REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1245 OF 2013

IN THE MATTER OF THE ESTATE OF JAMES MURIITHI GITHUA (DECEASED)

JUDGMENT

1. The deceased herein died on 10th April 2013. A letter from the Chief of Embakasi Location, Nairobi, dated 21st May 2013, states that he was survived by two individuals, being his widow, Anne Wanjiru Muriithi, and his children – Sandra Njeri Muriithi and Toiny Muthoni Muriithi. Representation to the estate was sought in this cause in a petition filed herein on 31st May 2013 by Anne Wanjiru Muriithi and Sandra Njeri Muriithi. They listed themselves and Toiny Muthoni Muriithi as the survivors of the deceased. The deceased was expressed to have died possessed of four assets, being LR No. 97/1179/072 Tassia, LR No. 11-07/1138/129 Tassia, LR No. 97/1360/548 and money in a bank account. The cause was gazetted on 28th June 2013; a grant of letters of administration intestate was issued to the petitioners on 6th August 2013. The same was confirmed on 27th May 2014 on an application dated 24th February 2014, and there is a certificate of confirmation of grant on record dated 27th May 2014.

2. It transpired that another cause in the same estate had been initiated in HCSC No. 1927 of 2013 by Filomena Kinanu M'Riria, in her capacity as widow of the deceased, in a petition for a limited grant *ad litem*, filed in that cause on 2nd August 2013. She then obtained a citation for service upon Anne Wanjiru Muriithi and Sandra Njeri Muriithi, the administrators in this cause, dated 7th October 2013. She also, quite unwisely, lodged a summons in HCSC No. 1927 of 2013 for revocation of the grant made in the instant cause. The said application was struck out on 11th February 2015 on grounds that HCSC No. 1927 of 2013 had been withdrawn on orders made on 29th January 2014.

3. The petitioner in HCSC No. 1927 of 2013 filed a similar application herein on 6th February 2013, of even date, seeking revocation of the grant herein. The applicant, Filomena Kinanu M'Riria, claimed to have had been married under customary law to the deceased, which meant that he was a polygamist with two wives. They begat two children, Prince Junior Githua Muriithi and Precious Joy Njeri Muriithi. She averred that she and the deceased 'stayed' together with the children, and that he took care of them. She complains that after his death the administrators obtained representation to the estate without involving her. She says that there was fraud and bad intention on their part. She has attached a copy of a letter from the Assistant Chief of Karima Sub-Location, Othaya, dated 28th June 2013, which identified her and her children as survivors of the deceased. She has also attached copies of birth certificates of her children. There are also copies of records from various hospitals showing that the deceased met their medical expenses. There are also three photographs which depict the deceased, the applicant and the children together.

4. The administrators responded to the application through an affidavit sworn on 16th June 2016, by Anne Wanjiru Muriithi. She asserts in it that she and the deceased had contracted a statutory marriage in 1991, and lived thereafter as husband and wife. She states that the deceased had no capacity to contract any

other marriage. She says that the applicant and her children were strangers to their family, and could not have been dependants of the deceased. She has attached to her affidavit copies of a certificate of the marriage celebrated between her and the deceased in 1991, among other documents.

5. Directions on the disposal of the objection were given on 21st October 2013. The same was to be disposed of by way of *viva voce* evidence.

6. The oral hearing commenced on 21st June 2016. The applicant was the first to take the stand. She stated that she and the deceased got together in 2002, and had their first child in 2005 and the next came in 2007. The deceased allegedly paid the bills at the hospitals where the two children were delivered. She produced financial statements from the said hospitals, as well as birth certificates for the two children, which show the deceased was their father. She also alleged that dowry was paid for her by the deceased and his relatives. She also said that the deceased paid school fees for her children, and also paid for foodstuffs. She stated that she attended his burial at Embu. She said she was aware of the other family, and they used to interact. She complained that after the deceased died the administrators sought representation without involving her. She mentioned that cohabitation began in 2002, but the customary ceremony was in 2007. The deceased's relatives made a single visit where they paid some money to her family. She stated that it was the deceased who procured the birth certificate for their child, Prince; while she obtained the birth certificate for the younger child, Precious. She said she had met the deceased's siblings and knew them well. She also testified that she knew where the deceased's assets were situated. She conceded that she did not use the deceased's name in her national identification card, but asserted that one need not use her husband's name as surname for her to be said to be validly married.

7. The next witness for the applicant was John Githungi Githua. He described himself as a brother of the deceased. He said that the deceased had two wives and four children. He claimed that the two wives did not know each other, as they were brought in at different times. He said that the deceased had told the family about the two women. Both attended the funeral of the deceased. He said that there was a marriage ceremony at the applicant's parents' home. He was among the elders who went there. He testified that they paid a sum of money to the parents. He said that they did not go back as the deceased died before that could happen. He stated that he used to visit the deceased and his first wife at their homes at Umoja and Tassia. He said he saw the second wife for the first time in 2007, and the ancestral home at Othaya. He added that she used to come previously with the deceased but 2007 was when she was formally introduced as a wife. He said that at the burial he did not introduce the applicant as he did not want to create a dispute.

8. The applicant's third witness was Bilha Wangui Githua, a sister of the deceased. She said that the deceased had two wives, naming them as the first administrator and the applicant. She also named their children. She alleged that the applicant was married in 2008. She testified that the two wives used to know each other as they used to meet at Othaya during family events. She stated that the applicant and her children were involved in the funeral arrangements, but excluded in the funeral programme.

9. The administrators' first witness was Anne Wanjiru Muriithi, the first administrator of the estate. She described herself as the statutory wife of the deceased. She asserted that the applicant was not at the burial and did not come forward as a widow of the deceased. regarding the assets she testified that the same were acquired jointly by her and the deceased, going into details on what she contributed in that behalf, including taking loans. She said that she was the one who completed some of the construction work on some of the assets after the deceased's death. She said that she also settled debts relating to the estate. She alleged that she met the applicant two years after the deceased's death. She denied knowing her and her children before then, and denied any interactions with the applicant and her children.

10. The next witness was Peterson Githu Gathingu, a cousin of the deceased. He stated that the deceased was married to the first administrator and that the two had two children. He was party to a meeting that was held at the ancestral home of the deceased at Othaya to discuss the estate. He said the same was not conclusive as the siblings of the deceased brought in persons that he described as strangers prompting the meeting to end prematurely. He also went into details of the requirements for a valid Kikuyu traditional marriage, saying that at the age of 80 years old he was familiar with them. He did not mention the

applicant at all in his evidence in chief, insisting that the deceased used to attend all family functions at Othaya in the company of the first administrator. He said he did not see the applicant during the funeral nor at the meeting that aborted, saying that if she attended the meeting she must have been one of the strangers that caused its premature end. He said that he did not know the applicant's children, and that he had never met them.

11. The respondent's third witness was John Mwangi Waita, an elder from the clan of the deceased. He testified that the deceased had only one wife, the first administrator. He said he was party to the clan meeting that aborted after the deceased's death on account of attendance by non-clan members. He said that no introductions were done, and therefore he did not get to know who the strangers were. He said that on account of his age, which he put at 72 years, he was familiar with Kikuyu traditions and customs relating to marriage, and he went ahead to give details thereof. He said that the applicant was never introduced to the clan by the deceased as his wife.

12. At the close of the oral hearing I directed the parties to file and exchange their respective written submissions. Both parties have complied with the directions, by filing their respective written submissions, complete with the judicial authorities that they have relied on. I have perused through the submissions filed and taken note of the arguments made therein.

13. The issues for determination are fairly straightforward – whether the applicant and her children were survivors of the deceased and whether they are entitled to representation and shares in the estate of the deceased.

14. The nature of the objectors are survivors of the deceased depends on the relationship between the deceased and the applicant. The administrator's case is that the deceased did not marry the applicant at all, and therefore she was never a wife. Indeed, according to her, the applicant only showed up after his death. She asserts that she was married under statute and her husband therefore lacked capacity to contract another marriage under any other system of law. The applicant's case is that the deceased was her husband. According to her, he had married her at customary law, and that they had lived together at Buru Buru, Nairobi, had children together and that he did provide for them during his lifetime.

15. Although the applicant argued that the deceased had married her under customary law, she did not call any evidence to establish the requirements of a valid Meru customary marriage, given that she is from that community. There was little effort to establish the content of the Meru customary law of marriage. No treatises were nor case law on Meru customary law of marriage were cited or referred to. No expert on Meru customary law was presented to guide the court on what that law is, and no attempt was made to bring the applicant's alleged marriage under that law. My conclusion from the evidence presented is that there is insufficient material upon which I can hold that the deceased had contracted a valid Meru customary law marriage with the applicant. The law on what needs to be proved with regard to the existence of a custom remains as stated in the old decision of the former Court of Appeal for Eastern Africa in *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* (1965) EA 735.

16. I have carefully combed through the affidavits on record as well as the recorded oral evidence and the written submissions, and noted that the applicant does not appear to be grounding her case on presumption of marriage founded on prolonged cohabitation. I note though that she alleges that she did have children with the deceased and named them in accordance with the Kikuyu tradition, and the deceased provided for them.

17. The principles governing presumption of marriage were stated in the Kenyan case of *Hortensia Wanjiku Yawe vs. Public Trustee* CA No. 23 of 1976, a decision of the former Court of Appeal for Eastern Africa. The centerpiece around which the presumption revolves is prolonged cohabitation and the repute that the parties were husband and wife.

18. The evidence placed before me by the applicant does not appear to be geared towards establishing a prolonged cohabitation and repute from which I can impute a marriage. It would appear that the applicant was keener on proving a customary law marriage rather than one founded on cohabitation, and therefore

failed to adduce evidence pointed at that. It is now left to me to evaluate what is on record to determine whether it provides any background to the making of a presumption of a marriage between the deceased and the applicant.

19. The applicant is said to have had allegedly lived at Buru Buru in a house rented by the deceased. There is scanty evidence on this. None of her witnesses testified as to visiting the two at the Buru Buru residence. No witness was called to describe how the two lived, so that the court can ascertain whether there was any repute that the two were married. The applicant did not call any of her friends or neighbours who were close to the couple and who could testify positively on that point. The persons she called were all resident upcountry and hardly visited Nairobi. From what is before me, they never visited the applicant and the deceased at Buru Buru. There is therefore no confirmation that the deceased cohabited with the deceased at Buru Buru as alleged. The deceased is said to have had several properties at Tassia, some of them completed and occupied by tenants. The first administrator lives in one of them, the applicant was not brought in to occupy any of the others, she allegedly remained in rented premises. That would raise the question why live in a rented house while there were premises at Tassia that she could live in.

20. The only thing that causes me so anxiety is the fact that it is the siblings of the deceased who allege that the applicant was a widow of the deceased. He allegedly introduced her to them. One of them says categorically that he was party to the delegation that visited the applicant's parents at Meru. Yet, if indeed they were so sure that she was a spouse of the deceased, why did they leave her, and her children, out of the obituary and the funeral programme. To me these are pointers that they did not consider her and her children to be part of the family of the deceased. They also gave inconsistent evidence – the brother said the two women did not know each other, while the sister testified that they used to interact.

21. The first administrator asserted that there could not be any other marriage for hers was a statutory marriage which meant it was impossible for the deceased to contract another marriage thereafter. Under section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya, upon the demise of a man married under statute any other woman purportedly married by him under customary law is to be treated as his widow for the purpose of succession. I have concluded above that there is no proof of a customary law marriage between the deceased and the applicant, and therefore it would appear that section 3(5) of the Act would be of no application to the circumstances of this case.

22. The facts presented paint a picture which suggests that the deceased might have had a relationship, which probably produced a child or two. It suggests that key persons might have had wind of it, hence the gallant efforts made to guard against an incident at the funeral. The applicant being aware of that ought to have made a serious effort to prove that that relationship was much more than a mere friendship. As there is a possibility that there might have been a friendship between the deceased and the applicant, there is a chance that her children were sired by the deceased. If that be the case then they ought to be provided for.

23. The application before court is for revocation of grant founded on the allegation that the applicant was a spouse of the deceased, and that fact was concealed from the court. As I have found that she was not, it follows that the application before me ought to be dismissed.

24. I am moved in the circumstances to resolve the objection proceedings in the following terms –

(a) That I hereby find that the applicant has not proved that she was a spouse of the deceased, and I hold that she is not entitled to a share in the estate of the deceased;

(b) That on account of the finding in (a) above, it would be necessary to determine whether the applicant's children were children for succession purposes, I hereby, in the circumstances, direct that a deoxyribonucleic acid (DNA) test be carried out within forty-five (45) days of date hereof using samples to be supplied by Toiny Muthoni Muriithi, Prince Junior Githua Muriithi and Precious Joy Njeri Muriithi;

(c) That should it turn out that Prince Junior Githua Muriithi and Precious Joy Njeri

Muriithi are children of the deceased they shall be entered into the list of the survivors of the deceased and be provided for out of the estate of the deceased;

(d) That to facilitate (c) above, I hereby direct stay of implementation of the certificate of confirmation of grant dated 27th May 2014 for a period of six (6) months to accommodate the conduct of the test in (b) above;

(e) That the application dated 6th February 2013 shall be determined in those terms; and

(f) That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 19TH DAY OF OCTOBER, 2017.

W. MUSYOKA

JUDGE