



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2083 OF 2007

LUCY WAMBUI KAHIROAPPLICANT

VERSUS

TERESIAH WANJIRU MBURU

HANNAH WANGUI MBURU

ANTHONY NJOGU MBURURESPONDENTS

JUDGMENT

1. The applicant and 1st respondent are the widows of the deceased this issue decided in the ruling by the court dated 31st January 2014 and which decision has not been appealed against. The applicant resides in her matrimonial home in Thika while the respondent resides at Ngong on a property owned by the deceased. The applicant was the wife of the deceased having married him in accordance to kikuyu customary law. The applicant cited the respondent to commence the administration proceedings. She failed to do so and went on to initiate other succession proceedings in Succession Cause no. 47 of 2007. A grant of letters of administration were given to the respondent and confirmed on 30th November 2009. The applicant also petitioned for grant of letters of administration and was granted the same on 14th December 2009 and confirmed on 14th February and the applicant proceeded to distribute the deceased's estate. However, when the applicant attended the Land registry at Kajiado to effect change and transfer she was shocked to learn that there were pararell proceedings conducted at Kajiado Law court. This prompted her to file the application dated 17th July 2012 which was heard and a decision made on 31st January 2014 to the effect that titles and grant issued to the respondent be cancelled and a new grant be issued to **Lucy Wambui Kahiro, Teresiah Wanjiru Mburu, Hannah Wangui Mburu and Anthony Mburu**. The application dated 17th July 2012 was heard and determined and consequently Succession Cause no. 2083 of 2007 was consolidated with Succession Cause no. 47 of 2017. The grant of letters of administration and certificate of confirmation issued in both succession causes were revoked and the court issued a fresh grant of latters of administration was granted to **Teresiah Wanjiku Mburu, Lucy Wambui Kahiro, Michael Muguro Mburu and Hannah Wangui Mburu** on 21st September 2012.

2. Lucy Wambui Kahiro vide a summons for confirmation dated 10th March 2014 sought to have the said grant of letters of administration confirmed to the effect that she and her child gets **Kajiado/Olchoro Onyore/1494** and **Plot No. 102** while the respondent gets **Kajiado/Olchoro Onyore/258** and **Plot Oloosirkon T. Center** to go to the Teresiah Wanjiku Mburu to hold in trust of her children. This is what culminated to the current hearing.

3. The applicant in her oral and affidavit evidence stated that she got married to the deceased in 1997 and they were blessed with one child. That at the time she had 2 children from a former relationship which the deceased absorbed into the family and which he took care of and provided for their upkeep and

maintenance. The applicant stated that the deceased formalized the marriage sometime in 1998 when he informed her parents he wanted to marry their daughter and paid kshs.10,000/- for introduction in a ceremony called “kuhada Ithigi” the same was witnessed by 3 witnesses. She testified that both wives were recognized during the deceased’s funeral. Before the said marriage she and the deceased resided at Ngong but after they got married they moved to Thika where the deceased carried out subsistence farming while leasing other land. She stated that the deceased and 1st respondent had differences which necessitated him to move to Thika. After the burial sometime in 2003 the family met to discuss way forward on how to distribute the deceased’s estate a follow up meeting was held in 2006 and the 1st respondent reneged on the earlier agreement. This court on 31st January 2014 had determined that the applicant was a wife to the deceased and hence a dependant and beneficiary of the deceased together with her children.

4. Njogu Mututo (PW2) a brother to the deceased testified that the deceased was a polygamous and indicated that he was aware that the traditional rites were conducted at the applicant’s home signaling that he had officially taken a second wife. That Lucy lives in Thika in the family shamba and that the deceased died in Thika but was buried at Kiserian. That Teresia is his brother’s first wife.

5. PW3 Muhia Nguku a friend and village elder from Kabati area confirmed that the deceased was married to two wives. That though the “kuhada Ithigi” had been done the deceased died before the other ceremonies had materialized. Though he stated that the applicant made a further payment in 2013 to fulfill the deceased’s wish. He stated that the deceased had given each of the wives a parcel of land. To the 1st respondent she was given property within Kiserian measuring 3 ½ acres while the applicant received a parcel measuring 4 acres.

6. Teresia Wanjiku Mburu in her testimony denied knowledge of the applicant as the deceased’s wife. She stated that she married the deceased in 1972 and they were blessed with 7 children. That the applicant was a girlfriend of the deceased. She stated that **L.R. Kajiado/Olchoro Onyore/ 1494** measuring 4 acres and **Kajiado/Olchoro Onyore** were acquired in the years 1989 and 1982 respectively and at the time the applicant was not a wife of the deceased. She avers that it is only the applicant and her son who are entitled to a share in the deceased’s estate. That her matrimonial home with the deceased was built on **Kajiado / Olchoro Onyore/258**. She avers that the applicant is only entitled to Plot No. 102 Oloorsikon trading center, Plot No. 53 Oloorsikon trading center and 1 ¼ acre to be extracted from L.R. No. 4903/14 North East Thika. She proposes that the property of the deceased to be distributed as follows;

Household of Lucy Wambui Kahiro

i. Plot No. 102 Oloorsikon trading center

ii. 1 ¼ acre to be extracted from L.R. No. 4903/14 North East Thika

Household of Teresia Wanjiru Mburu

i. Kajiado/Olchoro Onyore/194 -4 acres

ii. Kajiado/Olchoro Onyore/258 -2 acres

iii. Plot no. 53 Oloosirkon trading center

7. In her further affidavit dated 17th November 2015 the respondent recants her previous affidavit denying knowing the applicant stating that she was married to Peter Ndichu who died on 28th November 2003 and with whom they sired 3 children. She listed her 6 children and herself as the only beneficiaries surviving the deceased and the properties surviving the deceased adding that the properties were purchased between the year 1982 and 1983 at the time she and the deceased constructed their matrimonial home. She added that the applicant was a girlfriend or concubine to the deceased with whom she had extra marital affair with and sired one child Patrick Mungai.

8. Nelly Mumbi (DW2) a sister to the deceased sought to confirm that the deceased had no other wife other the 1st respondent and that they had a good marriage. She denied knowing the applicant and her children. That she knows where the deceased's property are.

9. Virginia Wanjiku Njoroge (DW3) a landlord to the applicant's testimony was based on the applicant's former marriage to one Peter Ndichu and that upon his demise she was bought for land by the community however she could not tell the court where the alleged land was bought.

10. Parties filed written submissions. The applicant gave a background of the matter culminating to the current application. On the issue of her being a wife or not it was submitted that it was concluded in a ruling dated 31st January 2014 and no appeal was preferred against the same. Being a 2nd wife married to the deceased having been married to him through kikuyu customary law. That despite holding meetings with the family the respondent who was always against her being her co-wife and refused to co-operate and file a petition for grant of letters of administration. The applicant acknowledges that she had 3 children and only one was sired by the deceased. That she and the deceased were residing at Thika, Kabati the deceased's ancestral home. That when the family met there was consensus on how the deceased's property was to be distributed. However, when it came to the 2nd meeting the respondent did not turn up. She submits that the property of the deceased should devolve to the 2 wives to hold the same in trust for their child.

11. The respondent in her submissions raised 6 issues for determination as follows;

- i. Whether the applicant was a wife
- ii. Whether there was a valid will
- iii. Whether the applicant is entitled to a share in the deceased's estate
- iv. Whether the suit properties were bought during the subsistence of the marriage of Teresiah and the deceased.
- v. Can the children of the applicant share in the property of the deceased
- vi. Whether the prayers sought should issue.

12. It was submitted that the institution of marriage is a noble voluntary association and cannot be imposed on any party. Customary marriage by elopement is commonly to be where there is no consent by parents. When elopement takes place it is immediately formalized by performance of the customary requirement either in full or in part. As quoted from **Civil Appeal No 61 of 1984**. That the marriage between the deceased and objector was not valid because not all rituals were performed and full dowry was not paid. She relied on the case of **Amulan Ogwang v Edward Ojokit** where it was held that under Customary law there is no marriage until full bride price is paid. That children born from the couple are usually named after the couples parents however, in the objector's case two of her children are named after her late husband Peter Ndichu's parents. Further, that the objector has gone ahead and changed the surnames of all her children to Mburu despite them belonging to Peter Ndichu. She relied on the case of **M vs. V (2008) 1KLR** where it was held that, "*the presumption of marriage covers two aspects that the parties have capacity to enter into marriage and they did so in effect.*"

13. It was further submitted that the objector had indicated that she was given a will by the deceased and that he had disclosed his intentions for his properties. She referred the court to Section 8 of the law of Succession Act which provides, “.

A will may be made either orally or in writing.

9 (1). Oral wills

(1) *No oral will shall be valid unless—*

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.”

She relied on the case of **Re Rufus Ngethe Munyua (Deceased) Public Trustee vs. Wambui (1977) KLR**. In this case the deceased gave instructions on disposal of his properties to his wives and children. The persons receiving the instructions wrote the instructions on a piece of paper. The deceased died a few days later. It was held that the writing disposing the property was a will. It was submitted that for the oral will to be valid it has to be made before two or more witnesses and is valid for three months and that the said oral will does not meet the threshold set out under Section 9 of the Law of Succession Act.

14. On the properties it was submitted that the properties listed were acquired during the subsistence of the marriage between the respondent and the deceased and at the time the objector was never a wife and as such she cannot claim a share of the same. On this she relied on the case of **Cooke v Head [1977] 1 WLR 518** where it was held that *“whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner is bound to hold property in trust for them both. This trust does not need any writing and can be enforced by an order for sale, but in proper case the sale can be postponed indefinitely.”*

15. On the objector’s children it was submitted that the objector’s children are strangers to the estate of the deceased as they were sired by Peter Ndichu Muguro and there is no proof adduced by the objector to show that the deceased ever provided for them. On this she relied on the case of **John Ndungu Mubea vs Milka Nyambura Mubea Nyambura CACA No. 76 of 1990** where it was held that, the children of adulterous relationships are children for purposes of succession. She also relied on the case of **the estate of Stephen Nganga Gathiru (deceased) Nairobi HCSC No. 500 of 1992**, where it was held that, *the applicant was not a wife of the deceased and that she and her child sired by someone other than the deceased were not dependants of the deceased however the court held that the child sired by the deceased was a dependant for purposes of Section 26 of the Act.”* The respondent urged the court to dismiss the objector’s application with costs.

DETERMINATION

16. I have read and considered the parties pleadings, affidavits, testimonies and submissions and have identified these are the issues for determination;

- i. Whether the applicant was a wife?
- ii. Who are the legitimate beneficiaries of the deceased?
- iii. Did the applicant prove the wishes of the deceased were as she alleged?
- iv. How should the estate of the deceased be distributed?

17. The issue on whether the applicant was a wife had been determined by the **ruling dated 31st January 2014** and which decision has not been appealed against. To avoid this court interfering with the said finding this court will not re-litigate on the same matter again.

Who is a beneficiary of the deceased?

18. The applicant in her affidavit had stated that she had 2 children from a previous marriage and only got one son with the deceased. This is confirmed by the respondent in her affidavit where she admits that the relationship between the deceased led to the birth of one child. It is clear then that the said child was sired by the deceased and as per Section 29 of the Law of Succession Act is a beneficiary to the estate of the deceased and hence is entitled to share in the estate of the deceased. The said section defines a dependent 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;”** The applicant had been held to be a wife to the deceased and as such she too qualifies as a beneficiary to the estate of the deceased and is entitled to a share of his estate.

19. From the foregoing, it is clear that the deceased died intestate and was polygamous and as such his estate devolves under Section 40 of the Law of Succession Act Cap 160 which provides that,

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

20. The 1st house comprises of the widow Teresia and her 6 children hence they are 7 units while the 2nd house comprises of Lucy Wambui Kahiro and her son who make up 2 units.

21. The deceased was survived by the following properties;

- i. *Kajiado/Olchoro Onyore/194 -4 acres*
- ii. *Kajiado/Olchoro Onyore/258 -2 acres*
- iii. *Plot No. 102 Oloorsikon trading center*
- iv. *Plot no. 53 Oloosirkon trading center*
- v. *1 ¼ acre to be extracted from L.R. No. 4903/14 North East Thika*

22. The respondent has argued that the property known as ***Kajiado/Olchoro Onyore/1494*** – measuring 4 acres and ***Kajiado/Olchoro Onyore/258*** – measuring 2 acres were acquired in the years 1989 and 1982 respectively and that is the time she and the deceased constructed their matrimonial home was constructed on ***Kajiado/Olchoro Onyore/258*** the same having been acquired before the applicant came into the picture. The applicant on her part argues that the deceased wished that the respondent retains her plot of land ***Kajiado/Olchoro Onyore/258*** while she retains ***Kajiado/Olchoro Onyore/1494***. The applicant does not deny that the said parcels of land were acquired long before she and the deceased started their relationship. The respondent in her affidavit dated 8th April 2014 had indicated that the only properties that are available for distribution are;

- i. *Plot No. 102 Oloorsikon trading center*
- ii. *Plot no. 53 Oloosirkon trading center*
- iii. *1 ¼ acre to be extracted from L.R. No. 4903/14 North East Thika*

From which she was agreeable to give the applicant and her son Plot no. 102 Oloosirkon trading center and 1 ¼ acre to be extracted from L.R. No. 4903/14 North East Thika, leaving her and her 6 children to share;

- i. Kajiado/Olchoro Onyore/194 - 4 acres
- ii. Kajiado/Olchoro Onyore/258 - 2 acres
- iii. Plot No. 53 Oloorsikon trading center

23. The applicant on her part insists that the estate be distributed as per the wishes of the deceased. The said wishes appear to be only known to her and the same cannot qualify to be termed as an oral will as the same do not meet the requirements of Section 9 of the Law of succession Act and as such, the same cannot be relied upon.

24. After considering the proposals for confirmation of grant, I find that the proposal made by the respondent is reasonable. The grant issued on the 21st of September 2012 and rectified on the 31st day of January 2014 is confirmed as follows;

The 1st house of Teresia Wanjiru Mburu shall inherit and shall hold in trust for her children the following properties;

- i. Kajiado/Olchoro Onyore/1494 - 4 acres**
- ii. Kajiado/Olchoro Onyore/258 - 2 acres**
- iii. Plot No. 53 Oloorsikon trading center**

The 2nd house of Lucy Wambui Kahiho shall inherit and shall hold in trust for her child the following properties:

- i. Plot no. 102 Oloosirkon trading center and**
- ii. 1 ¼ acre to be extracted from L.R. No. 4903/14 North East Thika**

Costs in the cause. It is so ordered.

Dated, signed and delivered this **2nd** day of August **2017**.

R. E. OUGO

JUDGE

In the presence of;

Absent Applicant

In person Teresia Wanjiru Mburu,

Hannah Wangui Mburu and

Antony Njogu Mburu Respondents

Ms. Charity Court Clerk