



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCC. CAUSE NO.1290 OF 2009

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

RACHAEL WANJIRU KARANJA.....APPLICANT

NANCY WAMBUI KAMAU.....RESPONDENT

RULING

PLEADINGS

The deceased Karanja Kigo died on 24th December 2006 vide Death Certificate No.69035. The Applicant, Rachael Wanjiru Karanja filed summons for revocation of grant of letters of administration to the deceased's estate on 20th May 2009 filed on 5th June, 2009 in this court against the grant issued to the Respondent, Nancy Wambui Kamau in Thika Succession Cause No.390 of 2007.

The application is brought under **Section 76 of the Law of Succession Act Cap.160** and **Rule 44 of the Administration and Probate Rules** on the grounds that the proceedings to the grant of letters of administration to the Respondent were defective, the grant was obtained fraudulently by making false statements and concealment of material facts.

The facts are that upon the deceased's demise, the Respondent took possession of the deceased's Title deed LR. No.Ruiru/Ruiru/East Block 2/429. The beneficiaries of the estate are in fear that the Respondent shall sell or receive money and dispossess the beneficiaries of the estate.

Secondly, the Respondent alleged to be the wife of the deceased obtained grant of letters of administration of the deceased's estate without knowledge and consent of the other beneficiaries, the applicant. In the proceedings, the Respondent is alleged to have used forged documents to facilitate the grant of letters of administration. The documents in question are the Death Certificate of the deceased No.58707 which has no date of death and it is indicated that the deceased hailed from Ruiru and the Applicant's copy of the deceased's Death Certificate No.69035 which shows the deceased's death was on 24th December 2006 that and he hailed from Maragua. The other document is the Chief's letter filed in court on 31st October 2007 which showed the Respondent had 2 children, George Ruhu Karanja and Anne Wanjiru Karanja as the beneficiaries of the deceased's estate. The said letter was later revoked by the one dated 4th November, 2008 by the same Chief D.K. Karuita. There is also attached to the application, the letter dated 11th June, 2007 from the Chief of Gakumari Location showing the deceased's family as the Applicant and (Vivian Wambui Karanja, Patricia Mbaire Karanja and Sylvia Nduta Karanja) the 3 daughters of the deceased. Their mother Mary Gathoni Karanja died on 15th October 2005.

The Respondent Nancy Wambui Kamau filed a replying affidavit on 19th October 2009 and stated that she was the 2nd wife of the deceased as she was married under Kikuyu Customary Law and procedures.

She averred that the Applicant's allegation that the death certificate is a forgery is baseless and unfounded. That the Applicant's family distanced her and it is shown by the letter to N.S.S.F. dated 20th November 2006 by Francis Macharia brother to the wife of the deceased and Anastasia Mariga sister to the deceased. The letter was to stop payment of the benefits of their late mother to her and instead be paid to the children of the deceased.

The Applicant, Rachael Wanjiru Karanja filed Reply to Replying Affidavit on 11th December, 2009 and reiterated that the death certificate produced by the Respondent was forged and presented in the grant of letters of administration proceedings and the Chief's letter was obtained from Gatunyaga instead of Maragua where the deceased hailed from. The Applicant explained that during the last days towards her father's death he was not of stable mind and the Respondent took advantage of him. As orphans, the applicant's aunt and uncle wrote to the NSSF to protect their late mother's final dues from being paid to the Respondent.

PROCEEDINGS:

The matter came for hearing in court on 28th October 2009, the Presiding Judge sought the application be served and the relevant pleadings filed. On 22nd March 2010, the Presiding Judge ordered the matter to proceed by reliance of affidavits filed. On 23rd May 2012, the Judge identified the issues for determination as follows:

- a. Whether the administratrix was married to the deceased or not.
- b. Whether the grant be revoked or annulled.
- c. Whether the administratrix is a beneficiary of the deceased's estate

or the defendant.

Parties were to file witness affidavits on the 3 issues above cited.

On 23rd October 2012, the court confirmed that affidavits filed were on 15th June 2012, 17th July 2012 and 23rd August 2012. The court noted the affidavit of 17th July 2012 was not in the court file.

On 8th October 2013, the court ordered the parties to file written submission and highlight them in court. On 22nd October 2014, the court confirmed the written submission of the Applicant and gave a further date of 17th November 2014 for highlighting of submissions and the parties sought a Ruling date on 19th December 2014 at 2.30 p.m. and by then the court was on annual leave.

The court record shows, that the Applicant's counsel filed written submission on 28th January 2013; John Wamakau Kung'u filed an affidavit on 23rd August 2012 and stated as friend and business partner of the deceased, he was not aware of any marriage ceremony by the deceased to Nancy Wambui Kamau, the Respondent.

John Njiiri Kigo (the eldest brother of the deceased) - filed an affidavit on 15th June 2012 and deponed that the deceased was married to Mary Gathoni Karanja, mother of the applicant and 3 sisters and there was no customary marriage conducted between the deceased and the Respondent.

Rachael Wanjiru Karanja daughter of the deceased filed an affidavit on 14th July 2014 and deponed that she and other siblings: (1) Vivian Wambui Karanja, (2) Patricia Mbaire Karanja and (3) Sylvania Nduta Karanja lived with the deceased until his death; the Respondent did not live with him, instead she was a co-tenant with the family in a rented plot in Ruiru. Francis Wachira Macharia filed an affidavit on 15th June 2012 and he deponed he was brother in-law to the deceased, his wife Mary Gathoni Karanja who died earlier was his sister and since the children of the deceased were orphaned, he lived with them upto the time of filing the summons. He indicated the deceased never remarried. The Respondent and other

parties did not file affidavits or written submissions from 23rd May 2012 and 8th October 2013 but she was present in court on 17th November 2014.

The issues for determination are as obtained by the court on 23rd May 2012.

LAW:

To determine the issues the court is obliged to receive evidence as stipulated under **Section 107, 108, 109 and 112 of the Evidence Act Cap.80**. These provisions spell out the burden of proof and in summary he or she who alleges must prove by oral and/or documentary evidence.

The 1st issue is whether the administratrix/Respondent was married to the deceased or not. The burden of proof rests with her to prove the same. The court record has only the Replying Affidavit filed by Nancy Wambui Kamau filed on 19th October 2009 where she stated she is the deceased's 2nd wife and was married under Kikuyu Customary Law. She attached a letter marked "**NWK 1(a)**" dated 20th November 2006 to the N.S.S.F. by brother to the deceased's wife and sister to the deceased's husband. They stated among other things that the deceased's father was busy "**conducting a Gikuyu Customary Marriage instead of a ceremony of unveiling the cross of the deceased's wife. He has a written Will and nominated his wife and children as beneficiaries of the estate. Since then, he has transferred his bank account to the wife**".

The Gikuyu Customary marriage as explained in **Restatement of African Law; the Law of Marriage and Divorce** by Eugene Cotran Volume I Chapter 2 page 10-15 states;

"The essentials of a valid marriage under Kikuyu Law are;

- a. *Capacity which includes age, physical condition and marital status.*
- b. *Consents of the family of the husband and wife and first or senior wife.*
- c. *Ngurario ram slaughtered*
- d. *Ruracio part of dowry paid*
- e. *Commencement of cohabitation"*

The Respondent's evidence of a customary marriage based on the letter attached amounts to an allegation by 3rd parties who were not privy to the conduct of the marriage so it is possible there was no marriage conducted as they did not witness or participate in it. The Respondent did not have affidavits sworn by elders and or family members to show that the marriage actually took place. The affidavits filed in court do not disclose any marriage ceremony between the deceased and the Respondent.

(2) The 2nd issue is, if it actually took place, *then does it constitute a legally constituted Gikuyu Customary marriage?* The requirements as stated above have not been proved to have been complied with. There are no witnesses to the ceremony. The elders and/or family members have not discussed such a ceremony. There is no evidence of family members and/or participation, evidenced by the affidavits filed and on record; the *ngurario ram* was not slaughtered, part of the dowry was not paid, therefore even if a marriage was conducted between the deceased and the Respondent; I find that the evidence adduced by the Respondent of the alleged marriage fall short of a valid legal Gikuyu Customary Marriage.

One of the requirements to the marriage is capacity which include physical condition of either party; the deceased had been sick for some time as alluded to by the affidavit and in the submission of counsel. In fact, the alleged marriage between the deceased and respondent took place on 21st October 2006 and the deceased died 2 months later on 24th December 2006. Clearly, the deceased having been sick during this period could not be stable to make decisions and participate in the marriage ceremony.

REFERENCE:

Pricilla Waruguru Gathigo –vs- Virginia Kanugu Gathigo (2004) eKLR in the matter of the estate of Joseph Gathigo Kabuito (deceased).

On similar facts, Okwengu JJA held;

“...I find that the evidence adduced by the protestor in proof of her alleged marriage to the deceased fell short of proving the alleged marriage.there were no other independent witness to the customary formalities. There was no evidence that there was any Ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased’s relatives who participated in the alleged formalities...”

The Court finds that there was no marriage between the deceased and the respondent.

The 2nd issue whether the Respondent (administratrix is a beneficiary or dependant of the deceased’s estate). Section 3(5) Law of Succession Act Cap. 160 – no evidence of living with the deceased, children of the deceased or acquired parental responsibility. Therefore not wife for purposes of succession. With regard to evidence on record, the Respondent obtained grant of letters of administration intestate of the deceased’s estate from Thika Succession Cause No.390 of 2009 to the exclusion of the children of the deceased, the Applicant and 3 sisters.

The evidence on record does not prove that she was legally married to the deceased or that the marriage contracted with the deceased was a valid Gikuyu Customary Marriage. The death certificate and Chief’s letter were not genuine documents with true information. Therefore, the Respondent and her children are not entitled to inherit the estate of the deceased.

(3) The 3rd issue for determination;

Is the Respondent a dependant and her children dependants of the deceased?

Section 29 of the **Law of Succession Act Cap.60** stipulates:

“dependant” means **“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”**.

In the matter of the Estate of James Mberi Muigai Kenyatta, Succession Cause No.2268 of 1998. Joyce Aluoch J found that the wife now widow did not have the legal right to apply for letters of administration for the estate of the deceased.

From the above evidence, the Respondent was not a wife to the deceased and her children were not the deceased’s children and there is no evidence the deceased acquired parental responsibility.

This court finds that from the evidence on record, there is no proof of marriage to warrant the Respondent and her children benefit from the estate of the deceased.

(4) *The 3rd issue is whether the grant of letters of administration intestate were obtained fraudulently?*

In filing the petition for grant of letters of administration intestate, the Respondent did not inform and consult with other beneficiaries of the deceased’s estate as required by law, specifically **Section 66** of the **Law of Succession Act Cap 160 & Part III Rule 7(7)(b)** of the **Probate and Administration Rules**. **She did not** fully disclose all the beneficiaries of the estate of the deceased and obtain the requisite consents.

The Petition did not include all the beneficiaries of the estate; the Applicant and 3 sisters who are children of the deceased. Instead it included the children of the Respondent who are not the deceased's biological children and there is no evidence he had acquired parental responsibilities.

The Chief's letter of 31st October 2007 from Gatwanyaga Location shows the Respondent and her 2 children as the only family of the deceased. The Chief's letter of 4th January 2008 by the same Chief recants the earlier letter of 31st October 2007.

The Chief's letter of 11th June 2007 from Chief of Gakumari Location/Githurai Division shows the Applicant and her 3 sisters as the family of the deceased which had not been disclosed in Thika Succession Cause No.390 of 2007.

The death certificate by the Respondent No.58707 has no date of death and the deceased is said to hail from Ruiru. The other death certificate No.69035 shows the date of death as 24th December 2006 and the deceased hailed from Maragua.

In normal circumstances a person dies once and naturally ought to have 1 death certificate. The fact that there are 2 of them, one must be a forgery and was used to fraudulently aid in obtaining grant of letters of administration.

From the totality of the above evidence, the court finds that the Respondent did not prove that she was the wife to the deceased or was a wife under Section 3(5) Law of Succession Act Cap. 160 and is therefore not entitled with her children to inherit from the deceased's estate. She is also not a dependant of the deceased and cannot benefit from his estate.

The court also finds that the grant of letters of administration intestate obtained by the Respondent in Thika Succession Cause No.390 of 2007 were obtained fraudulently because of;

- a. Non-disclosure of the other beneficiaries and information to the other beneficiaries and family of the deceased.
- b. Exclusion of the family of the deceased in the proceedings.
- c. Petitioning for grant of letters of administration and appointment as administrator without seeking consent of other beneficiaries.
- d. Filing of forged documents i.e. death certificate of the deceased.
- e. Filing of Chief's letter with material non-disclosure and concealment of relevant information i.e. omitting any matters or reference to the family of the deceased.

This court therefore orders:

- a. The Grant of letters of administration intestate made to the Respondent Nancy Wambui Kamau in Thika Succession Cause No.390 of 2007 in respect of the estate of Karanja Kigo (deceased) and all other orders/confirmation of grant subsequently made by the court as the grant and all other orders were made without material facts and disclosures placed before the court. The grant is revoked and annulled under Section 76 of Law of Succession Cap.160.
- b. By virtue of Section 66 of Law of Succession Act Cap.160 this court appoints Rachael Wanjiru Karanja administrator to the estate of the deceased's estate.
- c. The property LR No. Ruiru/Ruiru East Block 2/249 be preserved as the estate of the deceased under Section 45 Law of Succession Act Cap 160 until the grant and confirmation of the grant to distribute the estate of the deceased are issued.
- d. No orders as to costs

No appearance.

It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY, 2015

M. MUIGAI

JUDGE