



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 345 OF 1998

IN THE MATTER OF THE ESTATE OF THE LATE KIHARA THATU GATU (DECEASED)

ROSE WAMBUI KIHARA.....PETITIONER

VERSUS

LUCY WANJIRU KIHARA OBJECTOR

RULING

1. The deceased, Kihara Thatu Gatu (deceased) died on the 26th September 1997. Upon his death Rose Wambui Kihara (hereinafter the petitioner) lodged a petition for letters of administration intestate in respect of the estate of the deceased on 22nd July 1998.
2. An objection to the making of the grant was lodged by Alfred Mwaniki Kihara on 8th October 1998. He at the same time lodged a petition by way of cross-application for a grant.
3. The petitioner took out a summons for confirmation of grant on the 7th June 2007. This summons was met by a protest from Alfred Mwaniki Kihara.
4. Among the contested issues is whether the petitioner was a wife of the deceased.
5. On the 20th February 2019 directions were taken that the issue of whether the petitioner was a wife of the deceased be determined first and the parties were to submit on it.
6. In addition to the evidence on record, I note both parties have filed written submissions.
7. I have had regard to the evidence and submissions on record.
8. The issue for determination is whether Rose Wambui Kihara was wife to the deceased.
9. It is the petitioner's case that she got married to the deceased under Kikuyu Customary Law. The deceased took dowry to the petitioner's mother in Nyeri in February 1998 where they gave "*Mwati na harika*" in form of money amounting to Kshs. 10,000/= being the initial dowry payment under Kikuyu Customary Law marriages. She however did not have minutes taken at the ceremony nor photographs. She said elders who witnessed the event are now deceased.
10. The petitioner further averred that she cohabited with the deceased at Subukia at the deceased's plot number 15 from 1998. They got two (2) children being Elijah Thatu, who is named after the deceased's father, and Peter Gathu. The petitioner acknowledges that she had three (3) other children before her marriage to the deceased. The deceased took in these children as his own.
11. For the objector, it is denied that the petitioner was a wife. Alfred Mwaniki Kihara testified that the deceased had only three (3) wives namely Naomi Wanjiku Kihara, Peris Wanjiku Kihara and Lucy Wanjiru Kihara.
12. Alfred stated that there was no relationship whatsoever between the deceased and the petitioner.
13. On cross-examination Alfred testified that he only met the petitioner in court. He had never been to the petitioner's house and he had never been arrested for going to her place. He said the petitioner was only a tenant at deceased's premises.

14. PW2 Naomi Wanjiku testified that the deceased was her husband. The deceased had three (3) wives namely herself, Wanjiku and Wanjiru. PW2 said the deceased did not have a 4th wife.
15. On cross-examination PW2 stated that the petitioner rented a room at a plot owned by the deceased.
16. Lucy Wanjiru Kihara testified that she was a wife to the deceased. She asserted that the petitioner was not a wife to the deceased.
17. Both parties filed written submissions.
18. I have considered the evidence on record and submissions by counsel.
19. As per the directions of court on 20th February 2019, the issue for determination before the court is whether the petitioner is a wife to the deceased.
20. In answer to this question the petitioner's testimony is that she is a wife of the deceased under Kikuyu Customary Law. It is her case that the deceased took dowry to the petitioner's mother in Nyeri in February 1988. "*Mwati na harika*" in form of money (Kshs. 10,000/=) was paid. This was the initial dowry payment under Kikuyu Customary Law.
21. Notably the petitioner did not have minutes or a record of the proceedings in the ceremony. She did not have photographs and she said all witnesses to the ceremony are deceased.
22. Her assertion is countered by the evidence of Alfred Mwaniki Kihara a son and two (2) wives of the deceased who deny that she was a wife and that she was only a tenant at the deceased premises.
23. The applicable legal position is that whoever alleges must prove. It is trite law that the onus of proof is on he who alleges.
24. **Section 107 of the Evidence Act** clearly provides;

"S.107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

25. This burden is known as the legal burden of proof. This principle of law is amplified by the learned authors of the leading **Text book; The Halsbury's Laws of England, 4th Edition, Volume 17 at paragraphs 13 and 14** where the legal burden is described thus;

"13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish those to the appropriate standard, he will loose."

"14. The legal burden of proof normally rests upon the party desiring the court to take action: thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

26. In our instant suit, the petitioner alleges she is a wife of the deceased *under Kikuyu Customary Law*.
27. She bore the burden of proof to establish this fact and this contention.
28. From the evidence adduced by the petitioner, she has not laid material to show that a ceremony was held where initial dowry of Kshs. 10,000/= was paid. The court takes judicial notice of the fact that such ceremonies are always elaborate, involving family members from the man and the woman's side and more often than not involving friends of both families including friends of the man and the intended wife.
29. It is in my view not probably true that among the people who attended the ceremony (if at all) only the petitioner is alive.
30. In the case of **MWK vs AMW, 2017 eKLR** it was held;

"In this case the only proof that the plaintiff has offered to demonstrate the alleged existence of a Kikuyu Customary marriage are pictures which she admits were taken when the parents of the respondents and a few other guests visited her after she had given birth to her child in 2000. There is no evidence of any negotiations by the family no evidence of bride price negotiations and no demonstration of any other customary formalities."

31. This case falls on all fours with our instant suit. I am, in the circumstances constrained to conclude that the plaintiff did not demonstrate

existence of a Kikuyu Customary Marriage.

32. Marriage is a serious union with profound legal and social ramifications. It cannot be second guessed. One is either married within any of the legally recognized systems of marriage or a marriage can be presumed again within parameters known in law.

33. I am again guided by the decision in **NJOKI VS MATHARA AND OTHERS, CIVIL APPEAL NUMBER 71 OF 1989**, where **Kneller J.A** reading the judgment of the Court of Appeal held that;

“i) The onus of proving a customary marriage is on the party who claims it.

ii) The standard of proof is the usual one in civil action, balance of probabilities.

iii) Evidence as to the formalities required for a customary law marriage must be provided to the above standard.”

34. In my considered view the petitioner has fallen short of achieving this standard.

35. I am quick to note that at submissions stage an attempt has been made by counsel for the petitioner to introduce an aspect of presumption of a marriage on the basis of a lengthy cohabitation.

36. From the evidence, the petitioner’s case was specific. She was married to the deceased under Kikuyu Customary law, dowry was paid being Kshs. 10,000/= for “*Mwati na harika*” an initial dowry payment.

37. If the scales of justice were to be equal, it would be a monstrous travesty of justice to allow the petitioner to vacillate and adopt a different position from what is clearly her stated case.

38. A claimant must be certain of his/her claim based on facts within their knowledge. A party cannot be allowed to conduct a case through trial and error method. On the one hand stating, yes, I am married under customary law and bride price was paid and at the same time ask a court to presume a marriage. In my view the respondent must at all times be certain of the case that confronts him.

39. Even if one was to entertain the argument that the petitioner should be allowed to rely on this aspect even though her case is clear cut that she was married under customary law, the only evidence she adduced states that she lived with the deceased from 1988 and they bore two (2) children.

40. The burden of proof again lay on her to show this long cohabitation. Evidence of children between a man and a woman is not necessarily evidence of long cohabitation.

41. The petitioner needed to call evidence to show that she had a long cohabitation with the deceased and that they held each other out as man and wife.

42. As stated in the case of **MWK vs AMW (supra)**, there has to be evidence that the long cohabitation is not a close friendship between a man and a woman, that she is not a concubine but that the cohabitation has crystalized into a marriage and that it is safe to presume that there is a marriage.

43. The judge in the **MWK VS AMW** case went ahead to state;

“Since then, our case law has been consistent in following the English Common Law in requiring that a presumption of marriage arises only when a person proves two factual predicates:

a. Quantitative element – namely the length of time the two people have cohabited with each other; and

b. Qualitative element – namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative elements include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account – and so forth.”

44. These factors in my view must be applied conjunctively and not disjunctively. I am fortified in this holding by the realization that for example a man and a woman may have children over a long period of time yet they continue living separate lives hence no presumption of marriage can be made. At other times a man and woman may be engaged in business together for long yet that alone does not lead to a presumption of marriage. It is the sum total of the factors that leads to the presumption of a marriage. Whether the community considered the two as husband and wife is central.

45. The person asserting the presumption must of necessity put in evidence which, on a balance of probabilities, demonstrates the quantitative and qualitative elements alluded to above (see **MWK vs AMW** case).

46. In our instant case, other than stating that she cohabited with the deceased from 1988 and they bore two (2) children, the petitioner provided no evidence of such cohabitation and repute that the two (2) held out as husband and wife. She did not call any member of the community in which they lived or even a family member to prove the cohabitation and general repute of a husband and wife.

47. Again the case of **MWK vs AMW** falls on all fours with our instant suit. The court at **paragraph 36** of the judgment rendered itself thus;

“What evidence did the plaintiff proffer to enable the court to make the presumption” First, she asserted that she and the Respondent cohabited between 2000 and 2006. However, there is little to prove such cohabitation. The plaintiff produced no rental agreement, no witnesses, and no other evidence to demonstrate the cohabitation. Indeed, the available evidence tends to militate against the argument of cohabitation because the Respondent lived in the UK for four of the years that the Plaintiff claims they cohabited together.

If the Plaintiff’s demonstration of the quantitative elements required for the presumption of marriage to arise was shaky, her demonstration of the qualitative elements were tenuous at best. Of the commonest indicators of “general repute” as termed by Nyarangi JA, this is how the Plaintiff fared.”

48. From the above analysis, this court reaches what to it is the inevitable finding that the petitioner Rose Wambui Kihara has failed to prove that she was married to Kihara Thatu Gatu (deceased) through any system of marriage recognized under the Laws of Kenya and specifically has failed to prove the existence of customary marriage between her and Kihara Thatu Gatu (deceased). On the material before court, and for reasons above stated no presumption of marriage can be made between Kihara Thatu Gatu and the petitioner.

49. The conclusion is that Rose Wambui Kihara was not a wife to Kihara Thatu (deceased).

Dated and Delivered at Nakuru this 17th day of July, 2019.

A. K. NDUNG’U

JUDGE