



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2292 OF 2011

IN THE MATTER OF THE ESTATE OF GEOFFREY KAHURA NJOROGE (DECEASED)

GRACE NJOKI NDUNGU

GLADWELL WACERA

GEOFFREY MUIGAI APPLICANTS

HENRY NDUNGU

AND

MARY WAMAITHA GITHU

HANNAH GATHONI GITHU.....RESPONDENTS

JUDGMENT

1. Geoffrey Kahura Njoroge whose Estate is in issue died on 16th January 2010 aged 55 years. The widow Mary Wamaitha Githu (hereinafter referred to as the first Respondent) and her sister Hannah Gathoni Gitau successfully petitioned Limuru Senior Principal Magistrate’s court for letters of Administration intestate indicating that the deceased was survived by the following:

- 1. Mary Wamaitha Githu - widow
- 2. Josto Njoroge Kahura - son
- 3. James Githu Kahura - son
- 4. David Ndungu Kahura - son
- 5. Isaac Muniu Kahura - son
- 6. Anthony Kinyanjui Kahura - son

The grant of letters of Administration intestate was issued on 23rd December 2010 in succession Cause No.59 of 2010 in the Limuru Senior Principal Magistrate Court and confirmed vide certificate of confirmation of Grant dated 21st July 2010.

2. On 18th October 2011 Grace Njoki Ndungu (hereinafter referred to as the Objector) filed summons for revocation or annulment of the said grant in the High court at Nairobi under **Rule 44(1)** of the **Probate and Administration Rules** and **Section 76** of the **laws of Succession Act**. She complained that the proceedings to obtain the grant were defective in substance and that the said grant had been obtained and confirmed fraudulently, by making of false statements and concealment of material facts to the case and by means of an untrue allegation of fact essential to

justify issuance of the grant.

3. In her supporting affidavit sworn on 11th October 2011 the Objector averred that the Deceased was polygamous and at the time of his death he had left two houses as follows:

First house:

1. Mary Wamaitha Githu - 1st widow
2. Josto Njoroge Kahura - son
3. James Githu Kahura - son
4. David Ndungu Kahura - son
5. Isaac Muniu Kahura - son
6. Anthony Kinyanjui Kahura - son

Second house:

1. Grace Njoki Ndungu - 2nd widow
2. Gladwell Wacera - unmarried daughter
3. Geoffrey Muigai - son
4. Henry Ndungu - son

The Objector complained that the Respondent obtained the grant in conjunction with her own sister without involving the Objector herein, with the aim of disinherit her and her children. That the Objector “discovered the apparent fraud” on a chance visit to the then Kiambu District Land Office, hence this application. The Objector avers that the grant was obtained by means of the Respondent deliberately and fraudulently holding themselves and the members of the first house as the only surviving beneficiaries of the Deceased.

4. The Objector also deponed that the first Respondent had lied to the Land Office officials in Limuru that the title deed to parcel No. Limuru/Rironi/1078 was lost yet she knew that it was in her custody. That the first Respondent presented the value of the said land to be Kshs.100,000/= when in reality it is in excess of Kshs.10 million hence beyond the pecuniary jurisdiction of the subordinate court. The Objector asserts that she is a duly recognised widow to the Deceased having gone through the relevant Kikuyu customary rites and having cohabited together with the Deceased for 18 years.
5. Anthony Kinyanjui Njoroge (hereinafter referred to as Anthony), the brother of the Deceased swore an affidavit dated 9th July 2012 in support of the Objector. He averred that the Objector was indeed the second wife to the Deceased hence his widow and that he had attended a “Ruracio” ceremony (negotiation of dowry) in her regard.
6. In response the first Respondent filed a Replying Affidavit dated 27th July 2012 in which she averred that at the time of the Deceased’s death on 16th January 2010 he was survived only by herself as his widow and their five sons. She deponed that to her knowledge, in all her life the Deceased did not have another wife or children who could lay claim to his Estate. That the Objector not being such a wife, could not claim to be the widow of the deceased and that infact the Objector was the widow of one Edward Waweru Mungai who was also the father of her children.
7. The first Respondent denied that the succession proceedings she filed in Limuru, Senior Principal Magistrate’s Court were filed secretly or surreptitiously since she had obtained an introduction letter from the area Chief’s office. She maintained that the Objectors are strangers bent on delaying the distribution of the Estate. In her support Ngige Gathuru one of the sureties in her petition, swore an affidavit dated 27th July 2012 stating that the Deceased did not have a second wife as stated by the Objector.

8. The Objector filed a supplementary affidavit and reiterated what she and Anthony had stated in their earlier affidavits.
9. I have carefully assessed the rival contentions put forward by each party herein and find that they raise only one issue for determination. What is in issue is whether or not the Objector is a legitimate widow to the Deceased and is therefore entitled to share in his Estate.
10. There seems to be no dispute that the first Respondent was the Deceased's widow and even the Objector recognised her as such. What is in issue is what manner of relationship the Objector had with the Deceased. The Objector asserted that they contracted a marriage with the Deceased under customary law. Both being of Kikuyu descent, the applicable customary law is therefore that of the Agikuyu.
11. No credible evidence was tendered to show that any of the known kikuyu customary law practices that make a marriage valid, were performed with regard to the applicant by the deceased. No elders appear to have accompanied her and her late husband to her home on the occasion that she said was for the performance of "**Ruracio**" (dowry negotiation) and no actual negotiations appear to have taken place. Thereafter there is no evidence that the deceased established her in his rural home as his wife or built her a house anywhere else although he had the means to do so.
12. I examined the relationship further to establish whether a presumption of marriage could be drawn from their relationship to qualify it for a common law marriage. No neighbour or friend of the family came forward to testify that the manner in which the Objector and the Deceased had carried on had led them to believe that the two were husband and wife. There was no evidence of joint ventures between the two. The Objector remained in the home which she had built for herself after her husband died and even when the Deceased acquired a plot and built a house in Nairobi he did not install the Objector in it. Instead he shifted the Respondent from the ancestral home in Limuru and settled her in it.
13. In the obiter dictum of Nyarangi JA in Njoki v Muthuru [1985] KLR pg 896, he said:

"In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married."

In sum there has to be evidence that the long cohabitation is not close friendship between a man and a woman, that she is not just a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage.

14. The Objector's witness Anthony, the brother to the Deceased was partisan in his testimony. He appeared to have some deep seated animosity towards the Respondent as was evinced by the evidence of Ngige Gathuru an elder and neighbour in Limuru, who testified in support of the Respondent. Ngige Gathuru testified that the Deceased did not have a second wife and that he had seen the Objector for the first time in court. He also testified that at one time Anthony had gone to ask him as an elder, to remove the Respondent from her matrimonial home and return her to her parents. That he had refused to do so insisting that as an elder no reasons had been given to him to warrant such a move.
15. I also note that what Anthony deponed in his affidavit seemed to raise new evidence not deponed to in the Objector's supporting affidavit sworn on 11th October 2011. This on its own is not a cause for alarm save that these were such essential facts that it is difficult to comprehend how they

slipped the Objector's mind if indeed they were true, only to be raised by a third party. For example, it was Anthony who deponed that there was a "**Ruracio**" ceremony (dowry negotiation) which was performed for the Objector and also that the Deceased had subdivided his portion of their ancestral land in Rironi Limuru to provide for the Objector.

16. Neither Anthony nor the Objector could name one elder or one neighbour who attended the ceremony with them, nor remember how much dowry was negotiated for the Objector. Anthony would have the court believe, as sworn in paragraph 11 of his affidavit, that the Deceased settled each of his wives in their respective residences in Ruai estate Nairobi, yet the Objector testified that she remained in her own home in Ruai and that the Deceased did not provide a home for her. It is also suspicious that only the son of the Objector was present at the alleged subdivision of the Limuru land and not any of the five sons of the 1st Respondent or an elder, or any other independent person.

17. It has also been deponed that the deceased took on the Objector's children as his own and that they are therefore entitled to inherit from his estate. There is however not a shred of evidence of how the Deceased assumed responsibility towards the Objectors' children. Except that they were mentioned in the eulogy alongside the Objector and the family of the Respondent. The eulogy was not written by the deceased. He cannot therefore be held responsible for the contents thereof. Secondly the eulogy on its own is not proof of a matter in one way or the other. Thirdly Anthony being part of the committee that prepared the eulogy may very well have projected his wishes into it.

18. It is not clear in what circumstances the Objector came to be in possession of the documents, of title to the two pieces of land at Rironi in Limuru and Ruai, but considering that she caused the Deceased to sign transfer documents for his motor vehicle to her, while he was on his death bed at Kenyatta National Hospital, I find that not much weight can be placed on the fact of her possession of the title documents. In any case such possession alone does not confer ownership thereof to her. None of the titles had been changed to reflect her name and the Respondent was the one in actual occupation of the two homes at the behest of the Deceased himself, at the time of his death. There is no evidence that the Objector moved in and utilised the land in Limuru in any way at any one time while the deceased was alive.

19. I therefore find that the evidence given of the relationship between the appellant and the deceased was not sufficient to give rise to a presumption of marriage. There was no evidence before me on which I could found the existence of any form of marriage between the Objector and the deceased, including a common law marriage.

20. The only ground upon which the Objection succeeds is that of the lower court having lacked pecuniary jurisdiction to issue the grant dated 23rd December 2010, since the Estate of the Deceased is obviously worth more than Kshs.100,000/-. For that reason alone I make orders as follows:

1. That the grant issued on 23rd December 2010 by Limuru SPM court is hereby revoked.
2. Succession cause No.59 of 2010 SPM Limuru Court be and is hereby consolidated with this Succession cause No. 2292 of 2011 High Court Nairobi.
3. There being a petition in this cause by virtue of the consolidation, of the two causes a fresh grant shall issue to the Administrators.
4. The names of persons to be appointed as Administrators in the fresh grant to be supplied to the court.

SIGNED DATED and DELIVERED in open court this **18th day of February 2015.**

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L. A. ACHODE

JUDGE