



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. SUCC NO. 25 OF 2012**

**IN THE ESTATE OF THE ESTATE OF THE SAMUEL MURAGURI KARORI**

**Alias MURAGURI KARANGI- DECEASED**

**LUCIA WANJIKU NGIGE.....APPLICANT**

**V E R S U S**

**KESIAH WANJIKU MAINA.....RESPONDENT**

**JUDGMENT**

1. This matter relates to the estate of Samuel Muraguri Karori alias Muraguri Karori (deceased) who died intestate on 21/9/1995. A grant of Letters of Administration was issued to Kesiah Wanjiku Maina in her capacity as the widow of the deceased on 21/9/1999. The Grant was confirmed on 3/5/2000 and the estate was distributed to the petitioner and Jane Njeri Karuri. Land Parcel No. Mwerua/Gitaku/41 was distributed to Kesiah Wanjiku Maina and Jane Njeri Karuri who were to share equally. Plot No. Kamara/Mau-Sammit/Block 1/447 was to go to Kesiah Wanjiku Maina.

2. The application which is now pending before this court is the one dated 6/2/2012 filed by Lucia Wanjiku Ngige brought under **Section 76 (a)(b) & (c) Law of Succession Act & Rule 44 (1) Probate and Administration Rules**. It seeks an order for the revocation of grant on the ground that the grant was obtained fraudulently by the making of a false statement by the concealment from court something material to the case. It is also alleged that the grant was obtained by means of untrue allegations of fact essential on a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

3. The applicant in the supporting affidavit sworn on 6/2/2012 depones that she is the eldest wife of the deceased Samuel Muraguri Karori and has been living with the deceased on land parcel No. Mwerua/Gitaku/41 from the time of their marriage in 1965. The marriage was conducted under Kikuyu customary Laws and they were blessed with Eight Children namely:-

- **Beatrice Waithera Ngige**
- **Trasia Nyawira Ngige**
- **Mary Wanjiru Ngige**
- **Pauline Wambui Ngige.**

**All daughters who are married.**

- **John Mwangi Ngige – Son**
- **Wachira Ngige – Son (deceased).**
- **Muchoki Ngige – Son (deceased).**
- **Wangithi Ngige – Deceased.**

4. The applicant avers that the respondent who is her co-wife fraudulently misrepresented herself in court as the only wife of the deceased when she obtained the grant when it was issued by this court.

5. She further avers that from the year 1972 she has been sick upto February 2012 and she could not have known what was happening in court. She depones that she is now fit to prosecute the cause.
6. The petitioner Kesiha Wanjiku Maina opposed the application and filed a replying affidavit sworn on 15/2/2012. Her contention is that Lucia Wanjiku Ngige is a total stranger to her and her late husband. She got married to the deceased in 1974 and have always lived on land parcel No. Mwerua/Gitaku/41 and the applicant and her children have never featured anywhere. She asserts that the applicant is a busy body who has filed the instant application through malice and bad faith.
7. The court gave directions that the matter proceeds by way of 'viva voce' evidence. The applicant adduced evidence that she was married to the deceased under the kikuyu customary law. Dowry was paid. They were blessed with children. She suffered cerebral malaria and was like she had mental illness. Her husband returned her to her parent as he could not afford to treat her. She went to stay with her father where she is staying todate. She prays that the grant be revoked.
8. In cross-examination, the applicant stated that she got married to the deceased in 1965. She could not produce the birth certificates of her children. She testified that her children were educated by her parents. She further stated that all her children had never lived with the deceased.
9. PW-2- Harun Muchoki who was the applicants witness testified that the deceased is his elder brother. He told the court that the applicant was married to the deceased under the Kikuyu Customary Law and dowry was paid. They went to live in Kericho in 1972. Later in 1978 the deceased married the respondent, Kezia. He stated that the applicant can be given a share of her husband's estate.
10. In cross-examination PW-2- testified that the applicant had no house on the land of the deceased. He testified that from 1964 to 1995 the applicant and the deceased did not live together as she (applicant) was sick that time and was living with her parents. He further stated that she could not tell when the children of the applicant were born or where they were born. He further told the court that Lucia had no house on the land of the deceased. He further told the court that when dowry for Lucia was paid, the deceased was not there.
11. PW-3- Samuel Gathibo Gatuba testified that he is the former Senior Chief of Mutira Location from 1985 to 2004. He testified that the deceased was married to the applicant. That he was staying in the home of Muriuki where Lucia was staying. That dowry for Lucia was taken there. He could not remember the year dowry was paid.
12. In cross-examination he stated that he was not involved in the marriage negotiations and he did not see the deceased during the negotiations. The father of the deceased did not attend the negotiations as well as he was said to be sick. PW-3- further told the court that the 1<sup>st</sup> child of Lucia was born in 1996. The child died and was buried in Kerugoya but the deceased did not attend his burial. The children of Lucia who have died were not buried on the land of the deceased.
13. PW-4- was Cecilia Mumbi Muriuki. He testimony was that the applicant had built on her land when her husband had given them a place to build. She testified that the applicant was married to Ngige in 1965. That dowry was paid for the applicant.
14. The Petitioner/respondent, DW-1- testified that the deceased was her husband having been married to him in 1974. The marriage was formalized in 1994. They lived in Kericho but in 1984 they constructed a house at Kabonge on land parcel No. Mwerua/Gitaku/41. There was a person using the land and they had planted coffee and tea bushes. She produced documents to prove that she is the one who planted coffee and tea. She testified that James Migwi Magondu a Cousin of the deceased was leasing the land and had planted subsistence crops. The deceased never told her he had another wife nor did the objector and her children. The children never came to the deceased to tell him that he was their father.
15. She further testified that when the deceased died they were still living in Kericho. The applicant and her children did not attend burial. She testified that she did not include the applicant in the succession. The Chairman of the clan and Harun Muchoki stood as surety when she filed the succession and they never said there was another family. She testified that the land is hers and she cannot give the applicant.
16. DW-1- James Migwi Magondu testified that he was Seventy Years old at the time he testified. On his part he testified that he knew the deceased for a very long time as he has married his sister. In 1971 the deceased told his sister to be using the land. He used the land by planting maize and beans. He testified that he did not find anybody on the land even the wife of deceased. He testified that there was nothing on the land and he is the one who planted coffee and later tea bushes.
17. DW-2- testified that she knows the applicant Lucia and did not know her relationship with the deceased and they lived a distance apart and the deceased lived very far. Lucia never lived in the home of Muraguri's parents. He never met Lucia when she went to marry his wife who is a sister to the deceased.
18. Parties filed submissions. For the applicant it was submitted that the applicant has proved that she was married to the deceased. That the respondent did not comply with **Rule 2a(1), 2 & 3 P & A Rules** as she did not inform the applicant when she filed the succession. He submits that the grant was obtained fraudulently by making a false statement and the petitioner concealed from the court the fact that she had a co-wife. The applicant urged the court to order that the grant be revoked.
19. For the respondent, it was submitted that the application for revocation of grant lacks merits. He submits that the respondent did not breach **Rule 26 P&A Rules**. That the children of the applicant were not dependants as he never acknowledged them during his life time and he never supported them. They cannot be construed as dependants. He submits that the application lacks merits.
20. I have considered the evidence tendered, the averments in the affidavits and the witness statements. The issues which arises for determination are:-

a) Whether the applicant is a wife of deceased and therefore a beneficiary entitled to the estate of the deceased.

b) Revocation of grant.

**A. Whether the applicant is a wife of the deceased.**

**Section 29 of the Law of Succession Act** provides:-

*“For the purposes of this Part, “dependant” 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, grand-parents, 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*

*(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”*

The applicant claims that she was the wife of the deceased herein. She therefore bears the burden to prove that she is indeed a wife of the deceased. **Section 107 & 108 of the Evidence Act** provides:-

*“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. 108. Incidence of burden The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”*

She bears both the legal and evidential burden to prove that she is a wife and therefore a beneficiary entitled to the estate of the deceased.

21. The applicant in support of her evidence that had sworn an affidavit and filed a witness statement. In Para -3- of her affidavit she deposes that she has been living with the deceased in his land parcel No. Mwerua/Gitaku/41 from the time of her marriage in 1965. However, upon being cross-examined she stated that she went to live with the deceased in Kericho and when she fell sick she went back to live with her parents. Her witness testified Harun Muchoki Karuri (PW2), (I will come to his evidence later) stated that the applicant never lived on her husband’s land as they lived in Kericho. Even her witness, PW-3- testified that the land of the deceased was not being used and a care-taker was using the land. The applicant lied on oath that she has been living on the land.

22. The name of the applicant is Lucia Wanjiku Ngigi and all her children bear the surname Ngige. PW-3- stated that the applicant was married to Ngige. The applicant did not tell the court who Ngige is as that is not the name of the deceased given in the various documents.

23. It is also a fact that the applicant did not prove with evidence that her Eight children were sired by the deceased. No birth certificates were produced. Though the applicant stated that they were lost, this court is allowed to take Judicial notice under **Section 59 of the Evidence Act**. I take Judicial notice that where documents like birth certificates are lost copies of such documents can be easily obtained from the Registrar of person(s). This was crucial evidence which the applicant needed to produce to prove her case and she never produced. There is a dispute that the applicant was a wife of deceased. Prove that the deceased is the father of the children was material evidence.

24. Where a party fails to produce material evidence in her case and which evidence was readily available, the court must draw an inference that had the evidence been produced, it would have been adverse to her case. I must draw this inference because there is evidence on record showing that these children were not supported by the deceased with food, clothing and education. Majority of them are said to be deceased and it came out in evidence that none of the children is buried on the land of the deceased and the deceased never participated in the burial. The surviving children and the applicant never attended the burial of the deceased. My finding is that the deceased never sired Eight(8) children within a period of Seven years i.e between 1965 – 1972. There was no prove as no birth certificates were given and there was material contradiction as to when they were born.

25. The applicant’s contention is that she was married to the deceased under Kikuyu customary law. A customary marriage is a valid marriage. The fact of separation does not exclude a wife from being recognized as such. **Section 3 Law of Succession Act** defines a wife –*“includes a wife who is separated from her husband”*.

26. The Act also recognizes a woman who was married under a customary law which allows polygamy where the husband subsequently contracts a monogamous marriage. **Section 3(5) of the Act** provides:-

*“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.”*

27. Such a wife and her children are recognized as beneficiaries entitled to the estate. What the applicant need to prove is that she was a wife of the deceased under the kikuyu customary law.

28. There are essential of a customary marriage. A customary law marriage which is itself a contract of marriage must be sealed by the fulfilling the necessary essentials. In this case the applicant is basing her claim in allegation that there was a marriage as dowry was paid for her. The Court of Appeal in **Kaaka & Kaaka –v- Tabitha Waitheera Mararo (2018) eKLR** quoted Cotran case book on customary law and stated:-

Eugene Cotran's "*Casebook on Kenya Customary Law*" at page 30 sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;

***1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.***

***2. Consent; the parties to the marriage and their respective families must consent to the union***

***3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.***

***4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.***

***5. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home".***

***In the case of Gituanja vs Gituanja [1983] KLR 575 the Court held inter-alia that;***

***"The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario."***

29. As submitted by counsel for the respondent, there is a liturgy of Judicial Authorities as to what constitutes a kikuyu customary marriage and ingredients thereof which are admissible under the **Judicature Act** as they are not repugnant to justice and morality. The applicant and her witnesses gave contradictory evidence which was intended to prove existence of a customary marriage.

30. PW-2- -3- even admitted that the deceased and his father did not attend the negotiations for the payment of dowry. A clear indication that they could not have been telling the truth. There is no way such negotiations could have been held without the suitor being present to give his consent and to confirm that the applicant was the intended bride. There was no good reason stated as to why the deceased and his father did not attend such important function as dowry negotiations. My finding is that the evidence tendered by the applicant has not proved that any customary marriage took place between the applicant and the deceased. The essentials of a customary marriage which I have quoted above have not been proved. The applicant did not discharge the burden to prove that there existed a customary marriage between her and the deceased between 1965-1972. The applicant has not based her claim on cohabitation giving rise to a presumption of marriage. Even on the issue of cohabitation there were contradictions as to where they cohabitated if at all and the evidence of cohabitation is not credible. There is nothing upon which this court can hold that there was a presumption of marriage.

31. The applicant did not make any attempt to prove that her Eight children were named after the parents of the deceased in accordance with Kikuyu customs. These purported children (I use the word purported as there was no prove with birth certificates that they exist) never claimed that the deceased was their father during his lifetime nor have they come to this court. It is common in this Country for wives to lay their claim on their deceased husband or alleged husbands during his burial. They come forward to be recognized as wives and to participate in the burial. This has led to burial disputes being filed in court. The applicant in this case never attended the burial nor did her children. She never came forward during the burial so that she could be recognized.

32. Though the applicant stated that she was sick and could not follow the case. I have looked at the medical documents which she produced. The first one is dated 3/2/12 in the name of Lucia Wanjiku Ngige. The second one has name Lucy (the 2<sup>nd</sup> name appear to be Wangari or Wangeci, it is not legible) aged 55 years and is undated safe for TCA 29/12/10. On top the name Lucia Wanjiku Ngigi is written. The 3<sup>rd</sup> document is for Lucy Wanjiku Miano aged 60 years on 18/12/10. The other document dated 3/02/2012 is for Lucy Wangeci Ngigi and her age is given as 52 years. This documents are falsified and do not seem to be for the same person. They are unreliable. This raises doubts on her claim that she was sick for all that time. There was an attempt to fabricate evidence.

33. The applicant had annexed in her list of documents dated 4/10/2018, a document No. -3- listed as "***DOWRY PPPAYMENT(sic)DOCUMENT***" and its interpretation. On 7/12/2018 when the applicant testified, she relied on the document as her exhibit and the document was therefore produced. It turned out that the document had nothing to do with dowry payment. It was an agreement for sale of land. The applicant disowned the document during cross-examination and said the document is not hers. This after she asserted that it was to prove Maina was sent to take a ram. The document does not prove that any dowry was paid. It is dated 4/3/73 and yet the applicant alleged that deceased chased her away in 1972.

34. I find that the document was an attempt to fabricate evidence that dowry was paid. Even PW-2- & -3- admitted that the document related to sale of land.

35. I must comment on the testimony of PW-2- Harun Muchoki Karuri. This witness was not truthful and his testimony cannot be relied on at all. The respondent testified that this witness (PW-2-) stood surety for her when she filed succession. Indeed Form P & A 57 in succession cause No. 78/1999 shows that Harun Muchoki Karuri ID 3403456 signed Guarantee by Personal Sureties. Twenty (20) years later

he cannot be heard to say that the deceased had another wife. Form P & a 57 is an oath and he signed the document before a commissioner of oaths. He was aware that the respondent was filing succession in the estate of the deceased and agreed to stand surety.

36. He never objected to the averments by the respondent that she is the only wife of the deceased. The turn around by PW-2- shows that he was not telling the truth. In any case PW-2- admitted that he was a young person who could not have been involved in dowry negotiations. The evidence of PW-2- that deceased had built a house on the land was contradicted by an independent witness DW-2- James Migwi Magondi who struck me as truthful, he stated that he is the one who has been using the land and there was no house on the land.

37. All in all, my finding is that the applicant has failed to discharge the burden to prove that she was a wife of the deceased. The evidence in support of the claim was contradictory which lead me to the conclusion it was a mere fabrication.

**Revocation of Grant:-**

**Section 76(a)(b) &(c) of the Law of Succession Act** provides:-

***“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;”***

These circumstances under which a court will order revocation of grant are well laid out under **Section 76** above. These are –

§ **Proceedings to obtain the grant were defective in substance.**

§ **The grant was obtained fraudulently by**

- **Making a false statement.**
- **Concealment of something material to the case.**
- **Grant was obtained by means of untrue allegations of facts essential in a point of law.**

38. The applicant alleges that the respondent concealed a material fact that she was a wife of the deceased. It has turned out that the applicant was not a wife of the deceased. The respondent did not therefore conceal a material fact. The respondent exhibited a chief's letter when she filed the succession. The letter dated 29/3/99 shows that the Chief Mukure location confirmed that the deceased was survived by Kesiah Wajiku Maina as the wife and Jane Njeri Karuri, a daughter. Though the applicant has stated that she was sick, the Chief would not have omitted her name as wife of deceased if at all she was.

39. She had annexed a letter by the Chief Mwerua which she never produced. I have taken liberty and looked at it. It was introducing Beatrice Waithira Ngigi. The name does not relate to the applicant as she gave her name on oath in this court as Lucy Wanjiku Ngigi. She has therefore not produced a Chief's letter to confirm that she was known in the locality by the administration as the wife of deceased. The purpose of a Chief's letter in succession matters is to confirm to the court as to who are the rightful beneficiaries. The letter annexed by the respondent confirms that it is only the respondent who was the wife of the deceased.

40. The respondent did not conceal material facts as the Chief's letter confirm that herself and her daughter were the beneficiaries entitled to the estate of the deceased.

41. The applicant has failed to prove that she was a beneficiary entitled to the estate of the deceased. It follows that the respondent had no obligation to inform the applicant when she filed the succession cause. The respondent did not breach the provisions of **Rule 26(1)(2) & (3) of the P & A Rules** when she applied for Letters of Administration intestate in the estate of her deceased husband. The applicant has failed to prove any of the grounds under **Section 76 Law of Succession Act** to warrant the court to order the revocation of grant.

42. I find that the application for revocation of grant is without merits and is dismissed with costs.

**Dated at Kerugoya this 20<sup>th</sup> Day of February 2020.**

**L. W. GITARI**

**JUDGE**