



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 803 OF 2013**

**IN THE MATTER OF THE ESTATE OF JAMLICK GITONGA KARIA (DECEASED)**

**SUSAN KAGWIRIA KITHINJI**

**ANN KARIMI MURIUKI.....PETITIONERS**

**VS.**

**MARY WANGUI MURIITHI .....PROTESTER**

**JUDGMENT**

Jamlick Gitonga Karia died on 3<sup>rd</sup> July 2007 at the age of 39 according to the certificate of death issued on 13<sup>th</sup> August 2007.

According to the letter from the Chief Kiamathaga location dated 2<sup>nd</sup> September 2013, Jamlick was survived by his two wives and four children viz:

Susan Kagwiria Kithinji and her children Timothy Kimathi, Godfrey Kithinji and Jacqueline Mwendwa, and Ann Karimi Muriuki and her child Pascal Muthee.

His estate comprised of 10 acres in Gatune Scheme, NAROMORU/KIAMATHAGA/BLK 3/ GATUNE/194, 2 acres in Gikamba, 4 acres in Njoguini, (both shares in MWICHWIRI FARM), 3 tractors with sawing machine and harrow, one Toyota corolla saloon car KAH 736W, bank account no 015015eight 256300 Standard Chartered Bank Nanyuki Branch.

Susan and Ann were issued with grant of letters of administration intestate on the 7<sup>th</sup> January 2014.

They filed Summons for confirmation of grant on 21<sup>st</sup> October 2015 distributing the estate between themselves and also in trust for their children.

On 14<sup>th</sup> April 2016, Mary Wangui Muriithi filed her affidavit of protest stating that she had cohabited with the deceased from 1996 in Njoro and later got married. That there was one issue of the marriage Joseph Kaimenyi born on 8<sup>th</sup> October 1999 as evidenced by the certificate of birth issued on 12<sup>th</sup> November 2013. (which was no attached to the protest) That she had other children prior to this marriage, Tabitha Wambui Wangui born in 1994, Zachariah Muriithi Wangui born in 1996 whom she claimed the deceased was taking care of as his own.

She also alleged that the petitioners had disposed off the deceased's tractor Registration no. KAK 979P- the alleged certificate of insurance and copy of records were not attached. She required that the petitioners give an inventory of the proceeds of sale and the same be shared equally.

She proposed a mode of distribution which she said was based on the wishes of the deceased whereby she would get the 2 acres in Gikamba, the 1<sup>st</sup> wife the Gatune land, the second wife the 4 acres in Gikamba, and the proceeds in the bank and the two motor vehicles be shared equally.

The protest was heard by way of viva voce evidence.

The protester testified that she got married to the deceased in 1996 in Njoro where the deceased worked as a saw miller. She said they lived both in Njoro and his home in Mushwiri. That they had one child in 1999.

She said the deceased visited her home with his brother in law and his father but she could not recall the date. Her parents did not visit his

home.

She said she knew her husband had two wives Susan living at Gatune and Anne living at Njogu-ini. That she was the 2<sup>nd</sup> wife while Anne was the third wife. That she and their husband lived in a rental house in Njoro.

In cross examination when asked what kind of marriage she had with the deceased she responded: *“We loved each other. We had not reached the point of getting married”* that they had not reached the point of having a wedding. Asked about the properties she alleged had been sold by the petitioners she changed her story and stated that it was her father in law who had refused with the property. She confirmed that both Susan and Anne were left in occupation of the shambas where they were living and were utilizing the Gikamba shamba which she claimed was hers. She did not attend the family meeting at the Chief’s Office on 13<sup>th</sup> May 2010

On re-examination she said that no one lived on the Gikamba shamba “it should be mine” because Susan was living at Gatune and Anne at Njogu-ini.

Grace Kathangu Muriithi testified that the deceased was her younger brother and that she recognized the petitioners and the protester as her brother’s wives. That when Mary joined the family Susan had disappeared for 15 years and only came back later. She could not tell when Mary became known to her. She did not know whether her parents had gone to Mary’s home.

Asked whether she knew that her brother had distributed his estate, she said one could not know about the affairs of another person’s home.

Jaeri Nkirote Karia testified the deceased was her son. That he had three wives: Susan with three children, Mary Wangui with three and Anne with one.

She said she knew Mary as her daughter in law but could not recall the town where Mary lived with her son.

She said her three daughter’s in law should share in her husband’s estate.

On cross examination she denied any knowledge of a meeting at the Chief’s in 2010. She denied any knowledge of tractors that her son owned. She said she knew that Mary was living in Nakuru. That the shamba in Gikamba was two acres and not occupied by bay one.

Susan Kagwiria Kithinji testified that her husband had two wives, herself and Anne Karimi. She did not know Mary. She and Anne were each left on their own parcels of land and were utilizing the Gikamba land.

She testified to the meeting held at the Chief’s office in 2010. There it was learnt that their father in law had sold the tractors and the car, and that the money in the account had been given to the father hence the only properties left were the three parcels of land. Mary was never mentioned by anyone.

On cross examination she told the court that their husband had not transferred the land to her but that Anne had the title deed to hers.

On her part Anne Karimi testified that she got married to the deceased in 2003. He took her to the Njogu-ini shamba. However, that her father in law was claiming that the Njoguini land belonged to him and the deceased and even attempted to evict her but the elders refused only allowing him to cut the trees. Their father in law also took the tractors and sold them saying that he owned them jointly with the deceased. When the deceased was unwell, that he transferred the moneys in his account to his father.

On cross examination she testified that they had not produced any evidence to prove that their father in law had done all the things they claimed he had done.

That if indeed Mary Wangui was a wife of the deceased she would have known about the meeting that was held at the chief’s office.

She testified that after the meeting in 2010, the land company issued the allotment letter for where she was living in her name.

Counsel for each party filed submissions Waruingi and Associates for the petitioners and Keli and Mwaura Advocates, for the protester.

I have considered the rival submissions.

This case turns on twos issue only: Whether the protester was a wife of the deceased, and whether the children named as those of the protesters were dependants of the deceased.

### **WAS THERE A MARRIAGE?**

**In answering this question I found guidance in the case of Eva Naima Kaaka & another v Tabitha Waithera Mararo[2018] eKLR and the authorities cited therein which I re cite herein.**

The protester own testimony was that she and the deceased only loved each other but had not reached the point of marriage. She still went on to call the sister and mother to the deceased to testify that she was a wife to the deceased. How now, when she herself had testified that they were not married. The two stuck to a fact only known to themselves, that they recognized Mary as a wife of their brother and son respectively. Why? They could not explain. There were no details, of an alleged visit to Mary’s home. She herself confirmed that her parents

never went to the home of the deceased. She never lived at his home but lived with him in a rental house at Njoro, while each of his two wives was living on her own land. She could not explain how Anne came onto the scene in 2003 and was settled on her own parcel while she, who had been there since 1996 had not been moved from the rental house to the land she claims should be hers.

It is the Court of Appeal in the case of Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another [2009] eKLR which held that the presumption of marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute ..that;

**“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.”**

The protester wants this court to believe that she and the deceased lived together for close to 10 years and there were no acts of repute she could rely on except the shallow testimonies of PW2 and 3.

**Nyarangi JA’s statement in Mary Njoki vs John Kinyanjui Muthuru [1985] eKLR, appears to speak to the facts in this case;**

**The appellant’s own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant’s father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage”.**

The protester provided no evidence of having lived in the same rental house with the deceased, no neighbours or friends came from Njoro to speak to this, neither did any of her relatives who may have been present when the deceased allegedly visited her home.

She also produced no evidence to show that her two older children knew or were known to the deceased or even received any support from him to qualify as dependants.

Did the applicant have a child with the deceased?

It is noteworthy that the certificate of birth was obtained 7 years after the death of the deceased. By 2007 the child was eight years. He must have been school going. Why was there no certificate of birth when the deceased was alive only for one to be obtained after his death? By 2013 the child was 14 years old. No evidence was produced to support the information on the certificate of birth and especially the insertion of the deceased’s name in there as the father the child.

I am not persuaded that the protester was a wife to the deceased. Neither am I persuaded that she and the deceased had a child together.

In the upshot the protest is dismissed.

The Summons for confirmation of grant filed on the 21<sup>st</sup> October 2015 is confirmed as filed.

**Dated, delivered and signed at Nyeri this 25<sup>th</sup> January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Mr.Mwaura for the protestor

Mr.Waruinge for petitioners

Mr.Mwaura- I pray for leave to appeal.

**Mumbua T Matheka**

**Judge**

Court- Leave granted.

**Mumbua T Matheka**

**Judge**

