



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 203 OF 2019

WALFORD NGUGI NJAMBI.....1ST APPELLANT

EUNICE WAITHIRA NGUGI (NOW DECEASED).....2ND APPELLANT

VS.

EUNICE WANJIRU WAMBUI.....1ST RESPONDENT

DANIEL KARUGA MACHARIA.....2ND RESPONDENT

JANE WANGUI MACHARIA.....3RD RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate's Court at Kikuyu, G. Onsarigo, SRM,

in Succession Cause No. 172 of 2016 – In the matter of the Estate of James Muigai Ngugi (deceased)

dated 21st November, 2019)

JUDGMENT

1. This is an appeal pitted between parties who allege they are the rightful heirs of the *Estate of JAMES MUIGAI NGUGI (deceased)*.

BACKGROUND

2. The deceased died on 5th April, 2016. *Eunice Wanjiru Wambui* (hereinafter *Wanjiru*) together with her brother *Daniel Karuga Macharia* petitioned grant of Letters of Administration intestate.

3. A petition by way of cross-application for grant was filed in that court on 14th October, 2016 by deceased's nephew, *Walford Ngugi Njambi* (hereinafter *Walford*) and deceased's sister, *Eunice Waithira Ngugi* (now deceased). Their cross-application was filed on the applicants' own behalf and on behalf of six other deceased's siblings. They opposed the petition filed by Wanjiru on the grounds that the deceased, in his life time, expressed a desire to have Wanjiru removed from his home and that the deceased had, in his life time, appointed Walford to manage his properties which included a residential house and 33 single rental properties.

4. Yet, another petition by way of cross-application for grant was filed on 24th April, 2017 by *Jane Wangui Wahome* (hereinafter *Jane*) and *Stephen Mwangi*. The two applicants described themselves as widow and uncle of deceased respectively. That application was supported by the grounds that Jane, sometime in the year 2000, got married to the deceased under Agikuyu customs, which marriage was blessed with four children namely;

(a) EWM (16 years)

(b) RWM (9 years)

(c) NNM (7 years)

(d) EJN (3 years)

5. Jane attached birth certificates for the said children. Further, Jane stated that in 2012, she had matrimonial “differences” with deceased and Jane left their matrimonial home with the children. That the deceased however continued to financially provide for those children by sending to Jane money transfers through Mpesa transaction. Jane provided her Mpesa statements to prove the same.

6. The trial court ordered the matter to proceed by way of *viva voce* evidence. The trial court by its judgment dated 21st November, 2019 stated that the two issues before it for consideration were:-

(a) Whether the deceased was married or at all.

(b) Whether deceased had dependants.

7. The trial court’s judgment allowed Wanjiru’s petition to proceed but further stated:-

“Be that as it may, and since this is not a confirmation of grant where the court would require all the beneficiaries listed.”

8. The trial court’s determination aggrieved Walford. Walford’s co-petitioner, Eunice Waithira is now deceased. Walford brought the following grounds of appeal:-

1. **THAT** the learned magistrate erred in law and fact by framing his own issues to be determined for trial as opposed to the framing issues from the pleadings filed by the parties thereby exceeded its jurisdiction.

2. **THAT** the learned magistrate erred in law and fact by failing to satisfactorily appreciate and correctly apply the laws in relation to Kikuyu Customary Marriage and ended up at arriving at a wrong decision.

3. **THAT** the learned magistrate erred in law and fact by holding that a marriage by presumption existed between the 1st respondent and the deceased yet the petitioner had not pleaded so and further there was no material evidence placed before the trial court to hold so.

4. **THAT** the learned magistrate erred in law and fact by failing to properly analyse the evidence tendered on record by the parties especially the one tendered by the respondents that was marred by lies and contradictions that led the trial court in arriving at a wrong conclusion.

5. **THAT** the learned magistrate erred in law and fact by upholding that the 1st and 2nd respondent can proceed to take out letters of administration of the deceased’s estate yet both the 1st and 2nd 3rd Respondent’s had failed to prove marriage on a standard of probability as required in law.

6. **THAT** the learned magistrate erred in law and fact by failing to find and hold that it had been credibly proved after evaluation the material evidence placed before it that the appellants and their siblings were the deceased’s next of kin.

7. **THAT** the learned magistrate erred in law and fact by totally disregarding the testimony and evidence tendered by the appellants which was neither disputed nor shaken during cross examination.

8. **THAT** the learned magistrate erred in law and fact by failing to use his discretion properly, fairly and judiciously in considering the appellants’ case and the glaring evidence produced by the appellants rebutting all the allegations by the respondents as well as the well thought written submissions and extensive authorities made on their behalf thus arrived at a wrong conclusion.

9. **THAT** the learned magistrate erred in law and fact by failing to consider that the 1st respondent only used secondary evidence to demonstrate the nature of her relationship with the deceased, while refusing to avert to primary evidence thus telling on the truth intentions of their claim.

ANALYSIS

9. The primary role of this Court as the first appellate court is to re-evaluate, re-assess and re-analyse the evidence before the trial court and determine whether the trial court’s determination can be upheld. This Court will however bear in mind that it has neither seen nor heard the witnesses as they testified: See the case, **ABOK JAMES ODERA & ASSOCIATES VS. JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES (2013) eKLR.**

10. In support of his grounds of appeal Walford submitted that Wanjiru gave conflicting evidence on the date of her marriage to deceased’s at one time she said she got married to deceased in the year 2008, and that yet another time she spoke of the year 2009. He also submitted that Wanjiru also stated she began to live in the deceased’s house in the year 2012. Walford faulted the trial court’s failure to determine whether the children listed in Wanjiru’s petition were children of the deceased.

11. On the allegation by Wanjiru that she was married to the deceased, Walford relied on the case **MARY NJOKI VS. JOHN KINYANJUI MUTHERU (1985) eKLR** as follows:-

“A reading of all the judgments in YAWE’s appeal leads me to believe that it was held that:-

- i) *The onus of proving customary law marriage is generally on the party who claims it;*
- ii) *The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;*
- iii) *Evidence as to the formalities required for a customary law marriage must be proved to that standard; (of MWAGIRU V MUMBI (1967) EA 639, 642 (K));*
- iv) *Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the party asserting it.*
- v) *Only cogent evidence to the contrary can rebut the presumption (TAPLIN, WATSON V TATE, (1937) 3 ALL ER 105) (CH DIV);*
- vi) *If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage (SASTRY VELAIDER ARONEGARY V SEMBECUTTY VAIGALIE (1880-1) AC 364 (PC); SHEPPHERD, GEORGE V THYER, (1904) 1 ON 456. and see also RE TAYLOR, (1961) 1 ALL ER 557 (CA).”*

12. Walford also relied on the same case, MARY NJOKI VS. JOHN KINYANJUI:-

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. ...

To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage.”

13. Walford’s reliance of the Court of Appeal case M.W.G. V. E.W.K. (2010) was in error because he relied on the dissenting judgment which made a finding that presumption of marriage *per se* does not constitute marriage.

14. Walford submitted that Wanjiru failed to prove that her marriage was registered as required under **Section 55** of the **Marriage Act**. This is the section which provides that parties to a customary marriage must make an application for registration of the marriage within 6 months after completing the customary rites which confer on them the status of husband and wife.

15. Walford also submitted that Wanjiru concealed material facts, when petitioning, in failing to disclose the deceased’s siblings. Walford relied on the case In re ESTATE OF MIAWA DIANG’A (DECEASED) 2018 whose facts differ from this case because in that case it was siblings who, in petitioning for grant where the deceased was single, failed to list all the siblings of the deceased.

16. Walford acknowledged in his submission that, the court retains the discretion in appointing administrator as per **Section 66 Law of Succession act Cap 160**. Walford however stated that the trial court ought to have found that the deceased was not survived by a spouse or children and accordingly the trial courts should have been guided by provisions of **Section 39 of Cap. 160**. That Section provides that where the deceased is not survived by a spouse or children the net intestate estate would devolve upon:-

- “(a) Father; or if dead*
- b) Mother, or if dead*
- c) Brothers and sisters and any child or children of deceased’s brothers and sisters in equal shares; or if none*
- d) Half – brothers and half-sister, in equal shares; or if none*
- e) The relatives who are in the nearest degree of consanguinity upto and including the sixth degree in equal shares.”*

17. Walford concluded by stating that Wanjiru had failed to prove she was married to the deceased and according to Walford, Wanjiru was not a beneficiary of the estate.

18. The 1st respondent, (Wanjiru) and the 2nd respondent, (Daniel Karuga Macharia) commenced their submissions by cautioning this Court to bear in mind that it did not have the advantage of hearing the witnesses who testified before the trial court. The said respondent also submitted that the trial court correctly presumed Wanjiru was married to the deceased. The respondents relied on the case MNM V. DNMK & 13 OTHERS (2017) eKLR. The Court of Appeal in that case stated on presumption of marriage thus:-

“Madan, JA (as he then was) articulated the rationale of the presumption of marriage in the following famous words in NJOKI V. MUTHERU [2008] 1 KLR (G&F) 288:-

“It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the “husband”, or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in

the estate of her deceased "husband"

The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (MBOGOH V. MUTHONI & ANOTHER, (supra). Mustapha, JA added in HORTENSIA WANJIKU YAWE V. PUBLIC TRUSTEE (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. (See also KIMANI V. KIMANI & 2 OTHERS (supra)."

19. Those respondents further stated in their submission that a part of Kikuyu customary marriage rites performed on behalf of Wanjiru known as "*Kuhanda Ithigi*" bolstered Wanjiru's claim for presumption of marriage. Further, that it was not denied that Wanjiru resided with the deceased. That, if indeed Wanjiru was a stranger, the deceased's family would not have allowed her to continue residing in that house even after the death of the deceased.

20. The respondents also relied on Civil Case No. 5 of 2016 (O.S) ***MWK V. AMW*** and Civil Appeal No. 116 of 2018 ***CSO VS. RBO*** whose pronouncement was not dissimilar to the Court of Appeal case ***DNMK & 13 OTHERS*** (supra).

21. The 3rd respondent, Jane did not file submission nor did she appear at the hearing of this appeal.

ANALYSIS

22. Taking into consideration the trial court's pleadings, and the evidence and its judgment; and also considering the appeal before this Court I am of the view that the following are the issues for consideration in this case, that is:-

(a) Did the trial court consider the pleadings and the evidence adduced?

(b) What was the marital status of the deceased if any?

(c) Who are the beneficiaries of the deceased's estate?

(d) Who should petition for grant of letters of administration intestate?

(e) Who should bear the cost?

23. Before embarking on the first issue, it is necessary to give a summary of the evidence adduced before the trial court.

24. ***Eunice Waithira*** (now deceased) stated that ***Wanjiru*** cohabited with the deceased but stated that she saw her "one month ago". It is not clear whether the witness's statement meant that ***Wanjiru*** cohabited with the deceased a month before his death. That evidence was not clear.

25. ***Eunice Waithira*** (deceased) denied that ***Jane*** lived with the deceased but confirmed that ***Jane*** and deceased had children together.

26. ***Eunice Waithira*** (deceased) finally stated that deceased did not tell his family members he had a wife.

27. ***Walford*** stated that the deceased was his uncle and that he, ***Walford***, used to take care of his uncle, the deceased and also used to manage the deceased's properties. This witness stated deceased informed him that he was impotent, and that the deceased therefore did not leave any children surviving him.

28. ***Jane*** stated that the deceased was her husband and that they bore children together. They resided in Kinoo. By the time of his death, ***Jane*** and deceased were not living together but the deceased used to pay the school fees for their children. She lived with the deceased for seven years.

29. ***Jane's*** evidence was supported by ***Ephraim Matindi Thibu*** who confirmed that ***Jane*** and deceased were married under the Kikuyu Customary rites and had four children.

30. ***Jane's*** evidence confirming her marriage to the deceased was also supported by ***Stephen Mwangi Igangi***.

31. ***Wanjiru*** stated in evidence that she was married to the deceased and they resided in Kinoo. She stated that when she got married to the deceased, she had two children which children the deceased accepted as his children.

32. ***Wanjiru's*** evidence was supported by ***David Kinuthia*** and ***Daniel Karuga***.

33. The appellants herein erred to allege that the trial court did not consider the evidence adduced. To the contrary, the trial court reproduced the parties' evidence in the judgment. I therefore reject the ground of appeal which makes that allegation.

34. What then, if any, was the marital status of the deceased? Two women alleged to have been wives of the deceased at different times.

35. It is clear from the evidence produced by way of written witness statements and adduced in open court that the two women, that is, ***Jane***

and Wanjiru, who allege to have been deceased's wives did not prove marriage under the Kikuyu custom. Jane did not state that any of Kikuyu customs of marriage were performed in her case. Wanjiru stated that the rite of "Kuhanda ithigi" was performed. That rite is but one of those that must be fulfilled. That was made clear in the case **JULIUS MWANGI MUNIU & ANOTHER VS. LUCY WANJIRU NJOGU & ANOTHER (2016) eKLR**. In that case the totality of those rites were discussed as follows:-

"The essentials of a Kikuyu customary marriage are codified in Restatement of African Law on the Law of Marriages and Divorce by Eugene Cotran. These essentials include; capacity to marry, consent of parties, ceremonies of 'ruracio' 'ngurario' and commencement of cohabitation. In the instant case if as alleged the deceased went with his father to the deceased's home and only conducted the first initial ceremony 'kuhanda ithigi' this ceremony did not constitute a marriage between the deceased and the 1st Respondent under customary law.

This is because as illustrated in the following case, the essentials of a kikuyu customary law were completed especially 'ruracio'; payment of dowry. In THE ESTATE OF JOSEPH GATHIGO (DECEASED) PRISCILLA WARUGURU GATHIGO vs VIRGINIA KANUGU GATHIGO (2004) eKLR Hon. Lady Justice H. Okwengu stated as follows:-

'I find the evidence adduced by the protestor on proof of alleged marriage to the deceased fell short of proving the alleged marriage ... there was no independent witness to customary formalities. There was no evidence that the elders from the deceased relatives who participated in the said marriage. There was no evidence that a 'ngurario' ram was slaughtered. The Court finds there was no marriage between the deceased and Respondent.'

36. The trial court by its judgment made a finding that, Wanjiru had proved under the doctrine of presumption of marriage, that she was married to the deceased. The court by that judgment granted Wanjiru an order to proceed and petition for grant of letters of administration intestate, in respect to deceased's estate.

37. I have re-evaluated the evidence tendered at trial. Jane stated that she lived with the deceased from the year 2000. They lived together and out of their relationship they were blessed with four children. Jane attached the birth certificates of the four children and those certificates show that the father of the four children was the deceased. Jane's evidence was that due to marital disagreement with the deceased, she left the matrimonial home in the year 2012. The evidence of Jane leaving the matrimonial home coincides with the testimony of Wanjiru who on being cross examined stated that she began to reside with the deceased in the year 2012. My re-evaluation of the evidence leads me to find that Jane was not a stranger to the deceased as all parties in this case attempted to portray her. She produced Mpesa statement for the period from 1st June, 2015 to 31st May, 2016. In that period the deceased sent money to Jane for total of 14 times. This evidence supports Jane's contention that the deceased continued to support the children they had with the deceased, even after their separation.

38. Wanjiru did not prove what if any, children she had with the deceased. This is because the documents filed by her at the trial court on 6th May, 2019 were expunged by the trial court on 10th June, 2019.

39. I am satisfied that both Jane and Wanjiru proved that they were married to the deceased under the doctrine of presumption of marriage. Jane left the matrimonial home in 2012 and Wanjiru began to co-habit with deceased from that year until his death.

40. The next issue to consider is, who are the beneficiaries of the deceased's estate. The beneficiaries are:-

(a) Jane Wangui Wahome – 1st Wife

1. Eugene Wahome Muigai
2. Rianne Wangui Muigai
3. Nimoh Nyambura Muigai
4. Edgar Jabez Ngugi Muigai

(b) Eunice Wanjiru Wambui – 2nd wife

41. In accordance with the provisions of **Section 66 of Cap 160** the surviving spouses, in this case Jane and Wanjiru are entitled to be appointed administrators in preference to Walford who was deceased's nephew.

42. Accordingly, on the penultimate issue, this Court shall order the petition for grant of letters of administration be filed by **Jane Wangui Wahome** and **Eunice Wanjiru Wambui**

43. On the final issue, this Court shall order each party to bear their own costs of this appeal and of the lower court.

DISPOSITION

44. The judgment of this Court is that the orders of the trial court are hereby set aside and are substituted by the following orders:-

(a) The deceased had two wives namely, **Jane Wangui Wahome (1st wife)** and **Eunice Wanjiru Wambui (2nd wife)**.

(b) The beneficiaries of deceased's estate are:-

(i) Jane Wangui Wahome – 1st Wife

1. Eugene Wahome Muigai
2. Rianne Wangui Muigai
3. Nimoh Nyambura Muigai
4. Edgar Jabez Ngugi Muigai

(ii) Eunice Wanjiru Wambui – 2nd wife

(c) The petition for grant of letters of administration intestate shall jointly be filed by:-

(i) Jane Wangui Wahome; and

(ii) Eunice Wanjiru Wambui

(d) There shall be no order as to costs to this appeal and before the trial court.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF FEBRUARY, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Mourice

For Appellant (**WALFORD NGUGI NJAMBI**):- Mr. Kirika HB Mr. Kimathi

For 1st Respondent (**EUNICE WANJIRU WAMBUI**):- Mr. Gitau

For 2nd Respondent (**JANE WANGUI MACHARIA**): - No appearance

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE