



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 87 OF 2010

ESTATE OF THE LATE MOSES MUGO WAWERU

FLORENCE NYAMBURA MAIN.....1ST PETITIONER

PETER MINDO MUGO.....2ND OBJECTOR

VERSUS

LUCY WANGUI MUGO.....1ST OBJECTOR

JAMES WAWERU MUGO.....2ND OBJECTOR

JUDGMENT

1. When **MOSES MUGO WAWERU** died on 18th January 2010 **FLORENCE NYAMBURA MAINA** and **PETER MINDO MUGO** (1st and 2nd Petitioner respectively) petitioned for grant of letters of administration for his estate in their capacity as his widow and son respectively. The Chief's letter dated 7th February 2010 merely indicated that the deceased had left two windows.

2. According to the petitioners, they had requested the objectors **LUCY WANGUI MUGO** and **JAMES WAWERU MUGO** (1st and 2nd Objectors) who happen to be the members of the 1st house (being mother and son) to jointly apply for grant of letters of administration in vain. Meanwhile the 1st objector was secretly selling and transferring some of the deceased's property without the consent of the 2nd house 1st Petitioners'.

3. Subsequently on 29th March 2019 the petitioners applied for grant of letters of administration of the estate but the 1st house objected.

It is explained that the 1st petitioner and the 1st objector being widows of deceased were longtime rivals who lived separately with their children, and according to the petitioners, the deceased.

4. According to the petitioner, she lived with her five children in Turbo before moving to **KIDIWA ESTATE** a property she maintains was bought for her by the deceased. She lists her children as,

Reuben Waweru – 1981

Eunice Waithera 1984

Peter Mugo 1978

Susan Njeri Mugo 1978

Charles Maina –

She got married to the deceased in 1977 after staying with him for a while from around 1975 and she relied on a marriage agreement dated 31.10.1999 to support her position.

5. The objector maintains she is the deceased's 1st wife having married him under Kikuyu custom in 1954, and the same was solemnized in 1977 in church. She does not recognize the objectors who she describes as strangers, who incidentally recognize them as the 1st widow and son of the deceased.

6. As far as the 1st objector is concerned, none of the petitioner's children are related to the deceased as the petitioner has never been married to the deceased. She produced a document dated 28/5/1977 showing that her marriage to the deceased was formalized in church and they were blessed with eleven children. On account of this, the court is urged to find that the deceased had no capacity to contract another marriage as he was already in a statutory marriage.

7. The court was urged to be guided by the decision in MW a v EWK [2010] eKLR which held that;

“The existence or otherwise of a marriage is a question of fact... for instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if facts, and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

8. This court is urged not to presume a marriage existed between the 1st petitioner and the deceased as there has been no evidence tendered to even support cohabitation in terms of reputation of the parties as husband and wife. It is pointed out that even in the funeral program and the newspaper obituary never mentioned the petitioner as the widow of the deceased, and the petitioner never adduced any evidence to show that the public knew and regarded her as the deceased's wife.

9. However, the petitioner maintains that the letter of acknowledgement of marriage receipts of payment bills and school fees paid for the children prove cohabitation, to that a marriage can be presumed between the deceased and the 1st petitioner, and that all the essentials of a Kikuyu customary marriage were met- that infact she cohabited with the deceased for over 30 years before his demise even if there was no evidence of marriage.

10. As for the children, it is argued on behalf of the petitioner that her five children are beneficiaries of the deceased as their birth certificate and identity cards bear the names of the deceased who provided for them and paid their school fees as demonstrated by the receipts annexed as FNM3 (L), and they lived on one of the deceased's properties.

11. Further that when one daughter named **NYAMBURA** got a baby with another man, the deceased instructed the family lawyer to draw a parental agreement **FNM6** that the deceased also purchased several properties for his 2nd family, and the petitioner proposed to be co-administrator with the objectors – something the objectors cannot even fathom. The issues for determination are:-

(1) Was there a marriage between the petitioner and the deceased.

(2) Who ought to be the administrators of the estate.

(3) Are the 1st petitioners children entitled to inherit from the estate

(4) Was there a marriage between 1st petitioner and deceased.

12. In addressing the issue, I begin from the premise that there is no contestation that the deceased was married to the 1st objector in 1954 under Kikuyu and they got eleven children.

13. The 1st petitioner claims to have got into a relationship with the deceased which constitutes a Kikuyu Customarily Marriage. However, there is no demonstration or evidence that the essential of a Kikuyu Customary marriage were met. No reference is made regarding **ruracio** or **ngurario** as contemplated by Rule 64 of the Probate & Administration Rules.

14. In any event the marriage to the 1st objector which was solemnized in church in 1977 under their marriage certificate No 063010 nullified the deceased's capacity to contract a subsequent marriage whether it was by custom or cohabitation and the court cannot make a presumption of a legal marriage between the deceased and the 1st petitioner.

15. I concur with the objector's counsel that a letter of acknowledgement of marriage is not by all standards a proof of marriage regardless of who the author of such a letter is.

16. Does this render the 1st petitioner a stranger or would she find refuge under section 3(5) of the Law of Succession Act as proposed by the petitioner's counsel?

“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 women, nevertheless a wife for purposes of this Act, and in particular sections 29 and 40 thereof, and his children are accordingly children within the meaning of the marriage.”

17. Whereas that provisions offers refuge to women who find themselves in a contested multiple union, I think the fact of marriage, whether by custom, cohabitation or presumption, must first be established. – This was unfortunately lacking in the present case. It subsequently

follows that the rightful person to administer the estate is as provided under section 66 of the Law of Succession Act that;

“When a deceased has died intestate, the court shall save as otherwise expressly provided have a final discretion as to the person per persons to

shall without prejudice, to that discretion except as a general guide the following order of prejudice.

a) Surviving spouse or spouses with or without association of other beneficiaries.

b) Other beneficiaries entitled on intestacy with priority according to their respective beneficial interest as provided by para V.

18. Whereas I concur with the objector’s counsel that the 1st objector is the only surviving widow, it would be myopic to act as though there never were resultant issues from the association the 1st petitioner and the deceased had, those children’ whether biologically sired or otherwise not only have the deceased’s name entered in their birth certificates as being their birth certificates as being their faith, but the deceased took care of them by paying their school fees and providing for them.

19. They therefore qualify as dependents under section 29 to the estate and for purposes of fairness the 2nd petitioner is enjoined to the 1st and 2nd objectors as administrators of the estate – for purposes of clarity the persons appointed of the late **MOSES MUGO WAWERU** are:

LUCY WANGUI MUGO

JAMES WAWERU MUGO

PETER MINDO MUGO

They are at liberty to file and exchange joint proposed mode of distribution, or separate proposed modes of distribution within (twenty) days hereof.

Each party shall bear its own costs.

DELIVERED, SIGNED AND DATED AT ELDORET THIS 27TH DAY OF JUNE 2019

H. A. OMONDI

JUDGE