



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1289 OF 1974

CHARLES KIMACHIA MBUTHI PLAINTIFF

VERSUS

MILKAH WAIRIMU MBUTHI

FLORENCE PENNINAH KIBUI MBUTHI

ROSE PENNINAH WAMBUI MBUTHI

CHARLES KIMACHIA MBUTHI (JUNIOR).....DEFENDANTS

JUDGMENT

This is a claim by the plaintiff, who is a son of the late Stephen Mbuthi Kimachia (to whom I will refer as “the deceased”), brought by originating summons under order XXXV, rule 1, of the Civil Procedure Rules for determination of the persons entitled to the estate of the deceased, and in what respective proportions, and for other relief. The deceased was survived by his first wife (from whom he had been divorced) and by his second wife and by two children of his first marriage (one of whom is the plaintiff) and two children of his second marriage but by no other lineal descendants.

The four defendants are the deceased’s second wife, and the deceased’s remaining three children, the second defendant who, like the plaintiff, is a child of the first marriage, and a daughter and son respectively of the deceased by his second marriage. The fourth defendant bears the same name as his elder brother, the plaintiff.

The following facts have been agreed by the parties: (1) the plaintiff, together with the second, third and fourth defendants, are the only lineal descendants of the deceased who were living at his death and, together with the first defendant, are all of full age. (2) Each of the parties is a Kenya citizen of African origin, as was the deceased. (3) The deceased died intestate on 26th December 1972 at Nairobi domiciled in Kenya and leaving assets in Kenya exceeding Shs 80,000 in value. (4) Letters of administration intestate were granted by this Court to the first defendant on 31st May 1974. (5) The deceased’s first wife, Joyce Waringa Mbuthi, was divorced from the deceased in 1938 and survived him but died in 1974. (6) The marriage of the deceased to the first defendant took place after his divorce from his first wife. (7) The deceased left two plots of land each registered under the Registered Land Act. (8) At the time of his death the deceased was subject to African customary law relating to succession on

death within the meaning of section 120(1) of the Registered

Land Act; but no certificate to that effect under the subsection has been signed by an administrative officer.

A question has arisen as to whether the deceased's assets, moveable and immovable, devolve under the provisions of the Succession Act 1865 (India), or under African customary law, or partly under the one and partly under the other, and the parties have asked that this question be dealt with as a preliminary issue.

Mr Gaturu, for the plaintiff, contended that by reason of the first defendant having taken out letters of administration to the estate of the deceased, for which purpose she must have sworn the usual oath for its due administration required by the Act of 1865, she should be deemed to have elected to have the administration governed by that Act and that, accordingly, she should take one-third of the estate, both moveable and immovable, and the remaining two-thirds should be divided among the four children equally. He also relied upon the provisions of section 3 of the Judicature Act and the principles of equity and submitted, presumably as an alternative, that the Court should not permit the first defendant and her children (namely, the third and fourth defendants) jointly to receive more than the children of the first marriage (namely, the plaintiff the second defendant) jointly, and that the first defendant should divide the one-half share to be awarded to herself and her two children between the three of them as she thinks fit.

Mr Gaturu also contended that if African customary law is applicable, the "household" of the deceased's first wife, which now consists of the plaintiff and the second defendant, should take one-half of the estate, the other half going to the "household", of the second wife, which now consists of the first, third and fourth defendants, but so that the third and fourth defendants cannot inherit until the death of their mother (the first defendant) who during her lifetime would be the life tenant and hold in trust for herself and the third and fourth defendants.

Mr Gichuki for the second defendant at first adopted the submissions put forward by Mr Gaturu but later contended that the moveable assets should descend under the Act of 1865 and the land under section 120 of the Registered Land Act, and that if African customary law is applicable the Court should hear evidence as to the descent of the moveable assets and that the determination of the heirs under the Registered Land Act must be made by the district officer. He also contended that unless the letters of administration were revoked the moveables must descend under the Act of 1865.

Mr Mwaura, for the first, third and fourth defendants, submitted that all assets, moveable and immovable, descend under African customary law and that unless this Court were to hold that the Act of 1865 applies it would have no jurisdiction to decide how the division of the assets under customary law should take place. Relying on the decisions in *Suleman Ibrahim v Awadh Said* [1963] EA 179, and *Mangat v Sharma* [1968] EA 620, he argued that section 10 of the Magistrates' Courts Act confers upon the District Magistrates' Courts exclusive original jurisdiction of the High Court under the Constitution.

Taking the last point first, I am satisfied that, although the jurisdiction in civil matters conferred by section 10 of the Magistrates' Courts Act upon the district magistrates' Courts in proceedings concerning claims under customary law is unlimited as to the monetary value of the subject-matter, the section does not purport to confer exclusive jurisdiction in such cases upon those Courts so as to impinge upon the provisions of section 60(1) of the Constitution conferring upon the High Court unlimited original jurisdiction in civil and criminal matters.

The issue for determination in relation to the deceased's immovable property of section 120 declares that where a "proprietor" dies intestate and is subject to African customary law relating to succession on death, the section shall apply and that a certificate signed by an administrative officer to the effect that the proprietor was so subject at the date of his death shall, when delivered to the Chief Land Registrar and filed, be conclusive evidence that the deceased proprietor was so subject. The term "proprietor" is defined in section 2 as meaning, in relation to land, the person named as the proprietor in the relevant land register and I shall assume, despite the absence of any express admission, that the deceased was the proprietor of so much of his assets as consisted of land registered under the Act. It is agreed that the deceased died intestate and that at the time of his death he was subject to African customary law relating to succession on death. It appears, however, that no certificate signed by an administrative officer was delivered to the registrar and filed which would have constituted conclusive evidence in the matter; but nevertheless I will accept the admission of the parties as to this.

Subsection (2) of section 120, as amended by the First Schedule to the Magistrate's Courts Act 1967 (not printed in cap 10), provides that the registrar, after satisfying himself of the death of the proprietor, shall apply to a subordinate court having jurisdiction where the land is situated for the determination of the heirs and that that Court shall determine who are the persons entitled, according to the customary law applicable to the deceased, to his land and the nature and extent of their respective shares. It was conceded that this procedure has not been adhered to and that no such application has been made to any subordinate court. The plaintiff and the second defendant nevertheless invited this Court to make such determination as to the heirs but the remaining defendants contended that the provisions of section 120 should be strictly followed.

Although, as with section 10 of the Magistrate's Courts Act, I do not consider that the effect of section 120 of the Registered Land Act is to oust the jurisdiction of this court, I am satisfied that the intention of the latter section is that the determination of the heirs of a deceased proprietor of land registered under the Act who was subject to customary law should be dealt with in the first instance by the appropriate Court, which in this case is a Magistrate's Court with a right of further appeal, on questions of law, to this Court.

Reading sections 119 and 120 together it appears to me that they must be construed as being mutually exclusive and that, when a deceased registered proprietor of land dies intestate and subject to African customary law, the transmission of his interest in the land is governed by section 120 and not section 119 of the Act. Accordingly, I hold that the provisions of section 120 rather than those of section 119 have application in the present case. I am not persuaded that the obtaining by the first defendant of letters of administration from this Court has the effect, by way of implied election or otherwise, of limiting the application of section 120 in the manner suggested by the plaintiff, and accordingly I direct that the registrar of this Court do take steps to inform the Chief Land Registrar appointed under section 7 of the Registered Land Act of the fact, agreed by all the parties to this suit, that the deceased has died and was subject at the date of his death to African customary law relating to succession on death. This will enable the Chief Land Registrar to take all proper steps under section 120 of the Registered Land Act as therein provided for the determination of the persons entitled, according to the customary law applicable to the deceased, to the immovable property to which he was entitled at his death.

Turning now to a consideration of the moveable property, counsel for the plaintiff and for the second defendant both contended that the provisions of the Act of 1865, are applicable, while counsel for the remaining defendants submitted, as I understand him, that all the deceased's moveable property should devolve according to customary law and that this Court has no jurisdiction to determine questions affecting such devolution although he agreed, nevertheless, that under section 3(2) of the Judicature Act in case of conflict the written law prevails over customary law and that, if the Act of 1865 applies, then

this Court has jurisdiction in the matter. It is regrettable that none of the counsel was able to refer to any authorities in support of their respective submissions that the Act of 1865 does or does not have application to Africans in this country nor have I been able to find any.

Section 3(2) of the Judicature Act declares that this 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 or affected by it so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law. The immediate question therefore is: does the Act of 1865 constitute "written law"? By section 3 of the Interpretation and General provisions Act this term includes an "applied Law" which must, I think, extend to the laws and statutes originally applied to this country as forming part of the East Africa protectorate by article 11(b) of the East Africa Order in Council 1897(now revoked), in so far as any such applicable provisions may be said to be now in operation. A measure of doubt as to this arises from the deletion by the Statute Law (Miscellaneous Amendments) Act 1968 (No 8 of 1968) from the Indian Acts (Amendment) Act (cap 2 of the Revised Edition of the Laws of Kenya 1948) of section 9 which enacted that the provisions of all Indian Acts already applied to Kenya should apply to Africans only to the extent in that section provided or as might be expressly declared by Ordinance, but not otherwise. It has been suggested elsewhere, but not in this case, that this deletion may have had the effect of restoring the position which had existed prior to the coming into force of section 2 of Ordinance No 2 of 1903 of the East Africa Protectorate (of which in 1948 section 9 was the revised version) and which had in effect restricted as from 1903 the operation of the Act of 1865 to persons other than Africans. In the light of the general canons of construction of statutes and of section 20 of the Interpretation and General Provisions Act, however, I am not satisfied that the position existing immediately prior to the Ordinance of 1903 has been restored and accordingly I must hold that, since one or more of the parties hereto is affected by African customary law, the succession to the moveable assets of the deceased is governed by that law as provided by section 3(2) of the Judicature Act.

As to the grant of administration already issued, I am of the opinion that its effectiveness can and should be upheld by virtue of section 3(1)(c) of the Judicature Act whereby it is declared that the jurisdiction of the court should be exercised in conformity with, *inter alia*, the statutes of general application in force in England on 12th August 1897 and the procedure and practice observed in Courts of justice in England at that date. In that year, by virtue of the Court of Probate Act 1857 and subsequent United Kingdom legislation, the Probate Division of the High Court of Justice in England, with the probate registries throughout the country, had a wellsettled practice governing the issue of letters of administration intestate relative to the personal estate of deceased persons, and in my opinion a corresponding jurisdiction was granted to the superior courts of this country by virtue of the Order in Council of 1897 and is now enjoyed as part of the unlimited original jurisdiction of this Court conferred upon it by the Constitution.

For these reasons, I must hold that the grant of administration to the first defendant effectively vested in her as his legal representative the moveable assets of the deceased. As to the distribution of these moveable assets, however, it is clear that the appropriate African customary law must apply and that the first defendant, as administratrix, must deal with those assets accordingly.

Order accordingly.

Dated at Nairobi this 24th day of May, 1976

L.G.E. HARRIS

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JUDGE



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