



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1161 OF 2015

IN THE MATTER OF THE ESTATE OF JOSEPH NJENGA CHEGE (DECEASED)

ESTHER NYAMBURA NJENGA.....1ST APPLICANT

PAUL CHEGE KAMAU.....2ND APPLICANT

GLADYS WAMBUI JOSEPH.....3RD APPLICANT

DAVID KING'ERU NJENGA.....4TH APPLICANT

VERSUS

MARGARET WANJIKU NJENGA.....1ST RESPONDENT

ERIC CHEGE NJENGA.....2ND RESPONDENT

RULING

1. The deceased died on 13th October 2014. A grant of letters of administration intestate in respect of his estate was issued to the respondents on 3rd May 2017 and is pending confirmation. The following comprised the estate of the deceased:

- a) Karai/Karai/919;
- b) Karai/Karai/920;
- c) Karai/Karai/2776;
- d) Karai/Karai/1725;
- e) Nguirubi/Thigoi/577; and
- f) Dagoretti/Riruta/T.135

2. The applicant filed the present summons dated 1st August, 2017 seeking orders that :

- a) the 1st, 2nd, 3rd, and 4th applicants be recognized as the dependants of the deceased by virtue of their being wife and children of the deceased respectively;
- b) to confirm the paternity of the 2nd, 3rd and 4th applicants, the remains of the deceased interred in Karai/Karai/919 be exhumed and a DNA test be carried out by the government chemist; and
- c) the police officer in charge of Karai area does supervise the exhumation process.

3. The application was based on the grounds that:

- a) the applicants are dependants of the deceased by virtue of the deceased being a husband to the 1st applicant and a father to the 2nd, 3rd and 4th respondents;
- b) the deceased was polygamous whereby the house of the applicants constitutes the first house whilst the house of the respondents constitutes the second house; and
- c) due to selfishness and greed, the respondents have refused to include the applicants as dependants and beneficiaries of the estate of the deceased.

4. The application was supported by the affidavit of the 1st applicant. It was her case that she was a widow of the deceased having married in 1957 under Kikuyu Customary Law; that the deceased paid a cow and Kshs.200/= to her parents as dowry, and that he visited her parents and continued paying dowry but unfortunately all the witnesses to the payment of dowry, who were the deceased's parents and brothers, have since died; that together with the deceased they were blessed with 7 children, although 4 of them have since died; that the properties registered as Karai/Karai/917-920 and Dagoretti/Riruta/T.135 were acquired through the joint efforts and the income from her farming and the deceased's income from employment; that she immensely contributed to the development of Karai/Karai/917-920 including digging of a borehole when the deceased was working away from their home; that she disagreed with the deceased and went to live on Dagoretti/Riruta/T.135 where she still lives today but has continued farming in Ndeiya; that the deceased catered for all the needs of their children by paying school fees, food, clothing and other basics; that the deceased secretly married the 1st respondent in 1989; that she together with her children have always been regarded as family by the 1st respondent and her children and were even recognized in the deceased's eulogy; that the prolonged cohabitation between her and the deceased from 1957 up to 2014 when the deceased died, the children they got together and the various acknowledgements by the 1st respondent gave rise to a presumption of marriage; and that a DNA test ought to be done to determine the paternity of her children.

5. The application was further supported by the 2nd, 3rd and 4th applicants through their joint affidavit dated 2nd August 2017 and filed on 3rd August 2017.

6. The application was opposed by the 1st respondent through her replying affidavit dated 3rd October 2017 and filed on the same day. She stated that she was the only legal wife of the deceased having solemnized their marriage on 12th August 1989 under the Marriage Act; that the 1st applicant was never married to the deceased under customary marriage as alleged and that she and her children are not dependants; that the 1st applicant did not prove that there existed a marriage between herself and the deceased, and that she did not provide certified copies of the birth certificates of the alleged children to prove paternity; that this court has no jurisdiction to grant the prayers sought for exhumation as the **Law of Succession Act Cap 160** does not have provisions for exhumation of a deceased body; that the order for exhumation is only given under special and unique circumstances which have not been shown by the applicants; and that during his lifetime, the deceased never introduced her or put on record that he had another wife and children and that her family believed that the deceased died monogamous.

7. Parties filed their written submissions which I have considered. The issue for this court's determination is whether the 1st applicant was married to the deceased and thus a dependant of his estate, and whether the 2nd, 3rd and 4th applicants are dependants of the deceased by virtue of being his children.

8. **Section 29** of the **Law of Succession Act**, defines a dependant as:

“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand- parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

9. The 1st applicant's case is that she was married under customary law to the deceased. The onus of proving a customary marriage rests on the party claiming it (**T -v-W [2008] 1 KLR [G&F] 276; In Re Estate of Kebeya (Deceased) [2008] 1 KLR [G&F] 374**). It was up to the 1st applicant, who alleged that she was married to the deceased under Agikuyu customs, to prove the same.

10. To prove the marriage, the 1st applicant provided the following:

- i. a copy of proceedings from the Provincial Land Disputes Appeals Committee, Central Province in Appeal Case No. 108/99 in which the committee, upholding the findings of the Kikuyu Land Dispute Tribunal, and after taking evidence of various witnesses among them the 1st respondent's mother, held that the 1st applicant was a wife to the deceased and that dowry had been paid to the 1st applicant's father. The committee had proceeded to distribute to her a portion of the deceased's properties;

- ii. a copy of hand-written judgment signed by the assistant chief, Karai sub location where the assistant chief found that because of

the long cohabitation of 22 years between the deceased and the 1st applicant; the 7 children they got together; the fact that the deceased had never ended their cohabitation by slaughtering a goat or any other legal action; and because of the fact that the deceased had educated their children and buried those that had died, the elders had decided that the 1st applicant was still the deceased's wife;

iii. a copy of the funeral programme contained an "Eulogy" whose part of "Marriage" read as follows:-

"The late Joseph met and married his dear wife Esther Nyambura Karinga in accordance with the Kikuyu tradition in 1957. They were blessed with 4 children namely Gladys Wambui, Paul Chege, David Kingeru and the late Samuel Gikera. In the year 1981, he married his second wife Margaret Wanjiku in accordance with the Kikuyu traditions. They were blessed with their first born child Fraciah Gathoni Njenga and later on Mary Wanjiku Njenga and Eric Chege Njenga. Their marriage was solemnized in 1989..."

iv. copies of photographs of the deceased with herself together with other members of both families allegedly taken during several occasions and during the burial of the deceased;

v. an affidavit in verification of proposed citation to accept or refuse letters of administration intestate sworn by the 1st respondent on 20th April 2015 before the Kikuyu Principal Magistrate Court, she confirmed that the deceased died intestate and was survived by two houses, the 1st house being the 1st applicant together with her three children while the 2nd house comprised of herself and three children;

vi. a copy of a letter from the chief of Karai location in which the chief acknowledged that the deceased hailed from Karai location and was survived by two houses being Esther Nyambura Njenga (1st wife/widow), Gladys Wambui Njenga (daughter), Paul Chege Kamau (son) and David Kingeru Njenga (son); and Margaret Wanjiku Njenga (2nd wife/widow), Frasier Gathoni Njenga (daughter), Mary Wanjiru Njenga (daughter) and Eric Chege Njenga (son);

vii. a copy of receipts for payment of funeral expenses received from David Kingeru Njenga and a copy of burial permit issued to David Kingeru Njenga;

viii. an affidavit of Stevenson Gakumo Chege, the deceased's nephew confirming the deceased and the 1st applicant lived together as husband and wife from 1957 and got children together before the deceased married the 1st respondent in 1981, that he knew that the deceased took sheep and cows to the 1st applicant's home but he had not finalized the whole process in that Ngunario was not done and that he knew all the men who took the dowry to the 1st applicant's home but they are all deceased; and

ix. a copy of an affidavit the assistant chief of Karai sub location, Francis Njoroge Ngigi who confirmed that he deceased left behind two houses.

11. To further prove that her children were the children of the deceased, the 1st applicant filed copies of birth certificates for her children Paul Chege, Gladys Wambui and David Kingeru which confirmed that their father was Joseph Njenga.

12. The 1st respondent's contention was that the evidence sworn by the 1st applicant was insufficient to prove that she was the wife of the deceased, or that she and her children were his dependants. Regarding the decision of the Provincial Land Disputes Appeals Committee (Appeal No. 108 of 1999), she swore that the deceased had appealed to the High Court in **Civil Appeal No. 238 of 2000 at Nairobi, Joseph Njenga Chege –v- Esther Nyambura Njenga** (Annexure "M-2") wherein the appeal was allowed on the ground that the Tribunal (whose decision led to the appeal to the Provincial Committee) had no jurisdiction over registered land. She denied that she had sworn an affidavit at the Principal Magistrate's Court at Kikuyu in Succession Cause No. 52 of 2014 to acknowledge that the applicants constituted the first house of the deceased.

13. There is no dispute that the deceased and the 1st respondent were married under the **Marriage Act** on 12th August 1989. This was a monogamous marriage. The 1st respondent's case was that the deceased never told her that he had another wife, or family. However, it does not appear disputed that when the deceased died, and during the burial ceremony, the 1st applicant was acknowledged in the "Eulogy" as the first wife of the deceased, the two having got married under Kikuyu customary law in 1957. Her children (the applicants) were acknowledged as the children of the deceased. The copy of the funeral programme and the "Eulogy" were not made by the applicants, and were not challenged, either during the funeral or now, by the respondents. Both families were, according to the photographs taken during the funeral, present and prominently so.

14. It is also evident that the 1st respondent initially filed this succession cause at Kikuyu Court and swore an affidavit in verification of proposed citation to accept or refuse letters of administration intestate addressed to the 1st applicant whom she alleged had refused to sign the petition for the grant of letters of administration intestate. She swore that the 1st applicant was the 1st wife of the deceased, and that the 2nd to 4th applicants were the deceased's children by her. She cannot be allowed to resile from her own sworn evidence given before Kikuyu court. The cause came to this court because jurisdiction was successfully contested at that court.

15. I find that the 1st applicant's evidence that she was the Kikuyu customary law wife of the deceased had sufficient material support as shown in the foregoing. The 1st respondent's denial of this fact is an afterthought. Infact, strictly speaking, the deceased had no legal capacity to enter into a monogamous marriage with the 1st respondent. Nonetheless, both the 1st applicant and the 1st respondent were under **section 3(5) of the Law of Succession Act**, wives of the deceased, and their children were children of the deceased. I so declare.

16. With the clear and incontrovertible evidence that the applicants constituted the first family of the deceased, it is not necessary to consider the request to have the remains of the deceased to be exhumed to be subjected to DNA testing.

17. Under **rule 73** of the **Probate and Administration Rules**, the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I have declared that the 1st applicant was the widow of the deceased, and that she and the other applicants constituted the first house of the deceased. The grant herein was issued to the respondents on 3rd May 2017 without reference to the applicants. The 1st applicant had equal right to petition the court and be issued with the grant. I consequently revoke the grant that was issued to the respondents on 3rd May 2017. In its place, I order a fresh grant to be issued into the joint names of the 1st applicant (Esther Nyambura Njenga) and the 1st respondent (Margaret Wanjiku Njenga). The parties, or either of them, shall within 30 days apply for the confirmation of the grant.

18. This was a family dispute. Each side shall bear own costs.

DATED and DELIVERED at NAIROBI this 30TH day of MAY 2018.

A.O. MUCHELULE

JUDGE