



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1870 OF 2005

IN THE MATTER OF THE ESTATE OF JOSEPH KIARIE (DECEASED)
ROSE WAMBUI KIARIEOBJECTOR/APPLICANT
JANE NJERI NARUYARESPONDENT/PETITIONER

RULING

1. The deceased died intestate on 25th February 2005. Jane Njeri the respondent on 7th July 2005 applied for grant of letters of administration the same were issued on 24th November 2005. On 25th August 2005 Rose Wambui Kiarie raised an objection to the said petition for grant of letters of administration and later on 17th January 2006 sought revocation of the grant issued to Jane Njeri Ngaruiya on grounds that the same was irregular as the same was issued to an impostor and that there were minor children and hence the estate cannot be administered by one person. Rose Wambui Kiarie was issued with a fresh grant of letters of administration on 22nd July 2008 and sought to have the same confirmed on 4th March 2011.

Evidence

2. PW1 Rose Wambui testified that she is a farmer staying at Kamuthui. She testified that she was married to the deceased Joseph Kiarie who died in February 2007. That she got married to the deceased in 1979 under customary law and stayed in Kamuthui a shamba that was bought by Kiarie and they were blessed with 7 children. That Kiarie paid her dowry as per the Kikuyu customary law and later in 2001 they did a wedding at the District Commissioner's office and issued with a marriage certificate dated 18th September 2001. That they were both farmers and bought 2 plots in 1993 at Kamuthi and had 4 plots at Kiamumbi and that she stayed together with the deceased until his death. That they built their home in Kiarie's shamba and at the time he was staying with his parents. That she didn't know that the deceased had another wife and only heard of Jane Njeri in 1999 when the chief called him and they went to the chief and it was decided that since both had farmed together they share the produce and that he did not go to court and no one opposed their marriage. She denied that the deceased maintained Jane or her children and insisted that the deceased's property should be distributed to her children only.

3. On cross examination she reiterated her evidence adding that she did not know when the deceased bought the shamba and that before marrying the deceased she used to stay at Gatundu. She testified that she came into the marriage with L N her first born daughter but stated that she had not been married elsewhere. She stated that she did not know how the respondent knew of the money the deceased had in the bank and how she managed to block the same. She did not know that Njeri went for letters of administration or that she wanted to be enjoined as an administrator of the deceased's account.

4. PW2 Francis Ng'ang'a a friend to the deceased, staying at Kahawa farmers and currently doing farming testified that Kiarie married Rose Wambui under customary law in 1979 and formalized the same

in 2001. That Njeri grew up in the same neighborhood but wasn't married to the deceased and denied knowing if the deceased had other children.

5. On cross examination he testified that he joined the police force in 1969 and was stationed at Ruaraka GSU headquarters where he served for 21 years. That when Kiarie went before the chief he did not confirm that Njeri was a wife nor did he admit to having sired 2 children with her. He stated that Kiarie bought the said plots between 1997 and 1998.

6. The petitioner Jane Njeri testified that she got married to the deceased in 1970 and the deceased took dowry as customary demands and that they had three children. That though they were not staying together with the deceased he was assisting her and also provided for her and the children's rent and food. She added that she left the home in 1976 due to home issues. That the deceased had 2 plots of one acre each and later on bought 4 plots at Kiamumbi. That later he took the deceased to the chief so that he could give them a place to build and the deceased agreed. The chief then sent them to the D.O but the matter took long and Kiarie died before they could resolve the issue. She went to court to stop the burial so that they could agree on division of the deceased's property but later on consented they bury the deceased's first before dividing his property. That she had cited Rose so that they could take out letters of grant of administration but she did not respond and she proceeded to gazette the said grant having listed all the other children. It was her testimony that she knew about the money in the bank as she used to accompany the deceased to the bank. That the said plots in Kiamumbi were bought when she was still there but their titles took time to come out.

7. On cross examination she testified that she was married to the deceased between the year 1970 and 1976 with his children namely Mganya being born in 1970, Tuba born in 1972 and Daniel Kimani born in 1974. She however stated that the three children had no birth certificates. That when she got her first child she was still at home and she hadn't gone to live with the deceased. That she went to the wazees in 1996 having separated from the deceased in 1976. That he went to confirm the deceased had died as she and the children used to visit him at home adding that in 2000 he wrote to her and told her to go to court as they disagreed and he wasn't supporting them. She added that she had no witnesses as they had all died. She testified that she withdrew all the money in the bank to get the grant of letters of administration.

8. DW2 Joseph Njuguna testified that she knew both Njeri and the deceased since 1963 and was their neighbor. That the two were married for about 7 years and had three children.

9. On cross examination he stated that he could not recall the day or year that they got married. He testified that the two got married under customary law but also could not tell when it was done and did not attend the same as he was not invited. That the first child is named after the deceased's father. He testified that he did not know that Njeri and the deceased separated but stated that Njeri took the deceased to the chief.

10. The respondent/ petitioner submitted that the administrator was mistaken to assume that Justice Rawal in her ruling of the application dated 25th January 2008 revoked the grant under Section 76 but sought to clarify that Justice Rawal only removed the administrator who was found in breach of her duties and rights as an administrator. She testified further that the elders were used since time in memorial in various customs not only in Kikuyu customs.

Submissions

11. The respondent/petitioner in her submissions reiterated the evidence by the parties and refuted the objector's claims to having been married to the deceased under Kikuyu customary law. She relied on the case of *Mwangiru –vs- Mumbi (1967) E.A 639* which held that marriage is a serious affair and it does not only involve the two parties but also their families. Marriage is not an event but a process. Kikuyu customary law has certain formalities. The onus of proof lies with the Objector, who has failed to prove the same by way of evidence. She sought to distinguish the case of *Estate of Ephantus Githaku Waithaka (deceased)* cited by the objector in support of her submission adding that presumption of marriage was the determining factor and not Kikuyu customary law. In the said case the court held that,

“I find that there was formal marriage between the deceased the deceased and the petitioner and the objector hail from the Kikuyu community. Kikuyu customary law is a system which permits polygamy. Notwithstanding the absence of formal marriage under the Kikuyu under the Kikuyu customary law between the petitioner and the deceased I do find that by virtue of long cohabitation the two were husband and wife coupled with the birth of three children this court is entitled to and I hereby declare the existence of marriage by presumption and/or cohabitation between the petitioner and the deceased.”

12. It was further submitted that proving of marriage is not only a deciding factor as the issue was decided by the elders during the lifetime of the deceased. The minutes have been on record and no objection to the contents that the objector admits to having participated in the said proceedings. That according to section 29 of the Law of Succession Act it provides that, “For the purposes of this Part, “*dependant*” means- (a) *the 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*” On this she submitted that failure to re-unite with her late husband does not disqualify her from being a former wife and her children from being the children of the deceased. She submits that having been separated from the deceased for over 29 years did not change the fact that the assets left by the deceased were acquired in 1960’s and 1970’s and the same are matrimonial properties in favor of the objector. That the respondents were genuine having chosen to confront the deceased in his lifetime. She refuted the respondent’s claim that her claim failed adding that the law recognizes ADR and it was upon the respondent to refer the matter to the Courts to challenge the elder’s decision and by not doing so it was evident that he was satisfied with the decision. She relied on the decision of ***RE: ESTATE OF WAKABA Succession cause no. 1048 of 1999*** and the case of the ***Estate of Bernard Ndungu Njoroge HCCC Succession cause No. 247 of 1999.***

13. In reply to the said submissions it was submitted that the essentials of a valid Kikuyu Customary marriage are now documented and codified Cotran in The Law of Marriage and Divorce summarizes them as follows;

- i. Capacity to marry
- ii. Consent of parties
- iii. Ngurario
- iv. Ruracio
- v. Commencement of Cohabitation

14. That the objector has not endeavored to establish the existence of a marriage by way of irrebuttable presumption even if that aspect was to be considered there was no evidence to illustrate fact of long cohabitation between the deceased and the objector. That the evidence from the deceased’s mother before the panel of elders together with Mr. Ngongas evidence confirms as much and refers the court to the case of ***Hottesiah Wanjiku Yawe –vs- Public Trustee.*** That the objector lived with the deceased between 1970 to 1976 when they separated only to resurface 24 years later claiming a share of the deceased’s properties which acquired through joint efforts of the deceased and the administrator. The administrator wonders why if the three children were indeed the deceased’s why did the objector did not take steps against the deceased after she immediately separated from him to compel him to provide maintenance for the children only to resurface 24 years later claiming a share of the deceased’s estate. In conclusion she submitted that the objector was not a wife to the deceased and hence not a beneficiary of his estate.

Determination

15. After considering the evidence submissions case relied on and the law I find as follows; The respondent has claimed that she was married to the deceased under Kikuyu customary law. The essentials of a valid Kikuyu Customary marriage are now documented and codified Cotran in The Law of marriage and Divorce summarizes them as follows; Capacity to marry, consent of parties Ngurario, Ruracio and Commencement of Cohabitation. She has not given a detailed account of the Ngurario and Ruracio ceremony nor has she called a witness who attended the same to ascertain her claims. The witness she called one Joseph Njuguna claimed to know the deceased and the respondent but he too was neither present during the said Ngurario and Ruracio cerebrations as such I find that this evidence is of insignificant value to the respondent’s case. As such I find that the respondent has not adduced sufficient

evidence to prove that she was a wife if at all for the purpose of these proceedings. However from the evidence as given by the parties it appears that there could have been a relationship between the respondent and the deceased and that two children were sired who under Section 29 qualify as dependents and as such should be included as beneficiaries in the application for confirmation of grant. The administrator can proceed with the confirmation of the grant of letters of administration and finalize the administration of the deceased's estate. In the event that the parties do not agree on the mode of distribution affidavits should be filed on the same for the Court's considerations. Costs in the cause. It is so ordered.

Dated, signed and delivered this 25th day of *June* 2015.

R. E. OUGO

JUDGE

In the presence of:

.....**Petitioner/ Respondent**

.....**Objector / Applicant**

.....**Court Clerk**