



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 200 OF 2009

(CONSOLIDATED WITH HCSC NO. 250 OF 2009)

IN THE MATTER OF THE ESTATE OF PETER KINYONGA KARONGA (DECEASED)

JUDGMENT

1. The deceased herein died on 15th July 2008. A petition for grant of letters of administration intestate was lodged herein on 30th January 2009, by Mary Wangeci Kinyonga, in her capacity as his widow. The deceased was said to have had married one wife, the petitioner herein, with who he had had nine (9) children namely; Lucy Wambui, Alex Njoroge (deceased), Rosebell Wairimu, Susan Waruga, Michael Kimani, George Gitau, Henry Kariuki, Grace Njoki and Florence Wambui. He was said to have had died possessed of a parcel of land known as Dagoretti/Kangemi/365 and money in account number [.....] at K-Rep Bank. A grant of letters of administration intestate was made to the petitioner on 6th July 2009. Mary Wangeci Kinyonga died on 19th June 2015, and she was substituted through by an order made on 21st September 2016, with Henry Kariuki Kinyonga and Lucy Wambui Gichu, a grant of letters of administration intestate issued to them accordingly.
2. On 29th July 2009, a summons for revocation of grant was filed in the cause by Esther Mwikali Kinyonga. She claimed that the petitioner had not made a full disclosure of the material facts, in particular that she had not included all the beneficiaries of the estate. The applicant claimed to be a widow of the deceased.
3. Mary Wangeci Kinyonga filed a response to the application on 22nd January 2010, by an affidavit sworn by her on even date. She asserted that the deceased had been married to only one wife, herself. She said the applicant, Esther Mwikali Kinyonga, was an impostor and not a wife of the deceased. She denied concealing any information from the court and of fraudulently making false statements.
4. There is another cause with respect to the same estate, being HCSC No. 250 of 2009. The petition originating the cause was lodged at the registry on 15th May 2009 by Esther Mwikali Kinyonga in her purported capacity as widow of the deceased. She expressed the deceased to have had been survived by four (4) children, being Nancy Mumbua, Derick Mululi, Maxwell Mambo and Caroline Kaluki. The only asset listed as making up the estate is the money in the bank account at K-Rep Bank. A grant of representation was not made in the matter.
5. The two causes were consolidated on 26th October 2009 by an order by Nambuye J. It was directed that the instant cause be the main cause. Directions were given on 26th January 2010 that the said application be disposed of by way of *viva voce* evidence.
6. The oral hearing began on 14th May 2013. The first on the witness stand was Camlus Otieno Oduor. He was the Chief of Kangemi Location. He testified on summonses that he had issued to Mary Wangeci Kinyonga in 2008, when he required her to come before him so that she could clarify as to who the members of the family of the deceased were. He stated that she came with elders, Esther Mwikali Kinyonga also came to the meeting with one of her daughters, eventhough he had not summoned her. He said that the summonses were necessitated by the claim by Esther Mwikali Kinyonga that she too had been a wife of the deceased. He stated that he required them to produce documents that connected them to the deceased. Mary Wangeci Kinyonga produced her identity card which had the deceased as part of her name, while Esther Mwikali Kinyonga did not produce any documents. He said that he knew the deceased personally but he did not know all members of his family. He added that he knew Mary Wangeci Kinyonga as he had met her at the deceased's home when he went there to resolve an issue that the deceased had with his tenants.
7. Mary Wangeci Kinyonga was the next witness on the stand. She said that she was the widow of the deceased. She testified that after the deceased died she obtained a burial permit and that they held meetings to arrange the burial, Esther Mwikali Kinyonga did not attend any of them. She alluded to the summonses by the Chief, where she met Esther Mwikali Kinyonga who told her that she was a wife of the deceased, although they did not have children together. She mentioned that there was a farm that the deceased was buying for her in order to put up a home for her, and she asked the witness to help her complete the sale transaction as well as the construction of the house. She stated that she told Esther Mwikali Kinyonga that she was not interested and asked her to go ahead and do whatever she wished with the property. Esther Mwikali Kinyonga was said to have had produced a document before the Chief and claimed that the deceased, and John Nyota, had gone for *uthoni* at her parents' home. The Chief then stopped the proceedings at that stage so as to summon the said Nyota. When Nyota eventually

appeared before the Chief he denied the alleged *uthoni*. The witness stated that Nyota said that he did know Esther Mwikali Kinyonga and her children, as she was a friend of his wife, but denied knowing any of her relatives. She further testified to having questioned Esther Mwikali Kinyonga about where she had taken the deceased's clothes, to which she responded that the deceased had left them at her home. She was reported to have said that the deceased used to visit her home from 10.00am and stay on till 8.00 pm, stating that he never slept there. The witness stated that she and the deceased contracted marriage in 1960 and the two lived together until the deceased died. She stated that the deceased never mentioned Esther Mwikali Kinyonga to her as his wife. She stated that she knew Esther Mwikali Kinyonga as a resident of Kangemi, who sold clothes, and said that she had even come to her house and sold, to her bed sheets. She said that the deceased probably visited Esther Mwikali Kinyonga during the day for he never used to stay away from her home. Confronted with photographs where the deceased was posing with Esther Mwikali Kinyonga, she said that she could not explain why he posed with her that why, adding that all the said photographs were apparently taken on the same day.

8. James Gitau Karonga took the stand next. He was the elder brother of the deceased. He stated his age to be 80 years and described himself as a family leader who represented the Karonga family in marriage ceremonies, saying that he gave out the deceased's daughters and received the deceased's daughters-in-law upon their marriage into the family. He identified Mary Wangeci Kinyonga as having been a wife of the deceased since 1958, and with whom the deceased had several children, whose names he mentioned. He said that he did not know Esther Mwikali Kinyonga, and did not know that the deceased had another wife save Mary Wangeci Kinyonga. He mentioned that he was among those who accompanied Mary Wangeci Kinyonga to the meetings at the Chief's office where Esther Mwikali Kinyonga claimed to have had been married by the deceased. He testified that Esther Mwikali Kinyonga even mentioned an *uthoni* ceremony that had been attended by the deceased and Nyota. He said that Esther Mwikali Kinyonga did not attend the funeral committee meetings and the funeral service, and no one came forward either at the committee meetings or at the funeral service to claim to be a widow of the deceased apart from Mary Wangeci Kinyonga. He also said that he did not know Esther Mwikali Kinyonga's children, adding that he only came to meet her for the first time at the Chief's office. He said that he was not aware that when the deceased was unwell he was taken to hospital by Esther Mwikali Kinyonga. He also said that he was aware that Nyota was a friend of the deceased, but he never asked him about the *uthoni* event that he was supposed to have had attended with the deceased. He further said that he did not know how Esther Mwikali Kinyonga got to know details of the property of the deceased.

9. John Nyota Macharia followed. He said that he was a close friend of the deceased since 1970. He testified that he knew of only one wife of the deceased, called Mary Wangeci Kinyonga. He said that he knew Esther Mwikali Kinyonga as a clothes hawker, who often sold bed sheets to his wife, but said that he did not know of her relationship with the deceased. He said he did not know her relatives and asserted that he did not attend any alleged customary law marriage ceremony at her parents' home. He stated that he had never set foot in Ukambani. He said that he could not have attended such a ceremony in the absence of the deceased's relatives. He stated that the deceased had never mentioned her to him as his spouse. When confronted with an exercise book where the proceedings at the alleged *uthoni* allegedly were recorded, the witness said that the signature in that book purported to be his was not his.

10. The administrator's last witness was Godfrey Chania, a Chief Inspector of Police. He was a document examiner, who had examined the known signatures of the deceased and of John Nyota against their purported signatures in the book where the proceedings of the purported *uthoni* were recorded. He declared that he formed the opinion that the signatures in the book and the ones said to be the known signatures of the two were not made by the same persons. Regarding the known signatures of John Nyota he said that the same tended to rise from the baseline, while the signature in the book tended to sit horizontally on the alignment or the baseline. Regarding the known signatures of the deceased he said that the deceased signed on the baseline so that the baseline tended to cross his signature, while the signature in the book did not cross the line and tended more towards being between the lines. He also stated that he noted that the signature in the book was slower and there was evidence of hesitations or several pen lifts.

11. The case for Esther Mwikali Kinyonga opened on 21st January 2015, with Mary Mwangangi Nduuti, her mother, taking the stand. She started by stating that her daughter was not married and had never married, but was lastly married by the deceased. She talked about the *uthoni* ceremony attended by Nyota, the deceased and her daughter. She stated that when the deceased came to her home at Kola, Machakos, to know the home and pay dowry, she looked for elders to come and carry out the ceremony. A sum of Kshs. 50, 000, 00 was paid as dowry. When he died the witness attended the burial, and so did Nyota and Mary Wangeci Kinyonga. She said that her daughter had four children, but she said that she did not know their names, neither did she know when they were born. She said that she did not attend the meeting arranging the deceased's funeral as she was not known to the family of the deceased for she had not been introduced to them by the deceased.

12. Esther Mwikali Kinyonga testified last. She introduced herself to the court as Esther Mwikali Mwangangi, saying that that was her official name. She testified that she had met the deceased in 1996 and began to live with him in 2000. He rented for her a house and moved her into it. She mentioned the visit to her parents by the deceased and Nyota, where *ntheo* was paid in form of Kshs. 50, 000.00. She mentioned that everything was recorded in a book that she sought to put in as evidence. The record was allegedly signed by the deceased and Nyota. She stated that Nyota did not tell the court the truth when he said that he had never visited Ukambani at all, had not been to her parents' home with the deceased and had not signed the record in the said book. After the deceased died, she was informed of the same and she attended the burial. She said that the deceased used to operate a bank account at K-Rep Bank, and he would send her to deposit money in the account. She stated that she got her children before she married the deceased. At the time of the marriage the said children were minors and the deceased had agreed to take her with them. She testified that the deceased had his clothes in her house and nothing else. She said that he would sometimes stay in her house for only up to one week. She said that she had been listed in the funeral programme and in the death announcements as a wife of the deceased, but her children were not recognized. She did not however produce evidence of the funeral programme and the death announcement. She was not given any role at the funeral although she attended the same. She said that she had at one time lodged a complaint with FIDA over the maintenance of her children against a Mr. Nicholas Ondari but then she said that was long before she met the deceased.

13. After the close of the oral hearing, the parties filed detailed written submissions, complete with the authorities that they proposed to rely on. I have read through the submissions, and the authorities, and noted the arguments made therein.

14. The contest herein is on whether Esther Mwikali Kinyonga was married to the deceased, and, if the answer to that question is in the affirmative, whether representation to the estate of the deceased ought to be made to her.

15. From the material that is before me, Esther Mwikali Kinyonga appears to be presenting a two-pronged case. One, she says that she was married by the deceased under customary law for he and Nyota paid a visit to her parents and paid dowry. The second prong is that there was cohabitation between the two from which the court ought to presume marriage. The latter case is apparently being pursued just in case the first one collapses.

16. Esther Mwikali Kinyonga's ancestral home appears to be at a place called Kola in Machakos. It is inhabited by people of Kamba tribe who speak the Kikamba language. Her name, and that of her mother, betrays her. She must be a Kamba by tribe or ethnicity. The deceased came from a cosmopolitan area, that is Kangemi, a suburb of Nairobi. His ancestral home cannot therefore be used as a basis to determine his ethnic background. His name, however, suggests that he was Kikuyu by ethnicity. This background is necessary for the purpose of determining the customary law system that governed the alleged marriage between him and Esther Mwikali Kinyonga. If they ever got married then their marriage must have been a mixed one, bringing a Kikuyu and a Kamba together. It is notorious that under the African customary law of marriage, the system of law that governs the process of marriage at the stage when the bride is being taken away from her people is the customary law of the tribe or community from which the woman comes and not that of the man. The customary law of the man would apply only after the woman has been properly married under the customary law of the woman. In this case, the woman was Kamba and the man Kikuyu, therefore the customary law to apply was not Kikuyu customs but Kamba customary law. Indeed, Esther Mwikali Kinyonga talks of taking the deceased to her parents and him paying dowry to them. Nobody talked about Kamba customary law being complied with, but it was presumed that whatever was happening was in keeping with those customs.

17. African customary law is unwritten. Because of that it is a requirement that the same be proved as a matter of evidence. It may be established by way of the calling of persons who are familiar with that custom, as required by section 51 of the Evidence Act, Cap 80, Laws of Kenya and section 87 of the Civil Procedure Act, Cap 21, Laws of Kenya. The courts have emphasized on that in such decisions as *Angu vs. Attah* (1916) PC 1874-1928, 43 and *Ernest Kinyanjui Kimani vs. Mburu Gikanga and another* (1965) EA 735. It may also be established by way of judicial precedent, where the custom is sufficiently notorious. Section 60 of the Evidence Act allows it, something that the courts sanctioned in *Ernest Kinyanjui Kimani vs. Mburu Gikanga and another* and *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* (1992) 2 KAR 292. The court can also have recourse to treatises on African customary Law, such as the *Restatement of African Law* by Eugene Cotran.

18. In this case Esther Mwikali Kinyonga has not attempted to demonstrate to the court what the Kamba customary law on marriage is, in terms of bringing out the various stages that parties seeking to marry under that law are required to go through, for at African customary law, the marriage contract is said to be entered into at one of the various stages that the parties here to go through. For Kikuyu customary law it is the *ngurario*, for the Luo it is the presentation of the *gonjo roya* heifer to the bride by the parents of the groom, and to the Nandi it is the tying of the *segutiet* grass on each other's wrists by the couple, and to the Kamba it is the *kuthea* ceremony. In *Geoffrey Kimeu Mukimithi vs. Matheka Nzioki and another* Machakos HCCC No 284 of 1999, it was held that in Kamba marriage ceremonies, the goats of *ntheo* precede *ngasya*, then a *muthoko* in the home of the woman to be married. Esther Mwikali Kinyonga could have established the relevant Kamba customs by calling persons familiar with the said customs, or by inviting the court to take judicial notice of the same, or by citing relevant judicial precedents, or referring the court to treatises on the said customs. It is only after that that the court would assess whether the evidence presented or adduced reveals that a proper Kamba customary law marriage was entered into by those who purport to have had contracted such a marriage.

19. I do not have before me material from which I can hold that Esther Mwikali Kinyonga was married by the deceased under Kamba customary law. There is no evidence that the all-important *kuthea* ceremony was ever conducted, and in particular the non-slaughter of *nthenge ya kwitia nthakame nthi*, a goat slaughtered at the bride's home. (See generally Cotran: *Restatement of African Law*, pages 24 and 28). The slaughter of the goat could not possibly be replaced with money. Indeed, its only dowry that can be converted into cash. She sought to rely on a writing that was eventually not put in evidence on technical grounds. The said writing was intended to demonstrate that the customary contract of marriage was entered into. However, even if the book were to be accepted as evidence it would still have fallen short, for the various requirements of a proper Kamba customary law were not established. Consequently I shall hold that there was no marriage contracted by the deceased and Esther Mwikali Kinyonga under Kamba customary law, and Esther Mwikali Kinyonga was therefore not a wife of the deceased at customary law.

20. On the second limb of her case, it would appear that she hinges her case on the presumption of marriage founded on prolonged cohabitation. The Kenyan case classicus on this is *Hortensiah Wanjiku Yawe vs. The Public Trustee* civil appeal number 13 of 1976, where it was stated that the presumption arises from the fact of a very long cohabitation and repute that the parties were married. These principles were fortified in *Njoki vs. Muthuru* (1985) KLR 871. Several other decisions followed thereafter. From the various judicial pronouncements some of the factors that guide the court on making the presumption were identified and include whether there were children fathered by the man, valuable property acquired jointly by the two persons involved, and performance of some marriage ceremony of marriage, among others. The primary factor in presumption is prolonged cohabitation. The other factors are additional to it. Without it there would be no basis to even begin to consider the presumption.

21. In this case, Esther Mwikali Kinyonga alleged that she began to live with the deceased as from 2000, although she further alleged that they were together for thirteen years before he died in 2008. The evidence, however, of the alleged cohabitation is scanty. Her witness, her mother, did not say that she ever witnessed her daughter living in the same house with the deceased, although she claimed to have been very familiar with the Kangemi area. No witness was called who testified as to the alleged cohabitation. No material was placed before me that could suggest such cohabitation. There is therefore nothing on record which points to a cohabitation between the two persons. Esther Mwikali Kinyonga testified that the deceased would visit her and could stay on even for a week, but that was contested by Mary Wangeci Kinyonga and her witnesses. She needed, therefore, to call evidence that would have placed the deceased at her residence on a frequent basis for periods long enough to suggest that he visited and resided there as a spouse. Without evidence on cohabitation being positive, the rest of the evidence can only be described as tenuous. Esther Mwikali Kinyonga sought to rely on photographs taken of her and the deceased allegedly in the rented house where they allegedly cohabited. Although, the same were marked for identification, she did not eventually call the photographer who took them. There was the book which had a record of the proceedings at her mother's when dowry was allegedly paid. The signatures on it were even subjected to document examination, however the same was not produced as its maker was not called. Esther Mwikali Kinyonga herself could not produce it as she was not in the alleged seating where and when it was written. Curiously her sole witness, her mother, did not make any reference to the recording of the proceedings in that book yet she ought to have been party to those proceedings as the sole surviving parent of the bride.

22. I believe I have said enough. I have come to the conclusion that there is not enough material from the evidence presented for me to presume marriage between the deceased and Esther Mwikali Kinyonga founded on prolonged cohabitation and repute.

23. It appears to me that the deceased and Esther Mwikali Kinyonga had a relationship of sorts, however Esther Mwikali Kinyonga has been unable to demonstrate that the said relationship met the threshold of a marriage.

24. The proceedings herein were conducted on the basis of the application for revocation of grant filed herein on 29th July 2009, dated 28th July 2009. The grounds set out are that there was no full disclosure of material facts and there was concealment of some beneficiaries. Upon my finding that Esther Mwikali Kinyonga was not married to the deceased at customary law and a marriage between them could not be presumed from prolonged cohabitation, it follows that her children could not be children of the deceased for the purpose of succession. It also follows that the petitioner was not bound to disclose them as survivors of the deceased and therefore there was no concealment of material facts from the court. The case presented does not meet the test for revocation of the grant made on 6th July 2009 to Mary Wangeci Kinyonga, nor that made on 21st September 2016 to her substitutes, Henry Kariuki Kinyonga and Lucy Wambui Gichu.

25. In the end I shall, as I hereby do, dismiss the application dated 28th July 2009. I shall award costs of the litigation to the estate. Should Esther Mwikali Kinyonga be aggrieved by these orders there is liberty for her to move the Court of Appeal appropriately within the next twenty-eight (28) days of date hereof.

DELIVERED, DATED AND SIGNED at NAIROBI THIS 27TH DAY OF JULY 2018.

W. MUSYOKA

JUDGE