



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.1684 OF 1995

IN THE MATTER OF THE ESTATE OF JAMES MUCHIRI KABII (DECEASED)

MARGARET NYOKABI MUCHOKI

SHARON GATHONI

ANTHONY MUCHOKI.....

APPLICANTS

VERSUS

CATHERINE WAIRIMU

GICHIRA

STANLEY MUKOLWE.....

.....RESPONDENTS

JUDGMENT

James Muchiri Kabii, the deceased to whose estate these proceedings relate died on 10th January 1995. On 24th July 1995, Thomas Kabii, the son of the deceased petitioned this court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. In the petition, he listed himself as a dependant of the deceased. He also listed Lucy Wangechi Kabii, Sharon Gathoni and Anthony Muchoki as dependants of the deceased. Curiously, he listed Margaret Nyokabi Muchoki, the 1st Applicant herein as a friend of the deceased. The grant was issued on 15th December 1995. It was confirmed on 28th June 1996. In the certificate of confirmation of grant, Margaret Nyokabi Muchoki benefitted from two properties *i.e.* LR. No. 209/6989/34 and LR. No. Bahati Block 1/522. Thomas Kabii inherited the rest of the properties belonging to the estate of the deceased.

On 16th May 2005, Josephine Kabii, Mary Wangong’u and Catherine Gichira filed summons pursuant to the provisions of **Section 76** of the **Law of Succession Act** seeking to have the grant issued to Thomas Kabii revoked on the grounds that the said Thomas Kabii had obtained the said grant by fraudulently making false statements and concealing from court material facts. In essence, the said applicants stated that they were daughters of the deceased and had been excluded from the succession proceedings. Before the application was heard, Thomas Kabii died. His wife Caroline Anne Kabii and his brother in-law Hugh Norman Wrigley petitioned this court in **Succession Cause No.433 of 2005** to be granted with letters of administration intestate in respect of his estate. They were not issued with letters of administration intestate because Josephine Kabii, Catherine Gichira and Mary Wangong’u, the sisters of Thomas Kabii objected to the grant being issued to them on the grounds that the properties that the said petitioners were seeking to inherit were infact properties which were subject of succession proceedings in the present

succession cause. It was agreed that the dispute in respect of the distribution of the estate of the deceased in the present petition takes precedence to the proceedings in respect of the estate of Thomas Kabii.

In a statement of agreed facts filed in court on 4th May 2006, the advocates of Caroline Anne Kabii and Hugh Norman Wrigley on the one hand, and the advocates of Josephine Kabii, Catherine Gichira and Mary Wangong'u, the parties agreed that the estates of Thomas Kabii and that of James Kabii were intertwined only to the extent of the property of James Kabii that devolved upon Thomas Kabii through the succession proceedings herein. The parties also agreed that the issue in dispute was the distribution of the estate of the deceased in the present proceedings. On 14th May 2007, the two parties entered into a consent. In the said consent, Catherine Wairimu Gichira and Stanley Mukolwe were appointed to be the administrators of the estate of the deceased. Stanley Mukolwe is a friend of Caroline Anne Kabii. Caroline relocated to Australia with her children. She is an Australian citizen. Her interests in the succession cause are therefore being taken care of by Stanley Mukolwe. The grant was confirmed in terms of consent of the parties. A certificate of confirmation of grant was issued on 21st September 2010.

On 18th April 2011, Margaret Nyokabi Muchoki (Margaret) filed summons seeking to have the grant issued to the respondents revoked on the grounds that the respondents had concealed from the court the fact she was a widow of the deceased. She was aggrieved that in the certificate of confirmation of grant issued on 21st September 2010, the properties that comprise the estate of the deceased were distributed without taking her and her children into account. In the affidavit in support of the application, she deponed that she was married to the deceased under Kikuyu Customary Law and had been cohabiting with him from 1988 to the time of his demise on 10th January 1995. She averred that their union was blessed with one child, Sharon Gathoni Kabii who was born on 24th February 1989. She stated that the deceased took care of them including her first born child Anthony Michuki. In support of her claim that she was married to the deceased, Margaret annexed an affidavit sworn on 28th October 1991 by the deceased and herself. In the said affidavit, the deceased acknowledged that he had married Margaret under Kikuyu Customary in October 1991. The affidavit was sworn with a view to secure Margaret's transfer to Nairobi by the Teachers' Service Commission. The transfer was duly given effect to. Margaret also annexed a death and funeral announcement of the deceased in the **"Daily Nation"** of 17th January 1995 which identified her as a widow of the deceased. She also annexed a copy of birth certificate of Sharon Gathoni which was issued on 31st March 2008 identifying the deceased as the father. Margaret therefore reiterated that she was wrongly excluded as a dependant of the deceased together with her children.

In further support of her case, John Wanduara swore a further affidavit dated 20th February 2013. In the said affidavit, he deponed that he came to know Margaret when she was transferred to Muthaiga Primary School where he was teaching at the time. He also came to know the deceased because he used to come to school to pick Margaret and the children. He deponed that the deceased told him that he was Margaret's husband. In October 1991, the deceased requested him to accompany him to Margaret's rural home at Ngandu, Karatina in Nyeri County. The deceased was accompanied by one Michael Kanyotu who then worked as a magistrate. The purpose of the visit to Margaret's rural home was to pay bride price. He recalled that the mission succeeded after which they returned to Nairobi. As far as John Wanduara was concerned, Margaret and the deceased were husband and wife who continued to live together until the death of the deceased when Margaret transferred back to Nakuru.

In her replying affidavit, Catherine Wairimu Gichira (Catherine) denied that Margaret was married to the deceased. She deponed that she was not aware that the deceased was married to Margaret. It was her case that if indeed Margaret was a wife to the deceased, why did she not identify herself as such when Thomas Kabii first petitioned the court to administer the estate of the deceased? She averred that the evidence placed on record by Margaret did not in any way establish that indeed a customary marriage took place or that there existed such a marriage. She was not certain that Sharon Gathoni was the daughter of the deceased because she recalls seeing a birth certificate of the said Sharon that did not contain the name of the deceased as the father. She reiterated that Margaret and her children were not therefore dependants of the deceased. She stated that Margaret should be satisfied with the two properties that she benefitted from

when Thomas Kabii was the administrator. She denied that the allegation that she had fraudulently excluded Margaret as a beneficiary of the estate of the deceased.

On his part, Stanley Mukolwe (Stanley) deponed that Margaret was not a wife to the deceased. He wondered why if Margaret was indeed a wife of the deceased she allowed Thomas Kabii to refer her as a friend of the deceased and not a wife. He reiterated that Margaret benefitted from the two properties that belonged to the estate of the deceased because she was a friend of the deceased and not a wife. Stanley urged the court to carefully look at the history of the case and ask itself why it took over fifteen (15) years for Margaret to complain yet she was aware of the proceedings in court. It was his case that the entire claim by Margaret was an afterthought. As regard whether the two children of the deceased should be considered as dependants, it was his case that the said children had already been catered for when the two properties were transferred to Margaret. He denied the suggestion made by Margaret to the effect that the administrators had fraudulently excluded her as a beneficiary of the estate of the deceased.

Counsel for the parties to this application agreed by consent to dispose of the case by filing written submission. The applicants filed their submission on 26th May 2013 while the respondents filed theirs on 20th March 2013. This court has read the pleadings filed by the parties herein in support of their respective opposing positions. It has also benefitted from reading the written submission filed by the respective counsel of the parties. The issue for determination by this court is whether Margaret and her children are dependants of the deceased and therefore entitled to benefit from his estate. In her evidence placed before court, Margaret states that she was married to the deceased under Kikuyu Customary Law. To support this evidence, she obtained an affidavit from John Wanduara who swore that in October 1991, he travelled with the deceased to the rural home of Margaret in Nyeri County where the deceased paid dowry to the parents of Margaret. The said John Wanduara did not describe what ceremonies took place to enable this court reach a definitive finding that indeed Margaret was married by the deceased under Kikuyu Customary Law.

Margaret also produced an affidavit which the deceased swore on 28th October 1991 to the effect that he had married Margaret under Kikuyu Customary Law in October 1991. The affidavit was prepared by an advocate and sworn before a Commissioner for Oaths. Margaret testified that she lived with the deceased from the time of her marriage to the time of his death. This evidence was not seriously controverted by the respondents. Margaret annexed a copy of birth certificate of her daughter Sharon Gathoni which indicated the deceased as the father. This evidence was not challenged. The property known as LR. No.209/6989/34 was purchased in the joint names of the deceased and Margaret on 9th September 1994. A copy of the agreement was annexed to the further affidavit of Margaret sworn on 20th February 2013. John Wanduara deponed that the deceased lived with Margaret while Margaret was teaching at Muthaiga Primary School in Nairobi until his death. This evidence was not controverted or seriously challenged by the respondents.

An issue that seems to have engaged the respondents was the description of Margaret by Thomas Kabii in the initial petition as a friend of the deceased. Under the **Law of Succession Act**, there is no provision for a friend. It was clear to this court that Thomas Kabii, the son of the deceased acknowledged that the deceased had a relationship with Margaret. That is why he acknowledged the children of Margaret as dependant of the deceased. This court finds the assertion by the respondents that the deceased was not married to Margaret not supported by cogent evidence. The deceased's own child acknowledged the children of Margaret as dependants of deceased.

This court therefore holds that Margaret established, to the required standard of proof on a balance of probabilities, that she was a wife of the deceased. Even if she was not able to describe in minutiae the prerequisites of Kikuyu Customary Law marriage ceremony, this court holds that she was married to the deceased. The deceased acknowledged this fact in the affidavit that he swore on 28th October 1991. For all intent and purpose, that affidavit is proof that the deceased considered Margaret as his wife. No evidence was adduced by the respondents to controvert this fact. Margaret was able to establish that she lived with the deceased from the time the deceased acknowledged her as his wife to the time of his death. In **Mary Wanjiku Githatu –Vs- Esther Wanjiru Kiarie [2010] eKLR**, the Court of Appeal held that

the fact that parties to a marriage did not complete the customary marital rites did not preclude the court from reaching a finding that the couple who had cohabited together for a long time were indeed presumed to be husband and wife. Bosire JA had this to say at page 3 of the judgment:

“There is no doubt that, that relationship was potentially customary in nature. The deceased according to Kikuyu Customary Law is the one who was obliged to pay dowry for the petitioner. As at the date of his death he had not done so. Cohabitation is one of the essentials of a Kikuyu Marriage. Likewise providing residence and maintenance for a wife are among other essentials of a Kikuyu marriage. The main component lacking here is dowry. There is no fixed time for paying dowry. Cotran, in his works, The Restatement of African Law (Kenya) Vol. 1(The Law of Marriage and Divorce) states that dowry may be paid by instalments and may even be paid after cohabitation has taken place. It would appear that if other essentials are satisfied but dowry is not paid, it may be paid even after one of the parties to the relationship is dead. It is clear from Cotran’s works that elopement is a common feature among the Kikuyu and such relationship in most cases matures into an acceptable Kikuyu marriage upon payment of dowry.”

In the present case, it was established that the deceased cohabited with Margaret in Nakuru and later in Nairobi. Their marriage was blessed with one child, a daughter born in 1989. The deceased also took the first child of Margaret under his wings. He maintained the said child as his own during his lifetime. The deceased was instrumental in the transfer of Margaret from Nakuru to Nairobi. This transfer request was made to the Teachers’ Service Commission so that the deceased and Margaret could continue living together. As stated earlier in this judgment, no evidence was adduced by the respondents to controvert this fact. The respondents have not been able to explain why Thomas Kabii, the son of the deceased, listed the children of Margaret as dependants of the deceased. This acknowledgement by Thomas Kabii cannot be wished away by Caroline Anne Kabii, the wife of Thomas and by the deceased’s daughters, including Catherine.

This court therefore holds that Margaret is a wife of the deceased within the meaning of **Section 3(5)** of the **Law of Succession Act** which provides thus:

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

This court further holds that the children of Margaret are dependants of the deceased in accordance with **Section 29(a)** and **(b)** of the **Law of Succession Act**. Sharon Gathoni, as a child of the deceased is entitled to be considered as a dependant regardless of whether or not she was maintained by the deceased at the time of his death. Evidence adduced however established that indeed the deceased maintained Sharon Gathoni at the time of his death. The deceased likewise maintained Anthony Muchoki, his step son by educating him and living with him until his death. Anthony Muchoki therefore qualifies to be considered as a dependant pursuant to **Section 29(b)** of the **Law of Succession Act**.

The upshot of the above reasons is that the certificate of confirmation of grant which was procured at the behest of the respondents on 21st September 2010 cannot stand because it failed to take into consideration Margaret and her children who were dependants of deceased. That certificate is hereby revoked. The respondents are ordered to present another application for confirmation of grant before court taking into consideration the interest of Margaret and her children as dependants of the deceased. If they fail to do so, Margaret shall be at liberty to file an application of confirmation of grant with her proposal on how she wants the estate to be distributed. They shall then serve Margaret with such application. Margaret shall be at liberty to file affidavit of protest, if she so wishes. If no agreement shall be reached, the parties shall be at liberty to list the case before the court for appropriate distribution. There shall be no orders as to costs.

DATED AT NAIROBI THIS 29TH DAY OF APRIL, 2014.

L. KIMARU

JUDGE