



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 116 OF 2006
IN THE MATTER OF THE ESTATE OF ISAACK CHEGE KAMAU (DECEASED)
JUDGMENT

1. The cause herein relates to the death of one Isaac Chege Kamau who died on 24th October 2005.
2. Representation to his estate was sought by a petition lodged in this cause on 18th January 2006 by Alice Njeri Chege in her alleged capacity as widow of the deceased. She expressed the deceased to have died possessed of shares at Kenya Commercial Bank Ltd, shares at the Standard Chartered Bank Ltd and death gratuity with the City Council of Nairobi. He was said to have been survived by the widow and her seven children – Catherine Wanjiku, Andrew Kamau, Philip Njoka, Ruth Muthoni, Rose Wanjiru, Irene Ngoiri and James Njue.
3. A grant was accordingly made on 16th March 2006 to the said Alice Njeri Chege. The grant was duly confirmed on 21st November 2006 pursuant to an application dated 25th July 2006.
4. A Summons for revocation of the grant dated 10th July 2007, was lodged at the registry on even date, by one Mary Wambui Chege, who was alleging that the said grant had been obtained on the basis of false allegations and concealment of matter from the court. Her case being that she was also a widow of the deceased, yet her existence and that of her two children had been concealed from the court by the administrator.
5. She swore a supplementary affidavit on 1st February 2008 to attach documents to support her case. There is a joint affidavit of marriage sworn by the applicant and the deceased on 19th February 2002 indicating that the two had contracted a customary law marriage in 1986. There are two certificates of birth for John Kamau and Ann Wanjiru, indicating that the deceased and the applicant were the parents of the said children. There is also copy of application for change of particulars of national identity card, the document is however not legible. There is a letter from the District Officer for Githunguri addressed to the Director of the Pensions Department, dated 14th June 2007, confirming that the deceased had been married to the administrator and the applicant. Then there is a bundle of photographs. One, depicts the applicant with the deceased. The rest depict the applicant at the deceased's funeral.
6. The reply to the application is by the administrator. Her affidavit was sworn on 30th June 2008. She denies the marriage between the applicant and the deceased. She alleges that she had never seen the applicant and her children before the deceased's demise. She asserts that the applicant did not file an objection after the petition was gazetted. She denies that the applicant ever visited the deceased in hospital or made any payments towards medical bills nor participated in his funeral. She has attached a

certificate of marriage to indicate that she and the deceased had contracted a statutory marriage sometime in 1978 at the Catholic Mission at Githunguri.

7. The applicant swore a further affidavit on 14th July 2008 to respond to the replying affidavit. She asserts that the deceased had taken her in as a wife, together with her children. She avers that she and her children used to meet the administrator and her children at family functions, and that all the children from the two families attended the same school and used the same surname. She further avers that she and her children visited the deceased at Nairobi West Hospital, but the administrator instructed hospital staff not to allow her to see him. The same thing happened at St. Mary's Hospital after the deceased was transferred to the latter.

8. Directions were given on 28th April 2008 that the said application be disposed of by way of *viva voce* evidence.

9. The hearing commenced on 27th January 2009, when the applicant testified before Gacheche J. She stated that she had been married by the deceased under Kikuyu Customary Law in 1986. He visited her parents on 8th February 1986 and paid dowry. More dowry was paid on 14th June 1986 and on 9th September 1986. He also performed the *ngurario* ceremony. She subsequently changed her name to adopt the deceased's surname. She had children with the deceased, and she produced copies of their certificates of birth which bore the name of the deceased. The son was named after the deceased's father. She lived with the deceased; who took care of her children. She and the administrator met severally at family functions. She was involved in the funeral arrangements when the deceased died and participated at the funeral itself. On cross-examination, she admitted that her first two children were not fathered by the deceased, and that she had no proof that the deceased was the father of her third child.

10. The applicant's second witness was her father Stephen Kamau Gitau. He testified that the deceased was the husband to the applicant. He had paid dowry for her sometime in 1986, and had performed both the *ruracio* and the *ngurario* ceremonies. He further stated that the deceased attended some of his family's functions such as burials.

11. The administrator testified before me on 1st April 2014. She stated that her husband never married any other woman. She asserted that the applicant only showed up after the deceased died. On the photographs taken at the funeral, she asserted that the applicant did not take any photographs with the rest of the family. She explained that she was unaware of any visits by her husband to the applicant's parents. She also stated that her husband had not been sexually active since 1996 due to illness.

12. At the conclusion of the trial I directed the parties to file and serve written submissions. The court record indicates that it is only the applicant who filed written submissions dated 6th June 2014. Attached to the submissions are copies of a number of decisions of the Court of Appeal to support the said submissions.

13. The matter turns on the point whether the deceased was married to the applicant or not. For if there was a valid marriage between them, then the administrator ought to have disclosed the applicant as a survivor of the deceased. There is also the issue as to the children of the applicant being children of the deceased for the purpose of the succession.

14. It is common ground that the deceased had contracted a statutory marriage with the administrator sometime in 1978. The certificate of marriage on record indicates that the same was celebrated under the African Christian Marriage and Divorce Act, Cap 151, Laws of Kenya. The said law has since been repealed following the coming into force of the Marriage Act, No. 4 of 2014. However, its provisions are still relevant for the purpose of determining validity of customary law marriages contracted prior to its repeal.

15. Section 4 of the Act applies the substantive provisions of the Marriage Act of 1902, Cap 150, Laws of Kenya, which has also been repealed by the coming into force of the Marriage Act, 2014. Section 37 of

the Marriage Act, 1902 declares that once a man contracts a marriage under statute he would lose capacity to contract subsequent marriages under customary law during the pendency of the statutory marriage.

16. Going by that provision, the deceased lost capacity to contract subsequent customary law marriages after 3rd May 1978. There is no evidence that the statutory marriage of 1978 was ever dissolved. This therefore means that the said marriage subsisted until the deceased died in 2005. Any purported marriages contracted by him between 3rd March 1978 and 2005 got caught up in Section 37 of the Marriage Act, 1902, and were therefore null and void. That would include the purported marriage contracted in 1986 between the deceased and the applicant. For as long as the deceased was alive, any purported marriage under customary law, or any other system of law, was a nullity.

17. The effect of Section 37 of the Marriage Act, 1902, was discussed by the courts in *Re Ruenji's Estate* (1977) EA 21, *Re Ogola's Estate* (1978) EA 21, *In the matter of the Estate of Reuben Nzioka Mutua HCP&A. Cause No. 843 of 1986* (unreported) and *Irene Njeri Macharia vs. Margaret Wainaina Njomo & another* (1996) eKLR.

18. However, Section 37 of the Marriage Act, 1902, has been blunted by the provisions of Section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya, which says that whatever any other law may say, a woman, married under a system of law allowing polygamy to a man who had previously or subsequently contracted marriage, is, nevertheless, a wife for the purposes of succession and her children should be treated as children for the same purpose.

19. The Court of Appeal discussed the effect of Section 3(5) of the Law of Succession Act in *Irene Njeri Macharia vs. Margaret Wairimu Njomo & another* (supra). The provision kicks in really after the man's death, for before then he would lack capacity and the purported marriage would be a nullity. The woman purportedly married under customary law would not be a wife before the man's death. However, once the man dies, the otherwise non-wife becomes a wife for succession purposes, entitled to be treated at par with the wife married under statute.

20. The question that I have to address is whether the applicant in this case is one such person who can seek cover under Section 3(5) of the Law of Succession Act. The issue is whether she had been married by the deceased under a system of law which allowed polygamy during the currency of his statutory marriage to the administrator.

21. The applicant led evidence as to her marriage in 1986 to the deceased under customary law. She mentioned dates when the deceased visited her parents to perform the customary law rites of *ruracio* and *ngurario*. Her testimony was supported by that of her father. The administrator did not adduce any evidence to counter that of the applicant on this score. I would conclude in the circumstances that there is positive evidence of a customary law marriage having been contracted. The applicant can therefore properly plead Section 3(5) of the Law of Succession Act.

22. What constitutes a proper Kikuyu customary law marriage is notorious. There is a wealth of case law on this which I need not set out herein, save to say that the *ngurario* is the all-important ceremony which signifies the commencement of the marriage.

23. There are other pieces of evidence which point to existence of a relationship amounting to marriage between the deceased and the applicant. There is the document from the District Officer for Githunguri Division and the birth certificates.

24. As there is evidence that the applicant was a wife of the deceased, she ought to have been disclosed, together with her two children, as survivors of the deceased. Their non-disclosure no doubt amounted to concealment of information from court and fraudulent misrepresentation. That would justify the revocation of the grant herein under Section 76 of the Law of Succession Act. However, given the length the matter has taken since it was filed in 2006, it may not be useful to revoke the grant, instead the court ought to make orders whose effect would be to move the matter forward.

25. The orders that I am moved to make in the circumstances are:-

- a. **That the applicant herein is appointed a co-administrator of the estate of the deceased with the current administrator;**
- b. **That the grant of letters of administration intestate made on 16th March 2006 shall be rectified to accommodate the appointment made in (a) above;**
- c. **That the confirmation orders on 21st November 2006 are hereby vacated to allow the distribution of the estate in a manner that would accommodate the applicant and her two children;**
- d. **That the administrators shall move the court within thirty (30) days of this order for the confirmation of the grant rectified today;**
- e. **That each party shall bear their own costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF DECEMBER, 2015.

W. MUSYOKA

JUDGE