REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1058 OF 1988

IN THE MATTER OF THE ESTATE OF KARANJA KINYUA (DECEASED)

JUDGMENT

1. The deceased herein died on 26th September 1986. Representation to his estate was sought in this cause by Hannah Njeri Karuma, in her purported capacity as widow of the deceased. The deceased was said to have been survived by nine individuals – Njiri Karuma, John Muiruri Karuma, Peter Njihia Karanja, Stephen Njoroge Karanja, Joseph Mugo Karuma, Flomena Wanjiru Karuma, James Munyua Karuma, George Ithibu Karuma and Samuel Ng'ang'a Karuma - and to have had died possessed of two assets, being 20 shares in Gatono Estate and parcel of land at Karao in Nyandarua District. A grant of letters of administration intestate was made to the administrator on 9th February 1989. The grant was confirmed on 13th November 1989 on an application for confirmation of grant dated 3rd November 1989. The estate of the deceased devolved wholly upon the widow/administrator, Hannah Njeri Karuma. A certificate of confirmation of grant was duly issued dated 13th November 1989.

2. The application for determination is the summons dated 13th June 2012, which seeks revocation of the grant dated 9th February 1989. The same is brought at the instance of Mary Wambui Karanja. She claims that the deceased was her late husband. She describes the administrator as her co-wife, and lists eight individuals who she describes as her children with the deceased. She complains that the letters of administration as well as the certificate of confirmation of grant on record were obtained fraudulently through concealment of the fact that the deceased had two wives. She states that she was not informed when grant was sought, and that she and her children were left out of the petition. She would like to be named administrator jointly with one of the children in the first house given that the widow in that house has since passed on.

3. The reply to the application is by Peter Njihia Karanja, by an affidavit sworn on 24th July 2012. He avers that the applicant is not a widow of the deceased as she had been married to Ng'ang'a Maithori alias Ng'ang'a Chege, with whom she allegedly got six children. He asserts that she was never married to the deceased at any time or at all. He insists that the deceased was survived by the nine individuals listed in paragraph 1 here above, but adding Lydia Wairimu Karuma. He adds that he was aware that the applicant had an extra-marital affair with the deceased. She allegedly left her husband and children, and began to cohabit with the deceased. At the time, the applicant and the deceased were working together at the Gatono Estate, where the deceased was a supervisor and the applicant a casual worker, although each of them had separate quarters there. After retiring in 1983 the deceased moved to a property at Ol Kalau known as Olkalau/Ndemi/764. The deponent alleges that he and his siblings built a house for him at Olkalau. The applicant is said to have followed the deceased there in 1984. It is alleged that the applicant never formally divorced her husband to enable her formally marry the deceased, but she did have two children with the deceased. He asserts that the deceased did not buy neither was he allotted Olkalau/Ndemi/764, as it was the deponent and his mother and siblings who completed the payment owed to the Settlement Fund Trustees (SFT) over the property. After the deceased died, the deponent and his

siblings allegedly settled their mother at Gatono too, but moved her back to Kiambu after she fell ill. It is also alleged that the deceased did not hold 20 shares in Gatono Farmers Company Limited. It is explained that the 20 shares represented a plot that the deceased gave to his sons James Munyua Karuma and George Ithubu Karuma before he died.

4. To that reply the applicant swore a further affidavit on 11th April 2015. She denies the allegations made therein, saying that the deceased was survived by two widows and children. She asserts that she and Hannah Njeri Karuma participated and played a role during the burial of the deceased in 1986, and produces photographs to buttress her position. She asserts that she had been living in the subject property – Nyanduma/Ndemi/764, long before the deceased died, in her capacity as wife of the deceased, a fact that was ignored by the respondent in his reply.

5. The respondent, Peter Njihia Karanja then swore an affidavit on 4th August 2015 to counter some of the issues raised in the further affidavit. He centres his response on the question of the ownership of Olkalau/Ndemi/764 and the 20 shares in Gatono Farmers Company Limited.

6. There is a further affidavit sworn by Paul Njoroge Karanja on 29th March 2016. The deponent claims to be a son of the applicant with the deceased. He asserts that the deceased had been allotted Nyandarua/Ndemi/764 by the Ministry of Lands, which allocation remained upto the date of the deceased's death. He states that the first widow was registered as beneficiary after the deceased's demise pursuant to these proceedings. He further says that the respondent and the Chief had listed the applicant as a beneficiary of the estate of Hannah Njeri Karuma but referred to her as a daughter of the deceased. He has attached copies of papers filed in the succession cause of Hannah Njeri Karuma in Kiambu SRMCSC No. 255 of 2011 where the applicant is listed as a survivor of the deceased.

7. Directions were given on 2nd March 2015 for disposal of the application by way of oral evidence.

8. The oral hearings commenced on 29th February 2016. The first on the stand was the applicant, Mary Wambui Karanja. She testified that she was a resident of Ndemi, and a widow of the deceased. She alleged that they got married in 1976, and begat four (4) children – Paul Njoroge, George Maina, Lydia Wairimu and Evan Ndung'u, although she had had other children before then. She said that they initially lived in Gatono, Kiambu. She mentioned that the deceased had another wife, with whom she lived at Nazareth, Limuru. She stated that in 1984 she and the deceased moved to Ndemi and settled at a settlement scheme at Plot No. 764, which had been given to the deceased by the government. She moved with all her children, and lived there with them and the deceased until he died, and was buried there. The other wife had been left at Gatono with her children. She later came to live at Ndemi, for a year, before going back to Gatono to her children. She claimed that the first family lived at Gatono, while the second family was at Ndemi. When the deceased died, the witness allegedly participated in the burial at Ndemi. She then produced photographs which depicted her and Hannah Njeri Karanja laying a wreath on the deceased's grave or during the burial. She mentioned that the respondent and his mother petitioned for representation without informing her. She said that she was informed that details of their farm at Ndemi had been changed to depict Hannah Njeri as the owner. She talked of George Ithibu coming to her to ask for the original death certificate, claiming that he needed it in connection with his schooling. She went to the lands office at Nyahururu and confirmed that indeed the transfer had been effected. She stated that the Ndemi property was 29 acres in size. She asked that the property be redistributed.

9. During cross-examination, she stated that the surname she used in her national identity card was Ng'ang'a. She said she and the deceased did not contract a church wedding, but a traditional one. She talked of going for a *ruracio* ceremony at her father's home with the deceased; there were no other people with them. She said there was a record of the *ruracio* which she did not produce. She mentioned that the deceased had not separated from nor divorced Hannah Njeri Karanja. She also said that she had had a sexual relationship with the deceased, and with Ng'ang'a Maithori or Ng'ang'a Chege, but she had been previously married by a Ndung'u. She said she was chased away from the home of Ndung'u after he died. She said that Ng'ang'a was never her husband, but just a lover. She stated that she got four children with the deceased, two of whom were named after persons on the deceased' side of the family. She asserted

that it was the deceased who settled her at Ndemi, but he still used to visit the other family at Gatono. .

10. Paul Njoroge Karanja testified next. He described himself as a pastor, living in Nairobi. He stated that his father, the deceased, had two wives, his mother and Hannah Njeri Karanja. She mentioned that the surname in his mother's identity card was Ng'ang'a because she had been previously married to that person, but that marriage did not work. He said his mother married the deceased in 1976; they had four children together, although the total number of her children was nine. The deceased was alleged to have taken over parental responsibility over all the children. He stated that they initially lived at Gatono together with their stepmother, but the deceased later moved them in 1984 to Nyandarua. He complained that when representation was sought in the matter, the name of his mother was omitted, and so were the names of her children. He also referred to the Kiambu SRMCSC No. 255 of 2011 where his mother's name was in the list of the survivors of his co-wife, but erroneously indicated as a daughter thereof. He further mentioned that he and his family visited the Settlement Fund Trustee offices at Nyahururu and found that the records had been altered to indicate Hannah Njeri as the proprietor of the subject property; the property had previously been allocated to the deceased. He urged that the grant be revoked for it had been obtained fraudulently; the deceased had two houses, but one house had been excluded. He stated that both sides of the family contributed to clearing the debt owing to Settlement Fund Trustee over the subject property, although the receipt came out in the name of the first family. He mentioned that from 1987 to 1989, Hannah Njeri lived at Ndemi; a house was constructed there just next to that of the applicant. She afterwards went back to Gatono where her sons were still living. He stated that the deceased had 20 shares in the Gatono Estate, and he believed that the first family lived on the land represented by those shares.

11. During cross-examination, the witness stated that his mother was previously married to Ng'ang'a Maithori, but he did not give details of their separation or divorce, and did not know whether that man was still alive or where he came from. He stated that their claim was on P/No. 764. He said that they occupied or had developed only half of that property, where they had planted trees and farmed crops, but they graze their livestock on the other half. He asserted that the transfer to the name of the Hannah Njeri from the name of the deceased happened long after the deceased's demise. He conceded that the deceased had not been documented as owner, adding that his mother was the heiress. He pleaded that the court papers filed in 1988 were clear that the deceased was the owner of the property. He did state that he was aware that the initial allocation was to his father, but was unaware that the deceased had failed to pay the requisite dues to Settlement Fund Trustee and the property was repossessed, nor was he aware of the amount that he was supposed to pay. He argued that he believed that his father had paid the same; otherwise he would not have moved the family to the land. He however conceded that Settlement Fund Trustee came to claim outstanding dues after the deceased's demise. He claimed that the dues outstanding were paid by both sides of the family.

12. The case for the respondent opened on 6th February 2017. Peter Njihia Karanja was the first on the stand. He stated that the deceased was his father, and that his mother was the initial administrator of the estate, she died but had not been substituted as administrator, although he was the administrator of her estate. He stated that he knew the applicant as the wife of Ng'ang'a Maithori also known as Ng'ang'a Chege, a relative of the deceased, who predeceased the deceased. He asserted that the applicant was never married to the deceased. He stated that he was an Assistant Chief for Cianda Sub-Location when she was registered for identification card using the name of Ng'ang'a Chege. He stated that she came to work at Gatono Estate where his father was also working, but he could not tell how she related to him at the time. He later moved to Ndemi, Olkalau. He explained that at the time the government was providing land for the landless, the deceased applied, was allotted land, and he settled there. The applicant then followed him there from Gatono. The witness alleged that he and his siblings built a house for his father there. He stated that the land was not for free, a sum of Kshs. 17, 000.00 was to be paid. The deceased did not pay the same even up to his death. After the deceased died, there was an attempt by the Settlement Fund Trustee to recover the land, and the witness's mother stepped in and paid off the allotment fee, and the property was reallotted to the witness's mother, according to him. He said that they, as her children, contributed to clearing the debt. He alleged that his mother paid the money over a period of time, running from 1982 to 1984. He later revised the period to read 1991 to 2004. The land was allegedly discharged in 2005, whereupon it was exclusively allocated to the name of his mother. After she died, the witness

pursued the title deed for the property, and as at the date of his testimony he was the registered proprietor. He asserted that dowry was never paid for the applicant, and therefore she was not a customary law wife of the deceased. He asserted further that the deceased did not own any land at Ndemi, neither did he have any property at Gatono. He said that his mother and the applicant never lived together as co-wives, adding that as a family they did not intend to chase her away but intended to give her a portion of the land out of compassion.

13. At cross-examination, he denied being party to the process of obtaining representation of the estate by his late father. He said he did not sign any papers to support the petition, and if any document therein bears his signature then the same must have been forged. He said he was not surprised that his mother listed the 20 shares in the Gatono Estate and the Olkalau land as assets of the state, as the same previously belonged to the estate, but they subsequently changed hands. He said that the allocation to his father was revoked by the Settlement Fund Trustee, and was reallocated to his late mother. He stated that the grant made to his mother was confirmed on 13th November 1989, and the entire estate, being Olkalau 714 and 20 shares in Gatono Estate, devolved upon here. The charge by Settlement Fund Trustee over the Ndemi property was done on 7th February 1991, but he could not tell whether his mother presented the grant to Settlement Fund Trustee to facilitate conversion of the charge to her name. He stated that the applicant had four children before she began to cohabit with the deceased, saying that he did not know how many she had in total. He said that the applicant followed the deceased to Ndemi in 1994 and has since lived there to date. His mother once lived there too for two years before going back to Gatono due to bad weather. She lived on the same property with the applicant. He stated that his side of the family never interfered with the applicant's possession of the Ndemi farm. He stated that as the applicant followed the deceased to the farm and the deceased died leaving her there, he had no basis for asking her why she was still on the land. He conceded that the payments made to SETTLEMENT FUND TRUSTEE were made after his late mother became administrator of the estate. The reciepts placed on record are dated 1991, 1993 and 2004.

14. The last witness was Samuel Ng'ang'a Karuma. He testified that he was a son of the deceased living at Gatono. He said that he was aware that his late mother had been appointed administrator of the deceased's estate. He conceded that he signed the papers that accompanied the petition, and was aware that his mother had listed the 20 shares at Gatono Estate in the petition but not the Ndemi property. He said that all the children of the deceased, including the respondent, Peter Njihia Karuma, also signed the papers. He said he got to know the applicant in 1980/81, but he could not tell when she began to live with the deceased, but she had four children then, and now has a total of six. He stated that the time he died the deceased was living with the applicant at Ndemi, while his late mother and her children lived at Gatono. He added that the deceased lived with the applicant's children at Ndemi. He said that he was not aware that the deceased went through any ceremonies of marriage with the applicant. He mentioned that his mother for some time lived at Ndemi before coming back to Gatono, but she never tried to remove the applicant from the .Ndemi property. He could not explain why no attempt was made at all in that respect. He concluded by saying that he could not say that the applicant was not his father's wife, but there was nothing traditionally to show that the deceased ever married her.

15. The oral hearing closed on 6th February 2017, and it was directed that the parties file written submissions. From the record before me, only the applicant filed written submissions. I have gone through the submissions and noted the arguments made therein.

16. The application for determination is for revocation of the grant herein. Under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya the court is granted discretion to revoke grants of representation on several grounds. One is where the grant is obtained through a defective process or where the grant is obtained by use of deceit or fraud. The second is where there are problems with the administration, such as where the administrator has failed to apply for confirmation within the time allowed in law, or has failed to proceed diligently with administration, or has failed to render accounts as and when called upon to by the court. The last ground is where the grant has become useless or inoperative on account of change of circumstances, such as where the sole grant holder dies, rendering his grant unusable.

17. The applicant in the application before me appears to anchor her application on the first ground, that

the process of obtaining the grant was defective, or the grant was obtained through fraud and misrepresentation. She argues that she was a widow of the deceased, yet when representation was sought in the cause, the petitioner did not disclose to the court that fact, her name and that of her children were concealed from court by the petitioner.

18. Applications for grant of representation are governed by section 51 of the Law of Succession Act. Section 51(2) of the Law of Succession Act, sets out what ought to be included in the application, it states as follows -

> *'(2). An application shall include information as to –*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(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 all children of any child of his or hers then deceased;*
>
> *(h) …*
>
> *(i) …'*

19. Rule 7 of the Probate and Administration Rules makes section 51 of the Act operational. Rule 7(1) sets out the details that should be in the application for representation, it states as follows -

> *'…the application shall be by petition … supported by an affidavit … containing the following particulars –*
>
> *a. …*
>
> *b. …*
>
> *c. …*
>
> *d. …*
>
> *e. In cases of total or partial intestacy –*
>
> > *(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act ...'*

20. Section 51(2) and Rule 7(1) are in mandatory terms. A person seeking representation in intestacy, in such cases as the present one, must give particulars of all the persons who survived the deceased. Failure to disclose all the survivors would amount to concealment of matter from the court and to misrepresentation, and the process of obtaining grant tainted by such fraud would be defective in substance. I will need to assess whether the process of obtaining grant in this case complied with Section

51(2) and Rule 7(1). If it complied with the same then it was above board and there would be no need for me to interfere. If it did not then the grant would be liable to revocation. At the heart of all this is whether the applicant was a widow of the deceased or not. In her case, she presented a two pronged argument. One, she claims to have been married to the deceased under customary law. Secondly, that she had cohabited and lived with the deceased in his final years, and bore two children with him, and therefore that made her his spouse.

21. I will start by considering whether she was married to the deceased under customary law. The parties are Kikuyu by tribe; the alleged marriage must conform to the customs and practices of the Kikuyu relating to marriage. During the oral hearing, she testified that she and the deceased had visited her parents and performed the *ruracio*. No other evidence was led on the alleged customary law marriage. The requirements of a Kikuyu customary law marriage are notorious. They are documented in Jomo Kenyatta's *Facing Mount Kenya: The Tribal Life of the Gikuyu*, Mercury Books, London, 1961, and Eugene Cotran's *Restatement of African Law: 1 Kenya I The Law of Marriage*, Sweet & Maxwell, London, 1969. These requirements have been discussed in several reported cases. There are several rites and steps, which include but not limited to introductions, *ngurario*, *ruracio* and *guthinja ngoima*. One key feature of these processes is that they are not just undertaken by the two parties to the married, but involve the two families and friends of both sides.

22. I have carefully evaluated the evidence presented to me and I am not satisfied that the applicant went through the ceremonies referred to above. What the applicant alluded to was a first visit to her parents by the deceased for introductions, and even then the introductions ought to have involved others who would have spoken for the deceased. The *ruracio* process is about payment of dowry, the applicant did not indicate whether any dowry was paid, and if it was what exactly was given. I do not believe that any *ruracio* was performed. *Ngurario* is the all-important ceremony which signifies the start of the marriage. No such rite was ever done. It cannot be said in the circumstances that the applicant was married to the deceased under Kikuyu customary law.

23. It is common ground that the applicant and the deceased lived together, initially at Gatono and later at Ndemi. They had two children before them, even though the applicant had had four others from previous liaisons. At the point the deceased died, he was living with the applicant at Ndemi. Her case is that it was the deceased who invited him to that property and they lived there until he died. The respondent's case is that the applicant followed him there and they cohabited there, and he died living there, and she remained there even thereafter. According to the applicant all that points to a marital relationship between her and the deceased, while the respondent argues that she was not there as a wife as a companion of the deceased.

24. The courts have held in a series of cases that a marriage can be presumed from prolonged cohabitation. The principles for making such presumption were pronounced in the case of *Hortensiah Wanjiku Yawe vs. Public Trustee* Court of Appeal for Eastern Africa civil appeal number 13 of 1976. Those principles have been followed since in many cases, including *In the Matter of the Estate of John G. Kinyanjui* (deceased) Nairobi High Court probate and administration number 317 of 1984 and *In the Matter of the Estate of Samuel Muchiru Githuka – deceased* Nairobi High Court succession cause number 1903 of 1994. Unbroken cohabitation is at the heart of it. There are other factors, such as the fact that the two got children together named traditionally.

25. There is ample evidence of cohabitation, which is acknowledged even by the respondent. The applicant and the deceased cohabited at Gatono first, and when the deceased moved to Ndemi, he took the applicant and her children with him. The two begat two children together, a fact which is also acknowledged by the respondent and his sibling. It is noteworthy that the applicant has been at Ndemi ever since she moved there in 1984. She remained there even after the deceased died. The respondent and his witness were categorical that no effort was ever made to have her removed from the farm at Ndemi, and they were even planning to allot her a portion of the property as a token of compassion. I am satisfied beyond per adventure that the cohabitation between the deceased and the applicant amounted to a marriage, and I do hereby make the presumption that there was a marriage arising from prolonged cohabitation. Having found that there was a marriage between the deceased and the applicant, it was

incumbent upon the person who petitioned for representation in this cause to disclose her as a survivor of the deceased. The petitioner ought to have disclosed her as a widow of the deceased.

26. Were the children of the applicant children of the deceased for the purpose of succession? The evidence adduced shows that the applicant had two children with the deceased. These two automatically qualify to a share in the estate of the deceased. It is common ground that the other four are not biological children of the deceased. They were born prior to the liaison between the applicant and the deceased, and are acknowledged to have been sired by another person or persons. The recorded evidence shows that the applicant moved with her children to Ndemi and they lived there with her and the deceased, and they are apparently still there. It would appear that the deceased and the applicant were also living with the said children at Gatono. It would appear that he had accepted them as his children, and they are therefore children for purposes of succession according to section 3(2) of the Act. It follows therefore that the said children ought to have been disclosed to the court by the petitioner.

27. I am persuaded that the application for grant of letters of administration intestate was defective, and the grant was obtained on the basis of a fraudulent process where certain facts were concealed from the court. A case has therefore been made out for revocation of the grant herein.

28. I have noted from the proceedings that the grant holder died, and therefore there is no administrator in office. The respondent replied to the application in his capacity as administrator of the estate of the dead administrator rather than administrator of the estate of the deceased. As the administrator is dead, the grant she held has become useless and inoperative as it cannot be used by anyone to administer the estate. It is available for revocation at the instance of the court.

29. The respondent led evidence to establish that the property listed as assets forming the estate did not form part of the estate. It was said that the ownership of the two assets changed after the deceased died. Regarding the Ndemi property, it was said that it was initially allocated to the deceased by the Settlement Fund Trustee, he moved into possession on the basis of that allocation, but then he failed to pay the allotment fees. An attempt was allegedly made by Settlement Fund Trustee to repossess the property whereupon the late administrator intervened and the property was reallocated to her, she redeemed it and it was subsequently allotted and registered in her name. It was on that account that it is claimed that the property is not available to the estate of the deceased.

30. I have looked closely at the record. When the late administrator moved this court for representation, she listed the Ndemi property as an asset in the estate. She was a surviving widow of the deceased. it would be presumed that she knew better. If it had been her own property at that time she would not have listed the same as an asset in his estate. The respondent did not call officers from Settlement Fund Trustee to shed light on how his late mother was registered as proprietor after the demise of the deceased. All the payment receipts placed before me indicate that she paid the requisite fees after the demise of the deceased. My view of the matter is that the Ndemi property belonged to the deceased, it was allotted to him in 1982, he settled on it and he died while residing on the land. After his demise, the late administrator took steps to perfect the title, in her capacity as administrator. The expense she incurred was so incurred in that capacity. It was an expense by the estate and not by the administrator in person. That property remains estate property.

31. The same would apply to the Gatono property. The late administrator listed the same as estate property. From the oral evidence it emerged that the family lived at the Gatono property. That is where the late administrator and her children lived. She was said to have had temporarily moved to the Ndemi property from Gatono, but then she moved back to Gatono after she found the weather at Ndemi unbearable. The records presented to the court regarding ownership of the said property by the sons of the late administrator date back to the period after the demise of the deceased. Indeed, the sons testified that the two assets belonged to the deceased and ownership only changed after his death. It is my finding that the said property was estate property.

32. In view of everything that I have said, the final orders that I shall make in the circumstances are:-

(a) That the grant herein made on 9th February 1989 to Hannah Njeri Karuma is hereby revoked ;

(b) That the names of Mary Wambui Karanja and her children shall be entered in the schedule of the survivors of the deceased;

(c) That I hereby appoint Mary Wambui Karanja and Peter Njihia Karanja as administrators of the estate of the deceased, and direct that a grant of letters of administration intestate shall issue to them accordingly;

(d) That I hereby set aside or vacate the orders made on 13th November 1989 confirming the grant of 9th February 1989, and cancel the certificate of confirmation of grant issued on the said date;

(e) That the ownership of the assets the subject of the cause herein shall be reverted to the position that prevailed on 9th February 1989;

(f) That the administrators appointed under (c) above shall move the court appropriately for confirmation of their grant;

(g) That the estate comprises of assets situated exclusively outside Nairobi, within Kiambu and Nyandarua Counties, the cause shall therefore be transferred to the High Court of Kenya at Kiambu for final disposal; and

(h) That the respondents shall bear the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE