



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO.6 OF 2007**

**IN THE MATTER OF THE ESTATE OF JULIUS MUTHOMI RINGERA – DECEASED**

**JANET NKIROTE MUTHOMI.....PETITIONER**

**VERSUS**

**ANN KAIRUTHI RUTERE.....PROTESTOR**

**DAVID KIRIMI RINGERA.....OBJECTOR**

**J U D G M E N T**

1. **Julius Muthomi Ringera (“the deceased”)** died intestate on 9<sup>th</sup> September 2006. On 11<sup>th</sup> January 2007, **Janet Nkirote Muthomi (“the petitioner”)** petitioned for grant of letters of administration intestate setting out the following as those who survived the deceased: -

- a) Janet Nkirote Muthomi – widow
- b) Kelvin Mwirigi Muthomi – son
- c) Edwin Mugambi Muthomi - son
- d) Yvonne Gacheri Muthoni – daughter
- e) Ian Mutuma Muthomi – son

2. On 8<sup>th</sup> March 2007, **Ann Kairuthi Rutere (“the protestor”)** and **David Kirimi Ringera** lodged an objection contending that the protestor was a wife to the deceased with whom she had a daughter by the name of **Felistus Gacheri Muthomi**. That the petition was filed secretly without the protestor’s knowledge. That motor vehicle registration no. KAC 111G belonged to the 1st objector and did not form part of the deceased estate. The objection was dismissed on 31<sup>st</sup> July, 2017 and the petitioner appointed the administrator of the estate. In the meantime, David Kirimi, Ringera died and the protestor was left alone in these proceedings.

3. On 13<sup>th</sup> February 2018, the protestor applied for orders to vary, review, discharge, vacate and/or set aside the said orders. In the alternative, she applied for an order for a joint grant of letters of administration. That application remained unprosecuted as at the time this matter came up for hearing. However, the court did suspend the appointment of the petitioner as administratrix of the estate pending the hearing of that application.

4. On 6<sup>th</sup> March 2018, the petitioner applied for confirmation and made proposals on how she wished the estate to be distributed. The protestor protested and the protest was ordered to be heard by way of *viva voce* evidence.

5. The parties filed their respective witness statements which they adopted at the trial and cross-examined on. The protestor stated that she was married to the deceased through Kimeru custom in 2002 and were blessed with a child named **Felistus Gacheri Muthomi**. That the family of the deceased and friends recognized her as such and had involved her in the deceased’s family affairs. That she had been in possession and occupation of the deceased’s properties **LR. No. Kiirua/Nkando/4527 and 1303** a part which she uses while the rest is occupied and utilized by the Petitioner. That despite as aforesaid, the petitioner had excluded her and her daughter from her mode of distribution. That she had been recognized as a wife in the eulogy of the deceased with whom she had lived with for 7 years before he passed on.

6. **PW2 Jeremiah Ruuri** testified that the deceased was his 1<sup>st</sup> cousin. In 2003, the father of the deceased informed him that there were to be dowry negotiations. In the same year, in the company of the deceased and others, they visited the home of the protestor's father at Gathuine village, where they paid dowry. That the protestor and the deceased thereafter lived as husband and wife at their matrimonial home which he visited several times. That the protestor had openly participated in the deceased's funeral.
7. **PW3 Silas Kirai Arimi** testified that he was the protestor's uncle. That at the time of her marriage to the deceased he had acted as her father as her real father had already passed on. Dowry was paid to him in the year 2003. He was later to be invited to the deceased's funeral as well as a family meeting held on 5<sup>th</sup> November 2006 to discuss the affairs of the deceased's family. That in 2013, they were summoned by the Njuri Ncheke where the deceased's father confirmed that the protestor was a wife to the deceased and the council held that the deceased had two wives.
8. **RW1 Janet Nkirote Muthomi** testified that she first underwent a Meru Customary marriage in 1988 with the deceased but later solemnized the same at the Methodist Church, Kinoru thereby making it monogamous. They were blessed with 4 children. She only heard of the protestor after the death of the deceased when the latter showed up at the funeral claiming to be a wife to the deceased. The family put up an advertisement in the National Newspaper and the name of the protestor was excluded. She denied that the Nchuri Ncheke Council had recognized the protestor as a wife to the deceased.
9. **RW2 Jenaro Kiogora**, a brother to the petitioner told the court that he knew the deceased well and they were very close. He had lived with him and the petitioner in Garissa and Meru during his studies. That at no time did the deceased disclose to him that the Petitioner was his wife. That he got to know of the protestor after the demise of the deceased. To him therefore, the protestor was but an imposter.
10. **RW3 Stephen Mwebia** testified that he was a family friend to the deceased. He was the best man at the deceased's wedding at M.C.K Church, Kinoru. That the wedding was announced but nobody opposed the marriage between the deceased and the petitioner.
11. **RW4 Douglas Ntoiti Makau** told the court that he was the Secretary of the Njuri Ncheke council. That the petitioner had filed a case against the protestor before the council. In which he sat as a member when the matter was deliberated. The elders found that the protestor was not a wife of the deceased because she had not conducted any customary marriage rites. In cross-examination, he admitted that the council had found that the protestor was an outside wife of the deceased and held that she takes one property at Maili saba.
12. Having considered the testimonies of witnesses, the submissions of learned counsel and the record in its entirety, the issues that arise for determination are; ***whether the protestor was a wife of the deceased, whether the protestor and her daughter are entitled to share in the estate and finally, how the estate should be distributed.***
13. The protestor contended that she had been married to the deceased under the Meru customary law. On the other hand, the petitioner contended that she and the deceased were married in church in a monogamous marriage and the deceased could not contract any other marriage.
14. The evidence on record shows that, in or about 2002, the deceased, accompanied by others, went to the home of the protestor armed with some gifts. The protestor's witnesses stated that the said visit was about marriage negotiations between the families of the deceased and that of the protestor. **PW4** stated that he received the said gifts from the visiting party as a father of the protestor.
15. After the demise of the deceased, it would seem that the protestor was accepted and recognized as a widow of the deceased. Although there was conflicting evidence on how the obituary of the deceased was advertised in both the Daily Nation and the Standard, with one referring to the protestor as a wife of the deceased and the other omitting her, the eulogy that was read at the deceased's funeral read in part:-
- “He is survived by Janet Nkirote and Ann Kairuthi. His children are Kevin Mwirigi, Edwin Mugambi, Vyone Gaceri, Ian Mutuma and Fellista Muthoni”***
16. From the foregoing, contrary to the assertions by the petitioner, the deceased's family seem to have accepted and recognized the protestor as a wife of the deceased. There is evidence that when the petitioner referred the dispute to the Nchuri Ncheke Council, the father of the deceased informed that council that the protestor was a wife of the deceased. This may have told the council's finding that the protestor was 'an outside wife' of the deceased and awarding her his property at maili saba.
17. The evidence of **RW4** that the said decision was appealed against and reversed was not convincing. There were no minutes of such meeting or decision that was produced. The court's view is that, the evidence of that witness was an afterthought hatched to address the damage already made by the earlier holding by the council.
18. In any event, on record was an affidavit sworn by the deceased on 1<sup>st</sup> October, 2003 before J. K. Ntarangwi, Advocate and Commissioner for Oaths. In that affidavit, the deceased deponed that he had married the protestor under Meru customary law. That he took her as his lawfully wedded wife and that he was authorizing his employer and all relevant offices to reflect that fact in all the necessary records. That affidavit was neither challenged nor its efficacy doubted.
19. To my mind, the deceased had spoken. While alive and in his right senses, despite begetting a daughter with the protestor, he had declared on oath that the protestor was his wife. My view is that, that having been his intention, it does not matter that there was no *mwati* that was given as bride price.
20. In **Sophia Wangechi Mugo v Geoffrey Wambugu Mugo & another [2016] eKLR** the court held that:-

*“Assuming that the applicant got married to the deceased after solemnising his marriage under the African Christian Marriage and Divorce Act, it still mattered less since she could still find refuge in section 3(5) of the Act which recognises her status as a wife for purposes of the Law of Succession Act more particularly in sections 29 and 40 of the Act that respectively defines who a dependant is and prescribes the devolution of the deceased’s estate if he was polygamous. That section provides as follows: -*

*3(5) 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.*

*The Court of Appeal (Omolo, Tunoi, JJA and Bosire Ag JA) explained this provision in Civil Appeal No. 139 of 1994, Irene Njeri Macharia versus Patrick Muriithi Harrison and held that it was meant for the benefit of women marrying men who had previously contracted statutory marriages. If it was established that there was such a subsequent marriage, a woman in that union would be considered a wife for purposes of the Law of Succession Act”.*

21. In this regard, looking at the totality of the evidence on record I find that the protestor is a wife of the deceased for the purpose of law of succession.

22. The next issue is whether the protestor and her daughter are entitled to a share in the estate of the deceased. Having made a finding that the protestor is a wife, it goes without say that she is entitled to a share. As regards the daughter, a certificate of birth no. 811778 dated 23<sup>rd</sup> December, 2004 in respect of Fellistus Gacheri was produced. It clearly showed that she was born on 29<sup>th</sup> July, 2004 and that the father was the deceased. She is likewise entitled to a share in her father’s estate.

23. The final issue is how the estate should be distributed. The deceased was polygamous. His estate will therefore be subject to the provisions of **section 40 of the Law of Succession Act, Cap 160**. Under that provision, each child of the deceased constitutes a unit and the surviving widow an independent and separate unit. All the units get an equal share of the estate.

24. Before addressing the final issue of distribution, it is imperative to set out what the deceased. Motor vehicle registration No. KAC 111G was shown to be registered in the name of the protestor. Although purchased by the deceased, he caused it be transferred to and registered in the name of the protestor. Accordingly, it does not form part of the estate.

25. In the present case, the two widows are alive and the children were five. That makes a total of seven (7) units. I note however that the parties did not file any valuations. They also did not disclose where their respective matrimonial homes were. The protestor did not give her own preferred mode of distribution. There was also a property known as **Segera Segera Block 2/399** measuring 2.185 ha which the petitioner excluded from her mode of distribution without giving any reason.

26. In view of the foregoing, to be able to equitably distribute the estate, it would be advisable that the foregoing issues are cleared. Since the court had suspended the appointment of the petitioner as administratrix pending the determination of the review application and having made a finding that the protestor is a wife, I make the following orders: -

- a) the order appointing the petitioner as the sole administratrix is hereby reviewed and set aside.
- b) a grant is hereby issued to **Janet Nkirote Muthomi** and **Ann Kairuthi Rutere** as joint administratrix of the estate of the deceased.
- c) at the expense of the estate, the administratrix are hereby directed to file valuations of the estate properties within 45 days.
- d) the administratrix to file affidavits setting out where their respective matrimonial homes are situated.
- e) the matter to be mentioned on an appropriate date to give a date for distribution.

**DATED and DELIVERED at Meru this 21<sup>st</sup> day of February, 2019.**

**A. MABEYA**

**JUDGE**