



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.537 OF 2004

IN THE MATTER OF THE ESTATE OF THE LATE GEORGE GATOBU M'MBOROKI

DOLLY WANJA NGITI.....PETITIONER

VERSUS

IRENE GAKII MBIJIWE.....OBJECTOR

J U D G M E N T

The petitioner DOLLY WANJA NGITI petitioned for grant of letters of administration intestate to the estate of the late GEORGE GATOBU M'MBOROKI who had passed on 25th October, 2004 claiming to be a widow to the deceased. That one Zipporah Judah (deceased) filed objection to the making of the grant and answer to the petition for grant on grounds that the petitioner was not wife to the deceased George Gatobu M'Mboroki and that plot No.22 Nkubu was not his property. Subsequently other objections were filed against the petitioner being granted letters of administration intestate to the deceased estate.

That on 6th February, 2006 the petitioner's advocates and advocate for 1st objector and 2nd objector agreed by consent the issue for determination to be:-

“The question whether Dolly Wanja Ngiti was a spouse of the deceased should be determined by way of viva voce evidence before letters of administration are issued to any party.”

The petitioner gave evidence and called five (5) witnesses whereas the objector Esther Kariuki Mboroki gave evidence and called three witnesses. That after hearing both the petitioner and her witnesses and the objector and her witnesses this court ordered that written submissions be filed and exchanged. That when this court was seized with this matter which had been heard by Hon. Justice I. Lenaola and Hon. Justice W. Ouko, as he then was, it directed that Counsel do highlight on their submissions.

The petitioner's case is that she was married to the deceased George Gatobu Mboroki in 1994 under Kimeru customary law. That dowry was paid by her husband's representatives and that she participated in the arrangements. That David Gituma and Stephen Kariuki a boy of 18 years old as of 2006 delivered the dowry. She averred that she lived with the deceased for 10 years at Kiria while working at Nkubu and that she is still running the business and living at the deceased home. The petitioner testified that she had one child with the deceased namely Calvin Mutuma and produced his birth certificate as Exhibit P.1. That the deceased had other children who the petitioner named as Nkirote, Kithinji, Zipporah Naito, and Eunice Muthoni. The petitioner testified as the deceased wife she use to participate in family functions

and did participate in the deceased's funeral and produced several photographs to confirm her participation in family functions. On cross-examination the petitioner testified that under Kimeru Customary law "Mwati" dowry is taken before marriage is solemnized. She admitted parents of the deceased never visited her parents' home and that even today she uses her maiden name. That dowry was paid in 2001, however the people who visited her parents in 1994 were Isaka Gichuru, Bernard Kariuki and Joseph Kinoti in absence of the deceased. She admitted that in her letter dated 10th June, 2003 Exhibit P2 addressed to Plan International she stated that she was single and that her dowry was paid in form of Cash of Kshs.10,000/- to represent a she goat and guard which dowry was received by her father and his clan. She confirmed her son's birth certificate was prepared for the purpose of this case. On the dowry negotiations she testified it was negotiated by Isaac brother to the deceased, Joseph Kinoti and David Gituma in presence of the deceased. PW2 Samson Murega father to PW1 testified that the deceased was husband to PW1 who had married her under Kimeru Customary law. He testified that in the first instance three men namely Kinoti, David Gituma and Kariuki informed him that the deceased George Gatobu wanted to marry the petitioner to which request the petitioner agreed to. That dowry was paid in 2001 being "mwati" and "ruracio" in form of cash of Kshs.10,000/(Kshs.8,000) for "mwati" and (Kshs.2000) for "ruracio" in presence of Pharis Kimaita(PW3) and many others including ladies. On cross-examination PW2 testified that Gatobu's parents never attended the negotiations but his brother was in attendance. PW2 went on to state the dowry was paid in 2007 by David Gituma and Kariuki, a young boy.

PW3 Pharis Kimaita testified that the petitioner was married to George Gatobu(deceased) and dowry was paid. That Gatobu(deceased) went to PW2 home with his brother, Isaac, a friend called Muriuki, David and Kinoti being five(5) people to ask for a hand of DOLLY WANJA the petitioner which request was accepted. That George later gave sheep in form of money(Kshs.8000) for sheep and (Kshs.2000) for knife through a young man and David in presence of deceased brother and brother to PW2 one Murerwa and that parents of the deceased did not attend negotiations of the dowry. PW4 Stephen Kariuki testified that he was the young man who had been sent by George Gatobu(deceased) to take dowry to the petitioner's parent with David Gituma. He testified he delivered cash of Kshs.10,000/- being (Kshs.8,000) for dowry of honey and Kshs.2,000 for sword in accordance with the tradition. That when they delivered the dowry they found Pharis Kimaita(PW3) and Samson only and handed money to Pharis Kimaita(PW3) who handed it over to Samson(PW2).

On cross-examination PW4 admitted that he is parking boy at Nkubu and that when they took dowry they only found two people and that the money represented honey and sword.

PW5 Angelo Gitonga testified that George Gatobu was his cousin and averred that the petitioner was introduced to him by the deceased as his wife and he was advised to be paying butchery rent to her and since then he has been paying her the rent.

He went on to aver that the deceased sponsored the petitioner to college and that they even lived together at Kiria. That the petitioner even took the deceased to mortuary. That she was involved in funeral arrangements. On being cross-examined he testified that the deceased home is used by petitioner and other family members namely:- Kithinji(in U.S.A), Naitore(Nairobi) and Muthomi. PW6 Zaberia Nyaga Mboroki testified that the deceased bought land from his clan Karuku clan and informed the clan about his marriage. That during the harambee to raise funds for the deceased's son to proceed to USA for studies the petitioner was fully involved in the arrangements and referred to photographs "A" taken during the harambee. He averred the petitioner was a wife to the deceased and was involved in farming in family land. That during the funeral of the deceased; PW6 testified the petitioner was involved as deceased widow. On cross-examination he testified that they met the deceased as he wanted to be part of Karuku clan and it was normal to introduce a person and his wife to the clan and as such the petitioner was introduced to the clan. He further testified that he had been to Baringo Hotel at Nkubu many times and each time he went to the hotel he used to pay to Dolly, the petitioner the bills, as a cashier.

The objector Esther Kariuki Mboroki who was substituted as an objector following the death of Zipporah Judah the initial objector and her mother testified that following the death of her mother she obtained a grant of representation in respect of her estate and produced the limited grant for the purpose of taking

over Succession Causes Nos 1/2003, and 537 of 2004 as objector's exhibit No.1. That when George Gatobu died, the petitioner filed this cause. That before his death the deceased was married to Catherine Njoki Gatobu with whom they had children, namely Nicholas Kithinji, Zipporah Naito, Winfred Kanana, Eunice Muthoni and Barbara Mwendwa. That Catherine Njoki Gatobu died in 1999 as per death certificate produced as Objector's exhibit 2. That the deceased used to live in Baringo Hotel in Nkubu on plot No.22 in OW1's father's name. He also had a house at Kiria-near Nkubu market on his own land. That Catherine was buried at Eldoret. That after death of Catherine, George(deceased) did not marry again. DW1 testified following the death of her father her mother used to head dowry negotiations for her brother's who were getting married assisted by paramount Chief Moses Marete who acted as their parent. She testified that she met the petitioners in 2003 and knew her as a worker at Baringo Hotel owned by late George Gatobu. That she was never introduced to her by George as his wife and that she never lived with George at Kiria at all as the house at Kiria is occupied by Nicholas Wambugu, George's son with the late Catherine and George's children out of wedlock, Barbara Mwendwa, Winfred and Nicholas. OW1 averred that the deceased never mentioned having a child with the petitioner. That the other children both out of wedlock, she testified are recognized by the entire family including her late mother. The petitioner was not listed amongst the deceased relatives in the obituary. In the eulogy petitioner appeared nowhere as per objector's MFI 3 and exhibit 4 being the funeral programme. That on burial date the petitioner was in attendance and did not complain that her name was not included in the programme. That workers from Baringo Hotel attended funeral and photographs were taken. OW1 stated as per photographs produced by PW1 she did not see her at the airport. She stated her late brother Isaac Gichuru and David Gituma who were alleged to have negotiated dowry marriage of the petitioner would not have done so in absence of the deceased's mother, his brother and chief Marete. She stated at Baringo hotel there was no home for the deceased as the deceased lived at Kiria. On cross-examination OW1 testified Baringo hotel was not a joint business between the deceased father and George but it was for George. She stated she is not aware of a child born to her late brother between George and petitioner. On P.exhibit 1 OW1 stated that the certificate shows George as father to petitioner's child. On P.exhibit 4 she stated she could see George next to the petitioner. On P.exhibit 4(a) shows her mother, petitioner, and George. P.exhibit 4(b) is of her mother and her brother. That at the funeral she averred the petitioner participated like any other mourner. P.exhibit 4(e) and (f) is of people dressed in black laying wreaths and most of mourners were dressed in black. That the petitioner was in photograph laying wreaths. That she was with Zipporah, Eunice and Gitonga, Zipporah's son. She averred at Baringo Hotel on raining days George would stay in one of the rooms at the hotel. OW1 reiterated that the petitioner was not widow to the deceased. OW1 testified the petitioner never attended her mother's funeral. She further stated the petitioner is still living at Baringo Hotel with Muthoni and Eunice. OW2 David Gituma who described himself as a friend of George Gatobu(deceased, testified that the petitioner was an employee of George(deceased) at Baringo Hotel-Nkubu. That George was married to Njoki who passed on and after her death George did not get married again. He testified that he did not go to pay dowry to Dolly Wanja's(Petitioner's) Parents. That he and Isaack Gichuru never went to Dolly Wanja's home and that he has never been to Dolly's parent's home and the only relationship he knew of Dolly and George(deceased) was that of an employee and employer. OW2 further testified that he, Kariuki, Kinoti and Gatobu were always together and that they never went to pay dowry to Dolly's parents. That OW2 used to visit George at his home at Kiria and at no time did he ever meet Dolly Wanja at George's home even after Njoki's death. He stated if George had married Dolly he did not tell him. He asserted that she was not married to George(deceased). On being cross-examined OW2 testified that in the evening he would go to George's hotel where Dolly, the petitioner was an employee amongst many other employees. That George lived both in the hotel and at Kiria. That George had four children. OW2 reiterated that he had never visited Dolly's home nor does he know her father. He stated that he does not know Stephen Kariuki but confirmed that Dolly lives in the hotel upto now. On P.exhibit 4(a) OW2 stated that he could see the photograph of Dolly and George (deceased). On P.exhibit 4(e), he stated it is over the funeral with many people being mourners in uniform laying wreaths and there is no employee of Baringo Hotel laying wreaths. That employees of Baringo Hotel were also given a chance to lay wreaths.

OW3 Simon Kanyaru Joseph a former employee of Gatobu as a watchman at Kiria and later at Baringo Hotel testified that in 1990's he was working at George's home and moved to Baringo hotel in 1997 upto 2004. He produced his employment ID card as objector, exhibit 5 and stated there were many employees at Baringo Hotel including the petitioner. That the petitioner worked in the kitchen and sometimes issued

receipts. That Dolly and other women slept in one room in Baringo Hotel. That George was married to Njoki(deceased) and after her death George(deceased) never married Dolly, the petitioner, but she was only an employee. The witness averred that he would have known if she was married to Gatobu. He averred he never saw them sleeping in the same room nor did he see her at Gatobu's home at Kiria. That on rainy days Gatobu(deceased) would spend the night at his hostel and whenever he did so he did not spend the night with Dolly, the petitioner. That the first room was used by women employees, the 2nd room by Gatobu's daughters and the 3rd room by Gatobu. OW3 testified that he knows Gatobu's children numbering 5 and gave their names as Githinji, Naito, Muthoni, Kanana and Mwendwa. He further averred that he attended Gatobu's funeral, Dolly attended and all placed wreaths on the deceased's grave and that there was nothing special of Dolly, the petitioner in laying a wreath.

In cross-examination OW3 stated that he was employed in 1997 and objector's exhibit 5 was issued in 2001. He stated at Gatobu's funeral he was wearing a yellow coat as per Exhibit 4(c) and he identified the 5 people depicted bending laying wreaths to be Dolly, Naito, Muthoni, and Dolly dressed in black with a label on lapel. He stated that the employees were dressed in black and that any employee could buy a black uniform. OW3 stated that he did not make the ID card and that it has a name Logo for Baringo Hotel and that he had signed it, and it is also signed by authorizing person that is Dolly, the petitioner as a supervisor. He stated Dolly had a son who she lived with in the same room as other women employees.

OW4 Winlove Kanana Gatobu, daughter to George(deceased) testified that the deceased was her father and they were very close. She named the deceased children being six(6) as follows:- Kithinji, Naitore, Muthoni, Mwendwa, and Wambugu all from different mothers. OW4 testified that she used to meet her father very often and that he did not have a wife at the time of his or at the time of his death. That the 1st wife Njoki passed on and he did not marry again. She stated that there was no 2nd wife. That OW4 met Dolly as an employee at Baringo Hotel where she was frequent and was never wife to George(deceased). That if George (deceased) had married he would have told her and the family as he was very close to his family. She stated that Dolly has never lived at Kiria. That OW4 had access to her father's room at Baringo Hotel and that Dolly never stayed in that room. That Dolly was employed as a waitress and would be serving customers or issuing receipts. OW4 did not know where Dolly slept or stayed as an employee. On cross-examination OW4 insisted the deceased had only one wife, Njoki and that her mother was never married by her father. That her mother never lived with her father. That whenever on holiday she used to stay with her mother and Gatobu separately and would even work in the hotel and knew the employees numbering 12 who included Dolly. That during the funeral of her father she was in attendance and was dressed in black. On P.exhibit 4(q) OW4 confirmed it was taken on the date of burial. P.exhibit 4(a) is a photo of some of members of family. That some family members were dressed in white while others in black. That Baringo employees were not dressed in uniform and Exhibit 4(f),OW4 stated was of Dolly and herself and that of her two sisters were carrying a portrait of OW4's father in which OW4 stated Dolly, the petitioner was there as an employee. OW4 stated that she is no longer in good terms with her own siblings over this dispute because of maintaining that Dolly was not married to her father. OW4 maintained she does not know who took the photograph.

After close of the parties respective case, submissions were filed. The petitioner's submissions were filed by the firm of M/s Mithiga & Co. Advocates on 21/10/2009 and objector's submissions were filed on 16th August, 2011. That on 2nd April, 2014 Mr. Murithi, learned advocate for the objector and Mr. M. Kariuki learned Advocate for the petitioner appeared for the respective parties. That both learned counsel highlighted on their submissions agreeing on the issue for determination at this stage was as was set out by consent; on 6th February, 2006 when parties appeared before Hon. Mr. Justice Isaack Lenaola.

The court has very carefully considered the pleadings, proceedings, written submission by both advocates as well as the oral submissions. The issue for consideration at this stage is whether Dolly Wanja Ngiti, the petitioner was a spouse of George Gatobu Mboroki(deceased) before letters of administration are issued to any party.

The petitioner averred that she was married to the late George Gatobu Mboroki in 1994 under Kimeru

Customary Law. IN THE RESTATEMENT OF LAW, EUGENE CONTRAN, THE LAW OF MARRIAGE AND DIVORCE WHILE CONSIDERING THE MERU AND THARAKA CUSTOMARY PRACTICES set out the essentials of a valid marriage thus:-

1. *Personal Capacity*

That there is no fixed age as such or attainment of which persons become legally capable of entering into marriage, however, no person male or female can marry before he or she has been circumcised and before a female has passed her first menstrual period. This has however changed with modern development and passing of the Children Act and the Constitution of Kenya, so that one cannot marry before the age of majority.”

2. *Consent*

Prior consent of both spouses is essential to validity of marriage. The consent of husband’s family was essential to the validity of first marriage in which the family is represented by husband’s father. Nowadays, however, if the husband has independent means, and can pay the “ruracio” without assistance of his family, he may marry without their consent. The family of the wife is essential to the validity of the union, and the family is represented by the bride’s father.

3. *Prohibited Degree*

A man may not marry a woman to whom he is related.

4. *Marriage Negotiations*

The standard procedure for negotiating the formation of a regular formation of a regular marriage is by way of betrothal. That once a boy selects his bride and proposes to her, upon acceptance his parents invites the girl’s parent to their home to have the beer known as “Ncobi ya Kuria Uthoni” i. e beer of asking the gift’s hand, followed by several visits between the parents of the boy and the girl follows. An appointment is then fixed at the home of the girl’s father where the “ruracio” negotiations are held. This centres on how ruracio is to be paid a it is standard, rather than or how much it is to be given. A first installment is paid normally, the other installment following gradually.

5. *Marriage Consideration.*

Ruracio is a payment or payments of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father or other guardian of the bride or the agreement to pay, which is necessary to validity of the marriage and to establish the affiliation. The character of marriage consideration consists of cattle, sheep, goats and honey or other equivalent in money. In South and North Imenti one ewe, one heifer, two bulls and one tin of honey is taken as standard consideration.

The petitioner’s evidence is that the first visit to her parent’s home was by three persons namely Isaka Gichuru, Bernard Kariuki and Joseph Kinoti in absence of George. PW2 in his evidence averred that in the first visit three men came namely Kinoti, David Gituma and Kariuki. PW1 and PW2 though they corroborate one another on the number of people who came they contradict one another on the identity of the persons who came. They do not agree in that respect. PW3 on the other hand gave the names of the people who visited the PW2’s home as five naming them as Isaack brother to George Gatobu(deceased) Muriuki, David, Kinoti, and Gatobu(deceased). PW3 includes the deceased amongst the first visitors whereas PW1 and PW3 disagree with him. PW3 named Muriuki amongst first visitors who PW1 and PW2 did not mention as being amongst the first visitors. The evidence of PW1, PW2 and PW3 contradicts each other on who visited the home of PW2 to ask for hand of marriage of PW1. On the issue of dowry negotiations PW1 testified that negotiations were made by Isaac brother to George deceased in

company of Joseph Kinoti, David Gituma and deceased consisting of 4 persons. PW2 on the other hand stated that dowry was brought in 2001 in form of Kshs.10,000/-(Kshs.8000) in form of “Mwati” and (Kshs.2000/-) for “Ruchiu” in presence of PW3 and many others including Rebecca, Mrs. Mureithi, and Mrs. Mutuma. He later stated the actual dowry was paid in July, 2007 by David Gituma and Kariuki contradicting himself. PW1 on the other hand stated that the dowry was paid in cash of Kshs.10,000/- being (Kshs.8,000/-) for goat and (Kshs.2,000/-) for guard and was received by her father PW2 and clan. PW3 contradicts both PW1 and PW2 by stating that the dowry was paid in cash of Kshs.10,000/-(Kshs.8,000/-) for “Mwati” and (Kshs.2000/-) for knife by David Gituma and Kariuki in presence of George. PW4 evidence did corroborate the evidence of PW1, PW2, and PW3. He stated he took dowry in form of cash of Kshs.10,000/-(Kshs.8,000/-) for drum of honey and (Kshs.2,000) for sword found only PW2 and PW3. OW2 David Gituma whom PW1, PW2, PW3 and PW4 mentioned to have been involved in the first visit to PW2’s home, to taking the dowry with PW4 denied in his evidence to have played that role. PW4 did not play any role in the alleged customary marriage between the PW1 and George(deceased). His evidence is on what he alleged to have been told by George. PW1 did not in her evidence mention George introducing her to PW5. I find evidence of PW5 to be uncorroborated and I reject the same.

PW6 evidence has nothing to do with the Kimeru Customary marriage between PW1 and the George deceased. The evidence deals with what he was purportedly told by George. PW1 did not mention having been introduced to PW6 at the clan level by George as his wife. Similarly, I find evidence of PW6 uncorroborated and reject the same.

On the other hand none of the family members of George gave evidence acknowledging existence of Customary Marriage between Dolly (petitioner) and George(deceased). OW1 denied existence of any marriage or relationship between Dolly, the petitioner and her brother George. She stated that she knew Dolly as an employee of George at Baringo Hotel. That she never lived with George(deceased) at Baringo Hotel or at his home at Kiria as man and wife or at all. That in all family functions Dolly appeared as an employee. That in all photographs PW1 relied on OW1 stated she was appearing as an employee and the photos had nothing special as regards petitioners relation with George. She insisted had there been any marriage between the two she would have known and her mother, her brother, sisters and Chief Marete would have attended the marriage negotiations. PW2 David Gituma stated that the deceased following death of his wife Njoki never married Dolly and denied having taken part in dowry negotiations with Dolly’s father or even going to Dolly’s parental home which he stated he did not know. He denied that Dolly lived with George at his home or at Baringo Hotel as man and wife.

OW2 evidence corroborated evidence of OW1. OW4 a retired watchman for George (deceased) from 1997 to 2004 stated that Dolly was an employee of Goerge at Baringo Hotel. That she never lived with George(deceased) as man and wife at Kiria or at Baringo Hotel and whenever George spent at Baringo Hotel he was in a separate room and never used one room with Dolly as man and wife. His evidence corroborated the evidence of OW1 and OW2. OW4 testified that she was very close to her father and knew Dolly as an employee. That her father never married Dolly or a second wife and had he done so he would have told her and other family members. She stated her father never lived with Dolly as wife and husband and she never stayed at Kiria home. That her father’s room at Baringo Hotel was not shared with Dolly. That the photos produced during family functions Dolly appeared as an employee and there was nothing special about it.

Having carefully considered the evidence of PW1, PW2, PW3 and PW4 who claimed to have played a key role in the purported marriage arrangement or negotiations between Dolly, the petitioner and George Gatobu(deceased) I find serious contradictions as to who played what role during the alleged visit, marriage negotiations and who were present and who paid the dowry and for what purpose the Kshs.10,000/- was being paid for. The contradictions and inconsistencies are fatal to the petitioners case and due to such serious contradictions and inconsistencies I find that the evidence of PW1, PW2, PW3, PW4 and PW5 cannot be relied upon as regards existence of a valid Kimeru customary marriage between the petitioner and the late George Gatobu. On the other hand I find the objector’s evidence and that of OW2, OW3, and OW4 to be consistent and corroborating one another and credible evidence that I have to believe to be true.

The petitioner had asserted that she was married to the deceased George Gatobu under Kimeru Customary law. It was upon her to duly prove on balance of probability of the performance of Kimeru Customary Marriage between herself and Gatobu. She has failed to prove consent by George Gatobu to marry her. She has failed to prove marriage negotiations and payment of marriage consideration. The evidence before the court if anything it points to employer and employee relationship to which the petitioner was occasionally involved in family functions and to which photographs would be taken. The photographs perse cannot be taken to connote existence of Kimeru Customary Marriage. After all the petitioner do not and did seek an assumption declaration of marriage between herself and the late George Gatobu but insisted that there existed Kimeru customary Law between herself and late Gatobu which customary marriage she was obligated to prove on balance of probabilities but miserably failed to do so.

The upshot is that I find and hold that the petitioner Dolly Wanja Ngiti was not a spouse of the deceased George Gatobu and is not entitled to be the petitioner in respect of the deceased estate.

I accordingly dismiss the petition by the petitioner with costs to the objector.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF MAY, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

Mr. Thangashia h/b for M. Kariuki for petitioner

Mr. Murithi for objector

J. A. MAKAU

JUDGE