



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 220 OF 1998

IN THE MATTER OF THE ESTATE OF DAVID NDIGIRIGI NGURE (DECEASED)

ALICE WANGARI WARUI

CHARLES WARUI MBUKI

ZACHARY GICHOHI MBUKI

ERIC MAINA NDIGIRIGI

PATRICK KURIA NDIGIRIGI.....PETITIONERS

-VERSUS-

JOHN KAMWANA KIRATHE.....1ST RESPONDENT

MARY NYAMBURA WAGURA.....2ND RESPONDENT

MARGARET MUMBI WACHIRA.....3RD RESPONDENT

MARGARET WAMBUI GITHAIGA.....4TH RESPONDENT

JOHN MBARAGA KAMAU.....5TH RESPONDENT

DAVID MURIITHI NGINGA.....6TH RESPONDENT

RULING

Before me is the Summons for revocation of grant dated 5th December 2016, and filed on the 8th December 2016 brought by Alice Wangari Warui, and her four children, the Applicants. The same is brought under section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules seeking the grant confirmed on 2nd February 2016 to be revoked on the grounds that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by making of a false statement and that the grant was obtained fraudulently by concealment from the Court that the applicants were dependants and beneficiaries of the deceased's estate.

The application is supported by an affidavit of the 1st Applicant in which she states the following: -

The applicants are dependants and beneficiaries of the deceased's estate *inter alia*

i) In 1990 the 1st Applicant accepted a proposal to be married under a woman-to-woman marriage to a married woman, the wife to the deceased herein one Tabitha Mbuki.

ii) Consequently, on 15th August 1990, the deceased accompanied by a village elder together with his then two wives, one Cecilia Wambui Kirathe (Deceased) and Tabitha Mbuki Kirathe (Deceased), visited the 1st Applicant's home at Mahiga in Othaya for marriage negotiations and the 1st applicant assented to the arrangement.

iii) According to the arrangement the 1st Respondent was to be the wife of the said Tabitha Mbuki Kirathe(Deceased). The 1st Applicant already had two children, the 2nd and 3rd Applicants.

iv) That the 1st and 4th respondents were also involved in the said negotiations together with the deceased's brother, Ndumbi Muhara and his wife, Gathoni Nginga.

v) Thereafter the 1st Respondent was taken to the deceased's homestead in one of his parcels of land L.R NO. THEGENGE/KARIA/279 to stay with her "husband" together with her said two children.

vi) In September, 1990 the deceased went to the 1st Respondent's home to take the traditional beer (Muratina) and Kshs.1500/- as required by Kikuyu customs for marriages of this nature. In April 1991, the deceased took to the 1st Applicant's parents the requisite "mwati na harika" (ewe and a goat) as dowry.

vii) The deceased equally subdivided his two parcels of land to his two houses and the 1st Applicant was settled on the half share given to Tabitha Mbuki Kirathe (Deceased), her "husband". She took exclusive possession of that half share with her "husband" and started farming.

viii) In August 1991, the deceased informed the 1st Applicant that there is another land in Narumoru, L.R NO. NARUMORU/NARUMORU BLOCK 2/AGUTHI/540 which should be shared between his two houses. Subsequently the deceased bought iron sheets and invited the 1st Applicant and the 1st Respondent's wife to the said property where he informally subdivided the land into two and showed each where to farm. The deceased built a two-roomed timer house as a farmhouse for both the 1st Applicant and the 1st Respondent for their accommodation as they farmed there.

ix) In the year 1993 both the deceased and the first wife passed away with the latter predeceasing the former. The 1st Applicant continued with her farming on the property allocated to her and her "husband". She later got two more children, the 2nd and 3rd Respondents who bear the names of her "husband".

x) In 2008 the 1st Applicant's "husband" passed away but she continued to occupy their allocated property with her children.

The 1st Respondent is the deceased's son with the first wife, the 2nd -4th Respondents are widows of the deceased's sons with the same first wife. The 5th Respondent and 6th Respondents are the deceased grandsons being sons of the deceased's daughter and son respectively.

The applicants only became aware of the instant cause on 2nd December 2016 when all the parties herein attended the Chief Magistrate's Court, Nyeri, for the 1st Applicant's application in Nyeri C.M Succession Cause No. 23 of 2016 which was filed by the applicants without knowledge of the instant cause.

The said application at the Chief Magistrate's Court was for preservation of the estate in which the 1st applicant had cited the respondents.

Although served with the application, the Respondent did not file any affidavit in reply. On 26th July 2017, this Court directed that the application be heard by way of oral evidence. The Respondents filed their joint statement dated 20th February 2018 setting out the properties of the deceased and the rightful heirs excluding the applicants. They stated that the 1st Applicant is a stranger to the estate of the deceased and that the issue of the alleged woman-to-woman marriage was overruled during the confirmation of the grant. This is not true because the record indicates that when the application for confirmation of grant came up for hearing on 26th February, 2016, only the respondents were present and the issue of woman-to-woman marriage was not canvassed.

At the hearing, the Applicants called four witnesses who adopted their witness statements dated 6th February 2018. The statement by PW1, Alice Wangari Warui (The 1st Applicant) reiterates the affidavit in support of the instant application as highlighted above. She further averred that in 2016 the 1st Respondent started dividing the land in Gachatha. He later gave the 1st Applicant a verbal notice to vacate the land as she did not have any land there. He brought a surveyor who demarcated the land into two. The 1st Respondent stayed put as the deceased had clearly showed her land. When the 1st Respondent started threatening her and destroyed her crops on the two parcels of land, the 1st Applicant reported to the area chief. She later proceeded to file Nyeri Chief Magistrate's Court Cause No. 23 of 2016 against the 1st - 4th Respondents for the preservation of the estate. It was during one of the court attendances of this case that she learnt of the instant cause. She produced evidence in support of her claim being copies of identity cards of her children and photos showing her attendance of burials of family members including that of Thabitha Mbuki Kirathe, her "husband".

The Statement by PW2, Zachary Gichohi Muthondia (Sister to the 1st Applicant) stated that he witnessed the traditional wedding ceremony between the 1st Applicant and her "husband" as stated in the 1st Applicant's affidavit. The 1st Respondent later lived with her "husband" with their four children, the 2nd -5th Applicants herein, and continued living on the deceased's property even after the death of both the deceased and the "husband" in 1993 and 2008 respectively. He also witnessed the "ngurario" in 1993. According to him his sister, the 1st Applicant, is the wife of Tabitha Mbuki (Deceased) and her children their children as per kikuyu customs.

The statements by PW3, Eric Maina Ndigirigi (4th Respondent) and PW4, Zachary Gichohi Mbuki (3rd Respondent) are in accord. PW3 was born in the homestead of her mother's "husband", Tabitha Mbuki, whom he called "maitu"(mother in kikuyu language). PW4 came to the homestead when he was a small boy and was treated as a child of the house as well. He considered Tabitha Mbuki (Deceased) as his 'grandmother'. They both stated that Tabitha Mbuki (Deceased) used to take care of all their needs together with those of their siblings and their mother, the 1st Applicant. PW3 considered maitu's husband, the deceased herein, as his father. They were allocated half a share of the deceased's land to live with Tabitha Mbuki (Deceased) where she was buried when she died in 2008.

The Respondents called one witness, DW1 (1st Respondent) who adopted their joint statement mentioned above and stated that the 1st Applicant was a casual worker to Tabitha Mbuki (Deceased) and that she had no relationship with his deceased father. On cross-examination he stated the following: -

1. The 1st Applicant came on the property of the deceased in 1990 as a casual worker.
2. The 1st Applicant was living with Tabitha Mbuki (Deceased) and would sometimes leave for her home. She used to wash clothes for Tabitha Mbuki (Deceased).
3. The 1st Applicant later brought her children who attended the nearby primary school. When the 1st Applicant left for her home she would leave her children with Tabitha Mbuki (Deceased) and then later come back.
4. The 1st Applicant's children are still in Tabitha's home even after her death because they refused to leave.
5. The photos produced by the 1st Applicant are indeed photos of the family. He indeed confirmed the photos showing Tabitha's house and family funeral photos where the 1st Applicant and her children were present. He however stated that funeral photos include anyone willing and not strictly family members.
6. He is the one who build the house in Naromoru and not his father as alleged by the Applicants. The cause was filed when Tabitha was alive and they had agreed that the estate would be distributed according to the mode set out in the impugned certificate of confirmation of grant as the deceased wished.
7. The reason why he did not involve the 1st Respondent when filing the instant cause is because the property had already been distributed.

The issue for determination is whether the applicants are beneficiaries to the estate and if the failure by the 1st Respondent to involve them in the instant cause warrants the revocation of the confirmed grant. Since the applicants stake their claim to the estate on an alleged woman-to-woman marriage between the 1st Applicant and Tabitha Mbuki (Deceased), a wife of the deceased, it is necessary to determine whether that marriage indeed existed and its consequences to the estate of the deceased.

Each party filed written submissions in support of their case through their counsel.

On proof of a customary marriage, the Court of Appeal in in *Gituanja vs Gituanja (1983)KLR 575*, held that the existence of such a marriage is a matter of fact which is proved with evidence. In that case the court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the "ngurario".

According to Dr. Cotran, in *Restatement of African Law: Kenya Volume 1 The Law on Marriage and Divorce, Sweet & Maxwell, 1968*, the following procedures, rites and ceremonies are involved in a typical Kikuyu customary marriage as upheld by the Court of Appeal in *Eliud Maina Mwangi ~v~ Margaret Maina Gachangi Gachangi (2013) eKLR* :

"A marriage proposal is conveyed to the girl. If it is favourably received the girl's parents are invited to the home of the prospective husband to partake in the "njohi ya njurio", the beer of asking the girl's hand. (It would appear that this is significant because Cotran specifically notes that there is a variation among the Waembu where the boy's parents take the beer to the girl's parents). Thereafter the first installment of rurachio is taken to the girl's father. Further installments follow until a sufficient amount of the full marriage consideration, stipulated by the girl's father has been offered and accepted to seal the engagement. Next a day is fixed for the engagement ceremony (ngurario), i.e. the pouring out of the blood of unity. A ram (ngoima ya ngurario) is sent from the boy's father to the girl's home, where the ceremonial feast is prepared. The ram is slaughtered, and the girl eats the kidneys as a sign of consent to the betrothal. The betrothal is complete when this ceremony has been performed. The ngurario ceremony is followed by a further ceremonial feast (guthinja ngoima). This feast is attended by members of the parties' clans, and after the slaughter of a sheep provided by the boy's family, the families exchange presents. After the guthinja ngoima ceremony, the bride is brought to the bridegroom's home by mock capture. The author notes that this procedure of capture is now obsolete."

The Court of appeal in the said case noted that customary law is not static and keeps evolving such that there is no rigidity. Payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. However, the essential steps and ceremonies must be performed, irrespective of the form in which they are performed. On the essentials of a valid kikuyu marriage, Cotran concludes that:-

"No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered" and that "there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid."

Specifically on the woman-to-woman marriage, Dr Cotran has rendered its rationale and essentials under Kikuyu customary law as follows at page 13 of his above cited book:-

"Where a husband dies leaving a childless widow, who is past childbearing age, the widow may marry a wife. The widow pays ruracio to the family of the woman selected, and arranges for a man from her deceased husband's age set to have intercourse with her. Children resulting from such intercourse are regarded as the children of the widow's deceased husband. Modern

development: This form of union is now very rare.”

The question arises as to whether the 1st Applicant proved on a balance of probabilities, as she was duty bound to do, that a valid woman-to-woman marriage under Kikuyu customary law had been contracted between her and Tabitha Mbuki, deceased. Looking at the pleadings and testimony of the Applicants, existence of a kikuyu woman-to-woman customary marriage has not been proved.

From her evidence, the ‘marriage ‘proposal was made on in 1990. That the said Tabitha went to her home on 15th August 1990 and they left for her home on the same day. David Ndigirigi died in 1993 after which the ‘mwati and harika’ were taken to her home. This is contrary to the evidence of Zachary Muthondu her brother who said the same was taken in April 1990. In any event there is no collaborating evidence of these allegations.

The chief did not include her as a beneficiary of the estate in his letter. There was no evidence from any village elder/ elder /local administrator on her side that dowry or any of the alleged customary rites were carried out. She also named a number of people who attended the first visit to her family on 15th August, 1990 and subsequent visits resting with a ‘ngurario’ in 1993, nobody from parents’ clan nor her deceased ‘husband’s’ were called to testify to verify the facts.

Critical elements of a kikuyu customary marriage such as ‘ngurario’ were only mentioned in the testimony of the 1st Applicant and her brother but were neither particularized nor collaborated with independent evidence from the clan of the alleged woman husband. If the essential customary rites and ceremonies were truly held in the presence of so many people and relatives as stated by PW1 and PW2, it is suspicious that no other witness was called save for the 1st Applicant’s brother and son. Under the Evidence Act, the matter in issue in this case could be proved even by a single witness. But since the central dispute is whether a valid Kikuyu customary woman-to-woman marriage was contracted between the 1st Applicant and Tabitha Mbuki (Deceased), it would have been expected that more of the alleged participants in those essential ceremonies would be called as witnesses. A statement of one Esther Gathoni, one of the alleged participants of the said marriage and a sister-in-law of the deceased, was filed but she was not called to testify.

When the instant cause was filed on 21st October 1998 the alleged woman husband, Tabitha Mbuki (Deceased) was a co-petitioner with the 1st Respondent herein and the grant was subsequently issued to both of them as co-administrators on 29th March 1999. The alleged woman husband neither mentioned the Applicants nor the existence of a woman-to-woman marriage in her affidavit dated 21st October 1998 in support of the petition for grant. This affidavit was not challenged. The 1st Applicant cannot say that she was not aware of this cause when indeed her alleged “husband” was once a co-administrator. No explanation was given as to how she could not have known about this cause for ten years from 1998 when it was filed by both the 1st Respondent and the alleged woman husband to 2008 when her alleged woman husband died.

It is curious that in her petition at the lower Court the 1st Applicant identifies her capacity as a daughter of the deceased. This capacity contradicts the affidavit in support of the said petition in which she says she is a wife of one of the deceased’s wives through a woman-to-woman marriage.

Further the 1st Applicant did not indicate that the two children, the 4th and 5th Respondents, born after the alleged marriage were sired by someone selected by the alleged husband, Tabitha Mbiku (Deceased) as would be expected of this kind of marriages. See ***Eliud Maina Mwangi vs Margaret Maina Gachangi Gachangi [2013] eKLR.***

Even if the 1st Applicant was able to prove the existence of a kikuyu customary woman-to-woman marriage, the children born before the said marriage being the 2nd and 3rd Respondents, would not have been regarded as children of the house in marriages of this nature. *This is because as held in the Court of Appeal decision of Eliud Maina Mwangi vs Margaret Maina Gachangi Gachangi [2013] eKLR* the customary woman-to-woman marriage was a recognized social system to preserve and perpetuate clans and lineages of the family in which one is married. It is therefore necessary that the children should be fathered by either the age mates of the marrying wife’s husband or a member of the clan of the childless woman. To include children born before the said marriage would amount to a translocation of one woman’s family into another rather than the said preservation of lineages.

Can the applicant and her children can be said to be beneficially entitled to the deceased’s estate? I find similar sentiments to mine in ***re Estate of the Late Maritim Rugut (Deceased) [2018] eKLR.*** The applicant cannot seek to inherit her ‘husband’s’ husband’s property. Neither she nor her children are beneficially entitled.

The applicant alleges that her husband was one Tabitha Mbuki. She is the one who married her. Why then would she seek to inherit the estate of David Ndigirigi Ngunge? There is no where she and her children allege that they were depended on the deceased David Ndigirigi. It is noteworthy that the applicant claims that the deceased involved her in the distribution of his property in 1991. Why would he do that yet she was not his wife? She had barely settled in the home. I find that to be incredible.

The allegation that that the deceased Tabitha Mbuki had taken the 2nd -5th Applicants into her family as her own children, providing for and educating them, within the meaning of *section 29 of the Law of Succession Act* and was maintaining them immediately prior to her death was not supported by any evidence. It is not disputed that lived with her in her home. In the circumstances they would have to file and prove the same, if they so wish, in an appropriate application.

Much was made of the woman’s right to positive culture as envisioned by the Maputo Protocol. One would want to ask the question whether it is still positive culture for a woman who is unable to get sons to be expected to ‘produce’ sons by whatever means. Tabitha Mbuki had one daughter who got married and bore her many grand -children. Any culture that makes a woman feel **obligated** or **obligates** a woman to bear sons for her husband or clan by whichever means cannot be said to be positive culture. It must be seen for what it truly is- misogynistic expressions of patriarchy. It says having daughters makes her less of a woman, and that daughters are lesser children. Clearly for the scales

to balance, no man should be made to feel less of a man because he is a father to daughters only. It feeds the same ogre.

Be that as it may the upshot is that 1st Applicant has failed to prove on a balance of probability that she is a widow to Tabitha Mbuki (Deceased) through a kikuyu customary woman-to-woman marriage. If she was her widow, then she would have to file a cause in the matter of the estate of Tabitha Mbuki and not David Ndigirigi Ngure. The application therefore fails. I find no reason to disturb the confirmed grant issued by this Court on 2nd February 2016.

Dated, delivered and signed at Nyeri this 25th day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Kinuthia holding brief for CM King'ori for applicants

Ms.Mwikali holding brief for Andrew Kariuki for respondent.

Mumbua T Matheka

Judge

25/1/19