



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 140 OF 2016

IN THE MATTER OF THE ESTATE OF LATE PETER KAMAU NG'ANG'A (DECEASED)

SUSAN WAMBUI KAMAUAPPLICANT

VERSUS

LUCY GATHEI KAMAURESPONDENT

RULING

1. Peter Kamau Ng'ang'a (the Deceased) died on 28.7.13 at Guru Nanak Hospital, Nairobi. Following his demise, Lucy Gathe Kamau, the Respondent herein filed a petition for the Grant on 19.5.16 in her capacity as widow of the Deceased. In her affidavit in support of her petition sworn on 11.5.16, the Respondent averred that the Deceased left the following 7 children surviving him:

Chrispus Ng'ang'a Kamau	son
Everlyne R. Wanjiru Kamau	daughter
Abigael Njeri Kamau	daughter
Angrate Wambui Kamau	daughter
Priscila Mugure Kamau	daughter
Kenneth Karanja Kamau	son
Alice Wairimu Kamau	daughter

2. A Grant of Letters of Administration in respect of the estate of the Deceased (the Grant) was issued to the Respondent on 20.9.16 and confirmed on 6.2.17. The Certificate of Confirmation of Grant indicated that the Respondent was to get 50% of the estate of the Deceased while her 7 children got the remaining 50% in equal shares.

3. On 13.7.17 a Summons was filed in Court by Susan Wambui Kamau (the Applicant) seeking the following:

1. Spent.

2. That this Honourable Court be pleased to have revoked and annulled:-

(a) The grant of letters of administration issued on 20th September 2016 and made to LUCY GATHEI KAMAU;

(b) The Orders and or Certificate of Confirmation of Grant issued in this matter and dated 10th February 2017.

3. That this Honourable Court be pleased to issue an Order setting aside or revoking and or nullifying all and any transactions conducted on the said Grant and Certificate of Confirmation of Grant;

4. That this Honourable Court do proceed to determine the administrator(s) and heirs of the Estate of Peter Kamau Ng'anga (deceased) and their respective shares.

5. That this Honourable Court be pleased to find that Susan Wambui Kamau, Angela Claire Wairimu Kamau, Crispus Winston Ng'ang'a Kamau, John William Lonjogi Kamau, Peter Ng'ang'a Kamau, Caroline Wairimu Kamau, Jackline Kayanda and Elizabeth Mghoi Chea who are respectively wife and the children of the deceased are all entitled to an equal share of the deceased's estate allocated to Lucy Gathei Kamau, Alice Wairimu Kamau, Evelyn Ruth Kamau, An grate Wambui Kamau, Pricilla Mugure Kamau, Crispus Ng'ang'a Kamau, Abigael Njeri Kamau and Kenneth Karanja Kamau.

6. That fresh Grant of Letters of Administration Intestate in respect of the Estate of the deceased be made out to such persons as the court shall appoint or direct and within such period the Court shall deem fit.

7. That this Honourable Court be pleased to grant an Order preserving, prohibiting, restricting and or barring any registration, transfer, transmission, sale, sub-division, allotment, advertisement for sale, execution, collecting of rental income, withdrawing monies from the deceased bank accounts and or dealing in whatsoever manner and or act of any dealing in respect to all immovable properties, assets, bank accounts and liabilities of the Estate of Peter Kamau Ng'ang'a (deceased) including but not limited to land parcels and assets described in the petition of letters of administration filed herein pending the hearing and determination of this application.

8. That this Honourable Court do grant and issue an Order directing all the Rental income collected on behalf of the Estate of Peter Kamau Ng'ang'a (deceased) be disclosed and an inventory thereof be provided to the Applicant and to the other beneficiaries of the deceased Estate for apportionment and or distribution.

9. That this Honourable Court be pleased to grant and issue an Order directing all rental income or proceeds from the Estate of Peter Kamau Ng'ang'a (deceased) be paid to an account opened and operated by of the Respondent, Applicant and Peter Kamau Ng'ang'a pending the hearing and determination of this application.

10. That the Respondent/legal representatives/beneficiaries of the Estate of Peter Kamau Ng'ang'a (deceased) do produce to this Honourable Court and the Applicant a full and accurate detailed rental income, inventory of the assets, bank accounts statements and liabilities of the deceased Estate and a full and accurate account of any dealings on assets and bank accounts number 0110100XXXXXX Equity Bank; A/C No. 0640297XXXXXX Equity Bank Pelly Properties dollar account; A/C No. 0163XXXXXX, Barclays Bank and A/C No. 200XXXXXX HFCK Bank from the date of his demise up to the date of account.

11. That pending the hearing and determination of this application, this Honourable Court be pleased to grant and issue an Order allowing the Applicant access to the deceased following bank accounts for the purpose of establishing the balance in the account, deposits and withdrawals: -A/C No. 0110100XXXXXX Equity Bank; A/C No. 0640297XXXXXX Equity Bank Pelly Properties dollar account; A/C No. 0163XXXXXX Barclays Bank and A/C No. 2000XXXXXX HFCK Bank.

12. That the costs of this application be provided for.

4. The Applicant claims that the Grant was obtained fraudulently by concealment from the Court of information that was material to the cause. According to the Applicant, the Deceased was survived by 2 widows and 14 children. The Respondent deliberately concealed from the Court the existence of the Applicant as the 2nd wife of the Deceased, her 3 children Angela Clair Wairimu Kamau, Crispus Winston Ng'ang'a Kamau, John William Lonjogi Kamau and 4 other children Peter Ng'ang'a Kamau, Caroline Wairimu Kamau, Jackline Kayanda and Elizabeth Mgoi Kamau who were all excluded from the proceedings to obtain the Grant. The Applicant further claims that the liabilities of the Deceased have not been verified. Further the Respondent did not disclose some income generating assets of the estate of the Deceased.

5. The Applicant exhibited the obituary in respect of the Deceased which was published in the Daily Nation newspaper of 2.8.13 as well as the funeral program both of which indicated the names of the 2 widows and all the children of the Deceased. The Deceased had 2 matrimonial homes. His matrimonial home with the Respondent was in Mtwapa on Plot No. III/MN/624 while that with the Applicant was in Kiambu on Plot No. 76/40 where the Applicant resides. She contributed to the construction of her matrimonial home and has since the demise of the Deceased built a 2 bed roomed guest wing. During the lifetime of the Deceased, the family peacefully coexisted with the Respondent being based in Mombasa while the Applicant was based in Kiambu. The Respondent has in spite of the foregoing being well within her knowledge distributed the Applicant's matrimonial home to herself and her children.

6. The Applicant further averred that upon the demise of the Deceased differences arose between the Applicant and her children and the other 4 children of the Deceased on the one hand and the Respondent and her children on the other that made it impossible to apply for a grant of representation. The Applicant only became aware on 6.7.17 that the Respondent had obtained the Grant without involving the other family members. She prayed the Respondent produce and accounts and an inventory of the all the estate of the Deceased utilised to the exclusion of other beneficiaries.

7. In her replying affidavit sworn on 13.11.17, the Respondent claimed that the Applicant was a stranger to her. She is the legally married wife of the Deceased and she exhibited her marriage certificate According to her, a person married under statute cannot at the same time get married under customary law. The Respondent further states that the Applicant has not stated who else attended the alleged customary marriage ceremony as such the same could not have taken place. The obituary exhibited by the Applicant is not proof of her marriage to the Deceased. She further claimed that she and not the Applicant is the one who contributed to the purchase of the property in Kiambu. She insists that the Grant was legally obtained and granting the orders sought would be against the rules of natural justice. She prayed that the Application be dismissed with costs.

8. The matter was heard by way of *viva voce* evidence. In addition to herself, the Applicant called 3 witnesses. The Respondent did not call any witnesses beside herself. The Applicant informed the Court that she met the Deceased in 1988 and began living together in 1989 at Nairobi West. In 1990, just before she got her first child she took the Deceased to meet her parents in Kambaa, Lari division. He informed the Applicant's father that he intended to marry the Applicant as a 2nd wife. The Applicant's father agreed on condition that the Deceased performed all the Kikuyu customary marriage rights and further that he established a home for the Applicant separate from his 1st wife. In

early January 1991, the Deceased accompanied by his mother, uncle, cousin and sister Margaret Wamuhu Njaga went to the Applicant's home to declare their intention to marry the Applicant. She produced pictures taken on the occasion. Thereafter the Deceased's family went to the Applicant's family a second time and paid dowry. The third visit took place on 30.11.91 and this was the *ngurario* ceremony. During the ceremony, the Deceased cut a roasted shoulder/forearm of a ram for the Applicant. The Applicant reciprocated by giving the Deceased some porridge. The ceremony was attended by members of both their clans. She produced pictures showing the foregoing. The Deceased and the Applicant were at this ceremony declared husband and wife. The Deceased and the Applicant continued to live together and were blessed with 3 children who are now all adults.

9. The Applicant further stated that she and the Deceased identified Plot No. 76/40, Kiambu where he built a home for her in compliance with her father's second condition. She contributed towards construction of the home from her early retirement benefits. The ground breaking ceremony was held on 24.9.94 and both the Applicant's and Deceased's parents as well as other relatives were present. She produced photographs which were taken during the ceremony. The house was completed in November 1996 and this is where she has lived since.

10. The Deceased had been suffering from diabetes, high blood pressure and had a heart problem. The Applicant was with the Deceased on 28.7.13, the day of his demise. He developed breathing problems at around 2.30 am and was rushed to Guru Nanak hospital where he was pronounced dead on arrival. Following his death, meetings to arrange the funeral were held in both Nairobi and Mombasa where the other family lived. Both wives and all the Deceased's 14 children were indicated in the obituary in the newspaper. The Applicant has 3 children while the Respondent has 7 children. The Deceased had 4 children with different women before he married the Respondent and he took care of all of them. The eulogy also stated that the Deceased married the Respondent in 1978 and the Applicant in 1989. The eulogy contained the names of all 14 children as well as various pictures of all family members. The Deceased was buried at Langata cemetery and the Respondent and her children were in attendance. The Applicant stated that she used to visit the Respondent in Mombasa and the Respondent also visited her in Nairobi.

11. The Respondent obtained the Grant and the confirmation thereof without involving the Applicant and the other children of the Deceased. The Applicant's wish is that all survivors of the Deceased be included in the sharing of his estate.

12. John Runjugi Njoroge, 79 years, the father of the Applicant testified that the Deceased went to his home with elders, the late Arthur, the late Benjamin and his sister Margaret Wamuhu Ng'ang'a. They wanted the Applicant's hand in marriage who was pregnant at the time. He gave the Deceased 2 conditions namely that his daughter was not to be taken to the home of another woman and that she was not to be taken to the farm of another woman. The Deceased took to the Applicant's father 60 sheep, to secure the Applicant. He was told to bring another 80 sheep and other items which were listed. The Applicant's spokesman in the negotiations was Stephen Ngugi. The *ngurario* was done on 30.10.90 and the Deceased came with over 200 people. 2 goats were slaughtered for the *ngurario* and another 4 for the Deceased's friends. The Deceased cut the *kiande* (shoulder) of the goat for the Applicant. This signifies a kikuyu marriage. The Applicant served the Deceased with porridge in a calabash signifying that she had accepted him as her husband. All matters concerning a Kikuyu traditional marriage were done. The Deceased bought a piece of land in Kiambu and invited the Applicant's father when he was laying the foundation stone. A goat was slaughtered and prayers were held. The Deceased told the Applicant's father that he had accomplished the 2 conditions set by him. The Applicant's father further testified that he knows the Respondent and the Deceased once brought his 2 wives and their children to visit him and he slaughtered a goat for them.

13. Margaret Wamuhu Ng'ang'a, 74 years, the Deceased's older sister told the Court that Deceased was married to the Respondent. A *ngurario* was done for the Respondent. She did not know that the marriage between the Deceased and the Respondent was statutory. When the Deceased wanted to marry the Applicant, he informed the family. She confirmed that visits were done by her family to the Applicant's family and that the *ngurario* ceremony was done. According to her, everybody knew that the Deceased had 2 wives.

14. Stephen Ngugi Muhuri a 73 year old man testified that he was the Applicant's father's spokesman when the Deceased had gone to ask for her hand in marriage. A list was prepared of the items the Deceased and his family were to bring to the Applicant's home as dowry. He was present during all the ceremonies. He confirmed that the *ngurario* ceremony took place signifying the marriage between the Deceased and the Applicant. He confirmed knowing that the Deceased had another wife but did not know it was statutory.

15. In her testimony, the Respondent stated that she met the Deceased in 1977 as she was completing her nursing training. He told her that he wanted to marry her and went to see her parents in July of that year. Their marriage was solemnised in July 1989 and they have 7 children. She further stated that she knew that the Deceased had other children before he married her and that he took care of them but not their mothers. She was not aware that he had another wife in Nairobi.

16. Her matrimonial home in Mtwapa was charged to secure Kshs. 500,000/= for the Deceased to get a credit card which he used to buy building material for the house. It has a loan to date. She did not however state in her replying affidavit or in the application for confirmation of grant that the house in Mtwapa was charged and she did not bring any document to support her allegation. She and the Deceased bought several properties and the Deceased was the registered owner of them all. Plot No. 76/40 was purchased by the Deceased in 1993 but she could not remember the purchase price as she has a memory problem. The Respondent thereafter stated that she knows the Applicant and has visited her at her residence in Thindigua, Kiambu. When the Applicant retired, she got Kshs. 108,000/= as golden handshake with which she built a *banda*.

17. The Respondent stated that there was need to file the Petition herein urgently as her roof was leaking, the rains were coming and she is sickly. She asked the Applicant's son Peter Ng'ang'a to come to Mombasa for purposes of filing the Petition but he failed to do so. She used to collect rent from the property of the Deceased but it all now goes to Court. She acknowledges all 14 children as the Deceased's children and is ready to have them all included as beneficiaries.

18. The Applicant was introduced to her as the mother of the children of the Deceased. She further stated that the Applicant was the last person with the Deceased and he was at her house when he died. She was not involved in preparation of the eulogy and she does not know where they got her pictures. She denied knowledge of the marriage of the Applicant and the Deceased which her sister in law Margaret Wamuhu testified about. She acknowledged that the Deceased and his mother are in the pictures of the Applicant's *ngurario* ceremony. She

further acknowledged the picture of the Deceased cutting a piece of meat (a leg) with the Applicant next to him. She stated it could be a *ngurario* ceremony but she is not aware of any ceremony between the Applicant and the Deceased.

19. From the evidence and parties' submissions, the following issues fall for determination:

- i) Whether the Applicant is a wife for purposes of the Law of Succession Act
- II) Whether the Grant should be revoked

Whether the Applicant is a wife for purposes of the law of succession Act

20. Before I consider the status of the Applicant, I must state that the Respondent acknowledged that the Deceased had 14 children and not just her own 7 children as indicated in her petition. The issue of the 14 children as beneficiaries of the estate of the Deceased is thus settled.

21. It would appear that prior to his conversion to faith in the Lord Jesus Christ, the Deceased was involved with several women. He had 4 children with different women prior to his marriage to the Respondent. The Deceased then married the Respondent and had 7 children with her. Thereafter he met and married the Applicant with whom he had 3 children.

22. The Applicant claims that she is the second wife of the Deceased, a fact that is denied by the Respondent. The Applicant testified that dowry was paid for her by the Deceased and further that the Kikuyu *ngurario* ceremony where the Deceased cut for the Applicant a piece of the foreleg/shoulder of a ram which is the kikuyu traditional marriage ceremony took place at her father's home. She produced pictures of the ceremony. This was corroborated by the testimony of the Applicant's father, his spokesman at the dowry negotiations and the sister of the Deceased. Although the Respondent stated that she is not aware of any ceremony between the Deceased and the Applicant, she did acknowledge the people in the pictures at the ceremony as the Deceased, his mother and the Applicant. The Court finds no reason to doubt the testimony of the Applicant and her 3 witnesses whose testimony was consistent.

23. A look at the obituary published in the Daily Nation of 2.8.13 shows that the Deceased was "husband of Lucy Gathe of Mtwapa Mombasa and Susan Wambui of Thindigwa Kiambu". The eulogy similarly indicated under the heading of family life that "Peter married Lucy Gathe in September 1978 and in April 1989 he married Susan Wambui". The eulogy also contains photographs of the Deceased with both the Respondent and the Applicant. The Court notes that though the Respondent stated that she was not involved in the preparation of the eulogy no evidence was adduced to show her opposition to the inclusion of the Applicant as the 2nd wife of the Deceased.

24. The Respondent produced a marriage certificate the marriage solemnised between herself and the Deceased on 28.7.89 at the Registrar's office. It is the Respondent's contention that the marriage between the Applicant and the Deceased is null and void. The fact of the statutory marriage between the Respondent and the Deceased is not disputed. The Marriage Act Cap 150 Laws of Kenya (now repealed) under which the marriage between the Deceased and the Respondent was contracted provided at Section 37 that:

Any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.

25. The Marriage Act 2014 provides at Section 11 what constitutes void marriages. The provision states that a union is not a marriage if at the time of the making of the union either party is incompetent to marry by reason of a subsisting marriage. From the foregoing provisions, it is clear that the Deceased having contracted a monogamous marriage with the Respondent on 28.7.89, he had no capacity to contract any other marriage of whatever nature while his marriage to the Respondent was still subsisting. However Section 3(5) of the Law Succession Act provides:

Notwithstanding the provisions of any other written law, (emphasis added) a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage (emphasis added) to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

26. It is not disputed that the Deceased had contracted a monogamous marriage with the Respondent. He then purported to contract a Kikuyu customary marriage with the Applicant. As absurd as it is the Law of Succession Act recognises this subsequent marriage for purposes of succession. Accordingly, the Applicant is catered for under Section 29 and/or 40 of the Act. For purposes of succession, the aforesaid provisions of the repealed or current Marriage Act are inconsequential. This appears to have been the intention of Parliament when it enacted Section 3(5) of the Act and the role of the Court is to give meaning to the intention of Parliament. In Irene Njeri Macharia v Margaret Wairimu Njomo & another [1996] eKLR the Court of Appeal in had this to say concerning Section 3(5) of the Act.

Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained undissolved upto the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy. Parliament, in its wisdom, and whatever it might have intended to do, provided that:- "Notwithstanding the provisions of section 37 of the Marriage Act ..."

Josephine was, nevertheless, a wife for the purposes of the Law of Succession Act, and in particular sections 29 and 40 of the Act. We have unhesitatingly come to the conclusion that MUTUA'S case was wrongly decided and must now be treated as not correctly stating the position at law.

27. This Court is satisfied from the evidence that a Kikuyu customary marriage did take place between the Applicant and the Deceased. The Applicant being a woman married under a system of law which permits polygamy is, notwithstanding that the Deceased had contracted a previous monogamous marriage to the Respondent, nevertheless a wife for the purposes of this Act. In line with Section 3(5) of the Act and further duly guided by the above holding of the Court of Appeal my finding is that the Applicant is a wife of the Deceased for the purposes of the Act.

Whether the Grant should be revoked

28. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act (the Act) which provides:

“ 76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(e) ...

29. The Applicant's case is that the Respondent obtained the Grant without the involvement of the Applicant, her children and the other children of the Deceased. The Respondent further had the Grant confirmed and the estate was to be distributed to her and her children to the exclusion of the Applicant and all the other children of the Deceased. In her testimony, the Respondent acknowledged that the Deceased did indeed have 14 children and further stated that she wishes that all of them be included as beneficiaries of his estate.

30. Section 51(2) of the Act stipulates the information that shall be included in an application for a grant as follows:

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

31. A grant may be revoked if the same was obtained fraudulently by the making of a false statement and concealment from the Court of something material to the case. In the instant case, the Respondent did make a false statement on oath in her petition for the Grant. She stated that the Deceased was survived only by herself and her 7 children yet she was aware of the existence of the Applicant and the other children of the Deceased. She concealed to the Court the existence of the Applicant and the other children. She failed to indicate the names and addresses of the Applicant and the other children of the Deceased as required by Section 51(2) of the Act. It is therefore clear that the Respondent obtained the grant fraudulently by the making of a false statement and concealment from the Court of facts material to the case. In the premises, the Court finds that the statutory grounds for revocation of the Grant have been established.

32. Section 66 of the Act provides that the Court shall have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. In exercise of that final discretion conferred upon this Court and in the best interests of all concerned, I make the following orders:

i) The Grant of Letters of Administration issued to Lucy Gatheki Kamau on 20.9.16 and confirmed on 6.2.17 be and is hereby revoked.

ii) All transactions made pursuant to the said Grant and confirmation thereof are hereby set aside and/or nullified.

iii) Lucy Gatheki Kamau and Susan Wambui Kamau are hereby appointed joint administrators of the estate of the Deceased Peter Kamau Ng'ang'a.

iv) Lucy Gatheki Kamau to produce to the Court on or before 31.1.19 a full and accurate inventory of the assets and liabilities of the Deceased and a full and accurate account of all dealings therewith up to the date of the account.

v) The joint administrators or either of them shall within 30 days file a summons for confirmation of grant listing all the beneficiaries and all assets and liabilities of the estate of the Deceased.

vi) Mention for compliance on 4.2.19.

vi) This being a family matter each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 30th day of November 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**