



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 18 OF 2016

IN THE MATTER OF THE ESTATE OF JOSPHAT GITHUTHA MUTUA ALIAS JOSPHAT GITHUTHA ALIAS JOSPHAT GITHUTHA MUTUA KUNGU (DECEASED)

KIMAMA GITHUTHA KUNGU.....PETITIONER

VERSUS

MARGARET NJOKI GITHUTHA

JOHN MUTUA GITHUTHA.....OBJECTORS

JUDGMENT

1. By a ruling delivered on 27/7/2017 Ngugi J., the Letters of Administration intestate issued to **Kimama Githutha Kungu**, the Petitioner herein in **Thika CM's Succession Cause No. 624 of 2012** were revoked and directions issued for a full hearing of the Petition and Cross-Petition herein. Subsequently, the court directed that the Petition and Cross-Petition be heard by way of *viva voce* evidence.
2. During the hearing, witnesses adopted their filed affidavit evidence and were cross-examined. The first to take the stand was JOHN MUTUA GITHUTHA who placed reliance on his filed affidavits, sworn jointly with his mother Margaret Njoki Githutha. He stated that the deceased left behind a written will and that while the Petitioner's mother was the deceased's first wife his mother was the second wife and that in the second house to which he belongs, there are seven siblings, one of them deceased. He urged that the deceased's estate be distributed equally and that he and his mother ought to be appointed as administrators. Under cross-examination, he maintained that his mother was a wife to the deceased although he could not explain how the marriage was contracted. He denied that he had intermeddled in the estate albeit admitting to selling estate assets being parcels of land described as Ngenda/Mang'u/642, Plot No. 1360 Kyanjau Housing Co-op Society Limited and Kirai/Mangu/T.562.
3. The Petitioner also relied on his affidavits. He contended that his mother Petronila Mwihaki was the deceased's eldest wife while the Objector Margaret Njoki Githutha was hired into the family in the early sixties as a house help, prior to the separation of his parents. He stated that he has three siblings two of whom are deceased. He asserted that the deceased had no capacity to marry another wife having contracted a monogamous with his mother and therefore Margaret Njoki Githutha was not a wife to the deceased nor were her children the deceased's children. He contended that Margaret did not prove her claims that she was married to the deceased through customary marriage.
4. The parties subsequently filed their written submissions as directed by the Court. The Petitioner submitted that the deceased lacked the requisite capacity to marry Margaret Njoki as his marriage to Petronila Mwihaki subsisted during his entire lifetime. Moreover, he took the position that that there can be no valid marriage under Kikuyu customary law unless a part of the "*ruracio*" (dowry) has been paid; that the Objectors had failed to prove the existence of the customary marriage they sought to rely on. Further, it was his contention that the alleged will of the deceased is void and invalid for being contrary to the law of morality and public policy and having been made 31 years ago prior to the deceased's demise; for being uncertain on property description and purporting to disinherit the deceased's first house.
5. He reiterated that the Objectors have continued to intermeddle in the estate of the deceased having sold parcels of land known as Ngenda/Mang'u/T.642, Plot No. 1360 with Kyanjau Housing Co-op Society Limited and Kirai/Mangu/T.562 during the subsistence of the present cause. It was the Applicant's contention that Margaret Njoki cannot be appointed as an administrator not being a wife to the deceased. He urged the court to set aside the will and allow him to distribute the deceased's estate fairly to the true beneficiaries and/or as the court may deem proper.
6. The Objectors in their written submissions argued that the will before the court meets all the requirements of a valid will. Reliance was placed on the case of **In re Estate of Nyambia Mukaya (Deceased) (2019) eKLR** where it was held that the court cannot ignore the fact that there is a will which though discovered after the commencement of these proceedings contains the wishes of the deceased. Counsel for the Objectors submitted that the wife of a deceased person stands in a position superior to any other beneficiary. He asserted that Margaret Njoki was the deceased's wife and ought to be appointed as an administrator.

7. The court has considered the affidavit and oral evidence of the parties and submissions in respect of the Petition by **Kimama Githutha Kungu** (the Petitioner herein) and the Cross-Petition filed by Margaret Njoki Githutha and John Mutua Githutha (the Objectors) as amended *vide* the Notice of amendment of Application for grant dated 11th September 2014. By the said amendment which erroneously invoked Rule 14(1) instead of Rule 17(8) of the Probate And Administration Rules, the Objectors had asserted that the deceased herein died testate and they sought a grant of letters of administration with will annexed, the executor named in the Will, Barclays Bank Trust Co. Ltd having renounced executorship. The said alleged will is dated 11th December 1981. The court has also pored over numerous filings of the parties in the current High Court Cause and in the **Thika CM's Succession Cause No.624 of 2012** in which the grant revoked by Ngugi J on 27th July 2017 had been issued.

8. The deceased herein died on 6th May 2012 while possessed of several landed assets including but not limited to:

- a. Ng'enda/Nyamangara/289
- b. Ng'enda/Nyamangara/1419
- c. Ng'enda/Nyamangara/T. 198
- d. Ng'enda/Kirai/T. 186
- e. Ng'enda/Kirai/T. 188
- f. Ng'enda/Mang'u/642
- g. Four plots and/or shares in Kyanjau Housing Co-operative Society Ltd.
- h. Kirai/Mang'u/T 562
- i. LR No. 75/668 – at Buru Buru Phase II

9. The key issues arising for determination is the relationship between the two sets of claimants and the deceased; whether the deceased died testate or intestate and who among the claimants before the court is the rightful person or persons to be appointed as administrator(s) of the estate of the deceased.

10. On the first question, the parties appear to have changed their positions as the dispute evolved. The Petitioner had by his Petition dated 24th October 2012 and filed in the CM's Court, Thika listed the following persons as having survived the deceased:

- a) Margaret Njoki Githutha – wife
- b) John Mutua Githutha – son
- c) Magdaline Nyambura Chege - daughter
- d) Rosemary Muthoni Githutha - daughter
- e) Jane Njeri Githutha - daughter
- f) Joyce Wanjiku Githutha - daughter
- g) Agnes Wangui Githutha - daughter
- h) David Kiragu Githutha - daughter
- i) Petronila Mwihaki Kimama - widower (sic)
- j) Kimama Githutha Kungu - son
- k) Mary Nyambura Kungu - daughter
- l) JGM - grandson - minor

11. He had also filed a Citation to Accept or Refuse Letters of Administration against all the listed beneficiaries, which Citation prompted the objection and Cross Petition by the Objectors. Attached to the Petition by **Kimama Githutha Kungu** was the letter dated 25th July 2012 from the Chief, Mang'u Location listing the same persons above as the kin who survived the deceased. These same beneficiaries were listed in the Petitioner's affidavits before the lower court and in particular the affidavits in support of the two summonses for confirmation of grant

filed on 26th June 2014 and on 9th October 2015. Further, by his latest affidavits before this court, and especially the one filed on 13th August 2018, the Petitioner similarly identified the same persons above as those who survived the deceased.

12. Though he adopted his affidavits during the trial, the Petitioner as before, took issue with the fact that the deceased herein lacked capacity to marry Margaret Njoki Githutha (Margaret) having contracted a monogamous marriage with his mother Petronila Mwhiki Kimama (Petronila) in 1964. He was to state further that the said Margaret never got married to the deceased and that her children do not belong to the deceased even while admitting that the said Margaret lived with his father since 1966 until his death.

13. Similarly, the Objectors had by their affidavit in support of the Petition by Cross-application filed on 5th July 2013 listed the same beneficiaries as those in the Petition by **Kimama Githutha Kungu**. It appears that upon the alleged discovery of the deceased's alleged will, a notice to amend the Cross-Application was filed seeking that the Objectors be issued with letters of administration with will annexed. In consequent applications, including the two dated 9th September 2015 (for revocation of grant) and 4th November 2015 the Objectors refer to the petitioner as a step-brother.

14. However, in their latest affidavit filed on 14th December 2018, the Objectors assert that the deceased and Margaret got married under Kikuyu customary law in 1966 and formalized their union on 23rd November 1990 at the office of the Registrar of Marriages *vide* certificate 33045 and had 7 children. Referring to the alleged clandestine Petition for grant filed in the lower court by the Petitioner, the Objectors asserted that the Petitioner was a stranger to the deceased's estate and that in any event, the deceased left a valid will. They argued that all the assets of the deceased ought to devolve upon Margaret and her children "*as per the will*" and that Margaret has a superior right to administer the estate of the deceased.

15. Nonetheless, when the Objector John Mutua Githutha took the witness box, he recognized the Petitioner as his step-brother and son to the deceased's first wife even while adopting his affidavits on record including the one filed on 14th December 2018. The Objector further stated that he and his mother ought to be appointed as administrators and the estate be distributed equally. Under cross-examination he could not give any details relating to his mother's alleged customary law marriage to the deceased or whether any customary rights were performed. He however took refuge in the solemnization of the union at the Registrar's office in 1990. While asserting that the Petitioner did not deserve to administer the estate, the Objector admitted that his side of the family had sold several of the deceased's properties.

16. Concerning the two women, Margaret and Petronila, none of them appeared in court to give evidence. According to the Petitioner, Petronila is sickly and resides in Dar-es-Salaam. Going by the marriage certificate No.078007 annexed to the Petitioner's affidavit, as at 11th September 1964 when Petronila married the deceased, she was 19 years old, and would be well over 75 years today, while Margaret would be around 68 years old going by the copy of marriage certificate attached as annexure "MNG" to the affidavit of the Objectors filed on 14th December 2018. Both women are clearly getting on in years.

17. Regarding the women's respective union to the deceased, Petronila wed the deceased on 11/9/1964 at **St. Mary's Catholic Parish Nakuru**. This union was contracted under the African Christian Marriage and Divorce Act is not rebutted by the Objectors who in oral evidence admitted that Petronila was the deceased's first wife. There is no evidence that the monogamous union between Petronila and the deceased was ever dissolved even though the couple was estranged by 1966. By dint of the provisions of Section 37 of the Marriage Act (now repealed) the deceased had herein no capacity in 1990 or earlier to contract a second marriage either under customary law or under the marriage Act, as purported in annexure "MNG". Except for the purposes of succession in the former case.

18. However, as admitted by the Petitioner in his filings and evidence the deceased cohabited with Margaret since 1966 until his death. **John Mutua Githutha** was unable in his evidence, and indeed through affidavits to show that the deceased contracted a customary marriage with Margaret in 1966. So, what was the nature of the union between the deceased and Margaret? First of all, for purposes of spouses who contracted a marriage with a deceased person subsequent to his previous monogamous to another woman, the proviso to Section 3(5) of the Law of Succession Act throws them a life- line for purposes of succession. The proviso is in terms that:

"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".

19. In the case of **MNM V DNMK [2017] e KLR** the Court of Appeal gave the rationale of this proviso by stating that:

"This Section was introduced in 1981 by the statute Law (Repeals and Miscellaneous Amendments) Act, No.10 of 1981. The purpose of the amendment was to mitigate against the rigours of decisions such as Ruenji's Estate (supra) and Re Ogola's Estate (supra), which did not recognize as beneficiaries widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage is a marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognized as a beneficiary of the deceased (see Irene Njeri Macharia v M. Wairimu Njomo and Another C.A. No 139 of o1994, Miriam Njoki Muturi V Bilha Wahito Muturi C.A No 168 of 2009 and Muigai v Muigai [1995 – 1998] 1 E A 206)"

20. In **MNM v DNMK** (above) the court reiterated the essentials of a Kikuyu customary marriage as outlined in **Eugene Cotran's Restatement of African Law, Kenya, Volume 1: The Law of Marriage & Divorce. 1968 (London, Sweet & Maxwell)**. A key requirement of a valid Kikuyu customary marriage is the performance of the *ngurario* rite. No marriage is valid under Kikuyu customary law unless the *ngurario* rite has been performed and at least part of the dowry (*ruracio*) paid. In this case, no substantive evidence of the performance of these rites was tendered. Once more, in **MNM v DNMK** the Court of Appeal stated that:

“In Mbogoh v Muthoni and Another [2006] 1 KLR 199 the court stated that where the requirements of statutory or customary marriage have not been proved, and the issue of presumption of marriage has been raised, the court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (See also Kimani v Kimani and Others [2006] 2 KLR 2762)”

21. In this case, there is evidence of long cohabitation between the deceased and Margaret and together they sired seven children. Indeed, the Petitioner in his own Petition had recognized Margaret and her children as wife and children of the deceased even though he reiterated that the deceased having contracted a monogamous marriage with Petronila had no capacity to marry Margaret. Clearly, the Petitioner is partly right, but he appears unaware of the exemption introduced through the proviso to Section 3(5) of the Law of succession Act.

22. The Court of Appeal in **Mary Wanjiru Githatu v Esther Wanjiru Kiarie [2010] 1 KLR 159** held that:

“There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on Section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of this case.”

23. Therefore, while I agree with the Petitioner that there is no proof of a customary marriage and that the deceased had no capacity to contract a second monogamous marriage during the subsistence of the marriage to Petronila, for purposes of succession, a presumption of marriage arising from the facts of this case must be made. Thus, applying to provisions of Section 3(5) of the Law of Succession Act to the facts of this case, Margaret is presumed to be a wife of the deceased and the seven children born to them during their long cohabitation are children of the deceased and therefore beneficiaries of his estate. As for Petronila and her children born during the subsistence of the marriage between Petronila and the deceased, they too are beneficiaries of the estate of the deceased. On the evidence available and the Objector’s own affidavits and filed material, the Petitioner cannot be a stranger to the estate of the deceased. He and the children born to Petronila and the deceased are heirs to the estate of the deceased.

24. On the first question therefore, the court finds that the deceased had two wives, namely, Petronila the first wife and Margaret the 2nd wife and that the two women bore children with the deceased as follows:

With Petronila:

- a) Peter Mutua Githutha (deceased and survived by JGM)
- b) Mary Nyambura Kungu
- c) Kimama Githutha Kungu
- d) Charles Waweru Githutha (deceased) survived by Joseph Githutha Waweru,

With Margaret:

- a) John Mutua Githutha
- b) Magdaline Nyambura Chege
- c) Rosemary Muthoni Githutha
- d) Jane Njeri Githutha
- e) Joyce Wanjiku Githutha
- f) Agnes Wangui Githutha
- g) David Kiragu Githutha (deceased) survived by Pauline Njoki

25. Moving on to the second issue, it was the Objector’s contention through affidavits filed that the deceased died testate. However, no attempt was made at the hearing of the Petition and Cross Petition to prove the will, a copy of which is on record. The said will was apparently executed on 11th December 1981, some 31 years prior to the deceased’s death. None of the attesting witnesses were called to testify. Indeed, the Objector John Mutua Githutha during his evidence during cross-examination was to state that the deceased did not leave a will behind. In an obvious attempt to salvage themselves, the Objectors were subsequently to submit that:

“The issue of validity of the said will can only be ascertained once the previous grant has been revoked and the court is granted an opportunity to verify the contents of the will therein, the mode of execution and find out whether the testator had capacity to enter such a sacred exercise of devolving his estate....” (sic)

26. With the grant earlier issued to the Petitioner having been revoked in the ruling delivered on 27th July 2017 and the hearing of the Petition and amended Cross-Petition for grant of probate having been closed, such submissions are misconceived. Annexure “JMG 1” to the Notice of Amendment of Application for grant filed on 12th September 2014 is a copy of a letter addressed to the deceased by Barclay Trust Investment Services Ltd (the erstwhile executors under the will attached) dated 31st January 2002. The letter reads in part:

“Dear Mr. Kung’u

DISCONTINUANCE OF EXECUTORSHIP AND ADMINISTRATION SERVICES

After many years Barclay Trust Investment Services in Kenya has decided, with regret, for several strategic reasons, to discontinuance of the service of acting as executor and administrator of estates.

We have in our files a copy of what we believe is your last will, which appointed us or Barclay Trust Company or Barclays Bank as executor. We are therefore writing to inform you that when the time comes, we will be unable to take up the appointment, and will renounce our right in law.

We recommend that you should therefore now review your will arrangements especially with a view to choosing a new executor with your advocate.... we are, by a copy of this letter to the Barclays Branch where your will is currently retained in custody, advising them that your will is from the date of this letter held to your sole order for when you wish to withdraw it.

We are sorry to have to give you this news..... if you have any particular problem in connection with this letter or you wish to discuss the matter further please do not hesitate to contact either me or Ms Githinji here.

Yours sincerely,

(signed)

Robin Mason

EXECUTIVE DIRECTOR

c.c. BBK, Moi Avenue Nairobi Branch”.

27. It does not seem that the deceased withdrew the will as advised as the original alleged will was by the order of the lower court forwarded by the Branch operations Manager of Barclays Bank Moi Avenue to the court *vide* his letter dated 29th October 2013. The “will” was opened and read in the presence of all parties by Mutuku, SPM on 29.11.13. The appointed executor by their letter of January 2002 had however already signaled their renunciation of executorship, for reasons explained in their letter

28. The appointed executors in the will, Barclays Bank Trust Company having renounced their right of executorship, the onus lay with the Objectors claiming under the alleged will to propound the document relied on as the last and valid will of the deceased in terms of Sections 5, 7 and 11 of the Law of Succession Act. As has been repeatedly pointed out by the Petitioner, on the face of it, the alleged will does not list any of the assets of the estate, but even worse, fails to recognize or make any provisions for Petronila and her children, while giving absolute discretion to the executor in the administration of the estate for the benefit of Margaret and her children. Even if it were proved it would be against the provisions of Sections 29 and 40 of the Law of Succession Act, more so given the circumstances of this case to enforce such will in the terms therein. For all these reasons, but primarily, for the failure by the Objector’s to propound the document before the court as a will, the court finds that the deceased died intestate.

29. Concerning the question as to the rightful person or persons to whom a grant of letters intestate ought to be made, the order of preference is found in Section 66 of the Law of Succession Act which provides:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V; [Rev. 2017] Law of Succession CAP. 160 27

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will”.

30. As earlier indicated in this case, both widows Petronila and Margaret are advanced in years and the former is said to be ailing and residing in Tanzania. While the two widows ought to be given preference, it is my view that their age and health may be a bar to their effectiveness as administrators of the deceased's estate. Moreover, there is admitted evidence that Margaret and her son John Mutua have continued to intermeddle through sale agreements with third parties, with the estate of the deceased.

31. At the end of the trial, the real protagonists on behalf of the respective families were the Petitioner and John Mutua Githutha. Both are relatively active and while the latter has attempted to paint the Petitioner as unsuited to the role of an administrator, John Mutua Githutha with his mother Margaret have admittedly intermeddled with the estate by selling off several assets of the estate during the pendency of this cause and as late as 2017 when he sold the estate land parcel **No. LR KIRAI/MANG'U/T 562** to one **Lucy Wambui Ngigi** for the sum of KShs.400,000/= During his evidence in court John Mutua Githutha admitted to at least three sale agreements in respect of the deceased assets involving himself and his mother Margaret during the pendency of these proceedings. This intermeddling renders Margaret and John Mutua Githutha not suitable as administrators to the estate of the deceased. Their purported sale of assets belonging to the estate without the authority required is an illegality. Apart from the fact that the Petitioner filed the Petition unilaterally and subsequently issued the Citation to all the beneficiaries, there is no evidence that he has in any way intermeddled with the estate, in as much as the dispute has been the source of many conflicts between him and the second house.

32. In the circumstances, the court considers it prudent to appoint administrators to represent the two houses, and who have not been shown to have intermeddled with the estate. From the first house, the court will appoint the Petitioner and his sister **Mary Nyambura Kungu** and from the second house, **Magdaline Nyambura Chege** and **Jane Njeru Githutha**. A fresh grant is to issue in the joint names of the four administrators, and in light of the fact that this cause is already eight years old, the court directs that a summons to confirm the grant be filed by all the grant holders or those representing any side of the dispute after 30 days of today's date. Such summons will list all the assets of the deceased's estate and attach copies of respective title documents, list all beneficiaries and persons beneficially entitled and include proposals for the distribution of the estate. The summons to confirm the grant is to be served on all beneficiaries to enable them respond by filing their respective proposed modes of distribution, either directly or through the administrator representing their house. Parties will bear own costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 23rd DAY OF JULY 2020.

C. MEOLI

JUDGE