



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 518 OF 2012**

**IN THE MATTER OF THE ESTATE OF MAXWELL KINYANJUI MIRINGU (DECEASED)**

**ROSEMARY ALICE KINYANJUI.....1<sup>ST</sup>  
EXECUTRIX**

**(alias ROSE BALDWIN KINYANJUI)**

**NANCY NYOKABI DOLORES  
KINYANYUI.....2<sup>ND</sup>EXECUTRIX**

**VERSUS**

**MERCY MUTHONI KIROMO.....1<sup>ST</sup> OBJECTOR**

**MIRING’U KINYANJUI.....2<sup>ND</sup>OBJECTOR**

**J U D G M E N T**

Maxwell Kinyanjui Miringu, the deceased to whose these proceedings relate died on 24<sup>th</sup> January 2012. On 14<sup>th</sup> March 2012, Rosemary Alice Kinyanjui (alias Rosemary Baldwin Kinyanjui) and Nancy Nyokabi Dolores Kinyanjui (the Executrix) petitioned the court to be issued with a grant of probate of written Will. In the petition, the two claimed they were, respectively, widow and daughter of the deceased. In their petition, they annexed the last written Will of the deceased dated 7<sup>th</sup> March 2000. In the said Will, the dependants of the deceased, and therefore his beneficiaries are stated to be: Rosemary Alice Kinyanjui (widow), Nancy Nyokabi Dolores Kinyanjui (daughter), Susan Muthoni Nyakabuya Kinyanjui (daughter) and Theodore Miringu Kinyanjui (son). In the Will, the above dependants are the beneficiaries of all the properties that comprise the estate of the deceased. A grant of probate of written Will was issued to the Executrix on 18<sup>th</sup> July 2012.

On 19<sup>th</sup> September 2012, the Objectors, Mercy Muthoni Kiromo (1<sup>st</sup> Objector) and Miring’u Kinyanjui (2<sup>nd</sup> Objector) filed an application before court seeking to have the grant of probate of written Will issued to the Executrix to be revoked on the grounds, *inter alia*, that the Will that was annexed to the petition was fraudulent, a work of forgery and did not reflect the true wishes of the deceased. Mercy Muthoni Kiromo claimed that she was married to the deceased and was blessed with two children with the deceased, namely Miring’u Kinyanjui and Nyakiambi Kinyanjui. She stated that her exclusion as a beneficiary of the estate of the deceased was a scheme that was hatched by Rosemary Alice Kinyanjui, whom she referred to as her co-wife, and her children. She urged the court to revoke the grant of probate that was issued to the Executrix and proceed to have the estate of the deceased distributed to all the beneficiaries of the deceased in accordance with the law. The Executrix filed affidavits in opposition to

the application. They denied that the deceased was married to two wives or that they were aware that the deceased had a second family. They were emphatic that the Objectors emerged into the scene during the last days of the life of the deceased and thereafter started claiming that they were part of the family of the deceased. They urged the court to dismiss the application for revocation of grant and proceed to confirm the grant of probate in accordance with the last written Will of the deceased.

Directions were taken in the case. The parties agreed that the issue in dispute, which is essentially whether or not the 1<sup>st</sup> Objector and her children were dependants of the deceased, and whether or not they were entitled to benefit from the estate of the deceased, was to be determined by the parties adducing *viva voce* evidence. In that regard, this court heard oral testimony of Mercy Muthoni Kiromo (the 1<sup>st</sup> Objector), Miring'u Kinyanjui (the 2<sup>nd</sup> Objector), Nancy Nyokabi Dolores Kinyanjui (2<sup>nd</sup> Executrix), Jeffrey Chege Kirundi (the Advocate who prepared and witnessed the Will) and Rosemary Alice Kinyanjui (the 1<sup>st</sup> Executrix). It was the 1<sup>st</sup> Objector's case that she was the widow of the deceased. She testified that she was married to the deceased in 1981. She did not tell the court under what system of marriage she got married to the deceased. From her testimony, it was apparent that her marriage was neither statutory nor customary. She did not place any evidence before court that she was married to the deceased under any system recognized by the law. Her evidence however, was to the effect that she had lived, on and off, with the deceased in Mombasa where she was supervising one of the businesses of the deceased.

The 1<sup>st</sup> Objector testified that her marriage to the deceased was blessed with two children, namely a son, Miring'u Kinyanjui born in 1982 in Mombasa and a daughter, Nyakiambi Kinyanjui born in 1986. She stated that it was wrong for the Executrix to come to court with an alleged Will that excluded her and her children as the beneficiaries of the estate of the deceased. In support of her testimony that the deceased sired her children, she produced two birth certificates which indicated that the deceased was the father of her two children. The birth certificates were issued to the 1<sup>st</sup> Objector on 7<sup>th</sup> February 2012 and 8<sup>th</sup> May 2012 respectively after the death of the deceased. It was not clear from her evidence why the 1<sup>st</sup> Objector did not obtain the birth certificates of the children during the lifetime of the deceased. It was also not clear whether the deceased had any input in the issuance of the said birth certificates.

The 1<sup>st</sup> Objector did not produce any documentary evidence to support her claim that the deceased acknowledged paternity of her children. The 1<sup>st</sup> Objector testified that she lived in various rental premises in Nairobi with the deceased. She moved to the house of the deceased at Kaputiei in Kajiado County on 30<sup>th</sup> December 2010. This was shortly before the deceased died. She explained her movement to the house of the deceased to have been occasioned by the fact that her daughter, who was then a student at United States International University, had completed college. It was the 1<sup>st</sup> Objector's evidence that she knew about the first family of the deceased. She told the court that the deceased did not tell her that he had written a Will. She was of the view that the Will that was filed in court was fraudulent and a forgery. Her son, Miring'u Kinyanjui corroborated her testimony. He testified that the deceased was his father and before his death, had sold him a property at Kaputiei. He reiterated that the house her mother is currently residing in is her mother's matrimonial home. He urged the court to recognize her mother and her two children as dependants of the deceased.

On their part, the Executrix opposed the claim by the Objectors that they were dependants of the deceased. They testified that the deceased had only one wife who was blessed with the three children that appear in the Will. They denied the allegation by the 1<sup>st</sup> Objector that she was married to the deceased. The 1<sup>st</sup> Executrix explained that she used to live in the house at Kaputiei with the deceased upto December 2010 when they moved to their house at Spring Valley so that the deceased could be near the doctors who were attending to him at the time. The 1<sup>st</sup> Objector produced documents in support of her claim that she and the deceased were the ones who constructed the house at Kaputiei. She testified that the 1<sup>st</sup> Objector moved into the house after they had relocated to Spring Valley. At the time the 1<sup>st</sup> Objector moved into the house, the 1<sup>st</sup> Executrix was more concerned with the health of the deceased which had deteriorated. She was emphatic that the deceased did not marry the 1<sup>st</sup> Objector. Regarding the

Will, Jeffrey Chege Kirundi, testified that he was the advocate of the deceased. He received instructions from the deceased in the year 2000 to prepare a Will. He prepared the Will in accordance with instructions of the deceased. The Will was typed. The deceased signed the Will. He witnessed the Will in the presence of an advocate in his office by the name Nyambura Kamau. He emphasized that he gave effects to the deceased's instructions because he was at liberty to deal in whatever manner he deemed fit with his property. He reiterated that at no time did he receive instructions from the deceased to prepare another Will or to amend the Will that he had prepared.

This court, after hearing the evidence adduced on behalf of the Executrix and the Objectors, was of the view that to remove the doubt as to the paternity of the children of the 1<sup>st</sup> Objector, it was imperative that DNA tests be done to ascertain whether the deceased was the father of the 1<sup>st</sup> Objector's children. For the DNA tests to be conducted, the DNA samples were required from the children of the 1<sup>st</sup> Executrix. The said samples were provided. However, the 1<sup>st</sup> Objector and her children were not willing to cooperate in the provisions of DNA samples. They did not avail the relatives of the deceased that they claimed they were in contact with. The case was adjourned several times to enable the 1<sup>st</sup> Objector to provide the relevant DNA samples. This was not done by the time the court closed the case.

As stated earlier in this judgment, there were two issues for determination by the court. The first issue is whether the 1<sup>st</sup> Objector established that she was a wife of the deceased. From her testimony, she claimed that she cohabited with the deceased as husband and wife in Mombasa and Nairobi. However, there was no evidence to support the 1<sup>st</sup> Objector's claim that she had indeed lived with the deceased in that capacity. The 1<sup>st</sup> Objector placed no evidence before court to establish her claim that she was married to the deceased. She was not married to the deceased under either statutory law or customary law. There is no evidence that any form of marriage recognized by law was celebrated between the 1<sup>st</sup> Objector and the deceased. This court could still have found that the 1<sup>st</sup> Objector and the deceased were married by virtue of long period of cohabitation. No evidence was placed before the court to establish that indeed the 1<sup>st</sup> Objector and the deceased lived together for such a long period of time that they established a reputation in society that they were indeed husband and wife.

As regard whether the deceased sired children with the 1<sup>st</sup> Objector, this court noted that the birth certificates which were produced by the 1<sup>st</sup> Objector were procured after the death of the deceased. The Executrix legitimately questioned whether the deceased had any input in the registration of the said birth certificates and whether indeed the said birth certificates were obtained to support the 1<sup>st</sup> Objector's claim to be considered as a wife of the deceased. This court's evaluation of the evidence leads it to the conclusion that the 1<sup>st</sup> Objector placed no evidence before this court to support her claim that the deceased sired the two children with her. This doubt would have been cleared if the 1<sup>st</sup> Objector had cooperated in the determination of the paternity of her two children by DNA. Unfortunately, the 1<sup>st</sup> Objector frustrated the conduct of the DNA tests.

This court can only reach one conclusion: that the reluctance of the 1<sup>st</sup> Objector to co-operate in the determination of the paternity of her children implied that the deceased did not sire them. Another aspect of the case that persuaded this court that the 1<sup>st</sup> Objector's claim was not sustainable is the manner in which she moved into the deceased's house at Kapatiei after his relocation therefrom to Spring Valley. From the evidence adduced, it was clear that the 1<sup>st</sup> Objector moved to the said house without the permission or consent of the deceased. In any event, at the time the 1<sup>st</sup> Objector moved into the house, the deceased was literally on his death bed. He was a cancer patient and was undergoing treatment which included chemotherapy. The deceased died soon thereafter. There is no evidence that the deceased ever lived with the 1<sup>st</sup> Objector in the said house.

For the above reasons, this court is not convinced, to the required standard of proof on a balance of

probabilities, that the 1<sup>st</sup> Objector established a case that she was the wife of the deceased or that her children were sired by the deceased to entitle this court reach a finding that they should be recognized as dependants and beneficiaries of the deceased. The objection to the grant of probate to the written Will is hereby dismissed with costs to the Executrix. The Executrix shall be at liberty to apply to the court for confirmation of the grant of probate in accordance with the last will of the deceased. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**