



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 807 OF 2014

RE ESTATE OF STEPHEN NGIGI KARWIGI (DECEASED)

FAITH WANGUI NGIGI.....APPLICANT

VERSUS

ROYCE WANGARI NGIGI.....PROTESTOR

JUDGMENT

1. Stephen Ngigi Karwigi (hereafter *the deceased*) was a wealthy man. He ran a construction firm and owned over 40 landed properties. At the time of his death on 10th August 2013, he was 78 years and sickly.
2. His first wife died on 30th March 2003. The protestor claims that she got married to the deceased in the year 2009 under *Gikuyu* customary law. They had no children together.
3. The applicant, a daughter of the deceased from the first marriage, flatly denies the claims by the protestor. She avows that the protestor was a care-giver hired by the family to assist their elderly and sickly father; and, that her claim for a share of the estate is fueled by pure greed. She also contended that the deceased had executed a will on or about 8th May 2002.
4. The dispute before the court is thus on the twin issues of *administration* and the *distribution* of the free estate. Paraphrased, is the protestor a widow or dependant within the meaning of the **Law of Succession Act**? If the answer is in the affirmative, what then should be her share from the estate?
5. The applicant and her brother, David Kamau Ngigi (now also deceased), applied for a grant on 31st October 2014. A grant was issued to them on 6th July 2015. On 9th May 2016, they filed a summons for leave to introduce the will covering part of the properties; and, for directions over the remainder of the estate.
6. Following directions on 27th June 2016, the applicants seem to have abandoned that course and filed instead a summons for confirmation of grant on 22nd July 2016. In that summons, they categorically denied that the deceased was survived by the protestor. They prayed that some of the properties be distributed as per the will; and, that 7 other properties devolve to the beneficiaries as per paragraph 9 of the supporting affidavit.
7. The protestor then lodged an affidavit of protest on 24th October 2016 in which she staked a claim to four properties namely: Loc.11/Maragi/1193/11; Loc.11/Maragi/1193/89; Loc.11/Maragi/1463/9B; and, Loc.11/Maragi/4355.
8. She objected to the will on grounds that it was executed prior to her marriage to the deceased; and that it contained alterations or sketch plans that vitiated it. Her view was that the entire estate should be divided between the two houses as per section 40 of the **Law of Succession Act**. She opined that her one unit comprised the four properties above.
9. On 2nd May 2017, the court (*Waweru J*) directed that the protested summons be determined by *viva voce* evidence. The disputants were to file and exchange witness statements. The trial proceeded before me on 20th June 2018.
10. At the close of the trial, both learned counsel requested for time to file and exchange submissions to be highlighted at a later date. The applicant filed hers on 25th October 2018 while those by the protestor were filed on 24th July 2018. After a number of aborted mentions for compliance, learned counsel appeared before me on 20th July 2020. They confirmed that they no longer wished to highlight any part of their submissions.

11. I will commence with the salient evidence of the applicant (DW1). She relied largely on her statement dated 20th June 2018. She stated that the protestor was employed at a monthly salary of Kshs 6000 to care for the deceased who was diabetic and an amputee. She did not produce documentary evidence of such payments. She said the payments were made by her late brother, Kamau, who was managing the affairs of the deceased.

12. The witness claimed that following the death of her father, the protestor started intermeddling with the estate. The family instructed *Messrs Kimwere Josphat Advocates* to issue a demand letter (protestor's exhibit 1).

13. She testified that she met the protestor for the very first time in 2009 and has never visited her Elburgon home. She said that the only time she travelled to Elburgon was in 2011 for the funeral of the deceased's shamba boy, Ndung'u, who drowned in River Mathioya.

14. From what I can glean from her evidence, she and the family were prepared to accommodate the protestor but not in the capacity of a widow. She told the court that the protestor "was part of family as she had taken care of [her father] as an old and sick man. He was 78 and an amputee. We wanted to reward her".

15. As I stated earlier, the live issue for determination is whether the protestor was *married* to the deceased. The protestor relied on her affidavit of protest sworn on 21st October, 2013. The material evidence was that she first met the deceased in February 2009. He was then 75 years old. They started living together. She claimed that the deceased visited her parent's home in Elburgon in the year 2012 to pay for her dowry. She testified as follows-

The deceased came to Elburgon in 2012. He came with some people and I had people from my side. After that date, he decided to buy my mother land. It was registered in my name and my mother. Deceased issued a cheque to the seller. This is the agreement of sale and cheque.

16. Those two agreements are dated 21st January 2011 and 17th August 2011 respectively. They were attached to an affidavit sworn by Faith Wangui (the applicant) on a separate application dated 13th April 2016 and marked *FWN1* and *FWN2*. I will return to that subject shortly. But what is material is that the protestor insisted that the two plots formed part of her dowry. She denied that she was a salaried care-giver. She testified further as follows-

The deceased bought [the] two plots for me in my names and my mother. The plots were part of the dowry. I was not on salary as alleged by petitioner in her statement. Annexure RWN1 to supplementary affidavit at paragraph 4 lists me as a survivor. I also signed a consent during the filing of the cause. It was before Warima Advocate.

17. The witness insisted that she was the wife of the deceased and that "the care to the deceased when he was unwell was incidental". She testified that they lived with deceased in Murang'a in his house at Mukuyu. After he died, she relocated to his land in Kiawanjugu. She later returned to her mother's home.

18. The protestor's mother, Grace Nduta Njoroge (PW2), made reference to a witness statement dated 17th May 2017. She added the following-

He [the deceased] came to my place with other men. He paid 30,000 as 'Mwati na Harika'. I do not know the year. He said he would buy me a plot after that which was registered in my name and PW1. This is the agreement. The deceased died soon thereafter. The properties were a gift.

19. The ceremony was re-affirmed by her uncle, George Uno (PW3), who claimed he was present. He is a brother of PW2 and the uncle to the protestor. He said the Kshs 30,000 paid by the deceased was for "Mwati na Harika" at Kshs 10,000 each and a further payment of Kshs 10,000 for "Kiara". He said the deceased was accompanied by other people including one Francis Njoroge. He testified that that was the first and last visit by the deceased. He said that the deceased "was old but he knew what he was doing".

20. From the pleadings and evidence, it is clear that the protestor sought to rely on a *custom*. The evidential and legal burden thus fell squarely upon her shoulders. See section 107 of the **Evidence Act**. See also *Kimani v Gikanga* [1965] E.A 735; *Mwagiru v Mumbi* [1967] E.A 639 at 642; *Gituanja v Gituanja* [1983] KLR 575; *Njoki v Muthuru* [1985] KLR 874.

21. Learned counsel for the protestor, *Mr. Mbuthia*, submitted that all the requirements of a *Gikuyu* customary marriage were met. He relied on the decision in *Re Estate of Francis Kambo Ndirangu (Deceased)*, High Court, Nakuru, Cause No. 38 of 2008 [2012] eKLR.

22. I do not think that the submission is fully supported by the evidence. From the evidence of PW2 and PW3, the deceased only visited their homestead once. The *ruracio* was obviously never completed. All the protestor's witnesses were her blood relatives. No independent witness came forward to prove the celebration of a customary marriage.

23. It is possible that the deceased *may* have asked for the protestor's hand in marriage in his twilight years. But I find that all the requisite stages of a *Gikuyu* customary marriage including *ruracio* and *ngurario* were not carried out in this case. See the dissent of *Nyamu JA* in *Mary Wanjiru Githatu v Esther Wanjiru Kiarie*, Court of Appeal at Eldoret, Civil Appeal 20 of 2009 [2010] eKLR. See generally Contran E; *Restatement of African Law Vol. II – The Law of Marriage and Divorce*.

24. The protestor's evidence and that of her mother were also contradictory. To the protestor, the two plots in Elburgon above-mentioned were part of the *dowry* while to the mother they were mere *gifts*. The trouble is that the sale agreements were executed on 21st January 2011 and 17th August 2011 respectively, well *before* the dowry ceremony. It is also inconceivable that dowry could be paid to the bride. This is

material since the properties were *jointly* owned by the mother (PW2) and the daughter (the protestor) who was the one being betrothed.

25. *Mr. Mbutia*, learned counsel for the objector, submitted that in the alternative, there was a *presumption of marriage* between the protestor and the deceased. The applicant's counsel, *Mr. Njau*, was of the contrary opinion. A presumption of marriage arises under certain conditions, for instance, where parties have had a long cohabitation, have children together or joint properties and the community regards them as husband and wife. In short, the evidence must point to a *marriage* and that the woman was not merely a girlfriend or a concubine. See generally *Hortensia Wanjiku Yawe v Public Trustee*, Court of Appeal, Nairobi, Civil Appeal 13 of 1976; *Njoki v Muthuru* [1985] KLR 874.

26. I have looked at other evidence of the relationship between the deceased and the protestor. The first is an affidavit of sworn on 16th July 2012 by the deceased (protestor's exhibit 3). He deposed at paragraph 2 that he married the protestor under "*Kikuyu customary law way back in the year 2009*". That was long *before* he went to the protestor's home to pay dowry for the very first time in 2012.

27. But the true purpose of the affidavit appears at paragraph 7: It was to facilitate the protestor's application to the Registrar of Persons to change her maiden name and adopt that of the deceased. I find that the change of name was not proof of a *Gikuyu* customary marriage. See *Florence Kanyora v Njoroge Kinyanjui*, High Court, Nairobi, Civil Suit No. 11 of 2002 [2005] eKLR.

28. There is then a picture of the protestor seated in front of the deceased's casket at the funeral (protestor's exhibit 6). Learned counsel, *Mr. Mbutia*, submitted that it was a mark of respect for the widow. The funeral programme (protestor's exhibit 4) referred to the protestor as the widow. The applicant on the other hand testified that the programme was prepared by the protestor's friends in Mukuyu.

29. I have also studied the chief's letter (protestor's exhibit 2) which lists the protestor as one of the "survivors" of the deceased. The protestor conceded that she *went to the Chief alone and provided the list of beneficiaries*. It is not lost on me that the Chief did not recommend the protestor to be the administrator but listed her as one of those who survived the deceased. The letter proposed that the administrators be the applicant and her late brother, Kamau.

30. I have formed the opinion that the affidavit, the pictures, the funeral programme and the chief's letter viewed together reinforce the fact that the protestor and deceased had a close relationship and had resided at a plot at Mukuyu from about 2009. That must be the context that informed a letter by her former lawyers, *Messrs Kimwere*, dated 27th January 2016 (protestor's exhibit 1) addressed to the protestor.

31. I have kept in mind that the protestor initially moved into the Mukuyu residence to *assist* the deceased who was elderly, diabetic and an amputee. There is no contest that the protestor lived there until the deceased passed on. However, the protestor did not lead cogent evidence to show that the relationship mutated into a *marriage* or that the family, friends and community treated her as a *wife* of the deceased.

32. But as I have held earlier, there was no meaningful or proper celebration of a *Gikuyu* customary marriage. The burden to prove a marriage by *presumption* again lay on the protestor. The protestor said they cohabited together from the year 2009 to 2013. But as I said earlier she first entered the household to give *care* to the deceased.

33. No reliable evidence was marshalled to show that the relationship metamorphosed into a marriage. They had no children together or any joint assets. Although the protestor claimed that there "*is a title that we bought with deceased from Muthoni*" she was unable to provide any details or particulars. It remained a bare claim. I also find no clear cut evidence that the community regarded them as husband and wife.

34. I have reached the conclusion that there was *no* cohabitation with habit and repute. The relationship between the protestor and the deceased did *not* reach the threshold of a marriage either by custom or presumption.

35. It must follow as a corollary that section 40 of the **Law of Succession Act** is inapplicable in this case. I also find that the protestor is not a dependant as envisaged by section 29 of the Act.

36. The upshot is that the protestor is *not* entitled to any share. Her protest and her claim over four properties namely Loc.11/Maragi/1193/11; Loc.11/Maragi/1193/89; Loc.11/Maragi/1463/9B; and, Loc.11/Maragi/4355 lacks legal foundation and is *dismissed*.

37. However, and for the avoidance of doubt, the protestor and her mother shall retain the two properties gifted by the deceased in the year 2011 and namely: Elburgon/Arimi Ndoshua Block 1/213; and, Elburgon/Arimi Ndoshua Block 1/214. The properties do not obviously form part of the free estate of the deceased.

38. I will make a brief and gratuitous comment of the alleged will. The original will dated 8th May 2002 was *never* presented to the court in probate. Furthermore, the present proceedings were filed in intestacy. It would be untidy to create a procedural mongrel by introducing a will.

39. I also note in passing that the copy of the will (annexture *FWN 1*) attached to the applicant's affidavit dated 13th April 2016 on the face of it has alterations e.g. on the date at the bottom that does not seem to have been countersigned. The instrument does not also cover all the properties of the deceased. I thus find, *obiter*, that the will has *not* been proved.

40. I note however that none of the six beneficiaries named at paragraph 6 of the applicant's affidavit in support of summons for confirmation of the grant sworn on 20th July 2016 disputes their proposed shares. They also agree at paragraph 9 on the distribution of the additional properties.

41. In the interests of justice, the beneficiaries named at paragraph 6 of that affidavit shall file a fresh consent on distribution along those

lines within the next 14 days for adoption by the court.

42. In the end I order as follows-

a. That the protest is hereby *dismissed* in its entirety.

b. That the net intestate estate shall be distributed to the six beneficiaries named at paragraph 6 of applicant's affidavit in support of the *summons for confirmation of the grant* sworn on 20th July 2016. They shall file a suitable consent on distribution within the next 14 days for confirmation by the court.

c. Costs follow the event and are at the discretion of the court. In the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 21st day of September 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Kariuki holding brief for Mr. Mbuthia for the protestor instructed by J.N. Mbuthia & Co. Advocates.

Mr. Njau for the applicant/administrator instructed by Mugambi Njau & Co. Advocates.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.