



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**MISC. APPLICATION NO. 139 OF 2018**

**MARY WAITHIRA KIGOTHO.....APPLICANT**

**VERSUS**

**MARY CATHERINE WANGECHI.....RESPONDENT**

**R U L I N G**

1. This matter relates to a deceased Police Officer, **Francis Kimotho Kimani** who died intestate on 13<sup>th</sup> of May, 2018.
2. The applicant moved the court in a Misc. Application dated 12<sup>th</sup> October, 2018 wherein she described herself as the widow of the deceased having been married on the 26<sup>th</sup> of February, 1983 under Kikuyu customary law. She further informed the court that their union begot 2 girls and a boy between 1983 and 1993. She produced an affidavit of marriage and birth certificates of their children.
3. In the application she sought to stop any payment of group life insurance and death gratuity to her exclusion and that of her 3 children. She cited various sections of the Constitution in support.
4. One Mary Catherine Wangeci responded to the application by way of a preliminary objection and a replying affidavit. In the affidavit she described herself as the only wife of the deceased. She also claimed to have had children with the deceased and to be the nominee together with her children of the deceased group life policy which does not form part of the estate of the deceased.
5. Devoid of any technicalities this being a family matter I will invoke Article 50 of the Constitution in an attempt to apply substantive justice without considering whether the court was properly moved or not. It suffices that a dispute was brought before court by parties who seek to have a resolution arrived at.
6. The Preliminary objection which is subject of this ruling raises the following grounds;
  - **Sections 100(1) & 111 of the Insurance Act Cap 487 of the laws of Kenya ousts group life insurance benefits from forming part of an Estate;**
  - **Application premature as there is no proof of intermeddling;**
  - **This matter does not meet the requirements of an injunction.**
7. There is scanty material before the court. However one can deduce that the two women both had a relationship with deceased at either at the same time or different times during the life of the deceased, and both sired children. It also comes out that the two women at some point acknowledged each other and did share the burial benefits. Clearly therefore the applicant cannot be a total stranger as described by the Respondent.
8. It appears further that none of the two women have moved the court for probate and therefore the issues of who the heirs of the deceased are remains to be determined.
9. It is not clear though whether the deceased left any other legacies other than the insurance and death benefits.
10. The law governing intestate legacies/estates in Kenya is the Law of Succession Act Chapter 486 of the laws of Kenya which in my view is very liberal in its consideration of heirs. It considers ex-wife, wives, children and those who can prove to have been dependants of the

deceased inter alia, as beneficiaries. The above is a matter of evidence.

11. In my view the issue before this court is the interpretation of Section 100(1) and 111(1) of the Insurance Act vis a vis The provisions of the Law of Succession Act Cap.

12. The Respondent's case is that as a nominee of the for purposes of the Group life benefits the benefits go entirely to her and her children. The Applicant's position on the other hand is that as a widow of the deceased together with her children and as heirs they ought not to be excluded despite the nomination.

Section 100 (1) and 111(1) of the Insurance Act provides as follows:

**“100(1) Subject to any written law relating to bankruptcy, a policy effected (whether before, on, or after the appointed date) by a man upon his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by a woman upon her own life and expressed to be for the benefit of her husband or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects named in the policy, and the moneys payable under that policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the person whose life is insured, or be subject to his or her debts. Subject to any written law relating to bankruptcy, a policy effected (whether before, on, or after the appointed date) by a man upon his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by a woman upon her own life and expressed to be for the benefit of her husband or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects named in the policy, and the moneys payable under that policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the person whose life is insured, or be subject to his or her debts.”**

**“111(1) The holder of a policy of life assurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death:**

**Provided that, where the nominee is a minor, the policy-holder may appoint, in the manner prescribed, any person to receive the money secured by the policy in the event of his death during the minority of the nominee.**

Section 5 of the Law of Succession Act Provides:

**“(1) Subject to the provisions of this Part and Part III, any person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.**

**(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.**

**(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.**

Section 26 of the Law of Succession Act provides:

**“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.**

13. In order to resolve this issue of nominees versus heirs, the courts in India have settled the matter by defining a nominee as one who receives the legacy on behalf of the heirs pending succession. The said courts have further held that the nominee concept does not override the law of intestacy succession. In In the cases Indira Wahi v Registrar of Cooperative Societies & Another Civil Appeal 4646 of 2006 & Shakti Yezdan & Another versus Jayanand Jayant & others Appeal No. 313 of 2015.

14. In my view Section 100 is not applicable in this instance as the subject of this application is not a family policy. The relevant section is 111(1) which does not expressly oust the policy from being subjected to the law of succession.

15. Litigants hide behind the Insurance Act and other Acts that allow policy holders to nominate who is to receive funds. The said provisions in my view cannot be considered in isolation of other existing laws and more so where the said provision of law are silent on whether the proceeds may be subjected to the succession law and such is Section 111 of the Insurance Act cannot be considered in isolation and without considering surrounding circumstances as to do so, in circumstances where the deceased nominate his favourite girl friend or son to the exclusion of other heirs and where there may not have legacies other beneficiaries may be disinherited and therefore the import of such nomination may require more scrutiny.

16. And based on the above I am of the view that the matter cannot be wished away by way of a preliminary objection for the reasons and by the mere fact that issues raised refer to matters of evidence. The same is therefore dismissed.

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>TH</sup> DAY OF FEBRUARY, 2020.**

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**ALI-ARONI**

**JUDGE**