



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1698 OF 2007

IN THE MATTER OF THE ESTATE OF JOHN MUTHIORA MUTHEMBA (DECEASED)

JUDGMENT

1. John Muthiora Muthemba died on 13th March 2006. Representation to his estate was sought by Raphael Muthemba Gitogo, who described himself as his father, in a petition lodged in court on 16th July 2007, His survivors were stated to be his father and mother and the estate was said to be comprised of benefits from the Nairobi City Council. The petition was allowed and a grant of letters of administration intestate was accordingly made to the petitioner on 24th September 2007.
2. An application for revocation of the grant was lodged in the cause on 16th October 2008, by Virginia Njambi Muchene, who described herself as a widow of the deceased. She alleged that she and the deceased were blessed with two children whose names were not indicated. She stated that the administrator/respondent obtained the grant of 24th September 2009 on the basis of a forged letter from the Chief.
3. The respondent replied to the application *vide* his affidavit sworn on 11th November 2008. He stated that his son was living within his compound and that he had never married, and therefore he left no wife nor children. He further stated that the letter from the Chief was not a forgery.
4. Directions were given on 18th October 2011 that the matter was to be disposed of by way of oral evidence. The parties were directed to file their witness statements within fifteen (15) days. It is not clear whether the directions were complied with, but there is on record witness statements of Moses Mucheru Muthee, John Munene Muthee and Alice Warimi filed on 16th November 2011.
5. I heard the parties on 2nd October 2014 and 24th November 2014.
6. The applicant testified first. She said the deceased was her husband, having married him sometime in 2003. After he died in 2006, she was chased away from the matrimonial home. She said she reported the matter to the provincial administration, who handled the dispute. She said she and the deceased lived in his own property at Gatina, Dagoretti, Plot No. 1. They did not marry traditionally nor in Church although she alluded to a visit to her parents by the deceased's mother and his brothers. The alleged visit was said to have happened on a Sunday, 21st December 2003.
7. The second witness was Moses Muchene Muthee. He said he was the father of the applicant. She said that the deceased had come to his home seeking his daughter's hand in marriage. He was accompanied by his mother and brothers, he testified. After the deceased died, his daughter came and told him that she had been chased away. He stated that he did not know the respondent, the

- deceased's father in person and that he only knew him by name. He confirmed that no dowry was paid to him, he was only given sugar.
8. The third person to take the stand was Mary Wanjiru Ngugi. She said she knew both the applicant and the deceased. She did not know the respondent. She alleged to be one of the people who were at the function when the deceased's mother visited. She only met them at the gate and did not get into the house with them. She could not tell their number.
 9. The respondent testified that he was the father of the deceased, who used to work for the Nairobi City Council. He said he did not know the applicant and only met her for the first time when she had him summoned to the offices of the provincial administration. He alleged that the deceased used to live at home, within his compound, and did not have a wife nor children. He said he was not aware that his wife visited the applicant's parents. He denied, on cross-examination, sending his wife to the applicant's father and of facilitating the visit.
 10. The next witness on the respondent's side was Michael Kimani Muthemba. He was a son of the respondent and a brother of the deceased. He said he did not know the applicant, and denied being party to the alleged visit to her parents.
 11. The last witness was Virginia Wambui Njambi. She was the wife of the respondent and the mother of the deceased. She testified that she did not know the applicant, saying that she first saw her when she had them summoned to the offices of the provincial administration. She said she did not know the applicant's home and had never gone there at any time for any function or event.
 12. The application dated 14th October 2008 turns only one point, whether the applicant was a wife of the deceased or not.
 13. In her testimony, the applicant stated categorically that she never married the deceased traditionally nor statutorily. It emerged therefore that she was asking the court to presume marriage from a prolonged cohabitation.
 14. The factors that would be considered for the said presumption to be made were stated in ***Hortensiah Wanjiku Yawe vs. Public Trustee*** CA No. 13 of 1976. There must be a prolonged cohabitation and repute that the parties are married. Other factors could be children sired by the deceased, property acquired together and performance of some ceremony of marriage.
 15. The applicant alleged that they had cohabited at Kawangware. Her witnesses, who should have strengthened her case on this core component, however, did not talk about any such cohabitation. They further did not mention whether she ever lived with deceased, and if so, where they lived. He further talked of her being chased away by the father of deceased but he did not indicate where she was chased from. Her second witness did not say a single word about any cohabitation, she only said she knew both the deceased and the applicant.
 16. On the other factors, the applicant alleged that she had two children with the deceased. I have noted that the names of these children were not mentioned in the proceedings, neither in the pleadings nor in the oral testimony. Their certificates of birth were not produced. No other record was produced that would have linked them to the deceased.
 17. The evidence on the alleged function at her parent's home was very shaky. For a valid Kikuyu customary law marriage several functions or events or ceremonies ought to be conducted. ***Eugene Contram*** dealt with them in his seminal text – ***Restatement of African Law: 2 Kenya II The Law of Succession***. There should be ***ruracio, guthinja ngoima*** and ***ngurario***. It is not clear whether the alleged event was meant to mark any of the three important ceremonies. The event was denied by the respondent and his witnesses, while the evidence by the applicant and her witnesses was incredibly vague and sketchy.
 18. From the material before me, it is quite clear that there is no basis for me to presume marriage

between the deceased and the applicant. It is my finding therefore that she was not a wife of the deceased.

19. Having so found, I hold that there would be no basis for me to revoke the grant that had been made to the respondent on 24th September 2007. The application dated 14th October 2008 is therefore hereby dismissed. The respondent shall have costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE