



REPUBLIC OF KENYA



In re Estate of John Mwambire Guracha (Deceased) (Succession Cause 30 of 2017) [2022] KEHC 10402 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
SUCCESSION CAUSE 30 OF 2017**

RN NYAKUNDI, J

JUNE 24, 2022

N THE MATTER OF THE ESTATE OF JOHN MWAMBIRE GURACHA(DECEASED)

THE THE GURACHA & 2 OTHERS.....PETITIONERS

VERSUS

KAHASO SULUBU GURACHA.....RESPONDENT/OBJECTOR

CORAM: HON. JUSTICE R.NYAKUNDI

JUDGMENT

1. On February 14, 2013 the said Kahaso filed for grant *Ad Litem* (N0.8 Of 2013) petitioning the court to name her administrator of the Estate of the late John Mwambire Guracha which application was objected by The the Guracha, brother to the Deceased. In his sworn affidavit dated March 7, 2013 he contended that the said Kahaso has never been a widow of the Deceased (that is John Mwambire Guracha) and that his brother's only widow was the late Naomi John Mwambire and that they were never blessed with any children.
2. Further, the respondent/objector herein Kahaso Sulubu, the widow, filed a petition for the grant of letters of administration in the Estate of Naomi John Mwambire (Deceased) who died on August 31, 1999 in Malindi Succession Cause No. 19 of 2017. In her sworn affidavit dated June 8, 2017 she stated that she was married to the Deceased vide Giriama customary laws as the Deceased (Naomi) and her husband John (Deceased) had not been blessed with any children in their lifetime. She further stated that it was Giriama custom that an elderly woman who was childless, such as Naomi was, could marry a younger woman and have a man from the family of her deceased husband sire children who would be in turn be recognized as her husband's children. She further stated that the Naomi (deceased) had paid her dowry and married her under the Giriama Customary law and as such she (Kahaso) was entitled to all that Naomi was entitled to from the Estate of her husband (John Mwambire). The same was issued on January 31, 2018 naming Kahaso as the administrator of Naomi's Estate and in essence, John's Estate.
3. The petitioners herein then filed this current Petition (No. 30 of 2017) seeking to be appointed as administrators of the Estate of John Mwambire Guracha who died on August 20, 1977. They brought



their petition as blood relatives of the deceased namely brothers and nephews claiming that they were the rightful heirs to the deceased as he had died intestate and without any children.

4. The objector herein Kahaso Sulubu Guracha filed an objection October 3, 2017 stating the petitioners did not disclose that she was the wife of the late Naomi John Mwambire having been married under Giriama customary law in a woman-to-woman marriage is the sole beneficiary of the estate as the Deceased's (John Mwambire Guracha) inheritance was vested in Naomi John Mwambire (deceased) who in turn vested the same to her (Kahaso Sulubu Guracha). As such she contends that the petitioners intend to deprive her of her rightful interest in the Estate.
5. All matters were consolidated into one which is Succession Cause No.30 of 2017.

The Petitioners' Case

6. The petitioners herein describe themselves as a brother and nephews to the deceased. It is their contention that the deceased, John Mwambire Guracha died intestate leaving behind his wife Naomi John Mwambire and land title number Gede/Dabaso/147 as the only asset of the Estate. They affirm that Naomi John Mwambire did not seek letters of administration of her husband's estate but continued to live thereon, as such the estate automatically devolved to her as his sole heir. They further contend that Naomi (deceased) did not have any children.
7. The petitioners submitted that Rule 64 of the *Probate and Administration Rules* provide for the Application of African Customary law. They confirm that the courts have applied the customs of the parties before it to determine whether or not a customary marriage of woman to woman existed.
8. The petitioners' submissions listed two main issues; whether a woman-to-woman marriage is recognized under the Giriama Customary law and whether the objector was indeed married to the late Naomi John Mwambire under the said system of marriage.
9. On the first issue they submitted that indeed a woman to woman marriage is recognized under the Giriama customary law but there were certain conditions to be fulfilled for the marriage to be valid. They submitted that the Giriama customary law stated that the widow must be married to one of the deceased's brothers, however if none of the surviving brothers wished to marry her (inherit) then she is allowed to marry a girl but the consent of the family is a prerequisite to such marriage.
10. They also submitted that the objector had failed to prove that such a marriage between herself and the deceased Naomi John Mwambire had occurred as she could not prove that the family of the late John Mwambire Guracha had been involved in the ceremony nor given their consent. They further contend that the deceased were both staunch Christians who would not have contemplated such a thing as the late John Mwambire Guracha had in fact been a clergy in his church.
11. Finally, they submitted that the objector was in fact one of the two wives of Sulubu Guracha (a brother to the deceased) and that they used to assist the deceased Naomi John Mwambire and would reside with her on rotational basis and that the families of the brothers of the Deceased used the said property jointly until the objector obtained an injunction against the practice. They contended that they should be granted the letters of administration as they are the closest blood relatives of the deceased and the fact that the Objector had obtained Letters in the Estate of Naomi John Mwambire was immaterial as the property was in the name of John Mwambire Guracha (deceased) and hence devolves to his estate.

The Respondents/Objectors' Case

12. The Respondents opposed the grant to the Petitioners. They submitted that the Objector is the administrator of the Estate of Naomi John Mwambire vide H.C Succession Cause No 19 Of 2017 at



Malindi and any asset accruing in her estate devolves to her as no objection was ever raised in that cause and she applied as the 'wife' to Naomi. Further they submitted that as the wife and widow of the Late John Mwambire Guracha his estate was vested in her and consequently to the objector by virtue of the letters of administration.

13. They raised three issues for determination; whether there exists a woman-to-woman marriage in the Giriama Community as a custom, whether the objector was married to Naomi John Mwambire (Deceased) and if it is determined that she was thus married is she entitled to the Estate of John Mwambire Guracha.
14. On the first issue they submitted that under the *Probate and administration rules*, rule 64 application of African customary law is allowed and that courts have applied the customs of the parties before determining whether a woman-to-woman marriage exists. They submitted that their witnesses as well as the petitioner's witnesses had indeed confirmed that woman to woman marriage exists in the Giriama custom and gave the circumstances under which the same was allowed; when a woman is not married but has wealth she will look for another woman, pay the bride price and take her in as her wife to bear children for her, she will choose the man to sire her children of the marriage who might be a relative or an outsider, further when a woman is married but ages without children when the husband dies or even when he's still alive she has the right to get a wife and marry she will then choose the man to sire the children for her and her husband.
15. On the second issue they submitted that the normal marriage rites and traditions apply as in the normal marriages. They submitted that their witnesses confirmed that the objector had indeed been married to the deceased Naomi including one of the people who negotiated the bride price. They submitted that Naomi (deceased) paid a bride price of Kshs, 7,000 and that all customary rites were met.
16. On the last issue they argued that the objector is entitled to succeed her husband (Naomi John Mwambire) who was also entitled to succeed her husband John Mwambire Guracha. They further submitted that since Naomi had not taken out letters of administration to her Husband's estate then it only stands that the objector is entitled to be named as the survivor of the estate. They submitted that the deceased Naomi had chosen her husband's younger brother Sulubu Guracha to sire her children as she had wanted to retain the identity of her husband's family. They further submitted that the said Sulubu Guracha only sired children on behalf of Naomi and John and not because he had married the objector. They also submitted that the objector lived on her husband's land, that is at Dabaso together with her 'husband'.
17. They concluded that the evidence on record shows that Kahaso was married to Naomi but Sulubu sired the children for Naomi as such the estate devolves to her.
18. For these submissions the Objector relied on the cases of; *Wilfred Mongare Oina v Askah Mochache Momanyi* [2019] eKLR, *Eunita Anyango Geko & Another v Phillip Obunga Orinda* Kisii High Court Misc. C. A No. 1 Of 2013 (2013) eKLR, *Ernest Kinyanjui Kimani v Muiru Gikanga & anor* [1965] E.A 735 and *Mule Ndeti v Ngonyo Sila* [1997] eKLR.

Determination

19. The right to marry a person of the opposite sex has been specified in the *Constitution* of Kenya 2010. The *Marriage Act* also defines marriage as a voluntary monogamous or polygamous union between a man and a woman. Under the *Marriage Act*, a marriage may be registered if it is celebrated, inter alia in accordance with the customary rites relating to any of the communities in Kenya. Section 6(1)(c) of the *Marriage Act* is extremely important as it creates an impetus to ensure the registration of all marriages that are performed according to customary law in Kenya. In an ideal situation, the registration of



woman-to-woman marriages would be done under the *Marriage Act* 2014. However, because of the provisions of section 3(1) that define marriage as being between a man and a woman, there exists an inconsistency. Woman-to-woman marriage as a form of customary marriage is seemingly inconsistent with the provisions of the *Constitution* of Kenya 2010 and the *Marriage Act*. Having said this, there however exist numerous African traditional customs that allow a woman to woman marriage in Kenya including the Abagusii, the Kikuyu and the Luo among many others.

20. The *Judicature Act*, cap 8 Laws of Kenya under section 3(2) made provision for application of customary law in appropriate circumstances. Section 3(2) of the Act provides as follows:

“The High Court, the Court of Appeal 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 it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

21. Under section 3(2) of the *Judicature Act*, where both parties are subject to customary law the courts are enjoined to be guided by the customary law of the parties to the extent that the same was not repugnant to justice and morality.

22. The courts have applied the customs of the parties before it to determine whether or not a customary marriage of a woman to woman exists. In the case of *Eunita Anyango Geko & another v Philip Obunga Orinda* Kisii High Court Misc CA No 1 of 2013 [2013] eKLR the court held that in Luo customs, woman to woman marriages are defined in the same manner as that under the Kikuyu customs with the slight difference being that where the widow is left without a male child, and not necessarily without a child at all she could marry another wife. In the case of *Ernest Kinyanjui Kimani v Muiru Gikanga & another* [1965] EA 735 considered as a *locus classicus* in the application of customary law. Duffus J.A expressed himself while applying customary law to prove validation of woman to woman customary unions: -

“To summarize the position, this is a case between Africans and African Customary Law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice usually mean that the party propounding the customary law would have to call evidence to prove the customary law, as he would prove the relevant facts in the case.”

23. Eugene Cotran’s Casebook on *Kenya Customary Law* (1987) indicates that for there to be a valid customary marriage, there must be at least four essential elements; capacity, consent, payment of marriage consideration, and cohabitation.

24. In the instant case the marriage so contested wholly met these criterions. Again for purposes of clarity woman to woman marriage in the context of African culture should not be confused with same sex. Marriage prohibited by the *Constitution* and *marriage Act*. It is a marriage entered into by the female husband, with the wife as a care giver to ensure the propagation of lineage by creating a stable family. The siring of children in a woman to woman marriage remains to be one of the key components of the union.



25. Despite the petitioner's assertion that woman to woman marriage does not exist in the Giriama community and customs it is evident that it does indeed. The petitioner's own expert witness concurred with the objector's witness that indeed the same is true. As such I find that the crux of this matter is not whether woman to woman marriage exists in the Giriama customary law as the same has been reaffirmed but whether the objector was indeed married to Naomi John Mwambire and who is the proper heir of the Estate of John Mwambire Guracha (Deceased).
26. It is the petitioners' case that they do not dispute that the objector lived in the land asset of the estate and in fact continues to live there to date exclusive of any other person and that they also do not dispute that the deceased herein (John Mwambire Guracha) was the husband to the late Naomi John Mwambire until her death. The petitioner's own witness a Mr. Edward Shauri Ngala confirmed that indeed there did exist woman to woman marriage in the Giriama Customary Law, which occurred if the woman's husband died before they were able to have children and that said woman must be married to a brother of the deceased husband and should obtain consent from the deceased family before marriage.
27. Their bone of contention is however on the issue that the objector Kahaso Sulubu Guracha was married to the deceased Naomi John Mwambire. They argue that the customary rites to enter into the said marriage had not been fulfilled including consultations between husband's family and the wife's family to be allowed to marry another wife, relatives sent to find out the background of the new wife prior to the marriage, payment of dowry and 28 Kajamas provided to the wife's wife.
28. The petitioners argue that the Objector, Kahaso Sulubu Guracha is not an heir to the Estate on account that she was not married to the Deceased that is John Mwambire Guracha, they however confirm that the said Kahaso has been living on the land that is the sole Estate of the deceased.
29. Further it is not in contention that the objector did receive letters of administration on behalf of the estate of Naomi John Mwambire and none of the petitioners herein objected to the same. The petitioners do not also object to the fact that Naomi John Mwambire was indeed married and as such heir to the deceased John Mwambire estate.
30. I therefore concur with the submissions by counsel for the objector that she would in turn inherit from the current estate as she is the wife of Naomi John Mwambire and as such the Estate of John Mwambire which had devolved to Naomi John Mwambire should thus devolve to her.
31. I find no merit in the petitioner's case that the objector was married to one Sulubu Guracha (deceased) as they did not provide any evidence to the same, they neither attended nor assisted in any traditional rights relating to a marriage between the deceased Sulubu and the objector herein. Further since they never objected to the objector's grant of letters of administration in the Estate of Naomi John Mwambire as her wife it is evident that they know and are aware that the Objector was indeed a wife to the Deceased Naomi.
32. Consequently, I find in favor of the objector and affirm that the Late Naomi did indeed approach the family of the objector and paid dowry on her head making her his wife. Further to confirm that her intention was to ensure that her deceased's husband lineage does not end she procured a male relative of the deceased John Mwambire, his brother Sulubu Guracha to assist her procreate for her husband. The objection thus succeeds and the objector is confirmed as the heir to the estate of John Mwambire Deceased by virtue of the fact that she was married to his sole heir Naomi John Mwambire. I make no orders as to costs.

It is so ordered.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF JUNE, 2022.

.....

R.NYAKUNDI

JUDGE

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