



**In re Estate of George Ndirangu King'ori alias Ndirangu King'ori (Deceased)
(Succession Cause 24 of 2008) [2023] KEHC 20903 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 24 OF 2008**

FN MUCHEMI, J

JULY 27, 2023

**IN THE MATTER OF THE ESTATE OF GEORGE NDIRANGU
KING'ORI ALIAS NDIRANGU KING'ORI (DECEASED)**

BETWEEN

MARION WANGARI NDIRANGU APPLICANT

AND

MILLICENT GATHONI NDIRANGU RESPONDENT

RULING

1. The application for determination is the Summons for Revocation dated 23rd January 2020 brought under Section 76 (a), (b) & (c) of the Law of Succession Act and Rule 44(1) of the Probate & Administration Rules. It seeks for orders of revocation of grant issued on 27th May 2008 and confirmed on 19th March 2010 in favour of the respondent.
2. The respondent opposed the application through her replying affidavit sworn on 2nd November 2022.
3. The matter proceeded by way of viva voce evidence with parties calling witnesses.

The Applicant's case

4. PW1, the applicant, testified that she is a wife to the deceased and that the couple were blessed with six children as follows:-
 - a. Justus Kingori - deceased
 - b. Paul Wanjiri Ndirangu
 - c. Ruth Wanjiku
 - d. Hellen Wanjiku



- e. Paul Gichuki
- f. Jane Wangeci

Further that the deceased married her under Kikuyu Customary Law in 1945 and they settled at Ihithe. Later the couple moved to Mutero in Endarasha where they lived for about ten years. The applicant moved with her children to Muringato to work at Munyeni's Coffee Farm.

5. The applicant further testified that in 1967, the deceased married the respondent and they were blessed with thirteen (13) children. Thus the deceased was survived by nineteen children and two wives yet the respondent obtained letters of administration intestate where she indicated that she was the only beneficiary. The applicant urges the court to revoke the grant issued to the respondent as she obtained it through fraudulent means and by concealing material facts to the court.
6. The applicant further testified that there was a case in Mweiga Land Disputes Tribunal No. 7 of 2007 and an award was issued which recognized her and the respondent as wives of the deceased. The award provided that her and the respondent do file a succession cause in respect of the estate of the deceased. The applicant further stated that although the respondent was absent during the reading of the award, she participated in the tribunal proceedings. The applicant further stated that she did not change her name on her identity card to that of the deceased and neither did she name the children with the deceased's names as she would have lost her job at the coffee farm which she took up to educate her children.
7. According to the applicant, the deceased was allocated land in Mutero Endarasha, Kieni sub-county where they lived together for about ten years before the applicant moved to Nyeri to work at Munyeni Coffee farm.
8. PW2, testified that she was a niece to the deceased and that the deceased married the applicant under Kikuyu Customary Law and they had six children. The deceased later married the respondent as his second wife. Both wives were present during the burial of the deceased which PW2 attended. the reason for the applicant shifting residence from their Endarasha home where she lived with the deceased was that the deceased had become abusive and violent towards her. The applicant thereafter moved to a coffee farm in Nyeri to work and feed her children. The applicant and the deceased stayed separately but the deceased used to visit them at the coffee farm from time to time.
9. PW3, John Magenda Theuri testified that he knows the applicant since his childhood and that his own sister is married to the applicant's son. He further stated that the deceased was married to two wives, the applicant as the first wife and the respondent as the second wife.

The Respondent's Case

10. The respondent testified that the deceased married her in 1964 under Kikuyu Customary Law and later on 14/10/1990 renewed their vows under the *African Christian Marriage Act*. She further stated that their union was blessed with thirteen children. She further testified that she was married to the deceased for 34 years and in all those years the applicant did not set foot in their homestead or interfere with their marriage. The respondent said she only came to know of the applicant during the burial of the deceased.
11. The respondent testified that the deceased came into the suit land in 1964, which is the same year he married her. The suit property was acquired through purchase which the respondent stated they paid through a loan by selling milk and pyrethrum. The respondent stated that she was the one farming as the deceased was unable to work as he was involved in a car accident in 1981. She further stated that



- she cleared the loan in 1990 and the titles were issued in 1992. The respondent further stated that they acquired Plot No. 28 Endarasha in 1965 and she built a temporary wooden structure which she has rented
12. The respondent stated that the applicant colluded with others and lodged KW/LDT/7/2007 over land parcel number Nyeri/Endarasha/1335 where the award was ambiguous, outside the mandate and jurisdiction of the land disputes tribunal. The respondent further stated that she never met the applicant till she saw her in court and denied that the applicant attended the deceased's funeral.
 13. DW2, Justus Irimu Ngari, testified that he knew the respondent and the deceased since 1963. He further testified that they all settled at Endarasha in 1963 where they were allocated land. He further testified that the deceased married the respondent in 1964 and they were blessed with thirteen children. DW2 further stated that to her knowledge, the deceased only married one wife. DW2 came to know of the applicant during the deceased's funeral when she stated that she was the deceased's wife.
 14. DW3, Jerioth Wambui Gitahi a neighbour of the respondent, testified that she knew the respondent for over 40 years and in all that time she knew the respondent as the only wife of the deceased. She further stated that she attended the marriage ceremony between the deceased and the respondent in 1990. The deceased and the respondent were blessed with thirteen children. DW3 further testified that she does not know the applicant and that the applicant has never lived or stayed at the suit property in Endarasha.
 15. DW4, John Irungu Ndirangu testified that he is a son of the deceased and the respondent. He stated that he never knew the applicant but met her during the hearing of the land case at Mweiga. The witness further testified that he did not know Julius Kingori Ndirangu who is alleged to have been buried at the suit land and neither did he witness any burial on the land.
 16. This summons was disposed of by way of written submissions.

The Applicant's Submissions.

17. The applicant submits that the deceased is survived by two wives and nineteen children and further that on 13th January 1999, one year after the death of the deceased she and the respondent jointly wrote a letter to the District Land Registrar notifying the office concerning the death of the deceased and further instructed the office to restrict any dealings of the deceased's properties until they finalized the succession of the properties. The applicant further submits that on 6th December 2005, the applicant and respondent were jointly summoned by the District Officer of Kieni West Division to appear before the Kieni West Land Disputes Tribunal in Mweiga Civil Case No. 7 of 2007 where a claim had been made against them by individuals who had made part payment to purchase some of the properties of the deceased with his consent. The tribunal then recognized the applicant and the respondent as co wives of the deceased and ordered them to file a succession cause together.
18. The applicant argues that the respondent in her written statements confirms that she was aware of the Mweiga Tribunal Case No. 7 of 2007 and that a written record of the findings by the tribunal reveals that the respondent was present at the proceedings. However the respondent walked out of the proceedings and this fact strongly differs from the evidence of the respondent that she never appeared before the tribunal. Further, the applicant argues that the fact that the respondent did not raise any objection to the tribunal's decision that described them as co-wives and required them to file a succession cause together strongly suggests that the respondent was aware of her status as a wife of the deceased.



19. The applicant states that the respondent thereafter filed a succession cause on 27th May 2008 and she was issued a certificate of confirmation of grant on 19th March 2010. The respondent indicated that she and her children are the only beneficiary of the deceased's estate which is not true
20. It was further submitted that the applicant obtained a court order and a burial permit to bury her son, Jastus King'ori ndirangu who died on 19th November 1999 on the land of the deceased which was not disputed by the respondent and that he said burial could not have taken place if indeed she and the deceased were not married and had children.
21. The applicant submits that she has no doubt that her existence and that of her family are well known to the respondent and that the respondent's failure to conceal this vital information to the court was her attempt at fraudulently assuming possession of the deceased's estate.
22. The applicant states that although the respondent claims to have seen her only during the deceased's funeral, photographs were produced in court confirming that the two attended the burial and were photographed standing side by side in close proximity to the deceased's casket. Further, the applicant argues that the eulogy used during the burial ceremony described her as the deceased's first wife. Although the respondent testified that she did not know the contents of the eulogy, the applicant argues that the fact that the respondent did not raise any dispute prior to the publication of the eulogy confirms that she was aware of her status as the elder wife of the deceased.
23. The applicant submits that the deceased married her under Kikuyu Customary Law in 1946 which is legally recognized pursuant to Section 43 of the *Marriage Act* 2014. The applicant further relies on the cases of *Gituanja vs Gituanja* (1983) KLR 575 and *Rachael Wanjiru Karanja vs Nancy Wambui Kamau* [2015] eKLR and submits that the existence of a customary marriage is a question of fact that must be proved by adducing substantial evidence that raises the presumption of marriage. The applicant argues that Mary Wangui Macharia who appeared as a witness in support of her case admitted that the marriage between her and the deceased was legitimized through the payment of bride price and that the same had been consented to by her family. The applicant further argues that her testimony and that of John Magenda showed that the deceased and the applicant may have cohabited as husband and wife when the deceased frequently visited her in Muringato.
24. In addition to availing witnesses, PW2, the applicant states that other independent forms of evidence adduced prove that a valid marriage existed between her and the deceased for example the letter from the Senior Chief of Kiganjo location sent to the Land Registrar in Nyeri on 9/6/2021 requesting that she be assisted to file a caution over the deceased's land. In the said letter, the Senior Chief describes her as the elder wife of the deceased and the mother of deceased six (6) children. The applicant argues that the letter implies that the Senior Chief acknowledged her as the deceased's wife because he was aware of the said relationship.
25. The applicant further argues that when the deceased died, she was identified as the first wife of the deceased in the eulogy and her children as legitimate children of the deceased. Further, the fact that she was allowed to attend the burial of the deceased and appear in the eulogy as his wife without any objection from the respondent or members of her family and since that has not been controverted by the respondent, raises the existence of a presumption of marriage. To support this contention, the applicant relies on the case of *Rebecca Muthoni Kamau vs Tabitha Muthoni Kamau* [2021] eKLR.
26. The applicant submits that Section 3(5) of the *Law of Succession Act* legitimizes a customary marriage between a woman who gets married to a man who subsequently marries another woman under statute. The applicant further relies on the case of *Irene Njeri Macharia vs Margaret Wairimu Njomo & Another* [1996] eKLR and urges the court to find that she is a wife of the deceased.



27. The applicant relies on Section 29 of the *Law of Succession Act* and submits that she is a dependent of the deceased's estate as she is a legitimate wife of the deceased. It is further argued that the grant ought to be revoked as the proceedings to obtain it were defective due to fact that the other beneficiaries and dependents of the deceased were left out of these proceedings. The applicant further argues that the grant was obtained fraudulently and by means of untrue allegation since the respondent concealed from the court that there were other beneficiaries of the deceased's estate despite being well aware of the fact.

The Respondent's Submissions

28. The respondent submits that she petitioned for grant of letters of administration and was issued with a certificate of confirmation of grant on 19th October 2010. She further states that the applicant has sought to revoke the grant ten years after she was issued with a certificate of confirmation of grant. The respondent further argues that although the applicant alleges that she is the wife of the deceased, she did not prove the same as she did not bring any witnesses to court to testify that they witnessed the marriage ceremony of the deceased. Neither did she bring any of her children to give evidence that they were the deceased's children. Further, there is no evidence adduced to show that the deceased lived with her children or educated them. The respondent further argues that the applicant did not produce a birth certificate of her first child to show when the child was born to know whether she was married to the deceased and what year they got married.
29. The respondent further submits that the applicant does not fall into the category of former wife and pursuant to Section 29(a) of the *Law of Succession Act* which was amended to read "spouse" instead of former wife or wives. Pursuant to Section 29(a) of the Act, the applicant has not shown that the deceased was maintaining them two years prior to his death and as such, she and her children do not qualify to be dependents under Section 29 of the *Law of Succession Act*.
30. The respondent submits that the applicant was unable to support her contentions that mwati & harika had been paid as dowry and further she did not say whether ngurario was performed as was stipulated by Madan J in the case of *Zipporah Wairimu vs Paul Muchemi* HCCC No. 128 of 1970. The applicant did not tender proof to show that ngurario was performed or celebrated between her and the deceased. Further, no witness came forth to adduce evidence that they witnessed their marriage ceremony. The children of the applicant did not appear in court as witnesses to aid their mother to show that they knew the deceased or that he brought them up, lived with them or even stayed with him at any time.
31. The respondent submits that the applicant was unable to prove that she lived or stayed at the suit land at Endarasha. The respondent further states that the deceased settled into the suit land in 1963 and married her in 1964. Thus at no time was she on the suit land together with the applicant and in any event, she states that if she settled in the suit property in 1964, there is no way the applicant could have stayed there too. The respondent argues that she and the applicant never stayed in the suit land as co-wives and the only time the applicant set foot therein was after the death of the deceased.
32. The respondent states that she followed the law while applying for the grant of letters of administration and furthermore, the suit properties are matrimonial properties that she is solely entitled to having settled on the said properties in 1964 as the deceased's wife. As such, the respondent argues that the applicant has not proved her case on a balance of probabilities. She relies on the case of Nyahururu ELC Appeal No. 1 of 2017 *Mary Wabinga Ndirangu vs Lucy Wangari Ndirangu* to support her submissions.



The Law

Whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant.

33. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either:-
 - i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - ii. To proceed diligently with the administration of the estate; or
 - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
 - iv. The grant has become useless and inoperative through subsequent circumstances.

34. The applicant argues that she got married to the deceased under Kikuyu Customary Law in 1945 before he entered into his second marriage with the respondent in 1967. She therefore argues that the deceased is survived by two wives and nineteen children and the respondent who was privy of this information concealed these material facts from the court while she applied for the grant of letters of administration.

35. It is trite law that there are some conditions that have to be satisfied to prove the existence of a valid kikuyu customary law wedding. These conditions have been outlined by Eugene Cotran in his *Casebook on Kenya Customary Law* at page 30 as follows:-

- a. Capacity: the parties must have capacity to marry and also the 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 valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
36. The first point of instruction is Section 29 of the *Law of Succession Act* which provides:-
- For the purposes of this part dependent means-
- a. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and.....”
37. The deceased herein died on 8th September 1998. The respondent in her capacity as widow of the deceased filed this cause petitioning for letters of administration intestate which was issued on 27th May 2008 and confirmed on 19th March 2010 bequeathing the estate of the deceased to the respondent.
38. The Summons for revocation of grant dated 23rd January 2020 seeks for revocation of the said grant on grounds that it was obtained through fraud and non-disclosure of facts material to the case. The respondent vehemently denied the allegations in the summons that the applicant was the wife of the deceased.
39. The applicant testified that she married the deceased under Kikuyu customary law in 1945 and they were blessed with six (6) children. The deceased in 1967 named the respondent as his 2nd wife and they got thirteen (13) children together. The applicant claims that the fact that she is the 1st wife was well known to the respondent but she nevertheless proceeded to file this cause without informing her.
40. The evidence of the applicant as far as marriage is concerned was that of PW2 and PW3. PW2 testified that the deceased was her maternal uncle and that she knew him as well as his two wives namely Marion Wangari and Millicent Gathoni. The first wife who is the applicant had 6 children. According to her, the applicant was named under Kikuyu customary law. PW2 identified the applicant and the respondent in a photo during the burial of the deceased as they stood next to the casket. As for PW3 he said he knew the applicant since his childhood and he is now 55 years old. She worked in a coffee plantation and rented a house in the plot belonging to PW3's family. During the burial one who read the eulogy of the deceased where the applicant was recognized as the first wife of the deceased.
41. In order to prove that a marriage under Kikuyu customary law existed, the applicant who knew it was disputed, ought to have called a witness to testify on the tenets of such a marriage to the effect that such ceremonies as payment of dowry and “Ngurario” celebration took place. The two witnesses of the applicant came into her life after the alleged marriage. PW2 said she was sixty years old at the time she testified which means she was born in 1963. In her further affidavit the applicant testified that she got married to the deceased in 1945. This is long before PW2 and PW3 were born. The applicant said she later moved from their home and Endarasha and went to look for employment to feed for her children. In her evidence she says she came to learn the deceased married a second wife in 1967 and that deceased visited her once in a while and her family at Muringa to where she worked.
42. The respondent said she got married to the deceased in 1964 under Kikuyu customary law and that they solemnised their marriage in church in 1990. A marriage certificate was produced in evidence.



43. It is noted that the applicant did not produce any documents of her children, for example birth certificate to show when they were born and whether the deceased was acknowledged as their father. On cross-examination the applicant said that she never changed her maiden name even after getting married and that she had not named any of her children after the parents or other family members of the deceased.
44. The photos of deceased's burial and eulogy produced by the applicant show images of two elderly women being the casket with several grown up children on their side. The person who took the photographs was not called to produce them or to identify the persons on the said photos. Neither was the person who printed the burial programme called to testify. However, it was held in the case of *Lucy Wanjiru Mwangi Vs Daniel Njuguna Njibia & Florence Njeri Mwaura* [2016] eKLR and in the case of *Re Estate of James Muiruri Waweru* [20106]eKLR that photographs are not conclusive proof of any relationship. I agree with the said finding of the two judges as I find that eulogies would not be conclusive proof of a marriage or a relationship. He who alleges must adduce conclusive evidence of the alleged fact. I am of the considered view that the applicant has failed to prove that she was a wife of the deceased and as such, she cannot be considered a beneficiary in the estate of the deceased.
45. The court will examine the provisions of Section 29 of the Act in view of the applicant's evidence as to whether she, as well as her children would be regarded as dependants.

Section 29 provides:-

For the purposes of this part dependent means-

- c. The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- d. Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half sisters, as were being maintained by the deceased immediately prior to his death; and.....”
46. The applicant was very categorical that she fed for herself and her children and did not depend on the deceased. It is important to note that children born from 1945 and a couple of years thereafter, at the time the deceased died were aged between 40-53 years and in normal life were earning their own living. Furthermore, none of them joined this case to testify on whether they were dependent on the deceased or were maintained by him immediately prior to his death. In my view, neither the applicant nor her children could have been dependants of the deceased at the time of his death or prior to that time.
47. Given the fact that the applicant has failed to prove that she was a wife or a dependant of the deceased, the respondent had no obligation to comply with rule 26 of the Probate and Administration Rules.
48. I therefore find that this application dated 23rd January 2020 has no merit and it must fail.
49. The summons for Revocation dated 23rd January 2020 is hereby dismissed. Each party to meet their own costs.
50. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE



Judgement delivered through video link this 27th day of July 2023

