



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.2800 OF 2001

IN THE MATTER OF THE ESTATE OF PATRICK WARUIRU MUKUI (DECEASED)

HANNAH WANJA WARUIRU.....APPLICANT

VERSUS

ANNAH MWIHAKI WARUIRU.....RESPONDENT

RULING

Patrick Waruiru Mukui, the deceased to whose estate these proceedings relate died on 25th June 2000. On 14th November 2001, the Respondent petitioned the court to be issued with a grant of letters of administration intestate to enable her administer the estate of the deceased. In the petition, the Respondent listed herself, Elizabeth Wanja Waruiru, Margaret Wachege Waruiru and Regina Njeri Waruiru, the daughters of the deceased, as dependants of the deceased. She listed the following two (2) properties as comprising the estate of the deceased:

- I. LR. No. Ndarugu/Karatu/452
- II. LR. No. Ndarugu/Karatu/1568

A limited grant was issued to the Respondent on 9th April 2003 for the purpose of withdrawing the sum of Kshs.127,035/- from an Account held in the name of the deceased by the Kenya Tea Development Authority. The grant of letters of administration was issued to the Respondent on 10th June 2009. It was confirmed by this court on 22nd September 2010. The Respondent inherited the properties that comprised the estate of the deceased in trust for the three (3) daughters of the deceased who would eventually inherit the same in equal shares.

On 20th January 2014, the Applicant filed summons for revocation of grant on the grounds that the grant was obtained by the Respondent fraudulently concealing from the court material facts of the case. The Applicant claimed that the Respondent had failed to disclose to the court the fact that she was also a wife of the deceased. In the affidavit in support of the summons, the Applicant stated that she was married to the deceased under Kikuyu Customary Law in 1990. This was five (5) years after the Respondent had left the matrimonial home. At the time the Respondent left the matrimonial home, the deceased was ailing having suffered from a stroke. The Applicant explained that she lived with the deceased from that time until his death. She annexed a copy of the obituary notice published on 28th June 2000 in the Daily Nation in which she was acknowledged as a widow of the deceased. The eulogy noted that the Respondent deserted the deceased when he suffered a stroke. The Applicant stated that she took care of the deceased from the time she got married to the deceased until his death.

The Applicant stated that she organized the burial of the deceased. She deponed that the Applicant and

her children did not attend the funeral. She stated that in 2003, she was ejected from her matrimonial home at Karatu by the Respondent. Since then, she had been blocked from accessing the said matrimonial home. She stated that she was the one who tendered the tea which had been planted in the two (2) parcels of land that comprise the estate of the deceased. It was from the tea proceeds that she maintained herself and the deceased. She reiterated that she was a widow of the deceased and should therefore be recognized by the court as such. She explained that the deceased paid dowry to her parents in accordance with the Kikuyu Customary Law. She further stated that after the marriage, she changed her name and adopted her marital name “**Waruiru**” to reflect her changed status. The Applicant wondered why the Respondent had failed to mention to the court the fact that she had deserted from the matrimonial home in 1985 and only returned in 2002, two (2) years after the death of the deceased. She accused the Respondent of concealing from the court this fact. She urged the court to revoke the grant that was issued and confirmed to the Respondent.

The Respondent swore a replying affidavit to the application. She opposed the application. She denied the claim by the Applicant that she was married to the deceased under Kikuyu Customary Law. She stated that at the time the Applicant is alleged to have married the deceased under Kikuyu Customary Law, she was still legally married to the deceased, their marriage having been celebrated under the **African Christian Marriage and Divorce Act** (now repealed). The deceased did not therefore have capacity to enter into another marriage. She was of the view that the Applicant was acting in concert with her in-laws with a view to frustrating her and her children from inheriting the properties that comprise the estate of the deceased. She stated that the Applicant was unknown to her and was in fact a busy body who was claiming what was not hers. She denied the claim by the Applicant to the effect that she was entitled to be considered as a dependant of the deceased. She stated that, in the premises, the summons for revocation of grant should be dismissed.

During the hearing of the summons, this court heard oral rival submission made by Mr. Kimani for the Applicant and by Mr. Burugu for the Respondent. Learned counsel essentially reiterated the contents of the application and the affidavits filed by their clients in support of their respective opposing positions. The issue for determination by this court is whether the Applicant established that she was indeed a wife of the deceased and therefore entitled to be considered by this court as a dependant of the deceased in accordance with **Section 29(a)** of the **Law of Succession Act**. It was the Applicant’s case that she was married to the deceased under Kikuyu Customary Law. She deponed that she was married in 1990. She lived with the deceased until his death in 2000. At the time she got married to the deceased, the deceased had separated from the Respondent. She stated that the Respondent left the matrimonial home in 1985. She returned to the matrimonial home two (2) years after the death of the deceased. It was the Applicant’s further case that neither the Respondent nor her children attended the funeral of the deceased. In fact, the eulogy read during the funeral indicated that the Respondent had left the deceased when he suffered a stroke. In answer to these allegations, the Respondent did not specifically deny that she had been separated from the deceased from 1985 as alleged by the Applicant. She further did not deny the fact that she was separated from the deceased from that time until his death in 2000. She did not deny that she and her children failed to attend the funeral of the deceased. She further did not deny that she returned to the parcel of land that constitutes part of the estate of the deceased soon after his death.

Having evaluated the facts of this case, it was evident that the Applicant indeed established that she was married to the deceased under Kikuyu Customary Law. Although the Applicant did not adduce any evidence to support the celebration of the marriage under Kikuyu Customary Law, she established that she lived with the deceased for a period of ten (10) years before his death. This court therefore holds that even if the element of the marriage ceremony under Kikuyu Customary Law was not established, this court presumes the existence of the marriage between the Applicant and the deceased by virtue of their long period of cohabitation. In **Mary Wanjiru Githatu –vs- Esther Wanjiru Kiarie [2010] eKLR**, the Court of Appeal, in its majority decision, held that Kikuyu Customary Law did not preclude presumption of marriage by virtue of long period of cohabitation. In the present case, it was clear that the Applicant indeed established to the required standard of proof on a balance of probabilities that she cohabited with the deceased for a period of ten (10) years between 1990 and 2000. The Respondent did not dispute this fact. It was the Respondent’s case that the deceased lacked capacity to marry the Applicant because at the time he was married to her under statute which prohibits polygamy. That may well be the case. The case

before the court is a succession case. The issue of whether or not the deceased had capacity to marry the Applicant is now water under the bridge. **Section 3(5)** of the **Law of Succession Act** recognizes the marriage celebrated between the deceased and Applicant. It provides thus:

“Notwithstanding the provisions of any 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 purpose of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

Therefore, although the Respondent did establish that indeed that she was married to the deceased under statutory law that prohibits polygamy, from the facts of this case and for the purposes of succession, it was clear that the Applicant established that she was married to the deceased by virtue of long period of cohabitation. The Applicant is therefore a wife of the deceased for the purpose of these succession proceedings.

In the premises therefore, this court holds that the Applicant is a wife of the deceased and therefore a dependant of the deceased by virtue of **Section 29(a)** of the **Law of Succession Act**. She also established that the Respondent concealed from this court the fact she (the Applicant) was a dependant of the deceased when she petitioned this court to be issued with a grant of letters of administration intestate. The grant issued to the Respondent on 10th June 2009 and confirmed on 22nd September 2010 is hereby revoked. A new grant shall be issued to the Applicant, Hannah Wanja Waruiru and the Respondent, Annah Mwihaki Waruiru. The properties belonging to the estate of the deceased, if already transferred to the Respondent pursuant to the revoked certificate of confirmation of grant, shall revert back to the name of the deceased. Any titles issued to the Respondent pursuant to the said revoked certificate of confirmation of grant are hereby ordered cancelled.

There shall be no orders as costs. The parties are at liberty to fix the case for further hearing for the court to determine the distribution of the estate of the deceased to the beneficiaries. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF JUNE, 2014

L. KIMARU

JUDGE