



In re Estate of Wangui Kaihoto alias Wangui W/O Kaihoto (Civil Appeal E014 of 2022) [2024] KEHC 11798 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E014 OF 2022
AM MUTETI, J
SEPTEMBER 25, 2024
IN THE MATTER OF THE ESTATE OF WANGUI
KAIHOTO ALIAS WANGUI W/O KAIHOTO**

BETWEEN

JOSEPHAT MAKANGA NJAMA APPELLANT

AND

SAMUEL MWANGI ALIAS KAIHOTO RESPONDENT

(Being an Appeal against the Ruling of the Hon. D.K Matutu P.M delivered on the 6th Sep 2022 in the PM's Court Mukuruweini succession Cause No. 67 of 2018)

JUDGMENT

Introduction

1. The appeal arises out of a ruling delivered on the 6th September 2022 in Mukuruweini PM's Court Succession Cause No. 67 of 2022 in which the Respondent in this appeal had filed an objection seeking the revocation of grant issued in favor of the appellant.
2. The respondent in objection alleged fraud on the part of the appellant and concealment of material particulars by the appellant in his application for confirmation of grant.
3. The Respondent hinged his claim on a woman-to-woman concept of marriage under Kikuyu customary. He claimed that his mother was married to the deceased so as a son he was entitled a share of her estate.
4. The learned Honourable Magistrate relying on evidence tendered by six witnesses PW2-PW7 found as a fact that there existed a valid woman to woman marriage under Kikuyu Customary Law between the Respondent's mother and the deceased.



5. The learned Magistrate further held that the appellant had concealed material facts leading to the confirmation of grant thus revoked grant prompting this appeal.
6. The appellant had in the application for letters of administration indicated himself as the absolute heir of the deceased.

Analysis

7. The appeal presents an interesting scenario in a family where persons who have lived harmoniously during the life of the deceased turn against each other upon the demise of the deceased and seek to dispossess each other properties that the deceased left in their joint hands.
8. The duty of this Court as the first appellate Court is to reevaluate the evidence tendered before the learned Honourable Magistrate, re-appreciate the same and draw independent conclusions on the same. Simply, the appeal is a rehearing of the matter. However, the Court remains mindful of the fact that it did not have an opportunity to hear the case thus due allowance in that respect is to be given – See *Selle Vs. Associated Motor Boat Company LTD & Others*, [1968] EA 123.
9. The parties have filed their respective submissions in this appeal.
10. The Appellant argues that the learned Honourable Magistrate was wrong in concluding that there existed a valid woman to woman marriage between the deceased and the appellant’s mother.
11. He further submits that there was no proof that he concealed any material particulars in his application for grant to warrant the revocation order.
12. The appellant urges this Court to find that the Respondent was unable to prove fraud on his part and the evidence he called did not meet the required standard. In his view the standard of proof of fraud is beyond a balance of probabilities. The appellant relied on the *Christopher Nduru Kagina Vs. Esther Mbandi Kagina & another* (2016) EKLK decision in which the Court held :-

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular the pleader needs to be sure that there is sufficient evidence to justify the allegations. The onus prime facie proof is much heavier on the person alleging than in an ordinary civil case. The burden of proof lies on the applicant in establishing the fraud he alleges.”
13. On the question of whether there was a woman-to-woman marriage under Kikuyu customary law, the appellant submits that the same was not proved.
14. The appellant cites *Eva Naima Kaaka & Another Vs. Tabitha Waithera Mararo* (2018) eKLR quoting with approval Eugene Contran’s book *Casebook on Kenyan Customary Law* at page 30 which sets out according to the appellant essentials of a Kikuyu Customary marriage (whether man to woman or woman to woman as being: -
 - a. Capacity: The parties must have capacity to marry and also capacity to marry each other.
 - b. Consent: The parties to the marriage and their respective families must consent to the union.
 - c. Ngurario: No marriage is valid under Kikuyu customary Law unless the Ngurario ram is slaughtered.



- d. Ruracio: There can be no marriage under Kikuyu customary Law unless Ruracio (dowry) has been paid.
 - e. Commencement of cohabitation: The moment at which a man and woman legally become husband and wife is when the man and woman commence cohabitation.
15. The appellant strongly argues that these essentials were never met thus there was never a marriage between the deceased and the Respondent's mother.
 16. The appellant maintains that the totality of the evidence given by the Respondent's witnesses did not establish all the ingredients and he particularly singles out PW3, PW4, PW5 and PW6 for allegedly giving hearsay evidence.
 17. The appellant concludes by submitting that there was no proof of woman-to-woman marriage under Kikuyu Customary Law, and that the Respondent was not a son thus he could not benefit from the distributions of the estate of the deceased.
 18. According to the appellant therefore the provisions of Section 76 of the *Law of Succession Act* were not met and Rule 44 of the Probate and Administration Rules to justify the annulment of the grant. The appellant in support of that submission relied on the case of *Metheka & Another Vs. Matheka* (2005) eKLR 455.
 19. The Respondent on his part fully supports the Lower Court decision.
 20. He maintains that the witnesses he called were persons who knew his mother and that they too knew that the mother was married to Wangui Kihoto in a woman to woman marriage a common practice in Kikuyu land those days.
 21. The Respondent refers this Court to the evidence of PW2 Gerald Karaya who testified that he knew the Respondent's mother was married to Wangui Kihoto.
 22. The witness also confirmed receipt of dowry in respect of the Respondent's mother (Ngondi).
 23. The Respondent submitted further that the evidence tendered was sufficient to prove all the allegations raised in his objection.
 24. This court has reviewed the evidence in the file. PW2 was the brother to the Respondent's mother and he testified that the sister was married to Wangui Kaihoto and had a son Kaihoto Mwangi the objector.
 25. The witness on examination by counsel for the Respondent maintained that they received dowry in respect of his sister the objector's mother and that she was chased away from the home by Wangui Kaihoto.
 26. According to him one Tito chased the Respondent's mother from home and he was jailed for selling the land.
 27. PW3 Tabitha Nyambura also testified that she knew the deceased Wangui was married to Ngondi and they had a son by the name Mwangi Kaihoto.
 28. The witness gave evidence that during her life time, the deceased called her together with Tito and Rose Wanja and told them that when Mwangi comes back, the land at Karindi trees be sold he goes to school and the land was his.



29. The witness went further to state that:-
- “Mwangi had left since Ngondi had left the family following dispute with Tito who wanted her to be his wife. I heard what she said about property. She died after a month. Tito took up the land. He wanted to sell it sometimes. He was stopped and even jailed for three months.”
30. Having gone through the witness accounts as recorded by the Lower Court, I am not in doubt that the Respondent led sufficient evidence to establish there was a marriage between his mother and the deceased Wangui Kaihoto.
31. The witnesses were clear that dowry was paid and that Mwangi the Respondent was a son to the deceased by virtue of her marriage to his mother Ngondi.
32. It was thus incorrect for the appellant to declare himself the heir absolute of the estate of the late Wangui Kaihoto.
33. Evidence tendered shows that he knew that Mwangi the Respondent was a son of Wangui Kaihoto and Ngondi thus he was entitled to benefit from the estate of Wangui.
34. The essentials of marriage set out by Conran in his book on African Customary Law were met. The evidence of PW2 and PW3 left no doubt that dowry was paid and that Ngondi the Respondent’s mother was taken in by Wangui Kaihoto following the demise of her husband.
35. The failure by the Appellant to disclose this in the whole succession process was clearly an act of concealment of material facts.
36. He suppressed information that was within his knowledge and therefore the Magistrate was right in his conclusions leading to the revocation of grant.
37. Quite clearly from the testimony of PW3, the Late Ngondi was send away by one Tito following a family disagreement. That by itself did not efface the union between Wangui Kaihoto and Ngondi.
38. It did not also result in law in denying the Respondent his right to inherit that which according to PW3 was left behind by the deceased to him.
39. The action of the appellant of declaring himself the sole heir cannot be said to amount to anything else other than misrepresentation of facts thus concealment meant to fraudently deny the Respondent his rightful share of the estate.
40. In *cfR Vs. Bernard (1837)*, 7C & P784 of misrepresentation is stated to be words written or spoken or conduct calculated to mislead. See Street on Torts 8th edn pg 108.
41. The appellant made the representation to the Court knowing it to be false that he was the absolute heir. He made it knowingly and without belief in its truth.
42. It is not conceivable how a whole lot of 6 adults would come forth to testify to a fact of a marriage that never was.
43. I do not accept that all that PW2, PW3, PW4, PW5 and 6 testified on was hearsay and a concoction of untruths.
44. The appellant is supported by his own mother DW2 who testified that as at the time she moved into the family of Mzee Njama she had already gotten the appellant thus confirming that the appellant was adopted son of the late Njama who was the husband to Wangui Kaihito.



45. I make reference to this evidence of DW2 deliberately to highlight the fact that when she brought in the appellant into Mzee Njama's home, who was the husband to the deceased, the deceased had already died.
46. That being so, it is therefore an undeniable fact by the appellant that the wishes of the deceased Wangui Kaihoto whom he seeks to inherit were made when himself and the mother DW2 had not come into in the life of Mzee Njama.
47. The evidence of DW2 leaves the Court with evidence of PW2 and PW3 intact. DW3 and 4 also stated that they did not similarly know the wishes of the deceased.
48. DW4 and DW5 referred to the appellant as simply a trustee of the family since he was the oldest.

Determination

49. From the analysis of the evidence, I find that the evidence tendered before the learned Honourable Magistrate satisfied the provisions of section 76 of the law of succession in that there was ample evidence of concealment of material facts, misrepresentation all calculated to fraudulently enable the appellant benefit from the deceased's estate as the absolute heir.
50. The deceased Wangui Kaihoto had at the time of her death expressed her wishes on inheritance of her estate to PW3 and two others.
51. The evidence of PW3 taken together with that of the rest of the witnesses called by the Respondent left no doubt the Respondent was a son of the deceased under Kikuyu customary Law following her marriage to Ngondi the Respondents mother.
52. I also find that Pw3 testified to there having been an oral will made by the late Wangui Kaihoto a month before her death. From her evidence the wish expressed by the deceased was made voluntarily in her presence and two other witnesses.
53. The wish was that the Respondent receives education from proceeds received from the sale of trees growing on the land at Karindi, and that the Respondent takes that land. The oral will met the test set out in *Re Estate of Evanson Mbugua Thonjote (deceased) succession cause 2519 of 1988 (2016) ECLR* where the Court held:-

“An oral is made simply by making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will.... The other consideration is that the utterance ought to be made in the presence of two or more persons.”

In this case the ingredients of an oral will have been fully met and must be upheld.

Conclusion

54. The learned Honourable Magistrate did not err in his findings on the existence of a Kikuyu Customary Law marriage of a woman to woman between Wangui Kaihoto and Ngondi the Respondent's mother.
55. He too was correct in finding there was a fraudulent misinterpretation and concealment of facts by the appellant.
56. In the end I find and hold that this appeal has no merits.



57. Before I pen off I must say this; this case brings out one of the rich aspects of our African Culture that for ages our people embraced and upheld. Women who out of their own union with their husbands were unable to bear children were allowed to marry under African Customary Law to preserve their place in the history of their families. They were never meant to fade away and be eternally forgotten. *The Constitution* of Kenya 2010 recognizes culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation under Article 11.
58. As state agencies, we are required to promote all forms of natural and cultural expression through literature, the Arts and Traditional celebrations, (emphasis mine) science communication, information, mass media, publications libraries and other cultural heritage. It is through recognition of such traditional marriages that as a country we shall be able to protect and promote intangible culture that faces the imminent threat of extinction due to the progressive aping of western civilization, often expressed through statutes.
59. In *Monica Jesang Katam Vs. Jackson Chepkwony & Another* (2011) eKLR the Honourable Justice Professor J.B. Ojwang (as he then was) sitting in Mombasa recognized the place of a woman to woman marriage under Nandi customary law and in the said decision observed that the motivation of a woman who became a female husband was mostly for purposes of acquiring a male heir for her property. It would therefore follow that a claim of inheritance by any of the children of a woman to woman marriage would be protected under Section 29 of the *Law of Succession Act*. Thus once there is proof of fulfilment of the customary law requirement for a valid woman to woman marriage the Court should not hesitate to make the necessary provisions for the children of that union in the distribution of the estate of the female husband.
60. It is thus my finding that the appellant is basically attempting to wish away a union that was properly celebrated and accepted by the deceased and the rest of the community.
61. The appellant should therefore accept the Respondent as his brother and embrace peace as a family and seek to distribute the estate of the deceased by ensuring that all beneficiaries are equitably taken care of.
62. The appeal is dismissed with costs to the Respondent.
63. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.

HON. A.M MUTETI

JUDGE

In the presence of

Kiptoo: Court Assistant

Ngori & Mbongi Advs. Absent for the Appellant

Ms Murigi holding brief Muriuki for the Respondent

Appellant

