



REPUBLIC OF KENYA



**In re Estate of Joseph Gititu Mukui (Deceased) (Succession Cause 1706 of 2012)
[2022] KEHC 17018 (KLR) (Family) (23 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1706 OF 2012
AO MUCHELULE, J
DECEMBER 23, 2022
IN THE MATTER OF THE ESTATE OF JOSEPH
GITITU MUKUI (DECEASED)**

BETWEEN

SCHOLASTICA WAHITO WANJEHIA OBJECTOR

AND

DAMARIS WANGUI GITITU 1ST PETITIONER

SILVIAH WANJIRU GITITU 2ND PETITIONER

BERNARD MUKUI GITITU 3RD PETITIONER

JUDGMENT

1. The deceased Joseph Gititu Mukui died intestate on April 11, 2012 at the MP Shah Hospital in Nairobi. There is no dispute that, while alive, he on October 30, 1999 married the 2nd petitioner Silviah Wanjiru Gititu under the *African Christian Marriage and Divorce Act* (Cap 251 – now repealed). Together, they got five children: Damaris Wangui Gititu (1st petitioner), Bernard Mukui Gititu (3rd petitioner), Dorcas Wanjiku Gititu, Mary Wanjiru Gititu and Brian Mwaura Gititu.
2. On July 31, 2012 the petitioners petitioned for the grant of letters of administration intestate. The grant was issued on September 16, 2014, and confirmed on November 10, 2015. The estate was distributed to the beneficiaries. On November 28, 2012 a special limited grant had been issued to the 2nd petitioner, limited to her accessing the deceased's four bank accounts. The same was revoked on July 21, 2013 by Justice L Kimaru (as he then was).



3. On November 23, 2015 the objector Scholastica Wahito Wanjehia filed the present summons seeking the revocation and/or the annulment of the grant issued and confirmed to the petitioners. The application was brought under rules 44(1) and 73 of the Probate and Administration Rules for the following orders:-

- “ 1. That this application be certified as urgent and service be dispensed with in the first instance.
2. That pending the hearing of this application interpartes this Honourable Court be pleased to stay the implementation of the confirmation of grant.
3. That pending the hearing of this application interpartes, there be stay of special limited grant issued by this Honourable Court on November 28, 2012 that granted Silvia Wanjiru Gititu the petitioner unlimited and exclusive right of access to the estate’s bank accounts.
4. That the special limited grant issued by this Honourable Court on November 28, 2012 to Silvia Wanjiru Gititu be revoked, annulled, vacated or set aside.
5. That the grant of letters of administration intestate issued on September 16, 2014 to the Petitioners be revoked or annulled.
6. That Silvia Wanjiru Gititu be ordered to render true and accurate account of all monies withdrawn from the estate bank accounts from the time the deceased passed on and all the motor vehicles left by the deceased.
7. That this honourable court be pleased to consolidate High Court Succession No 1372 of 2012 Nairobi with the instant cause since they relate to the same estate.
8. That the objector be at liberty to apply.
9. That this honourable court be pleased to grant any orders it deems fit and just in the circumstances.
10. That the costs of the application be met by the Petitioners.”

4. The objector’s case was that she was the deceased’s second wife, and that they had a daughter, but that the two had been excluded from benefitting from the estate. They had also been excluded from petitioning for, and obtaining, the grant of letters of administration intestate. She swore that she got married to the deceased in 1997 under Kikuyu customary law, and lived in rental premises at Kahawa Wendani in Thika town before they put up their matrimonial home on Plot No Thika Municipality Bock 20/1136. The objection was heard through oral evidence. She called Peter Kagombe (PW 2), Raphael Njehia Wanjema (PW 3) and Johnson Mburu (PW 4) to support her case that she was customarily married to the deceased.

5. The petitioners opposed the application. The 2nd petitioner stated that she was the only lawful widow of the deceased, their marriage having been monogamous. She denied that the objector and her child had any claim to the estate. She denied that the deceased was married to the objector, or that the two had a child. She called two witnesses, Zacharia Wairuru (DW 2) and Kiruthi Chege (DW 3), to support her defence.



6. In support of the objector's version of events, she produced a Flexi Educator Policy that the deceased had taken out for her daughter in which the deceased had indicated that she was his wife. She also produced the child's birth certificate showing the two to be its parents. The deceased had also taken out a life policy for the child with Pan African Life Insurance Company Limited. She presented the policy document.
7. The other evidence produced by the objector was a DVD done by the deceased before he died, in which he had allegedly acknowledged the objector as his wife and the girl as his daughter.
8. Regarding the Kikuyu customary law, the objector called her two uncles (PW 2 and PW 3) who were brothers to her late father. They stated that they received dowry of Kshs 50,000/= from the deceased at Thika where he lived, and the second time where the objector's parents lived in Kirangi in Kiambu. During the visit to her parents, four sheep were slaughtered to mark the occasion. The first dowry was paid in December 2007 and the second time was in April 2012.
9. The 2nd petitioner countered the evidence on several fronts. She stated that the objector had declined to undertake a DNA test to establish whether the deceased was the father of the daughter. Secondly the court in CM Criminal Case No 984 of 2013 at Thika had convicted the objector for forging birth documents relating to her daughter, which documents had indicated the deceased to be the father. Thirdly, she (the 2nd petitioner) had successfully challenged the admissibility of the DVD evidence.
10. On the question of the said customary marriage, her case was that she knew the objector to be the deceased employee and that way she knew a lot of information about the deceased, including his property. She stated that she was at all not aware of the marriage or the alleged payment of dowry or performance of marriage rites.
11. DW2 is the deceased's eldest brother. Their father was not alive at the time the deceased allegedly married the objector under Kikuyu customary law. The parties are Kikuyu. He stated that he was traditionally supposed to step in the shoes of their later father, and would have been the one to lead the deceased in any customary marriage deliberations and rites. He stated that he was not aware of the said ceremonies between the deceased and the objector. According to him, a Kikuyu customary marriage is a public event where both families are involved, and that none of such happened in this case. He narrated the steps that such a marriage would be required to take, including "*kubanda ithigi*", taking of "*mwati*" and "*barika*" to the bride's family, "*ngurario*" and "*ruracio*". He stated that none of these happened to his knowledge.
12. The objector was represented by Mr Orege and the petitioners by Mr Mwangi. Counsel filed written submissions which I have read and considered.
13. It is evident that the marriage between the deceased and the 2nd petitioner was a monogamous one. The marriage law did not permit the deceased to enter into another marriage while the first marriage subsisted. However, section 3(5) of the *Law of Succession Act* (Cap 160) provided as follows:-

“(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”



14. The Court of Appeal in *Hortensia Wanjiku Yawe –v- the Public Trustees*, Civil Appeal No 13 of 1976 held that a customary marriage is a fact that has to be proved by the calling of cogent evidence. The onus of proving the customary law marriage is generally on the party who claims it; the standard of proof is on balance of probabilities; and the evidence as to formalities required for the customary law marriage must be provided to that evidential standard.
15. Eugene Cotran in *Restatement of African Law; the Law of Marriage and Divorce*, Volume I, Chapter 2, Pages 10-15 on Kikuyu customary marriage provided that the following elements must at least be conducted to establish a valid Kikuyu customary marriage:-
 - a. capacity which includes age, physical condition and marital status;
 - b. consents of the family of the husband and wife and first or senior wife;
 - c. Ngurario ram slaughtered;
 - d. Ruracio (dowry) or part of it paid; and
 - e. commencement of cohabitation.
16. It is evident that the deceased and the objector were cohabiting when the former died. But cohabitation alone does not amount to a marriage. Mr Orege in his written submissions asked the court to find that the deceased and the objector be presumed to have been married owing to their long time of cohabitation. However, during the hearing, and in the pleadings, that was not their case. Their case was that the two were married customarily. That is what they sought to prove through the witnesses they called. It is trite that written submissions do not amount to evidence. A party is bound by his pleadings.
17. It has to be accepted that a Kikuyu customary marriage is an open event that brings together the families of the bride and bridegroom. It has not been shown that the two events that the objector relied on to prove her marriage to the deceased were open. Neither did they involve the parties' family members. The evidence of PW 2 that he was not involved was critical, and the objector did not call any witnesses from the deceased's side who had participated in the said ceremonies.
18. The fact that the objector forged her daughter's birth documents to show that the deceased was the father, and the fact that she declined to have a DNA conducted to determine the child's paternity, taken together, have led me to find that, although the deceased and the objector were cohabiting, they did not contract a valid Kikuyu customary law marriage.
19. The basis upon which the objector sought the revocation of the grant of letters of administration intestate issued to the petitioners, and the basis upon which she and her daughter sought provision from the estate of the deceased, was that she was a Kikuyu customary law marriage widow of the deceased with whom he had a daughter. With the marriage not proved and with the paternity of the child not established, I find no merit in the application dated November 20, 2015, which I dismiss with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23RD DAY OF DECEMBER 2022.

A.O. MUCHELULE

JUDGE

