



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 670 OF 2013**

**IN THE MATTER OF THE ESTATE OF JANE NJERI KARIUKI (DECEASED)**

**JUDGEMENT**

1. These proceedings were initially initiated at the Limuru law courts in Limuru PM CSC No. 38 of 2009, before the matter was called up to the High Court on the orders of Njagi J.
2. The matter relates to the estate of Jane Njeri Kariuki, who died on 7<sup>th</sup> April 2004.
3. Representation to her estate was sought in Limuru PM CSC No. 38 of 2009 through a petition lodged in that cause on 7<sup>th</sup> April 2009 by Agnes Wambui Ngari in her purported capacity as daughter-in-law of the deceased. She listed herself and a son of the deceased called Benjamin Mbatia Wanjama as the deceased's sole survivors. She was said to have died possessed of two assets, being the immovable property described as Limuru/Kamirithu/T. 25 and T. 464.
4. After the petition was lodged in court, it was directed that citations be issued and served upon the said Benjamin Mbatia Wanjama. In compliance with that direction, the petitioner, Agnes Wambui Ngari, swore an affidavit on 5<sup>th</sup> August 2009, attesting that the said Benjamin Mbatia Wanjama had failed to take out letters of administration.
5. A citation to that effect issued on 17<sup>th</sup> September 2009, addressed to the said Benjamin Mbatia Wanjama, directing him to cause an appearance to be entered in the cause or, alternatively, to show cause why representation should not be made to the petitioner. There is an affidavit on record purporting that the citation was duly served on the said Benjamin Mbatia Wanjama on 18<sup>th</sup> September 2009.
6. After the citee failed to appear or to show cause, the petitioner's cause was duly gazetted on 3<sup>rd</sup> December 2010 through gazette notice number 15761. The gazette ment prompted the filing of the objection, out of time with leave, which culminated in the proceedings conducted on 7<sup>th</sup> July 2014, 29<sup>th</sup> September 2014 and 18<sup>th</sup> November 2014.
7. The objector, Benjamin Mbatia Wanjama, testified that the deceased was his mother, while the petitioner had been introduced to him by his late brother as a girlfriend when the latter lived at Subukia, but she was never married to him for he never paid dowry for her. He stated that his brother predeceased their mother. He was living at Subukia before then, but when he fell ill he came down to Limuru to be nursed by their mother. He was said to have come to Limuru alone. The petitioner only showed up at Limuru during his brother's burial, with a three months child named John Wanjama Kariuki. After burial she went back to Subukia. She showed up again at Limuru upon the death of their mother, this time with

two children. After the burial, she stayed at Limuru saying she had nowhere else to go, and the objector took pity on her and gave her a room to stay as she looked for a job. He allegedly did so as she had a child bearing his brother's name. He then referred to letters from the local chief indicating that he was the sole survivor of the deceased.

8. On cross-examination, he asserted that the petitioner was not a daughter-in-law of the deceased for she never married the deceased. He conceded that he was the one who showed her where to stay after their mother died, but he sought to have her move out but was restrained by the chief. He stated that the chief wrote two contradictory letters, one describing him as the sole survivor and the other identifying him and the petitioner as the survivors.

9. On her part, the petitioner alleged that she married the brother of the objector in 1996 after they met at Subukia. By then she had one child out of wedlock, and the couple got another one thereafter. Her alleged husband's parents got to know her when they visited Subukia in 1999. They visited her parents at Subukia for introductions, but did not pay dowry. In 2000, she and her alleged husband visited Limuru to introduce their child, Wanjama, and a goat was allegedly slaughtered to mark the occasion. Thereafter they went back to Subukia whereupon the alleged husband died within months. After his death, she was allegedly brought back to Limuru by the alleged husband's parents. After her alleged father-in-law died she went back to Subukia, but her purported mother-in-law came for her and took her to Limuru. She was allegedly settled on Limuru/Kamirithu/T. 464 by the alleged mother-in-law. After her death, the objector began to trouble her seeking to evict her from the land. The matter was referred to the chief who proposed that she remained on Limuru/Kamirithu/T. 464 while the objector kept Limuru/Kamirithu/T. 25. There was also money in an account at Barclays Bank, Limuru, which was withdrawn and shared equally between her and the objector. She asserted that she had consulted him before she moved the Limuru court for representation to the deceased's estate.

10. On cross-examination, she stated that the parents of her deceased husband did not actually visit her parents, and that it was in fact her alleged husband and someone else who visited. She alleged that it was her alleged husband who left her at the Limuru homestead before he died. She stated that she did not intend to apply for representation alone, she wanted to work with the objector but he refused to cooperate and instead sought to evict her.

11. It is not disputed that the deceased person whose estate is the subject of these proceedings had two children, the objector and the alleged husband of the petitioner. What is in dispute is whether the petitioner was a wife of the brother of the objector.

12. From the material before me, it is clear that the petitioner never went through any ceremony of marriage with the objector's brother. No dowry was ever paid, the *ngurario* was never performed. The only thing that the petition says was done was an introductory visit, which alleged did not involve the parents of the alleged husband, or even the objector. Indeed, from the testimony of the petitioner it is not even clear whether such a visit ever took place in view of the inconsistencies in her evidence. She was evidently not a customary law wife of the dead brother of the objector.

13. That being so, she can only stake her claim to the estate on the basis of presumption of marriage founded on a prolonged cohabitation with the objector's brother. She alleged that she and her alleged husband got married in 1996. I take this to mean that that is the date when she began to cohabit with the alleged husband. There is mention of a child who bears the name of the alleged husband. The objector alludes to this and does not object strenuously to it. Indeed, he concedes that he allowed her to stay on estate property on account of the fact that that child bore the name of his brother. She, somehow, found her way to the deceased's property at Limuru. Her story is not very consistent on how she got to live there. One thing is clear though, that she found herself at Limuru on account on her ties with the objector's brother. She variously says it was her in-laws who brought her to the property, and alternatively that it was her alleged husband who put her on the land. I also note that the objector concedes that he too allowed her to stay on the property.

14. The doctrine of presumption of marriage hinges on cohabitation. The evidence on this is tenuous. The

couple allegedly mainly spent their time at Subukia. Evidence of the persons who lived with them at Subukia was not adduced. It is not clear therefore whether the petitioner and her alleged husband ever cohabited.

15. However, there is the issue of the child who bears the family name. It would appear that there might have been some cohabitation which resulted the birth of the said child. There is also the whole issue of how the petitioner found herself at the Limuru home and property. It would appear to me that she did not impose herself there. She came in apparently with the acquiescence of her alleged husband, her alleged parents in law and the objector. To my mind, she was not an impostor. What I surmise from the evidence by the two sides is that she had been recognized as a wife of the objector's brother. The evidence on cohabitation might be tenuous, but it can be presumed from the tenor of the testimonies of the two witnesses that she had cohabited with the objector's brother hence her recognition by his relatives as his wife.

16. Having taken into account all the evidence on record, I have been moved to determine the petition and cross-petition before me in the following terms:

**(a)That I declare that the deceased herein was survived by her son, Benjamin Mbatia Wanjama, and her daughter-in-law, Agnes Wambui Ngari, the widow of her son, Harrison Kariuki Wanjama;**

**(b)That I appoint Benjamin Mbatia Wanjama and Agnes Wambui Ngari administrators of the estate of the deceased;**

**(c)That a grant of letters of administration intestate shall accordingly issue to them; and**

**(d)That each party shall bear their own costs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>TH</sup> DAY OF MAY, 2016.**

**W MUSYOKA**

**JUDGE**