



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 127 OF 2011**

**IN THE MATTER OF THE ESTATE OF GEORGE ROBINSON WANGOME THIGA (DECEASED)**

**BECKY NJOKI THIGA.....PETITIONER**

**VERSUS**

**LOICE NELIMA THIGA.....1<sup>ST</sup> OBJECTOR**

**ROBINSON WANGOME THIGA.....2<sup>ND</sup> OBJECTOR**

**GEOFFREY WACHIRA THIGA.....3<sup>RD</sup> OBJECTOR**

**JUDGMENT**

1. The deceased Robinson Wangome Thiga died intestate on 26<sup>th</sup> December 2010. He left an extensive estate. In Nairobi, he lived in Kitisuru. His rural home was at King'ongo' Farm in Nyeri. There is no dispute that on 1<sup>st</sup> July 1966 he married Loice Nelima Thiga (1<sup>st</sup> objector) with whom he got three sons. One died, leaving two. The two are Robinson Wangome Thiga (2<sup>nd</sup> objector) and Geoffrey Wachira Thiga (3<sup>rd</sup> objector). He was also survived by his mother Elizabeth Wangome.
2. The deceased and the 1<sup>st</sup> objector were separated before he met the petitioner Becky Njoki Thiga in 1990. A relationship begun and in 1993 the petitioner begun to stay with him on a continuous basis until the time of his death. She stayed with him both at Kitisuru and at King'ong'o. In 2006, she stated, the deceased visited her parents' home in Nyeri where dowry was discussed and paid. It was "Ruracio" ceremony. Thereafter the petitioner considered herself as married to the deceased under Kikuyu customary law. They did not have a child.
3. It was on the basis of the said marriage that, following the deceased's death, she petitioned this court for the grant of letters of administration intestate.
4. The objectors filed an objection to the petition, and also cross-petitioned for the grant. Their case was that the petitioner was not married to the deceased, customarily or otherwise
5. The petitioner testified, and called the deceased's elder brother Major (Rtd) Geoffrey Wangome Wachira (PW 2), the deceased's friend Major General (Rtd) George Ngatia Mbau (PW 3), her uncle Peter Githiru Wahome (PW 4), her villagemate Benson Warui (PW 5), her house help at King'ong'o Lucy Wangari Mbuthia (PW 6), Johnson Kigwongo Wahome (PW 7) who worked for the deceased as driver, and Elijah Ng'ang'a Gatimu (PW 8) who was working at Standard Chartered Bank in Nyeri where the deceased was a customer, and who was a member at Nyeri Golf Club where the deceased was a member.
6. The objectors called the 2<sup>nd</sup> objector to testify in their case.
7. The court is called upon to determine who, between the petitioner and the objectors, will be granted letters of administration intestate in respect of the estate of the deceased. I have indicated that the deceased and the 1<sup>st</sup> objector were married in a civil ceremony in London on 1<sup>st</sup> July 1966, but were separated when the deceased and the petitioner met in 1990. The marriage between the deceased and the 1<sup>st</sup> objector was never dissolved. It follows that the 1<sup>st</sup> objector is the widow of the deceased, and that she and her two sons (the 2<sup>nd</sup> and 3<sup>rd</sup> objectors) are beneficiaries of the estate of the deceased.

8. The petitioner's claim to the estate of the deceased is grounded on the allegation that she was a kikuyu customary law wife of the deceased with whom she cohabited and lived openly between 1993 and 2010 when he died. That would be a period of 17 years, and not 19 years as she claimed. The case by the objectors was that, the deceased and the petitioner may have lived together all that long but she was only a girlfriend and not a wife. The 2<sup>nd</sup> objector swore that the petitioner did not change her maiden name to that of the deceased, and that she always declared herself in her official documents as being single. The petitioner stated that for the duration that she lived with the deceased, they stayed at Kitisuru during the weekdays and at King'ong'o in Nyeri during the weekends. The 2<sup>nd</sup> objector testified that whenever the petitioner was in Nyeri she stayed at her house at Ruringu; that the house was amongst a block of flats that the deceased had developed for her. If the deceased had developed a block of flats for the petitioner, as alleged by the 2<sup>nd</sup> objector, that would go to show the close relationship that there was between the two. The petitioner, however, denied that the deceased had built a block of flats for her.

9. There is no dispute that for most of the time when the deceased and the petitioner lived together, the 2<sup>nd</sup> and 3<sup>rd</sup> objectors were living in the United Kingdom. The 2<sup>nd</sup> objector testified that he would visit and that way he kept in touch with what was happening at home.

10. The evidence of the petitioner was that on 8<sup>th</sup> July 2006 the deceased went to her parents' home in Ruringu to formalise his relationship with her under Kikuyu customary law. Her parents were not alive. Her relatives had gathered for the ceremony. The spokesperson on her side was PW 4. PW 4 testified that dowry was negotiated. On this day the deceased paid Kshs.70,000/=. He went away promising to bring a cow and calf, as had been agreed by the two sides. In December 2006 he brought a grade cow and a calf in fulfilment of the agreement. That evidence regarding the agreement on, and payment of, dowry was not challenged. Issue was taken about the fact that the deceased went to pay dowry alone without members of his family, and that there was no "Ngurario" function performed. The evidence by the petitioner and PW 4 was that their side had other people in attendance. She gave their names.

11. I am aware of the elaborate nature of Kikuyu customary law marriages, as was documented by Dr. Eugene Cotran in **Restatement of African Law: Kenya Volume I The Law of Marriage and Divorce (London: Sweet & Maxwell, 1968)**. According to Dr Cotran, there can be no valid marriage in Kikuyu unless "Ngurario" ram is slaughtered. He also stated that there can be no valid marriage under Kikuyu law unless part of the dowry has been paid. In the instant case, dowry was paid but no "Ngurario" ram was slaughtered. However, it has been observed by the courts that Kikuyu customary law is not static; it is dynamic and evolving. Where a party claims that there was a kikuyu customary marriage he has to only show that the essential steps and ceremonies were conducted, but with the necessary modification to suit modern times.

12. In **Eliud Maina Mwangi –v- Margaret Wanjiru Gachangi [2013]eKLR**, for instance, the Court of Appeal observed as follows:-

**“Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like 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. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.”**

13. In **M.W.K. –v- A.M.W. [2017]eKLR**, the High Court observed that-

**“Even then, there is no denying that certain pre-requisites must be present. However, the failure of certain formalities does not *per se* invalidate a customary marriage if there is enough evidence to show that a customary marriage was intended and certain substantive pre-requisites performed.”**

14. In the instant case, the deceased and the petitioner had lived together for about 13 years. The petitioner and PW 2 stated that he sought to formalise this relationship under Kikuyu customary law. He went to the petitioner's parents' home. He found her maternal uncle (PW 4) and other of her relatives. Dowry was negotiated. Part of it was paid to them in money form. The balance was by way of a cow and calf which he paid subsequently. He continued to stay with the petitioner until he died about 4 years later.

15. I consider that, as was stated in **Hortensia Wanjiku Yawe –v- The Public Trustee, Civil Appeal No. 13 of August 6, 1976**, the onus of proving customary law marriage is generally on the party who claims it; the standard of proof is on balance of probabilities; and the evidence as to the formalities required for a customary law marriage must be proved to that evidential standard. However, the court has to bear in mind that such customary marriage formalities keep evolving with time.

16. On the evidence that was tendered before me, and considering all that I have said in the foregoing, I find that it has been established to the required standard that there was a valid Kikuyu customary law marriage contracted between the deceased and the petitioner. The petitioner was therefore the 2<sup>nd</sup> widow of the deceased, and a beneficiary of his estate.

17. It is material to point out that PW 2 is the eldest brother of the deceased. He stated that since 1990s he knew the petitioner to be the deceased's wife after he introduced her to him. In 2009, in a family meeting called by the deceased, he introduced the petitioner to the family as his wife. In the meeting was their mother and siblings. When PW 2's daughter was getting married in 1999 and his son got married in 2011, the petitioner participated in her capacity as the wife of the deceased. PW 3 was a friend of the deceased for 18 years before the latter died. He knew the petitioner to be the deceased's wife after she was so introduced by him. PW 6 is a house help in the King'ong'o home where the deceased and the petitioner lived before the former died. She testified that the two employed her, and she knew the two to be married. PW 7 worked for the deceased as a driver between 2003 and 2011. When he joined the employment he knew, from then onwards, that the petitioner was the deceased's wife. It is evident that after the burial of the deceased the 2<sup>nd</sup> and 3<sup>rd</sup> objectors sought to evict the petitioner from the King'ong'o home even when the deceased's mother resisted the attempt. It took the court to stop the eviction. Lastly, the message of condolences by the then President Mwai Kibaki, following the death of the deceased was delivered to the petitioner.

That must have been in recognition that she was the deceased's widow.

18. It is true that the petitioner did not change her maiden name, and continued to refer to herself as single. There were several documents that she signed while staying with the deceased in which she described herself as single. According to the 2<sup>nd</sup> objector, this was evidence that the deceased and the petitioner were not married. However, he was referred to a photo taken in 2008 at King'ong'o home with him, the deceased and the petitioner. The deceased was celebrating 15 years after he stopped smoking. He admitted he had met her with the deceased in 2006 during his brother's funeral. Sometimes later, she brought the deceased's mother and his (2<sup>nd</sup> objector's cousins) to King'ong'o house. There were several fotos shown to him in which the petitioner was with his son at Kitisuru home. There were various skype and email communications between him and the petitioner, while he was at the United Kingdom, and the petitioner was living with the deceased at Kitisuru. There were documents produced to show that when the deceased was sick and in Nairobi Hospital he indicated the petitioner as his next of kin, and referred to her as his wife. The arrangements to take the deceased to India for treatment were done jointly by the petitioner and the 2<sup>nd</sup> objector. The 2<sup>nd</sup> objector acknowledged, when cross-examined, that the petitioner lived with the deceased, both at Kitisuru and at Kingong'o.

19. The petitioner had asked that, in the event that the court finds that a Kikuyu customary law marriage had not been proved, it be found that the long stay and cohabitation between her and the deceased was enough evidence to lead to the presumption of marriage between them. In **M.N.M. –v- D.N.M.K. & 13 others (Estate of Mbiyu Koinange) [2017]eKLR** the Court of Appeal was called upon to determine whether E., who had started to cohabit with the deceased while he was still married to M., could be recognised as a widow of the deceased. The court found that E. was a widow of the deceased by virtue of the presumption of marriage. It observed as follows:-

**“This leads us to the question whether on the evidence before it, the court could have presumed a marriage between the deceased and E. based on cohabitation and the parties holding themselves out to society as husband and wife. In (Mbogoh –v- Muthoni & Another [2006] IKLR 199, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable (See also Kimani –vs- Kimani 2 Others [2006]2KLR 272).**

**The presumption of marriage has been recognised in our jurisdiction for a long time. (See for example Hortensia Wanjiku Yawe –v- Public Trustee, C.A No. 13 of 1976). In M.W.G. –v- E.W.K. [2010]eKLR, this court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact. As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in customary, Mohammedan or statutory marriage. In Hortensia Wanjiku Yawe –v- Public Trustee (Supra), Wambuzi, P. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption, arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted .....**”

20. The petitioner and the deceased lived together and cohabited for a long time, their friends and relatives knew them to be married, and they (the petitioner and the deceased) held themselves out as married. Even assuming, for a moment, that they did not go through the Kikuyu customary law rites and ceremonies of marriage, this court would still find that they were married by virtue of the principle of presumption of marriage. In reaching this decision, I have considered that it was upon the petitioner to give strong and consistent evidence that their long cohabitation crystallised into a marriage and that it is safe to presume that there was a marriage (**M.W.K. –v- A.M.W. (Supra)**). I find that the petitioner discharged her burden.

21. **Section 3(5) of the Law of Succession Act (Cap 160)** provides that:-

**“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 purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”**

22. The deceased had no capacity to marry the petitioner, in view of his earlier civil marriage to the 1<sup>st</sup> objector. However, under **section 3(5) of the Act** the petitioner is considered a wife for the purposes of succeeding the deceased as Kikuyu customary law marriage is a polygamous marriage (**Irene Njeri Macharia – v- Margaret Wairimu Njomo & Another [1996]eKLR** and **Beatrice Adhiambo Sijenyi – v- Josephine Kapukha Khisa & 2 Others [2018]eKLR**).

23. As to who should administer the estate of the deceased who died intestate, **section 66 of the Act** provides for order of priority as follows:-

- (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 interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors.

24. I consider that the 1<sup>st</sup> objector, although preferred by the law, had been separated from the deceased for a long time. That being the case,

I appoint the petitioner and the 2<sup>nd</sup> objector as the joint administrators of the estate of the deceased. A joint grant shall issue to them.

25. Because this dispute has been outstanding since 2011, I ask that the two administrators, or any of them, shall within 60 days file and serve an application for the confirmation of the grant, proposing how the estate should be distributed.

26. This is a family dispute, costs shall be borne by the estate of the deceased.

**DATED and DELIVERED at NAIROBI this 28<sup>TH</sup> OCTOBER 2019**

**A.O. MUCHELULE**

**JUDGE**