



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CASE NO. 522 OF 2012

IN THE MATTER OF THE ESTATE OF FRANCIS GUANTAI MUGAMBI (DECEASED)

WINFRED NKUENE KIRIMI.....PETITIONER

VERSUS

JECINTA GAKII..... OBJECTOR

RULING

1. **FRANCIS GUANTAI MUGAMBI (“deceased”)** died on 8th November 2010. **Winfred Nkuene Kirimi** petitioned for letters of administration which were granted on 21st January 2013 citing **NTIMA/IGOKI/5968** registered in name of deceased on 15.3.1999 and **ABOGETA/LOWER CHURE/ 1167** the ancestral land as the only assets of the deceased. A letter of introduction by the chief of Igoki location listed the following as the dependants;

| | |
|----------------|------------|
| Winfred Nkuene | - Widow |
| Faith Gatwiri | - Daughter |
| Nicholas Koome | - Son |
| Samwel Kirimi | - Son |
| Fred Murimi | - Son |
| Joan Mukami | - Daughter |

2. On 17th October 2013 Winfred Kirimi Filed Summons for confirmation of grant however **Jacinta Gakii** filed an objection. In her affidavit dated 28th May 2014 and her statement dated 24 July 2017 she averred that she was the wife of the deceased who married her through Kimeru custom in 1988 and has been her husband until his demise. They had one son, Samuel Kirimi.

3. During her marriage they manage to buy several properties and develop, among others they bought land at Gaji (Igoki) measuring 1 ½ Acres and Kiriati measuring 1 ½ Acres which the deceased sold so as to develop their plot in Makutano. During her marriage she was employed and working with the ministry of land and she applied for a loan of Ksh. 600,000 to assist in the completion of the said development. Additionally she has spent all her savings towards the completion of the commercial including her terminal benefits in the sum of Ksh 791,715. After her husband brutally attacked her causing permanent body injuries she left him. It is her contention that she has big share over the building and the proceeds of the said building.

4. **Charles Nturibi** in his statement filed on 24th July 2017 deponed that he was a civil engineer by profession and in 2005 he was contracted by the deceased and objector to partition rooms in their plot in Makutano. He partitioned, plastered and roofed the houses and constructed toilets. Later in 2009 he constructed their matrimonial home and the objector paid for his expenses.

5. **Douglas Kirathe Kiberenge** in his statement dated 24th July 2017 stated that he was a cousin, friend and neighbor to the deceased. In 1988 he was among the elders who went to seek for the objectors hand in marriage at her father’s home. They gave a sheep heifer and later took 30 thousand shillings as dowry. That the deceased and the objector built a house near his. However, in 2009 he heard that the deceased had beaten the objector almost killing her, she went for treatment and stayed with her parents thereafter.

6. This was opposed vide statements by Winfred Nkuene Kirimi, Japhet Mbae M’Mugambi, Margret M’Mugambi and Timothy Mboroki dated 30th August 2017.

7. **Winfred Nkuene Kirimi** in her statement indicated that the deceased was her husband they solemnized their marriage on 11th August 1990 at PCEA Linus Waruiru Memorial Church, Kanyekine. They were blessed with two children Fred Murimi and Joan Mukami. Nevertheless, she did admit that the deceased had other children out of wedlock Faith Gatwiri, Nicholas Koome and Samuel Kirimi. She claimed they both pulled resources to put up their home at Mwichiune and initially the deceased took a loan using the family land as collateral. However it was not enough and they took a loan from Afya Sacco to complete the house. The house stands on a parcel gifted to them by her father in law, ABOGETA/L-CHURE/1167. NTIMA/IGOKI/5968 was gifted to her by her father and she requested him to register it in the name of the deceased. Thereafter, they jointly developed it by taking up loans between the year 2001 and 2004. The land at Kariati she bought together with the deceased through their own resources and the land at Gaji was gifted to the deceased by Mr. Muthaura for taking care of his grandson. Finally the deceased paid for his education through the sale of a portion of his family land at Mwichiune and Mitunguu, through sale of a family plot at Nkubu Market, through loan from Akiba microfinance Bank and through income from their family clinic at Mwichiune.

8. **Japhet Mbae M'Mugambi** in his statement stated that the deceased was his brother. He confirmed that Winfred Nkuene Kirimi averred in her statement. Additionally he stated that the deceased did not have any other wife.

9. **Margaret M'Mugambi** in her statement said that the deceased was her son and had two children with the petitioner. She also confirmed that he had 3 other children out of wedlock. She admitted that she knows Jacinta Gakii who is the mother of Samuel Gaki. However, stated that there was no dowry negotiation or payment for the objector that took place.

10. **Timothy Mboroki** in his statement stated that the petitioner is his sister. He is conversant with the history of plot No. NTIMA/IGOKI/5968 as it was a partition of NTIMA/IGOKI/4067 which was owned by their late father Erastus Kirimi Mboroki. He became registered as the owner of plot No. NTIMA/IGOKI/5969 while the deceased was registered as the owner of NTIMA/IGOKI/5968. He confirmed that the petitioner and the deceased subsequently embarked on developing their portion through bank loans and proceeds from the sale of some parcels of land.

11. This application was canvassed by way of viva voce evidence and at close of the evidence by parties in written submissions were filed. The objector seeks to be included in the share of the deceased estate on account of contribution, marriage and dependency on account that the deceased inflicted on her injuries that have rendered her incapable of maintaining herself.

12. The issue for determination before this court is **whether the objector was a wife to the deceased.**

13. In the case of **Hortensiah Wanjiku Yawe –vs- The Public Trustee, Civil Appeal No. 13 of 1976**, the court held:-

(i) The onus of proving customary law marriage is generally on the party who claims it.

(ii) The standard of proof is the one usually for a civil action namely “on the balance of probabilities.”

(iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.

(iv) Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.

(v) Only cogent evidence to the contrary can rebut the presumption.

(vi) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.

In this case the protester Jacinta Gakii gave evidence that he was married to the deceased under the Ameru customary law and that Douglas Kiraithe, a cousin, neighbor and friend to the deceased was one of the elders who went to her parents place to ask for her hand in Marriage to the deceased. Evidence was also adduced by Charles Ntumbi that the objector/Protester and the deceased contracted him to partition the development in LR Ntima/Igoki/5968 and in 2009 prior to her leaving the matrimonial home upon being assaulted the petitioner paid him to do some work in their matrimonial house. The chiefs letter dated 21.5.2014 confirms the claims objector was married to the deceased. Although the petitioner claims the deceased was not married to the objector evidence of her step brother in law confirms the Protester/Objectors evidence that while the deceased lived with the Petitioner in Meru town she was at their matrimonial home after she retired from Civil service as Senior support staff.

The deceased persons step brother also confirmed that the deceased had started constructing a house but it was not yet complete by the time he married the petitioner under the marriage Act in August 1990. The deceased persons step mother and step brother denied knowledge that protester was assaulted and injured by the deceased in 2009 but protester produced evidence of the assault reported to police together with evidence of treatment at Meru District Hospital and Kenyatta National Hospital. No evidence to the contrary was produced by the Petitioner and the witnesses. This court therefore finds that although the petitioner contracted a statutory marriage subsequent to the Objector/Protesters customary marriage, the objector finds protection under S. (3) 5 of the Law of Succession act as read with section 29 and 40 of the law of Succession Act. The deceased did assault and cause her grievous bodily harm and as a result she went to hospital and never returned to the matrimonial home. She is entitled to a share of the estate of the deceased as was held in the case of Irene Njeri Mathau vs Margaret Wairimu Njoiro & Another – Court of Appeal at Nairobi – No 139 of 1994.

There are 2 assets that fall for distribution in this estate but the petitioner claims that LR Ntima/Igoki/5968 was land that was a gift from her father to her but was registered in the name of the deceased in trust for her. She also said that she contributed towards the development of the said property jointly with the deceased by taking loans and she produced pay slips to show loans taken from the bank and saccos.

The protester/Objector also said that she bought LR Ntima/Igoki/5968 together with the deceased and she contributed to its development.

She produced payslips to show she took loans from her sacco, she also produced a cheque of Kshs 600,000/= in her name which was used to develop LR Ntima/Igoki/5968 and their matrimonial home at LR Abogeta/Lower Chure/1167. The objector also said that she used her retirement benefits towards the development of the matrimonial house, the commercial plot as well as funding the deceased people's further education. The Petitioners witnesses supported version of the claims that she contributed towards acquisition and development of the estate properties. The Objector/Protesters witnesses also supported her evidence that she contributed towards the development of the estate property. The payslips, cheque, loan advise, payment vouchers produced by both the petitioner and the protester/objector are in the names of the respective parties and the court cannot possibly say with certainty that monies shown as loans payments to either of the parties were utilized towards development of the estate property or that it was not used because there is no nexus a part from the relationship between the 2 ladies and the deceased. I have also looked at the title documents to LR Ntima/Igoki/5968.

As regards claims that LR Ntima/Igoki/5968 was a gift to the petitioner but registered in the name of the deceased. This court has looked at the copy of Green card which shows that the suit land was registered in the name of the deceased on 15.3.1999 after sub-division of LR 4067 which was in the name of Erastus Mboroki who is alleged to be the father of the petitioner herein. The Green card does not show that the resultant sub divisions were passed to the deceased and the petitioner's brothers as gifts.

The column for consideration and remarks is left blank. The mutation form shows that the persons interested and their addresses are Timothy M.K. Mboroki and Francis Guantai Mugambi without evidence on the register as to whether the deceased was registered as trustee to hold a gift for the petitioner. This court declares that this property is free as an asset in the intestate estate and therefore liable to distribution. In the circumstances the estate of the deceased will be distributed to the petitioner, the protester/objector and the children of the deceased. LR Ntima/Igoki/5968 – 0.0371 acres. Due to its size – rents accruing shall be divided equally unless the beneficiaries agree on a suitable formula.

For LR Abogeta/Lower Chure/1167 the beneficiaries shall share it equally save that the matrimonial house which has now been occupied by the petitioner since the deceased died shall remain occupied by her. The costs of the cause shall be borne by each party. Orders accordingly.

HON. A.ONG'INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 24TH DAY OF JANUARY 2019.

In the presence of:

C/A: Kinoti

Petitioner:- Ms Kujuki Advocate holding brief for M. Kariuki for petitioner

Objector: Ms Kiome Advocate holding brief for Mutunga for Objector

HON. A.ONG'INJO

JUDGE