1916] Gold Coast Privy Council Judgments (PC) 1874-1928 where it was stated as follows:

“As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have by frequent proof in the courts become so notorious that the courts will take judicial notice of them.”
28. The justification for is was the difficulty that courts find themselves in applying customary law to cases coming before them. The difficulties arise partly from the multiplicity of the different customary law and partly from uncertainty regarding the limits of operation of customary law and partly from the fluid nature of customary law itself.
29. Under section 51 (1) of the Evidence Act, when the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are admissible.
30. It is trite that "whoever alleges must prove. Section 107 of the Evidence Act, Chapter 80 Laws of Kenya states as follows:
  1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
31. At the trial, the Petitioner/Respondent did not tender any evidence concerning Ameru customs on inheritance and the issue has only arisen in the written submissions. It therefore follows that although the deceased died before the commencement of the Act, the Petitioner/Respondent has failed to place this cause under the exclusion clause of the Act. From the foregoing, I find that the Act is applicable to this cause.



32. Article 27(3) of the Constitution guarantees the right to equality and freedom from discrimination. It provides that

“women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.”

Sub-article (4) read together with (5) prohibits discrimination on the basis of inter alia sex or marital status.

33. The constitutional right to equality and non-discrimination is inalienable. This Court does not contemplate a situation where the scales of justice would tip in favour of the sons as though the daughters of the deceased were diminished in human worth in matters of inheritance, or in any other matter.

34. From the foregoing and on the basis of the Court of Appeal decision in Stephen Gitonga M'Murithi v Faith Ngira Murithi [2015] eKLR, I find that Section 38 of the Act enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried. Also see Rono v Rono & another [2008] 1 KLR). Consequently, the Objector/Applicant as a daughter of the deceased is entitled to a share of her father's estate.

## **2. Whether Objector/Applicant was Aware of the Filing of this Cause**

35. Petitioner/Respondent stated that the Objector/Applicant was not only aware of the filing of the cause, but also signed consent to the filing of the cause and attended court on the date of confirmation of the grant.

36. Applicant/Objector stated whereas she became aware of this cause in the year 2000, she only moved the court after she was evicted by her brothers from her mother's house, in 2022 and that was when she realised she had not been provided for.

37. A perusal of the proceedings and documents filed in this cause does not reveal any consent signed by the Objector/Applicant nor any evidence that she was in court on 04<sup>th</sup> December, 2000 when the grant was confirmed. In fact, the proceedings of that date only contain the order with no particulars of the parties present before the court.

38. From the foregoing, the contention by the Petitioner/Respondent that Objector/Applicant slept on her right since the cause was filed is not factual.

39. Whether the Certificate of Confirmation of Grant dated 07<sup>th</sup> December, 2000 ought to be revoked

40. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

41. At the point of confirmation of the grant, the Petitioner/Respondent failed to disclose that the deceased had daughters and thereby misled the court to confirm the grant in favour of sons only.

42. I have considered the Petitioner/Respondent's argument that the sons of the deceased have already developed the portions distributed to them and I find that the development of part of the estate, the



same having been distributed to the exclusion of the Objector/Applicant does not give the son an advantage over the Objector/Applicant for the reason that all the beneficiaries are equal before the law.

43. In the case of *Samuel Wafula Wasike vs. Hudson Simiyu Wafula* CA No.161 of 1993, Kwach, Omolo and Tunoi JJA stated that: -

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation”.

44. On the basis of concealment of material particulars, I find that the Objector/Applicant has made out a case for revocation of the grant dated 07<sup>th</sup> December, 2000.

45. Cancellation of titles issued to Edward Kinyua Itunga, Alexander Ndumba Ikunyua and Stanley Muriki Ikunyua

46. Having ruled that the grant herein was obtained fraudulently, the subdivision arising out of deceased's estate comprised in LR. Nyaki / Kihoka/54 cannot be allowed to stand and it is ordered that the same be and are hereby revoked.

47. Whether Letters of Administration ought to be issued to Zipporah Kajuju (Objector/Applicant)

48. From the history of this cause, I find that a case has been made out to include the Objector/Applicant as an administrator to this estate so that she can protect her interests.

49. In the end, I find that the summons dated 18<sup>th</sup> October, 2023 has merit and it is allowed in the following terms:

1. The *Law of Succession Act* Cap 160 is applicable to this cause
2. Objector/Applicant was not made Aware of The Filing of This Cause
3. The Certificate of Confirmation of Grant dated 07<sup>th</sup> December, 2000 is hereby revoked
4. Title numbers LR. Nyaki / Kihoka/2402, 2403 and 2404 arising out of subdivision of deceased's estate comprised in LR. Nyaki / Kihoka/54, issued respectively to Stanley Muriki Ikunyua, Alexander Ndumba Ikunyua and Edward Kinyua Itunga are hereby cancelled
5. The Registrar Lands Meru County is directed to effect the cancellation and revert the title to LR. Nyaki / Kihoka/54 in the name of Ikunyua Itunga (Deceased) and to dispense with production of original title deeds for numbers LR. Nyaki / Kihoka/2402, 2403 and 2404 in the event that the registered owners fail to submit them for cancellation
6. Zipporah Kajuju (Objector/Applicant) and Alexander Ndumba Ikunyua (Petitioner/ Respondent) are appointed joint administrators of the estate of the deceased
7. Letters of administration shall issue accordingly
8. The joint administrators are directed to either jointly or severally file an application for confirmation of the grant identifying the respective shares for Edward Kinyua Itunga, Alexander Ndumba Ikunyua, Stanley Muriki Ikunyua and Zipporah Kajuju
9. Costs shall be borne by the Respondent
10. Mention on 12<sup>th</sup> June, 2024 to confirm compliance with Order (1) to (9) above and for further directions



**DATED AT MERU THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024**

**WAMAE. T. CHERERE**

**JUDGE**

Appearances:

Court Assistants - Kinoti/Munene

For Objector/Applicant- Mrs. Mutege for Mutege Mugambi & Company Advocates

For Petitioner/Respondent - Mr. Ng'entu for Ng'entu & Co. Advocates

