



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS- FAMILY DIVISION**

**IN THE MATTER OF THE ESTATE OF SAMUEL NGUGI KAMAU (DECEASED)**

**SUCCESSION CAUSE NO. 3539 OF 2004**

**BETWEEN**

**MILKAH WAMBUI NGUGI ..... APPLICANT**

**AND**

**AGNES MUTHONI NGUGI ..... RESPONDENT**

**RULING**

**INTRODUCTION**

The deceased died on 17<sup>th</sup> April, 1990. Thereafter, Agnes Muthoni Ngugi (hereafter 'the Respondent') was issued with Grant of Letters of Administration on 12<sup>th</sup> May, 1994 in the Chief Magistrate's Court at Thika, in Succession Cause No. 173 of 1990.

Milka Wambui Ngugi (hereafter 'the Applicant') has filed the present Application dated 22<sup>nd</sup> November, 2004, seeking to have the said Grant revoked.

**THE APPLICANT'S CASE**

In her Affidavit sworn on 23<sup>rd</sup> November, 2004, in support of the Application, she deponed that the Grant was issued and confirmed without her being cited or served with any document in regard to the matter, so as to enable her participate in the proceedings. That she was also not served with the Application for the confirmation of the Grant and in any event, the same was confirmed only with the consent of the Respondent and her children.

She contended that the Respondent misled the Court into believing that she and her children had no objection to the same, when in fact they were not served. Additionally, that the Respondent failed to point out to the Court that the deceased had two wives, as per the Chief's letter attached to the Respondent's Petition for the Grant of the Letters of Administration.

In her Written Submissions dated 30<sup>th</sup> October, 2014, the Applicant pointed out that it is not clear why the Court ignored the Chief's letter at the time of the confirmation of the Grant and why the consent for confirmation was only signed by three children while she had nine. In that regard, it was her argument that the Grant was seriously flawed and therefore defective in substance as the Court ignored the Chief's

letter and disregarded **Rule 26 (1)** of the **Probate and Administration Rules**.

It was her submission that that the Respondent's allegations are far from the truth and that she (Respondent), as early as November, 1990, was aware of the fact that the deceased had another wife. In that regard, her argument was therefore that she is a wife by dint of **Section 3 (5)** of the **Law of Succession Act**, she is entitled to the deceased's Estate as she and her children were dependants within **Section 29 (a)** of the **Law of Succession Act**.

The Applicant therefore argued that as a result of the issuance of the Grant and confirmation of the same, she and her children have been rendered destitute and as such, she urged the Court to allow her Application and grant the order sought therein.

### **THE RESPONDENT'S CASE**

In response to the Application, the Respondent filed an Affidavit in reply sworn on 29<sup>th</sup> October, 2008 in which she deponed that she knew the deceased from about 1962 and started co-habiting with him as husband and wife in the year 1965. That they were blessed with 11 children but only nine survived and during the subsistence of the marriage, she has known the deceased's family and met them occasionally and that nobody ever told her that the deceased had another wife and that allegation only came about after his demise.

She stated that when she met the deceased, he was not married and they both used to live and work at CMC Coffee Plantation as labourers and that he did not at that time own any property. Further, that during that time, they did not own anything and that they decided to join other labourers in the surrounding plantations to form land buying companies where they saved their incomes to purchase shares in the area and beyond. It was her position that she made hefty contribution to the purchase of the said shares and even after the deceased's death, she continued paying in order to cover for the purchase price.

The Respondent urged the Court to take into consideration his hard labour and contribution in the acquisition of the properties when making any orders in the present matter. Further, the Respondent rebutted the assertions that she did not disclose to the Court that the deceased had two wives and stated that the same could not stand since she filed the Petition for Grant of Letters of Administration in September, while the Chief's letter was subsequently filed in November and that in any event, she denied being the one who filed the said letter. Additionally, she asserted that as per the letter, the Applicant seems to have been aware of the present matter as the Chief, through the letter, makes reference to having received letters from the respective Counsel acting for both Parties herein.

That in any event, the Applicant appeared before the elders immediately after the demise of the deceased but the elders dismissed her claims that she was the deceased's wife as she could not explain the basis of her claim since she only appeared 15 years later on. She deponed further that the Applicant and her sons have forcefully entered into one of her plots and have since refused to move out and that prompted her to file a matter at Thika Law Court in **Case No. 977 of 2001**.

In her Written Submissions dated 23<sup>rd</sup> December, 2014, she maintained that she jointly acquired properties with the deceased and that she was by then married to the deceased. Accordingly, that the deceased died in 1990 and yet the Applicant did nothing in regard to the proceedings at the Thika Court and waited 15 years to file the present Application.

She submitted that the Applicant has not proved that she was married to the deceased under Kikuyu customary law and the evidence adduced does not in any event demonstrate how the alleged customary marriage was conducted. Furthermore, that no mention is made of other persons who allegedly attended the customary marriage and no date, time and events are also given. In that regard, it was her argument that no customary marriage ever took place to warrant her to claim a share in the deceased's Estate.

The Respondent also submitted that the present matter started acrimoniously to the extent that the Chief

had been summoned in Court over the burial permit at Thika Court and as such, the Applicant was aware of the proceedings but opted to ignore the same until 15 years when she filed the present Application. According to the Respondent, there is no proof of fraud or misrepresentation and there is no evidence that the Applicant was married to the deceased.

The Respondent urged the Court to be guided by the decision in **IN THE MATTER OF THE ESTATE OF MUHINDI KIGURU (DECEASED), SUCCESSION CAUSE NO. 503 OF 1995** where the Court therein considered the fact that one of the widows had substantially contributed to the acquisition of one of the properties and accordingly gave her a larger portion of the same. In that regard, she urged the Court to take notice of the fact that the Applicant and her children have taken possession of Plot No. 746 Ngoigwa Company Limited, registered in the deceased's name, in which they have built a house. As a result, it was her position that the Court ought to make a finding that the properties registered in the deceased's name were jointly acquired by him and her.

For the above reasons, the Respondent urged the Court to dismiss the present Application and uphold the Grant as issued by the Thika Court, and the Applicant be further ordered to release the deceased's property in her possession, to her for distribution to the rightful beneficiaries.

### **DETERMINATION**

Has the Applicant made out a case for revocation of the Grant? The law on revocation of grants is outlined in **Section 76** of the **Law of Succession Act** in the following terms:

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-***

***(a) That the proceedings to obtain the grant were defective in substance;***

***(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.***

***(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-***

***(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or***

***(ii) To proceed diligently with the administration of the estate; or***

***(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(iv) That the grant has become useless and inoperative through subsequent circumstances.***

In the present case, the gist of the Applicant's case is that the Grant herein was obtained and confirmed fraudulently on the basis of material non-disclosure of the fact that the deceased had two wives. The question then that begs for answers is whether, at the time of petitioning and confirmation of the Grant, the Respondent and the lower Court were aware of the fact that the deceased was allegedly married to the Applicant.

I have seen the Chief's letter dated 26<sup>th</sup> November, 1990 and in the said letter, the Chief admits that the deceased had indeed married two wives. The said letter was filed in Court on 13<sup>th</sup> December, 1990 and this was before the confirmation of the Grant. It is therefore clear that at the time of confirmation of the Grant, on 12<sup>th</sup> May, 1994, the lower Court and the Respondent were alive to the fact that the deceased had two wives.

The Court did not however make an inquiry in that regard but it instead went on to confirm the said grant. In the circumstances, does that warrant the revocation of the said grant? In order to answer that question, I must satisfy myself to the assertions in regard to the claims by the Applicant, that she was married to the deceased.

Based on the materials before this Court, according to one Florence Njoki Njuguna, in her Affidavit of 29<sup>th</sup> October, 2008, she has lived in Mang'u and attended the same church with the deceased. Furthermore, she was the maid of honour during the deceased wedding on 8<sup>th</sup> June, 1985 and she never knew that the deceased had another wife. Additionally, according to Gabriel Njuguna Gicharu, in his Affidavit sworn on 29<sup>th</sup> October, 2008, he has also lived in Mang'u and attended the same church with the deceased. He has known the deceased and his family since 1984 as he took him and his wife through catechism classes and that he established their status before he could guide them to the sacrament of marriage and he even advised the local priest who ordained the marriage on 8<sup>th</sup> June, 1985. Gabriel Njuguna Gicharu stated further that the church, prior to the wedding, made regular announcements in church concerning the intended wedding and during that period, nobody objected to the same.

On the other hand, according to one Maxwell Mbuthia Kamau, in his Affidavit of 27<sup>th</sup> April, 2009, the deceased's younger brother, the deceased was married to the Applicant under Kikuyu customary law and procedures. He deponed that he was not aware of the deceased's marriage to the Respondent and that in any event, the deceased's properties ought to be shared among the two wives and their respective children. It was also his deposition that when the deceased was sick and admitted at Kenyatta National Hospital, he informed him that the Applicant and her children ought to have their share in his Estate and that the deceased never mentioned the Respondent as her wife.

Was the Applicant married to the deceased under Kikuyu customary laws as she alleges? On that note, it will be noted that marriage under Kikuyu customary law entails certain activities. These were highlighted by the Court of Appeal in **EIUD MAINA MWANGI VS MARGARET WANJIRU GACHANGI, CIVIL APPEAL NO. 281 (A) OF 2003**, where the Learned Judges of the Appellate Court, while citing Dr. Cotran, observed that:

*“Kikuyu customary marriages involve elaborate rites and ceremonies. According to Dr. Cotran, in Restatement of African Law: The Law on Marriage and Divorce, Sweet & Maxwell, 1968, the following procedures, rites and ceremonies are involved in a typical Kikuyu customary marriage:*

*A marriage proposal is conveyed to the girl. If it is favourably received the girl's parents are invited to the home of the prospective husband to partake in the “njohi ya njurio”, the beer of asking the girl's hand. (It would appear that this is significant because Cotran specifically notes that there is a variation among the Waembu where the boy's parents take the beer to the girl's parents). Thereafter the first installment of ruracio is taken to the girl's father. Further installments follow until a sufficient amount of the full marriage consideration, stipulated by the girl's father has been offered and accepted to seal the engagement. Next a day is fixed for the engagement ceremony (ngurario), i.e. the pouring out of the blood of unity. A ram (ngoima ya ngurario) is sent from the boy's father to the girl's home, where the ceremonial feast is prepared. The ram is slaughtered, and the girl eats the kidneys as a sign of consent to the betrothal. The betrothal is complete when this ceremony has been performed. The ngurario ceremony is followed by a further ceremonial feast (guthinja ngoima). This feast is attended by members of the parties? Clans, and after the slaughter of a sheep provided by the boy's family, the families exchange presents. After the guthinja ngoima ceremony, the bride*

***is brought to the bridegroom's home by mock capture. The author notes that this procedure of capture is now obsolete."***

The Learned Judges went on to state thus:

***"Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.***

***On the essentials of a valid kikuyu marriage, Cotran concludes that: 'No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered' and that "there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid.'"***

It is thus apparent that a marriage under Kikuyu customary laws entails an elaborate process and stages. Juxtaposing the above with the present case, other than the mere assertions by the Applicant, the deceased's brother and the Chief's letter, no other material has been adduced before this Court in support of the allegations that the Applicant was married to the deceased under Kikuyu customary laws. For instance, the Applicant has not availed information to this Court pertaining to the alleged customary marriage she states she underwent with the deceased. In the absence of such evidence, many questions remain unanswered for example? When did the customary marriage occur? Who were the parties present? What events transpired during the alleged marriage? Was *ruracio* paid? E.t.c in the absence of answers to these, the Court is at difficulties in accepting the mere assertions that the Applicant was married to the deceased.

It will be noted further that the Applicant filed the present Application on 23<sup>rd</sup> November, 2004, almost ten years after the confirmation of the grant herein. In the circumstances, the Court is inclined dismiss the assertions that she was married to the deceased.

Having reached the conclusion that the Applicant was never married to the deceased, the next question that I must pose is whether the Applicant and her children are entitled to a share of the deceased's Estate. In that regard, the Applicant deponed that she has seven children and that they are entitled to a share of the deceased's Estate. In the circumstances and based on the materials before this Court, I am not satisfied that the Applicant has made out a case in support of her assertions that she is in anyway entitled to the deceased's Estate. Furthermore, the Applicant has neither adduced any evidence in support of her allegations that her children are the deceased nor that they were dependants. Based on that, I am inclined to dismiss the Applicant's assertions in totality.

## **DISPOSITION**

Based on my analysis and findings above:

- (1) The Application dated 22<sup>nd</sup> November, 2004 is hereby dismissed.**
- (2) Let each Party bear its own costs.**

**DATED AND SIGNED IN ON THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2016**

**M.W.MUIGAI**

**JUDGE**

*In the presence of:*

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