



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**SUCCESSION CAUSE NO. 909 OF 2007**  
**IN THE MATTER OF THE ESTATE OF SAMUEL WAWERU GITAU**

**RULING**

1. This succession cause relates to Samuel Waweru Gitau who died on 1st January 2007. The widow Joyce Peris Waweru and the deceased's friend Francis Ng'ang'a Mbua petitioned for grant of letters of administration on 11th April 2007 and the same was gazetted on 31st May, 2007 in Gazette no. 1509. Subsequently on 23rd June 2007 the applicants Antony Gichana Gitau and George Gitau issued a notice of objection to making a grant and filed an answer to petition for grant on 12th September 2007 and further a cross application for a grant simultaneously.

2. In their said applications they objected to the issuance of a grant of letters of administration claiming to be sons to the deceased from his 2nd marriage to the late Catherine Murugi Gitau. They aver that they were never consulted before filing of the said petition for a grant of representation to the estate of the deceased by Rahab Waweru and Francis Nganga Mbua. They proceeded to list the assets of the deceased as follows;

- i. Dagoretti/Uthiru/T.318
- ii. Gatamaiyu/Gachoiri/1043
- iii. Ngong/Ngong/8453
- iv. Plot No. 578 Ongata Rongai Trading Center
- v. M/V Registration No. KAD 427Z (Isuzu)
- vi. M/V Registration KAT 092Z (Isuzu Bus)
- vii. M/V Registration KAV 521Y (Toyota saloon)
- viii. M/V Registration KAR 650M (Isuzu Bus)
- ix. M/V Registration KAT 134M (Toyota Station Wagon)
- x. Ten Thousand Five Hundred shares (KTDA Shares)
- xi. Family Finance Bank Account

xii. Barclays Account

All estimated at Kshs. 35 million

3. The respondent filed an affidavit dated the 19<sup>th</sup> of June 2008 in response to the objection and answer to the petition and cross petition filed on 12th February 2008. She denies knowledge of any other wives to the deceased and claims not to know the alleged wife to the deceased the late Catherine Murugi Gitau adding that no evidence had been adduced to prove the said allegations. She deponed that she married the deceased under Kikuyu customary law in 1980 and later solemnised their union at ACK Uthuru sometime in August 1988. She avers that in the instances that her husband was admitted in hospital at M.P. Shah and Kenyatta Hospital the alleged sons never visited him nor even go to bereave with them after he neither died nor attended the deceased funeral. That both the deceased's mother and brother claim not to know the alleged 2nd wife and her children and neither had they been introduced to them.

4. Peter Kiambuthi, a brother to the Late Catherine Murugi Gitau in his affidavit filed on 4th March 2008, stated that he was aware that his late sister was a wife to the deceased having married her under Kikuyu customary law in 1983 and that they had three children and had at one time paid her hospital bill.

5. In response to the respondent's affidavit the objectors filed an affidavit on 4th March 2008. They raised an objection to Francis Nganga being an administrator to the deceased's estate as he had no right to the deceased's estate. They stated that this was the first time they learnt of the formal marriage conducted and sought to rely on copies of their birth certificates to prove that the deceased was their father and he paid their mother's hospital bill when she was hospitalised in Nairobi hospital and when their mother died in 1995 the deceased attended her burial. They aver that when the deceased died the administrators chased them away for their own ulterior motives and refused to include them in the programme and they could not object to the same at the time due to financial constrain. They further stated that the administrators had omitted some of the deceased's assets, which include the deceased's personal and business accounts, and a ¼ acre plot in Langata Rongai valued at 20 million. They further sought an account of the deceased's rent proceeds and monies obtained from various lorry and matatu business.

6. This matter was a part-heard before Justice Onyancha. Anthony Gichanga testified that he was born on 31/3/1976 at Pumwani Hospital and admitted that he was not the biological son of the deceased but that he used to take care of him since he was in Std 1 way back in 1983 by helping the mother and paying their school fees but there was nothing to prove this. He testified that though the deceased paid his mother's hospital bill at Kenyatta and at Nairobi hospital he had no evidence to support the same. He further stated that the mother's name was Gitau and this is the name she gave her children. He testified that though they wanted to be included in the burial they were not and their stepmother chased them. He confirms that he never reported the incidence to anyone.

7. George Gitau sought to associate himself with the Antony's testimony. He testified that he and his sister Jennifer are biological children of the deceased. He testified that he attended the deceased's burial and was not chased. That when the deceased was alive he used to pay his school fees via cheques and that and that he visited him in MP Shah and Kenyatta Hospital before his demise.

8. Rahab Muthoni Waweru relied on her affidavit dated 19th June 2008. On cross-examination, she testified that she wanted to know about the alleged wife because she had not known her about her and that is the reason she went to her mother in law. She stated that the alleged wife was buried at her maternal home and not at the deceased's homestead. That it was his husband who appointed the co-administrator as he even introduced him to the tenants when he fell ill and her children are not objecting to this, as he does not stand to gain. The respondent was taken to task about the properties the deceased left.

9. Francis Nganga Mbuia adopted his affidavit sworn on 19th June 2008 as his evidence. He testified that the deceased came to Nairobi and stayed with him as he looked for employment. He travelled to Canada for further studies in September 1976 and when he returned, he found the deceased still in Nairobi and was working for a clearing company, KATE. That he knew when the deceased started dating Rahab Muthoni Waweru and their relationship led to marriage 1st under Kikuyu customary law and later on 23rd

June 1988 they solemnized their marriage at the office of the Registrar of Marriage in Nairobi, Sheria House and he was the witness and he was the best man to their ceremony at CPK (now in ACK) church in Uthiru. He stated that he is well acquainted with Rahab and her children. That Rahab's children consented to him being a co-administrator to the deceased's estate. He denied visiting the alleged wife's home but stated that she was invited and attended her burial but denied knowing Catherine's children. He confirmed that the deceased had a property at Ongata Rongai, which had about 15 rental units, which had tenants. He however stated that he was not able to give an estimate value of the same.

10. Joseph Kamau Gitau in his affidavit of 19th June 2008 stated that he is a brother to the deceased and that his late brother was married only married to Rahab Muthoni Waweru and they were blessed with three children Daniel Gitau Waweru, Andrew Kamau Waweru and Joyce Peris Njoki Waweru. That he was never informed that his wife took on another wife and that his brother never undertook any customary rites confirming her as Catherine Murugi Gitau. That neither he nor his mother knew or had met the alleged 2nd wife Catherine Murugi Gitau. He sought to confirm that the co-administrator was a good friend to his late brother.

11. I have read the submissions filed by the parties plus I have also carefully considered the evidence adduced by the parties and the law of succession and law on evidence.

12. The applicants claim that they are children of the deceased who married their mother under Kikuyu customary law in 1983. The burden to prove a party was married under customary lies with the party that alleges to prove the custom in question as was held in the case of *Kaityany & Another- Vs- Wamaitha* (1995) eKLR, where it was held that, **“the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case”**. The applicants allege that the deceased married their mother sometime in 1983 but have not adduced enough evidence to prove their claim on a balance of probabilities. In my view, the applicants did not adduce any credible evidence of the alleged marriage between the deceased and their late mother Catherine Murungi Gitau. The applicants only allege but do not adduce any evidence to support this. The essentials of a valid Kikuyu customary marriage are now well settled. In his pioneering work, *RESTATEMENT OF AFRICAN LAW: KENYA VOLUME 1 THE LAW ON MARRIAGE AND DIVORCE*, Sweet & Maxwell, 1968, Dr. Eugene Cotran states that there can be no valid marriage under Kikuyu law unless a part of *riracio* (dowry) has been paid and more categorically, that “No marriage is valid under Kikuyu law unless the *Ngurario ram* is slaughtered”. The applicants in support of their allegation claim that the deceased supported them and their late mother. This I find is not sufficient evidence to prove their allegation that there existed a customary marriage between the deceased and their late mother neither is claiming that he was married to her because he attended her burial or that he paid her hospital bill adequate evidence to prove the existence of a customary marriage. The applicant's also claim that the deceased assisted their mother and maintained them and paid their school fees. However, they have not adduced any evidence to support that the deceased if at all maintained them or paid their school fees.

13. The applicants in support of their claim as the children of the deceased adduced three birth certificates. Two of the birth certificate for George Gitau and Jennifer Waweru Gitau stated that Samuel Waweru Gitau was their father. However, the birth certificate for Antony Gichaga does not bear the name of the father and in his testimony, he had indicated that he was not the biological son of the deceased but had been maintained as one by the deceased and hence he was a dependant. The evidence on the said birth certificate was not rebutted and as such I find that the same was conclusive that the deceased was the biological father of George Gitau and Jennifer Waweru Gitau and as such they are entitled to benefit from the deceased's estate as beneficiaries. Unfortunately I find that Antony Gichana has not adduced sufficient evidence to show that he was a dependant of the deceased or that the deceased maintained him in absence of such evidence I find that his claim as a dependant of the deceased's estate fails. I therefore order that George Gitau and Jennifer Waweru Gitau shall be included as beneficiaries to the deceased's estate. The widow Rahab Muthoni Gitau and Francis Nganga Mbua shall remain as administrators, Francis is not to benefit from the said estate. George Gitau shall join them as the 3<sup>rd</sup> administrator .The three can proceed to petition for a grant of letters of administration as provided for under the law. Costs in the cause. It is so ordered.

Dated, signed and delivered this 25<sup>th</sup> day of *September* 2015.

**R. E. OUGO**

**JUDGE**

**In the presence of;**

.....**For the Applicants**

.....**For the Respondents**

**MS. Charity Court Clerk**