



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CASE NO. 148 OF 2017

(FORMERLY NAIROBI SUCC CAUSE 671/2009)

IN THE MATTER OF THE ESTATE OF JAMES NJENGA KINUTHIA (DECEASED)

J U D G M E N T

1. Before me is the Summons filed on 31st May, 2017, for the confirmation of the Grant of letters of administration to the Estate of James Njenga **Kinuthia** (Deceased). The Grant to be confirmed was issued to the two petitioners **Nancy Wambui Kamau** and **Bernard Kiruku Kamau** as joint administrators of the estate of the deceased. The Summons is supported by the affidavit of the said joint administrators.
2. The Summons was canvassed by way of *viva voce* evidence, followed by written submissions.
3. Margaret Wanjiru testified as **PW1**. She adopted her affidavit during the hearing. In the said affidavit, she stated that she is the deceased's eldest sister and she knew the 1st wife of the deceased, Grace Wambui, who died before the deceased. The 1st Petitioner Nancy Wambui subsequently got married to the deceased. That the deceased took Nancy Wambui as his wife and they had a child together. She deponed that during the funeral and burial of the deceased, Nancy Wambui was recognized as the wife of the deceased.
4. Nancy Wambui Kamau testified as **PW2**. She adopted her sworn affidavit wherein she had stated that a grant of letters of administration was made to her and the 2nd Petitioner. She listed the dependants in the 1st house and the 2nd house. She proposed a schedule for the distribution of the deceased's estate. In cross examination, she stated that she got married to the deceased in the year 2004 and that dowry was paid to her family. That **Charles Kariuki Njenga** the Protessor herein refused to petition for letters of administration with her.
5. James Gichuki Njau testified as **PW3**. He also adopted his sworn affidavit. He confirmed that the deceased was married to the 1st Petitioner and that dowry was paid at a ceremony which he attended.
6. Charles Kariuki Njenga testified as **RW1** and adopted his replying affidavit filed on 31st July, 2017 as his testimony in court. He opposed the said summons. He stated that the petitioners are strangers to the deceased's estate as the 1st Petitioner was not lawfully married to the deceased. That no rituals evidencing Kikuyu customary marriage were carried out by the deceased. He stated that the 2nd Petitioner is a brother to the 1st Petitioner hence not a dependant or beneficiary to the estate of the deceased. He deponed that the 1st Petitioner is an intermeddler to the estate of the deceased and the mode of distribution suggested by the 1st Petitioner is unjust and biased and will subject his family to great loss.
7. John Ngugi Kinuthia testified as **RW2**. He stated that the deceased was his brother and was only married to Grace Wambui Njenga, now deceased. That the 1st Petitioner soon thereafter moved into the house of the deceased, but the deceased had informed him that he did not have intentions of marrying her. He stated that the rightful person to petition for the letters of administration are the children of the deceased. He denied that dowry was paid to the family of Nancy Wambui by the deceased.
8. Both parties filed written submissions. The Petitioner submitted that she has the locus standi as she is the wife of the deceased. It was also submitted that the 1st Petitioner lived with the deceased as man and wife the deceased having paid dowry and was in the process of performing *ngurario*. Reliance was placed in the case of *David Kinyua Njiri v Peris Wanja Kinyua (1995) eKLR* where it was stated that *ngurario* has no time limit.
9. It was further submitted that the Protessor's denial of the status of the 1st Petitioner was fallacious as she was recognized as a wife during the deceased's burial. That she is a bonafide widow of the deceased, particularly for purposes of the law of succession. Counsel submitted that the applicable law in the distribution of the estate of the deceased in this case is Section 40 of the Law of Succession Act as the deceased had two houses.
10. That the deceased supported his wife and children thus the 1st Petitioner and her children are lawful beneficiaries to the estate of the deceased. The 1st Petitioner defended the mode of distribution suggested by her as fair, just and unbiased in comparison to the Protessor's,

noting that she was left with young children who need maintenance. She urged the court to allow the summons for confirmation of grant.

11. The Protestor submitted that the deceased only visited the 1st Petitioner's home once and 'ngurario' was never performed yet it is an essential ingredient of a Kikuyu customary marriage. Reliance was placed on the case of *MWG V EWK (2010) eKLR* where it was held that a Kikuyu customary marriage is evidenced by essential ingredients without which a marriage cannot possibly qualify as such. He urged the court to distribute the estate of the deceased amongst the children of the deceased with Grace Wambui Njenga.

12. At the commencement of the hearing the parties had narrowed down the issues for determination into two as follows:

- i) Whether Nancy Wambui Kamau was the wife of the deceased therefore suited to bring the cause
- ii) Which of the two proposed modes of distribution before the court was to be applied.

This court will also determine the corollary issue whether AM. and PK. were children of the deceased for purposes of succession.

13. The court has considered the evidence adduced on both sides. There is no dispute that **Nancy Wambui Kamau** (hereinafter Nancy) lived with the deceased at his Kanyariri home between 2004 and 18.1.07 when the deceased died and that a child, **AM.** was born just a few months into the cohabitation. Further, that the deceased had visited the home of Nancy in the company of elders after the birth of **AM.** That a grant had been issued to **Nancy** while the application by **Charles Kariuki Njenga** for grant was struck out. It is not in dispute **Charles Kariuki Njenga** (hereinafter **Charles**) the Protestor herein is the son of the deceased. He has other siblings and their mother is the deceased's first wife **Grace Wambui** who preceded him in death.

14. Regarding the first issue, **Nancy** relied on her own evidence and that of **Margaret Wanjiru (PW1)** and **James Gachuki (PW3)**. **Nancy's** position is that she got married to the deceased under Kikuyu customary law. That **PW1** and **PW3** attended the traditional ceremony and the family of the deceased treated her as a wife to the deceased during his life and even at his funeral. In her evidence **PW1** stated that he did not attend the dowry ceremony. Nevertheless she stated that the child **AM.** was a child of the deceased who had also accepted **Nancy's** older son **PK.** as his own son. The traditional ceremony referred to by **Nancy** was termed by **PW3** as a "ruracio" or dowry ceremony. Her contention is that the 'Ngurario' ceremony is the last rite of marriage but that the fact that it had not been done does not invalidate a marriage.

15. For his part, **Charles** disputed that even the 'ruracio' ceremony occurred. A brother to the deceased **John Ngugi Kinuthia (RW2)** who accompanied the deceased and elders to the home of the family of **Nancy** disputed that the ceremony held was a 'ruracio' ceremony. He asserted it was the sole visit to the home and that the deceased informed him at the time, that the occasion was a pure social visit and his instructions were that no intentions were to be communicated to the family of **Nancy**. It was evident that because the deceased suffered a violent death at the hands of criminals in January 2007, his family particularly **RW1** and **RW2**, suspected **Nancy** to have been involved. However, they admitted that she was not among those prosecuted for the offence and indeed there is no evidence tendered to connect **Nancy** with the murder of the deceased

16. The parties' respective counsel have in their submissions relied on two decisions of the Superior Courts on the question of the ingredients of a Kikuyu customary marriage. For **Nancy**, reliance was placed on the decision of **Mwera J** in *David Kinyua Njiri v Peris Wanja Kinyua [1995]e KLR*. **Charles** relied on the decision of the Court of Appeal in *MWG V EWK [2010] e KLR*. The decisions are more or less consistent on the plain fact that there are some essential ingredients without which a marriage cannot qualify as a kikuyu customary marriage.

17. This court found useful guidance in the recent decision of the Court of Appeal in *MNM V DNMK and Others (2017) e KLR*. In that case, the Court of Appeal reiterated its decision in *Gituanja v Gituanja (1983) KLR 575* and in *Kimani V Gikanga [1965] EA 735* where it was held that the existence of a customary marriage is a matter of fact, to be proved through evidence. In this regard Section 107 of the Evidence Act provides that:-

"(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 those facts exist."

18. In *MNM*, the Court of Appeal was called upon to determine whether a party named **E** was married to the deceased in that case under kikuyu customary law. The Court expressed itself as follows:

"Having carefully analysed the evidence, we do not see any basis for faulting the learned judge in his finding that **E did not prove that she was married to the deceased under Kikuyu customary law. The onus was on her to prove such marriage. In *Kimani v. Gikanga (supra)*, *Duffus JA* explained the position thus:**

"To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."

To prove a valid Kikuyu customary marriage, **E was obliged to adduce evidence showing on a balance of probabilities the essential rites and ceremonies, without which a Kikuyu customary marriage is not valid, were performed. On the essentials**

of a valid Kikuyu customary marriage, Dr. Eugen Cotran, in his seminal work *Restatement of African Law: Kenya Volume 1 The Law on Marriage and Divorce (supra)* explains that **no marriage is valid under Kikuyu law unless the ngurario ram is slaughtered and that there can be no valid marriage under Kikuyu law unless part of the ruracio has been paid.** (See also *Zipporah Wairimu v. Paul Muchemi, HCSCNO 1880 of 1970*). These are the rites that E readily admitted were not performed on account of her father's Christian background, and yet she was insisting that she was married under Kikuyu customs...

19. Both sides in the instant case are agreed as to the essentials of a Kikuyu customary marriage, which is consistent with the above passage. The court in **MNM** appeared to take the position adopted by **Nyamu J**, in **MWG** cited by the advocates for the Protector in this case, confirming the essential rites of a valid Kikuyu customary marriage to consist of at least the part payment of 'ruracio' (dowry) and slaughtering of the 'ngurario' ram.

20. In the present case, it is admitted that no ngurario ceremony had been conducted. It appears, from my reading of the Court of Appeal decision in **MWG** and **Zipporah Wairimu v Paul Muchemi HC SUCC NO. 188 of 1970** cited in **MNM**, that there is no time limit to the performance of the 'ngurario' ceremony and that even part payment of the dowry was itself an essential ceremony in validating a Kikuyu customary marriage.

21. Has the 1st Petitioner proved payment of dowry by the deceased? The evidence tendered by her is in my opinion insufficient for the following reasons. Her witness **PW1** did not attend the alleged ceremony, while Nancy herself did not give any details in her own affidavits on the said ceremony of which she ought to have been a key player. This is what she stated in cross-examination:

“Deceased married me in 2004... paid dowry to my family. I participated – about KShs.30,000/= and goats given to my family. Dowry paid to elders of my home Yes my husband did visit my home with his age mates including Tiras Kariuki.

I don't know the amount he paid – may be KShs.30,000. I am not certain about this second sum paid to my mother...”

21. During re-examination, she referred to a 'first' ceremony where a goat was slaughtered and sought to rely on affidavits by persons including **Major John Njonjo** who did not submit themselves for cross-examination. Thus their evidence remained hearsay. **PW3** claimed to have participated in the dowry ceremony of 12th December 2005, with the said Major Njonjo but he neither stated in his affidavit nor oral evidence what sum paid as dowry. Perhaps the explanation for this gap is found in his statement that at Nancy's home, elders were called into a private ceremony to negotiate and pay dowry. He did not state that he participated in that particular session, merely asserting that he knew that dowry was paid.

22. This witness also referred to a prior visit to the home of Nancy to take goats and other items allegedly required for the dowry ceremony. He contended that the goats were intended for the function and were not part of dowry. This latter evidence appears to conflict with the evidence of Nancy, implying that dowry was paid on two separate occasions, and that a goat was slaughtered during the first ceremony, which, she asserted was provided by the deceased.

23. For his part **RW2** denied that the ceremony he attended had anything to do with dowry. He asserted to be the leader of the delegation of the deceased's family, which accompanied the deceased to Nancy's home. He admitted quite frankly that he was displeased that the deceased had not followed proper traditional steps and had challenged the deceased concerning the visit. That while at the home of Nancy he sought to know from the deceased what to communicate to Nancy's family. That the deceased replied "nothing". That having eaten, the visitors left without making any communication. That later the deceased stated that he had no intention of marrying Nancy even though he continued cohabitation with her. He insisted that there was only one meeting at Nancy's home and during that meeting he did not witness any group of elders go into a private session to negotiate and pay dowry.

24 **RW2** is the brother of the deceased while **PW3** is a cousin. The deceased's son Charles alluded to a visit by the deceased to Nancy's home but emphasized that Nancy was not a wife to his father. Witnesses on the two sides gave rival evidence on the alleged dowry ceremony. The mother of the deceased who is alive and other elders who may have actually participated in the 'in camera' negotiations and payment if at all, were not called to give evidence. The Petitioner's own evidence is vague, even contradictory as to the sums actually paid as dowry and on what occasion – the first or second alleged visits to her home. It is noteworthy that the 1st Petitioner who should have been a key person in the dowry ceremony did not in her affidavit give any details of the ceremony at all, leaving it to be raised in cross-examination by the Protector's advocate. In my considered view therefore the Petitioner's evidence cannot support a firm finding that part or full dowry was paid by the deceased to her parents.

25. Undoubtedly, she was in cohabitation with the deceased for a brief period of 2 years during which she bore the child **AM** I am not satisfied that on a balance of probabilities Nancy's relationship with the deceased qualified as a marriage contracted under Kikuyu custom. The fact that she participated in the funeral of the deceased did not transform the relationship into a customary marriage.

26. Besides, in this case, the 1st Petitioner relied on the existence of a Kikuyu customary marriage and not a presumption of marriage. In **MNM** the Court of Appeal stated that:

“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 it be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of a long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted.” (emphasis added)

27. A key element of such presumption is long cohabitation which is obviously lacking in this case, and is perhaps the reason why the Petitioner did not appear to rely on such presumption. That said, there is no dispute that **A. M.** was born during the cohabitation between

Nancy and the deceased. Charles appeared to dispute through **RW2** that **AM** was fathered by the deceased.

28. There is no dispute that Nancy was pregnant with **AM** when she started cohabiting with the deceased. Whether or not he doubted that **AM** was his child, he did not cease to cohabit with Nancy after **AM** was born. It is doubtful that the deceased could have acted indifferently to the naming of **AM**. after his own mother and continued cohabitation while believing **AM** to be another man's child. Indeed it appears that the much disputed visit to Nancy's home took place after the birth of **AM**. For these reasons, I am prepared to hold that **AM** was a child of the deceased for purposes of Section 3(2) of the law of Succession Act.

29. However, regarding Nancy's older child, **PK** there is no material to support a finding that in the two years of the cohabitation the deceased took him as his son. Submissions made by the 1st Petitioner to the effect that the deceased paid his fees and upkeep were not based on any evidence. The production of a birth certificates procured after the death of the deceased indicating him as the father of **PK** is inconsequential. I find that **PK** was not a child of the deceased.

30. In the result the court finds that **Nancy** and her brother **Bernard Kiruku Kamau** are strangers to the estate of the deceased. The grant issued to them cannot therefore be confirmed.

31. The proceedings in this matter became entangled at the initial stage where two separate grants were issued to the parties in **Nairobi Succession Cause No. 671 of 2009** in respect of the same estate. There followed a series of orders to rectify the position, resting with the grant issued to Nancy and her brother on 22nd September 2016. A petition filed in the same matter by Charles was struck out and it ever heard. Thereafter, the parties proceeded with the summons for confirmation filed on 31st May, 2017, with Charles being treated as a Protestor for the purposes of the summons. The parties proceeded to canvass the issue regarding the status of Nancy and her children within the summons.

32. In the circumstances, the orders that commend themselves to this court are as follows:-

- a) The grant issued to **Nancy Wambui Kamau** and **Bernard Kiruku Kamau** is hereby revoked.
- b) A grant will issue to **Charles Kariuki Njenga** and his biological sister **AMN**.
- c) The administrators are to file a summons to confirm the grant within 60 days in view of the age of this cause. The said summons must take into account the beneficiary, **AM** whom the court has found to be a child of the deceased.
- d) The determination of the question of distribution of the estate must therefore await the occurrence of (c) above.
- e) Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF NOVEMBER 2018.

C. MEOLI

JUDGE

In the Presence of:

Mr. Nganga for the Administrators

Mr. K. M. Mwangi holding brief for Mr. Thuo for the Protestor

Court Clerk – Kevin`