



in re Estate of the Late Melchisedec Kingi Gideon (Deceased) (Succession Cause 80 of 2009) [2024] KEHC 13472 (KLR) (15 August 2024) (Ruling)

Neutral citation: [2024] KEHC 13472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 80 OF 2009
SM MOHOCHI, J
AUGUST 15, 2024
IN THE MATTER OF THE ESTATE OF THE LATE
MELCHISEDEC KINGI GIDEON (DECEASED)**

BETWEEN

SALOME WAMBUI KINGI PETITIONER

AND

MARY WANJIKU OBJECTOR

RULING

1. This Succession Cause relates to the estate of Melchisedec Kingi Gideon who died intestate on 13th October, 2008. Following the demise of the deceased, Salome Wambui Kingi, Petitioner herein, Petitioned the Court for Letters of Administration dated 19th February, 2009. It was indicated that the Deceased died Intestate and was survived by one (1) widow and five (5) children. Mary Wanjiku the Objector herein, filed an objection dated 18th March, 20089, an Answer to Petition for Grant as well as a Petition by way of Cross-Application for Grant both dated 23rd March, 2009.
2. The grounds for the Objection were that the Objector was the 2nd widow of the deceased; that the deceased was survived by two (2) widows and eight (8) children; that the Petitioner did not seek her consent; that at the time of death, she was living with the deceased in the plot at Mwariki and that the Petitioner evicted her and her children from the plot after the death of the deceased. That the exclusion from the list of surviving dependents was deliberate.
3. She was also apprehensive in the Answer to Petition that the Petitioner was not the proper person to administer the estate as both of them were involved in the burial of the deceased and the Petitioner deliberately excluded her and her children from the list of surviving dependents. That the Petitioner fraudulently obtained a cheque of Kshs. 333,900 from G.K Prisons Nakuru on behalf of Natmel



General Agencies which the deceased was a director and hence the reason for filing the Cross Application.

4. The matter proceeded by way of viva voce evidence with the Objector availing seven (7) witnesses in support of her case whereas the Petitioner availed two (2) witnesses

Objectors Case.

5. OW1, Mary Wanjiku, testified that she met the deceased in 2004 when she worked in the deceased's cousin's home in Chinga and in 2005 they went to her father to inform him that he had a visitor and that the deceased was her husband. They lived in Nyahururu and in 2007 they shifted to Bahati Maili Kumi. The same year they had a daughter Prisca Wambui Kingi, birth certificate produced as PExh 1. In May of 2008 they moved to the deceased's plot in Nakuru Mwariki Estate.
6. That on 15th February, 2008 the deceased went to her home together with his brother-in-law Charles Kimani, his brother Shon Gichuru and a friend Guthima to pay dowry. That she had two other children from a previous relationship and the deceased took them as his, they adopted his name, took them to school and provided for all their needs. That before the demise of the deceased they went to the registrar of marriages on 24th September, 2008, to get married. Marriage certificate marked MFI-2.
7. After death, the Petitioner went to the home they shared with the deceased and caused a disturbance. That she had been part of the funeral arrangements but together with the deceased's sister, Doris Wanjiku and cousin Mary Nyambura, they were chased away from the home by the Petitioner. She added that she did not find the Petitioner in that house and that the Petitioner had never visited there before. That the deceased had property and the property ought to be shared equally between the two houses and that she was a wife to the deceased.
8. In cross examination, she stated that she was not married to the father of her eldest two children who had died in 2002. She knew the deceased was married with children but she did not tell her father in 2005. She was not at home when the dowry was paid on 18th February, 2002 in Mukurweini, she was left in Nyeri and could not tell if they reached her father's home. She only heard dowry was paid but did not have minutes of the meeting. That she had receipts to show the deceased used to pay school fees for her two eldest children but had not produced them in evidence.
9. The birth certificate was obtained on 22nd February, 2010, after the death. The deceased was a member of PCEA Church and she fellowships in Anglican church. The Baptism was registered in Anglican Church Nyeri and the certificate was not false. That she was in Nyeri when the Baptisms was registered. She confirmed knowing that the deceased was married under Customary Law but denied knowledge that it was illegal for a person married under Customary Law to get into a marriage under the [Marriage Act](#). She lived in Mwariki from 2008 till the death of the deceased and the Petitioner used to live in Heshima.
10. It was her testimony that when the Petitioner and others chased her, they told her she was a house girl but they never beat her. She never reported it to the chief or the police or moved to Court. There were no photographs taken at the funeral and were only photographed when coming from the DC's office, she however did not produce the photos. There were also no photographs taken at the baptism of the child as the church did not allow photographs. It was also her evidence that it was normal for dowry to be paid in her absence and she was not ware if her father was given a female or a male goat.
11. In re-examination she clarified that the reason photographs were not taken at the funeral was because there was a fight at the mortuary and cemetery between herself and the Petitioner but she was present



- at the burial. She further clarified that the child was baptized in Nyeri since the other two were also baptized in Nyeri.
12. OW2, Charles Peter Kimani knew the deceased even before he got married as they were born in the same area and that he knew both the Petitioner and the Objector as wives of the deceased. That when the deceased died, he was not living with Petitioner as they had separated in 2007. That there had been a case at Chief Karanja's office. They were told to go and come back with more people. He was one of them. The two agreed to reconcile.
 13. He stated that the Petitioner feared that since they had stayed apart he may not be medically fit. They went to hospital and the deceased reported back to the chief with his medical report. He stated that he did not see the Petitioner's medical report as she said she knew herself. The chief asked them to dialogue. He added that the deceased tried to explain the disagreement but the Petitioner did not want any more negotiations and it was when the deceased decided to let her go and opted to marry the Objector.
 14. He testified that he had first seen the Objector with the deceased in 2005 and on 15th February, 2008 the deceased asked him to escort him to the Objector's home together with Charles Kimani, Shon Gichuru and Githima. They were asked to give 'Mwati na harika', a sheep and goat respectively, they gave them alive valued at Kshs. 20,000. They also gave Kshs. 5,000 for the elders' alcohol and Kshs 18,000 for dowry. The deceased died before they went back. That was the commitment that she was their wife and it would have been written down on the second visit. That according to him the Objector was a wife as 'Mwati na harika' was paid and the two were living together. the objector had a child while with the deceased.
 15. In cross examination he stated that the deceased used to live in Mwariki with the Petitioner. They had purchased the plot and developed it together. He found the Objector in Mwariki in 2008. The medical report and the minutes were left with the Chief in 2007. He confirmed that when they went to take 'mwati na harika' the Objector was not present but was told that the deceased had gone to see her parents in 2005. The deceased had been with the Objector but had not married her, he married her when the Petitioner refused to go back in 2007. He confirmed that he could not tell when the child was born or which month they went to the Chief but the deceased believed the child to be his.
 16. OW3, Benjami, Knoxwell Ngatia Mbugua adopted his witness statement and confirmed that he never resided in the same compound as the deceased but had knowledge of who was residing in the plot. He denied attending the dowry negotiations but was aware that the deceased wanted to marry the Objector and an African sausage was brought from the ceremony. That the marriage had commenced before 2008 and denied that the marriage lasted for six months. He averred that the ceremony was the official marriage but did not know the period they stayed together. He stated that the Petitioner had moved out of the Mwariki area and the deceased showed him the house she was constructing at Teachers. The deceased had acquired the Mwariki plot with the Petitioner.
 17. OW4 Dorcas Wanjiku Mwangi deceased's sister adopted her witness statement and in cross examination, she confirmed that the deceased had two wives, the Objector and the Petitioner. That the deceased had parted ways with the Petitioner and paid dowry for the Objector. She also confirmed that in 2005 they were living in Nyahururu. After the deceased married the Objector he acquired property but could not tell where. Denied having any health problems or being admitted to Mathari Hospital.
 18. OW5 John Githaiga Macharia adopted his statement and in cross examination confirmed knowing the deceased since 1950 and that the deceased had married the Objector around 2005 when they started living together. It was a customary marriage but denied not knowing when dowry was paid. He confirmed that the deceased and the Petitioner had a problem and he then married the Objector though did not attending the ceremony.



19. OW6 Mwangi Kamau, Objector's father adopted his statement and stated that the deceased was the father of the Objector's children and clarified that Edward Waweru was the father of the first two but died. The deceased took the Objector with her two children as his own and that is when he allowed the marriage. He also confirmed that Edward Waweru had not married the Objector. He confirmed that dowry was paid in 2008 by the deceased accompanied by Kimae, Githima and Shem. That they brought mwati na harika. He confirmed that the Objector was not present as she had a child admitted in hospital.
20. OW7 Barnabas Gathekia Kariuki deceased's brother adopted his statement dated 12th October, 2018 and stated that he did not participate in the dowry ceremony but sent Henry Gathima to represent him. He added that on 15th February, 2008 they paid ngurario, customary marriage symbolizing marriage and that one can do ngurario before ruracio. That ngurario is solemnizing of the union and ruracio is the delivery of animas agreed upon. He also confirmed that it was unusual for a kikuyu dowry payment to be done in the absence of the bride and would be shocked if the Objector was not present.
21. He stated that it was a speculation that the deceased had only married for 6 months. It was his testimony that the deceased was diabetic and had complained of being neglected by the Petitioner. It was his testimony that the deceased called him to say that he was getting married and confirmed that one of the deceased's children was named Wambui after their mother. He also confirmed that the certificate of birth of Wambui was obtained after deceased's death but clarified that that a certificate of birth can be obtained any time of importance is the certificate and not the date of collection as there can be late registration. He also confirmed that the Petitioner had separated from the deceased.

Petitioner's Case

22. PW1, Salome Wambui Kingi adopted her statement and further documents all of 26th June, 2019 and stated that she knew of the objector during the funeral arrangements. That they never spoke but the Objector claimed to be her co-wife. She denied knowing her and could not recognize her as she was emotionally drained and fainted at the hospital. She confirmed that during the mourning period, she heard people referring to her as her co wife.
23. It was her evidence that the deceased never mentioned being polygamous in his lifetime and that she resided with the deceased since 1975 with no disagreements apart from the small domestic ones. She denied separating with the deceased or leaving her matrimonial home and that at the time of passing they were living together. She also denied that the objector's child was the deceased's and that the Objector lied since the child was not born in Nakuru. She denied hearing that the deceased had a child.
24. It was her evidence that her marriage to the deceased was traditional and confirmed she never obtained a certificate of marriage. She added that they never used the eulogy that was prepared because the deceased was never buried on the date. The in laws wanted to add a co wife but she refused and moved to Court to stop the burial. That no other eulogy was prepared. She denied that the Objector participated in the burial.
25. PW2, Gideon Gathekia son of the deceased adopted his statement of 19th May, 2021. In cross examination he denied knowing, seeing or meeting the Objector. He also denied that the deceased had another wife and added that the deceased had never mentioned having a child out of wedlock. He denied that the deceased had a child with the Objector and that the documents he produced were dubious.



26. The parties were directed to file written submissions. The Objector filed her submissions 18th July, 2024 whereas by the time the Court had retired to write the Ruling the Petitioner's submissions were not on record.

Objector's Submissions

27. The Objector submitted that she satisfied the provisions of Section 43 of the *Marriage Act* and within the context of Kikuyu Customary Laws. She argued that the concept of presumption of marriage was not opposed under Kikuyu Customary Law. Since the deceased had intentionally cohabited with her and he took in her children when she moved in there was a marriage.
28. Reliance was placed in *Gachege vs Wanjugu* (1991) KLR 147 where the Court held that a party needs to establish a long cohabitation and acts of general repute before a presumption of marriage. She submitted that that cohabitation was there as they had lived together from 2008 until demise and even had a child.
29. The Objector also relied on the case of *Eva Naiama Kaaka & Another v Tabitha Waitthera Mararo* (2018) eKLR to submit that the general repute created from the testimonies was that the deceased and the Objector were husband and wife.
30. It was further submitted that her two children from the previous union were taken in by the deceased as his and they had a child together and therefore the Objector and her children are beneficiaries of the estate within the definition of Section 29 of the *Law of Succession Act* and should get an equitable share of the estate.

Analysis and Determination

31. The Objector has not demonstrated that she was married under the Kikuyu Customary Marriage to the deceased hence a spouse within the meaning of the *Law of Succession Act*.
32. That the doctrine of presumption of marriage under the *Evidence Act* is inapplicable under the *Law of Succession Act*
33. I am however persuaded that the deceased had a child Priscah Leah Wanjiku who is hereby deemed as a child and beneficiary to the estate of the deceased.
34. No evidence has been tendered that the deceased had taken in two children of the Objector and accepted them as his own, taking care of them immediately before his demise.
35. The Probate shall be Amended to include Priscah Leah Wanjiku as a beneficiary.
36. The Administrator is to file a summons for confirmation of grant with a proposed mode of distribution, within the next (60) Sixty days from the date of this ruling.
37. Any Party dissatisfied with the Administrators' proposed mode of distribution may file an affidavit of protest including an alternative proposed mode of distribution.

It is So Ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM CON THIS 15TH AUGUST 2024

MOHOCHI S.M

JUDGE

