



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 16 OF 2007

MARY NJOKI KAMAU APPELLANT

VERSUS

JANE WANJIRU KIARIE RESPONDENT

JUDGMENT

BACKGROUND

1. The appeal herein emanates from the decision (ruling) of Kiambu Senior Resident Magistrate's court in succession cause No. 138 of 2002 delivered on the 22nd day of February, 2007.
2. The grounds of appeal as stated in the memorandum of appeal dated 22nd March, 2007 and filed on even date are as follows:-
 - a. **That the Senior Resident Magistrate erred in law in failing to hold that the appellant and her children were heirs to the estate of Kiarie Karomo Ndungata (deceased).**
 - b. **That the learned Senior Resident Magistrate erred in failing to appreciate that the appellant was married to one Peter Kamau Kiarie who was a son to the said Kiarie Karomo Ndungata (deceased).**
 - c. **That the learned Senior Resident Magistrate erred in failing to consider the decree of the court in Kiambu Land Case No. 10/2003 in which the appellant had been awarded a portion measuring two (2) acres in land reference No. Kiambaa/Ruaka/40.**
3. Before I proceed to the analysis and determination of the appeal herein, it suffices to bring forth a brief background regarding the facts and the circumstances giving rise to this appeal.
4. This being a first appeal, the court is obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge (magistrate) was shown demonstrably to have acted on a wrong principle in reaching the finding he or she did (**see Sumaria and Another vs Allied Industries Ltd (2007)eKLR**).
5. On 24th November, 2001, one Kiarie Karomo Ndungata died intestate leaving behind a single asset LR No. Kiambaa/Ruaka/40 as free property for purposes of inheritance. Subsequently, Jane Wanjiru Kiarie a daughter petitioned for a grant of letters of administration intestate vide succession cause No. 138/2002 at Kiambu Senior Resident Magistrate's Court.

6. In form P &a 5, the petitioner/appellant listed the following as survivors of the late Kiarie Karomo Ndungata

- a. Lilian Mbarire Kiarie – Widow 80 years old**
- b. Jane Wanjiru Kiarie – Daughter 55 years old**
- c. Hannah Nduta Karomo – Daughter in law 61 years**
- d. Rachael Kaheti Kiarie – Daughter 48 years**
- e. Priscillah Nyambutu Munga – 55 years old married**
- f. Elizabeth Wanjuhi Ngugi – 53 years married**
- g. Miriam Wanjuhi Ngugi – 47 years married**
- h. Mary Njoki Kamau -**

7. Subsequently, a grant of letters of administration intestate was issued on the 8th December, 2003 with Jane Wanjiru Kiarie as the sole administrator. On 7th April, 2004, Mary Njoki Kamau a wife to Peter Kamau Kiarie a son to the deceased Karomo Kiarie Ndungata lodged a caveat. Apparently, the said Peter Kamau Kiarie predeceased his late father sometime in 1974 after being speared by the said father.

8. Upon receiving the said grant, the administrator moved the court for confirmation of grant through her summons dated 3rd April, 2007 and filed on 5th April, 2007. In support of that application was an affidavit sworn by the administrator on 3rd April, 2007 and a schedule of distribution of the asset in question.

9. The administrator proposed distribution of the estate as follows:

- a. Hannah Nduta Karomo – 1.8 acres**
- b. Jane Wanjiru Kiarie – 1.8 acres**
- c. Rachael Kaheti Kiarie – 1.8 acres**
- d. Priscillah Nyambutu Munga – 0.25 acres**
- e. Elizabeth Wanjuhi Ngugi – 0.25 acres**
- f. Miriam Wanjuhi Ngugi – 0.25 acres**
- g. Solomon Kiarie Wanjiru – 0.25 acres**
- h. Mary Kiarie Wanjiru – 0.25 acres**
- i. Jane Wanjiru Kiarie – 0.77 acres**

10. Aggrieved by the proposed mode of distribution which excluded her name and her children as heirs of Peter Kamau Kiarie a son to the deceased, Mary Njoki Kamau the caveator, filed affidavit of protest sworn on the 1st July, 2005 and filed in court on 12th July, 2005 challenging the mode of distribution in which she was not provided for being a widow to Peter Kamau Kiarie one of the deceased's sons. She also listed her children as hereunder being beneficiaries of the estate as well:

a. Jane Mbaire Kamau

b. Solomon Kiarie Kamau

c. Obadiah Kariuki Kamau

d. Mary Wambui Kamau

e. Jane Wanjiru Kamau

f. Priscillah Nyambutu Kamau

11. In the said protest, the protestor averred that she was entitled to a share of two acres pursuant to a court order in respect of Kiambu Land Case No. 10/2003.

12. After receiving the protest, both parties agreed to dispose the same by way of viva voce evidence.

Protestor's/Appellant's Case

13. During the hearing, the protestor (PW1) told the trial court that she was married to the late Peter Kamau Kiarie a son to the deceased and that they were blessed with six children. She further stated that, her husband died in 1973 after his father (the deceased herein) speared him following a litany of differences and fighting between the two.

14. She further claimed that, since her marriage under Kikuyu Customary Law, they established their matrimonial home on the subject land till the death of her husband when her father-in-law chased her away together with her children. She subsequently filed a suit against her mother-in-law (now deceased) demanding for her late husband's rightful share of the land. Her prayers were granted before a land disputes tribunal who directed that the protestor be given two acres. She produced a decree in respect of land case No. 10/2003 Kiambu Law Courts where the tribunal's award was adopted as a judgment of the court (PEXh1.).

15. PW2 Ndungu Kinuthia a nephew to the deceased Karomo Kiarie gave evidence in support of the protestor (appellant) to the effect that she was married to the late Peter Kamau Kiarie and the two were blessed with six children after staying together for 13 years. He confirmed that, their relationship was that of "come we stay" as dowry was not paid by Peter Kamau. PW3 Fredrick Mugure Kariuki a brother to the protestor confirmed that the late Peter Kamau never paid dowry as contemplated in Kikuyu Customary Law but he nevertheless visited his in-laws and paid a token.

Administrator's/Respondent's Case

16. In response to the protest, Jane Wanjiru Kiarie the administrator and witnesses James Nganga Murugu and Peter Njuthi Karomo told the court that, the appellant was never married to her brother Peter Kamau. They further said that, the deceased herein Karomo Kiarie killed his son Peter Kamau in 1973 after the said son persistently fought and beat him (father). They asserted that, the late Karomo swore not to bequeath any property to his son Peter Kamau due to his conduct/behavior and that before he died, the deceased had given each of the five children their respective shares excluding Peter Kamau.

17. Before the hearing commenced, both parties agreed to dispose of the matter by way of written submissions.

SUBMISSIONS

a. Appellant's Submissions

18. In his written submissions filed on 6th March, 2017, Mr. Thuo submitted that although the trial court

found that the appellant was not married in accordance with Kikuyu Customary Law, there was a marriage between the deceased Peter Kamau Kiarie and the appellant based on the presumption of marriage the couple having cohabited for 13 years giving rise to six children. Counsel quoted the case of **Hottensiah Wanjiku Yahwe vs Pubic Trustee in civil appeal No. 13/1976 and the matter of the estate of Isaac Gidraph Njuguna Mukururo Succ. Cause No. 1385/2010 Nairobi (2013)eKLR.**

19. Learned counsel further submitted that, the children of Peter Kiarie were heirs of the deceased hence dependants for purposes of succession. Lastly, counsel urged the court to consider that the appellant was awarded 2 acres out of LR Kiambaa/Ruaka/40 through land case No. 10/2003 Kiambu Senior Resident's Magistrate's court hence a grievous misdirection and failure by the trial court in not considering the same.

Respondent's Submissions

20. On behalf of the respondent, counsel filed written submissions on 15th March, 2017 wherein he submitted that there was no valid marriage customary or otherwise between the appellant and Peter Kamau Kiarie as alleged. Counsel stated that for a Kikuyu Customary Law marriage to be valid, certain rites and rituals must apply inter alia Ngurario (slaughtering of a sheep) and ruracio (payment of dowry). Learned counsel referred the court to the case of **M.W.G. vs E.W. (2010)eKLR** in which J. Nyamu in a dissenting judgment over emphasized on the performance of such rituals for any Kikuyu Customary Law marriage to be valid.

21. On the issue of dependency, counsel submitted that, neither the appellant nor her children were dependants to the deceased prior to his death and that during his lifetime, the deceased had made it clear that he could not provide any share of his property to his son Peter Kamau. Lastly, learned counsel urged the court to consider the relationship between the appellant and the late Peter Kamau as that of concubinage. He referred the court to the case of **Machani vs Vernoor 1985 KLR** in which the court held:

“where there is no marriage but parties are living together in an association that could be seen as that of husband and wife, they are living together in a state of concubinage. Children begotten of such an association have no legal rights since no legal obligation can be enforced against the father on behalf of the children in the absence of any legislation, since the Affiliation Act was repealed”.

Ananalysis and Determination

22. I have considered the grounds of appeal herein, materials placed before me and submissions by both counsels. I will consider the first and second grounds of appeal jointly as they relate to the issue whether the appellant was married to the late Peter Kamau Kiarie and consequently whether their children being issues arising out of the said marriage would qualify as heirs to the estate of the deceased Kiarie Karomo.

23. According to the applicant, she got married to the late Peter Kamau and stayed together for 13 years till Peter got murdered by his father Karomo Kiarie. She averred that, during the subsistence of their marriage, they were blessed with six children. That after her husband died having not paid dowry, she regularized the same by paying dowry using her first born daughter's dowry. On the basis of this arrangement, she alleged Kikuyu Customary marriage was validated.

24. She further claimed that, having been given land by the land disputes tribunal which was later adopted by the court recognizing her as a wife to the deceased, the same is enough proof of the existence of the said marriage.

25. Although the respondent (administrator) claimed in her evidence in chief during the hearing of the protest that the appellant was not married to her brother Peter Kamau, on cross examination, she admitted that the appellant and her husband used to live elsewhere. The actual words used were as follows:

“I do not know Mary Njoki Kamau. I have never seen her before as she and her husband used to live elsewhere. The husband was called Peter Kamau..... I knew Peter was married for he used to come asking for money to feed his family as he beat us.”

26. From the above statement, the respondent (administrator) cannot deny the fact that her brother Peter was married to the appellant. Another witness called by the respondent one James Nganga Murugu who also denied that the appellant was married to Peter, made the following statement in his evidence in chief:

“I was present when Kiarie Karomo divided his land amongst his sons and daughters and he expressly stated that he would not bequeath land to Mary or even Peter if he were alive.”

Again from this statement, it is admitted that Mary (appellant) and Peter Kamau were staying together as husband and wife.

27. The only thorny issue clung on by the respondent is that, there was no marriage conducted in accordance with Kikuyu Customary rites. It is true and as correctly admitted by both parties that during his lifetime, Peter Kamau never formalized his marriage in accordance with Kikuyu Customary Law.

28. The key question then is, what was their relationship for 13 years?

Although there was no statutory nor customary law marriage, there is proof that the two cohabited over a long period of time (13 years) and got children which is not challenged hence the presumption of marriage under common law. This position is authoritatively fortified by the case of **Hortensiah Wanjiku Yahwe vs Public Trustee** above quoted in which the court held that:

“the fact of a prolonged cohabitation between a man and a woman can give rise to a presumption of a marriage in favour of the woman, which presumption can only be rebutted or displaced by cogent evidence to the contrary.”

29. Similar position was held in the matter of **John G. Kinyanjui Nairobi HCP and A No. 317 of 1984** in which the court had this to say:

“cohabitation can be evidence from which it can be presumed that the parties to cohabitation are married.”

30. In considering whether cohabitation for a long period of time can breed a presumption of marriage, Justice Bosire and Tumoi extensively dealt with this subject in a majority decision where they upheld a marriage based on a long period of cohabitation even in the absence of any customary rites and rituals. (**See MWG vs EWK (2010)eKLR**). In this case, their Lordships held:

“it is a concept born from an appreciation of the needs of the realities of life when a man and a woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage then a presumption of marriage arises. If the woman is left stranded either by being cast away by the “husband” or because he dies, occurrences which do happen, the law subject to the requisite proof, bestows the status of “wife” upon the woman to enable her qualify for maintenance of a share in the estate of her deceased “husband”.

31. In fact, the honourable Judges dismissed the thinking of majority decision in Machani case terming it as “old thinking” arrived at before Parliament amended the Act through Act No. 10/1981 thereby introducing Section 3(5) which provides:

“notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where the husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purpose of this Act, and in particular Section 29 and 40 thereof, and her children are accordingly

children within the meaning of this Act”.

32. To further buttress her case, the appellant did produce a court decree (land case No. 10/2003) in which Kiambaa land disputes tribunal recognized her as a wife of the late Peter Kamau hence a beneficiary of the deceased's estate and the court at Kiambu adopted it as judgment and therefore awarded her two acres of land. That judgment is still subsisting as nobody has challenged it.

33. In the circumstances, the submission by Kithinji Kimamo based on the Machani case and a minority decision in *MWG vs EWK* by J. Nyamu cannot stand. A court of law is an institution managed by men and women who are part of society and therefore cannot blind their eyes from the realities of life. It would amount to a travesty of justice if this court were to call a relationship between a man and a woman having stayed together for a period of well over 13 years and blessed with six children as a relationship of concubinage. That cannot be the position in this age and era where the current generation has no idea of what “ngurario” or Ruracio is.

34. Dowry is not a mandatory requirement for people who mutually agree to start a family as the rest of the formalities follow. There is obviously a legitimate expectation by either party that having stayed together for such a long period of time, invested together and gotten children, they are for all purposes and intents husband and wife hence the relevance of the presumption of marriage as espoused by J. Bosire and Tunoi in ***MWG vs EWK (SUPRA)***.

35. Having held as above, I do find that the trial court erred in holding that the appellant was not married to one Peter Kamau Kiarie and that their 13 years relationship amounted to an act of concubinage. The appellant having relied on the case of Machani, which has now been overtaken by ***M.W.G. vs E.W. (2010)eKLR***, this court can comfortably find that the appellant was a wife to Peter Kamau Kiarie based on a presumption of marriage and all the six children born out of the said marriage were and still are heirs of the late Peter Kiarie and consequently the deceased herein Kiarie Karomo Ndungata.

36. Based on the above finding, the late Peter Kamau Kiarie despite having had a sour relationship with his father and eventually got killed by the said father, his widow and children are entitled to his (Peter Kamau's) share out of the deceased's estate in accordance with Section 29 of the Law of Succession which provides:

“For purposes of this part, “dependant” means

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.

b. Such of the deceased's parents, grandparents, grand children, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half brothers and half sisters as were being maintained by the deceased immediately prior to his death.

Indeed the petitioner recognized this fact and listed the appellant in form P & A 5 as a beneficiary of the estate.

37. Although the grand children herein referred to were not being maintained by the deceased prior to his death, they are as of right heirs to the deceased's estate through their father (Peter Kamau) who under Section 29(a) was entitled to a share being a child to the deceased.

38. In any event, the appellant had been given a share of the subject land by a court of law. For purposes of Succession Law, the children of the appellant are entitled to a share out of their grand father's estate. In real life situations, very few grandparents are maintaining their children or grand children as envisaged under Section 29 (b) as the reality is in the reverse in that it is the children and grand children who are maintaining their parents and grandparents yet they are still entitled as beneficiaries to a share of the estate of those they maintain in their capacity as beneficiaries. Why would the administrator list Mary

Njoki (appellant) as a beneficiary of the estate in form P & A 5 if she was not a dependant? The answer is obvious. She is a dependant and therefore a beneficiary.

39. I will now turn to the 3rd ground as to whether the appellant is entitled to two acres as awarded in land case No. 10/2003. It is true that the trial court did not address its mind to this aspect. There is no dispute that there was a case before the tribunal in which the appellant was awarded two acres out of the land in question. That judgment is still in force.

40. However, in the said case, it was the deceased's widow who was sued long after the deceased (Kiarie Karomo) had died and before any succession proceedings had commenced. The rest of the beneficiaries were not parties. To rely on that case to determine the share entitlement in respect of the appellant will be tantamount to disinheriting the rest of the beneficiaries and condemning them unheard.

41. Without questioning the merits of that judgment, I will use it as a guide in recognizing the appellant as a wife and therefore proceed to share the estate equally amongst the children of the deceased in accordance with Section 38 of the law of succession. This is because, the only widow left by the deceased died before this succession cause was instituted hence leaving the estate in the hands of surviving children with no spouse. Even if Karomo hated his son Peter and eventually killed him, his grand children will not be rendered destitute because of their father's mistakes.

42. In view of my finding that the appellant was married to Peter Kamau Kiarie, the appellant is entitled to a share of the estate herein for her benefit and in trust of her children in equal share.

43. Accordingly it is hereby ordered that:

a. The appeal herein be and is hereby allowed and the ruling of the Senior Resident Magistrate Kiambu dated 22nd February, 2007 set aside.

b. That the certificate of confirmation issued on the 20th day of September, 2007 be and is hereby revoked.

c. That beneficiaries among them the appellant are hereby given 30 days within which to come up with a mutual agreement on how to share L.R. Kiambaa/Ruaka/40 among the six children of the deceased and or dependants with the appellant getting 1.3 acres out of the total 8 acres and in default the court shall be at liberty to share the estate in accordance with Section 38 of the Succession Act in which each child shall get equal share.

d. That the Land Registrar Kiambu land registry be and is hereby directed to cancel all resultant title deeds issued as a consequence of sub-division of land parcel No. Kiambaa/Ruaka/40 and have the same revert to its original title being Kiambaa/Ruaka/40 reflecting its status before the deceased died.

e. This being a family issue each party shall bear her own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

Mr. Njuguna holding brief for Githinji Counsel for appellant

No appearance for Counsel for respondent

Edwin Court Assistant