



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 276 OF 2014

RE ESTATE OF JOHNSON GITHAIGA JOSHUA NG'ANG'A (DECEASED)

JANE MUKAMI GITHAIGA.....1ST PETITIONER

EDWARD MBUI GITHAIGA.....2ND PETITIONER

VERSUS

PERPETUAL WANGUI MICHUKI.....PROTESTOR

JUDGMENT

1. Johnson Githaiga Joshua Ng'ang'a (hereafter *the deceased*) died intestate on 6th March 2014.
2. A dispute has arisen over the *distribution* of his free estate. The protestor claims a share as his *second wife*. But according to the petitioners, the deceased had *one* wife, *Anastacia Njeri Githaiga*. They stated that the protestor was just a casual labourer at the deceased's farm. They also pleaded that the deceased lacked legal capacity to contract another marriage.
3. The grant was first issued on 29th August 2014 to the two petitioners. The protestor lodged a caveat on 1st July 2014 and an affidavit of protest on 9th June 2015. A further protest was filed with leave on 6th December 2016.
4. I recorded *viva voce* evidence. The disputants called two witnesses each. The witnesses relied largely on their written statements.
5. The deceased left the following assets:
 - a. Loc 9/Kanyenyaini/982
 - b. Loc 9/Kanyenyaini/820 (Jointly with his sisters)
 - c. Pension dues with NSSF
 - d. Shares in Barclays Bank Limited, Equity Bank Limited, Housing Finance Company of Kenya Limited, Kenya Commercial Bank Limited, Kenya Airways Limited, Safaricom Limited and KenGen Limited all listed on the Nairobi Stock Exchange.
6. The protestor (PW1) made reference to her statement dated 4th May 2018. She testified that she was initially married to another man, *Stephen Michuki* in 1986. The union was dissolved by a decree of the Resident Magistrate at Kangema on 22nd December 2011.
7. She said that she subsequently married the deceased in 2012 under Gikuyu customary law. She said that dowry negotiations took place at Tambaya, Mukwure-ini at her father's residence. She was present. The proceedings were witnessed by Samuel Wachira Kariuki, Simon Mbue and Richard Ndegwa (PW2). She said that her mother, Cecilia Wambui, was also present.
8. The protestor testified that on the first occasion in January 2012, the deceased paid Kshs 10,000. In February 2012, he paid a further Kshs 20,000 and a cleansing ram, *mburi ya mururu*. In March 2012, he paid a further Kshs 40,000 and the two ceremonial goats known as *mwati na harika*. She claimed that they cohabited with the deceased at Mutaro village, Kanyenyaini.
9. The protestor had children from her first marriage. She did not get any offspring with the deceased. She said that after the death of the

deceased, she and her co-wife collected the remains from Mathari Hospital. However, after the burial the petitioners chased her away from the homestead and filed this cause in secret.

10. Richard Ndegwa (PW2) is an uncle to the protestor. He relied on the witness statement dated 4th May 2018. He testified that he was present on all the three occasions when the deceased paid dowry at Mukurwe-ini. That marked the close of the protestor's case.

11. The 1st petitioner (DW1) is a daughter of the deceased. Her mother is Anastacia Njeri Githaiga (DW2). They both relied on their written statements dated 29th June 2018. The relevant evidence is as follows: the deceased married Anastacia in 1972 under Gikuyu customs. The marriage was later solemnized at Tuthu Catholic Church on 21st January 1984. The certificate of marriage was produced as exhibit 1. The marriage subsisted until the death of the deceased.

12. DW2 testified that she has five children:

- a. Jane Mukami Githaiga born in 1975;
- b. Alice Wambui Githaiga born in 1977;
- c. Margaret Nyambura Githaiga born in 1978;
- d. Grace Muthoni Githaiga born in 1981; and
- e. Edward Mbui Githaiga born in 1983.

13. There was another child, Luka Mugo, who is now deceased. DW2 testified that the protestor was employed as a casual labourer by the deceased to pick tea. She said that in 2013, the deceased was ailing. DW2 invited the protestor to assist her in taking care of the deceased. DW2 was emphatic that the protestor was not cohabiting with the deceased but was residing in her first husband's (Michuki's) homestead.

14. DW1 and DW2 denied that the protestor signed off for the body of the deceased at the morgue or participated in the funeral. They made reference to a copy of the funeral programme. They admitted in cross-examination that they authored the programme to the exclusion of the protestor.

15. The live issue for determination is whether the protestor was married to the deceased. As suspicious as it sounds, I have no cause to doubt that the deceased *may* have asked for the protestor's hand in marriage between January and March 2012. But all the requisite stages of a Gikuyu marriage of *riracio* and *ngurario* do not seem to have been achieved.

16. Furthermore, the entire proceedings were a *nullity*. The deceased had no *legal capacity* to marry another wife under Gikuyu customary law. He had contracted a statutory and *monogamous* marriage with his first wife, Anastacia, at Tuthu Catholic Parish on 21st January 1984 under the **African Christian Marriage and Divorce Act** (now repealed). The marriage persisted until his demise.

17. I thus readily find that the purported marriage between the deceased and the protestor was unlawful and *void* for all purposes. The deceased and the protestor had *no* children from the alleged union. The children of the protestor from her first marriage are *not* entitled to any share of the estate of the deceased. The protestor's suit is accordingly *dismissed*.

18. The final orders shall be as follows-

- a. That the protest is hereby dismissed.
- b. That the grant issued on 29th August 2014 to the 1st and 2nd petitioners is hereby confirmed under section 71 of the **Law of Succession Act**.
- c. That the net intestate estate shall be distributed as follows:
 - i. Loc 9/Kanyenyaini/982 shall be divided equally between Anastacia Njeri Githaiga, Jane Mukami Githaiga, Alice Wambui Githaiga, Judy Wanjiku Maina, Grace Muthoni Githaiga and Edward Mbui Githaiga.
 - ii. Loc 9/Kanyenyaini/820 shall in the first instance be subdivided into *two equal* portions. The first portion shall be distributed equally to Lucy Wanjiku Ngugi and Margaret Wambui Ngugi. The second portion shall be shared equally between Anastacia Njeri Githaiga, Jane Mukami Githaiga, Alice Wambui Githaiga, Judy Wanjiku Maina, Grace Muthoni Githaiga and Edward Mbui Githaiga.
 - iii. Shares in Barclays Bank Limited, Equity Bank Limited, Housing Finance Company of Kenya Limited, Kenya Commercial Bank Limited, Kenya Airways Limited, Safaricom Limited and KenGen Limited shall devolve wholly to Anastacia Njeri Githaiga.
 - iv. Pension dues with NSSF shall devolve wholly to Anastacia Njeri Githaiga.

19. Costs follow the event and are at the discretion of the court. In the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 29th day of November 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Kirubi for the petitioners instructed by Kirubi Mwangi Ben & Co. Advocates.

The protestor (present).

No appearance by counsel for the protestor.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.