



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Succession Cause 1385 of 2010

### IN THE MATTER OF THE ESTATE OF ISAAC GIDRAPH NJUGUNA MUKURURO (DECEASED)

#### RULING

The applicants' summons dated 12<sup>th</sup> August 2011 seeks several orders, but the primary order is that seeking the revocation of the grant made to Mwaniki Njuguna. The application is premised on **Sections 44, 46, 47 and 76 of the Law of Succession Act and Rules 44(1), 49, 63 and 73** of the Probate and Administration Rules. The application is supported by the affidavit of Pauline Gathigia Ndirangu, sworn on 12<sup>th</sup> August 2011. The application is opposed by the respondents. The respondents' case is stated in the affidavit sworn on 14<sup>th</sup> November 2011, by Mwaniki Njuguna, the 1<sup>st</sup> respondent and the administrator of the estate.

The directions given by court on 28<sup>th</sup> May 2012, on the disposal of the application, were that the matter would be determined on the basis of affidavit evidence and written submissions. Both sides have filed lengthy written submissions supported by several authorities.

The applicants' case is that the grant was obtained by fraud and misrepresentation, as the 1<sup>st</sup> applicant and her daughters were omitted from the list of beneficiaries and are likely to be disinherited. The 1<sup>st</sup> applicant alleges to be the second wife of the deceased. The persons named as the 2<sup>nd</sup> and 3<sup>rd</sup> applicants are the daughters of the 1<sup>st</sup> applicant.

To support the allegation that she was married to the deceased, the 1<sup>st</sup> applicant has annexed to her affidavit several documents, namely:

- a) An affidavit sworn on 17<sup>th</sup> January 2006 purporting to be made jointly by the late Njuguna Isaac Gidraph Mukururo and her. According to the affidavit the couple married under Kikuyu customary law on 14<sup>th</sup> January 2006.
- b) There is also the funeral programme of the deceased where she and her daughters are listed as members of the deceased's family. The relevant part reads:

'He was married to the late Mary Wambui and Pauline Gathigia and were blessed with five children Jackie Wanja, Mark Mukururo, Mwaniki, Susan and Georgina...'

- c) She has also attached documents from the provincial administration for the area of Ngong Division, Kajiado District, where the deceased resided, which show that he was survived by, among others, the

applicants.

- d) She has attached copies of birth certificates of Susan Wamaitha and Georgina Wangui, the 2<sup>nd</sup> and 3<sup>rd</sup> applicants, which show that the two are daughters of Pauline Gathigia Ndirangu and Njuguna Isaac Gidraph Mukururo. These birth certificates were issued on 20<sup>th</sup> and 13<sup>th</sup> January 2003, respectively.
- e) There are employment records of the deceased with the Emirates which identify the 1<sup>st</sup> applicant as the wife of the deceased and the 2<sup>nd</sup> and 3<sup>rd</sup> applicants as daughters of the deceased. The letter dated 21<sup>st</sup> October 2003, for example, is from the Finance Manager of the Emirates showing that the deceased was due to travel to the United States of America with his daughters, the 2<sup>nd</sup> and 3<sup>rd</sup> applicants, and was therefore entitled to rebated airline staff tickets.
- f) She has also attached bank statements to show that she operated joint bank accounts with the deceased at the Kenya Commercial Bank Limited, Savings & Loan Branch.

On their part, the respondents aver that the deceased had only one wife, Mary Wambui, the mother of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the only children of the deceased. To support this position the 1<sup>st</sup> respondent has attached several documents:

- a) He has attached a certificate of marriage showing that his mother and the deceased contracted a marriage in church on 2<sup>nd</sup> April 1983. There is also a photograph of the deceased and the alleged Mary Wambui, taken on the wedding day.
- b) There are also NHIF cards (for the periods 1998/1999, 1999/2000 and 2000/2001) identifying the late Mary Wambui as the spouse of the deceased, Njuguna Isaac.
- c) An application for insurance with Alico Kenya dated 14<sup>th</sup> May 1986, where the deceased identified Mary Wambui as his wife and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents as his children.

It is my view that the issues raised by the parties in this matter are weighty. It is unfortunate that the case was not heard orally, where some of the assertions made in the affidavits on record could have been tested by way of cross-examination. The validity of the 1st applicant's alleged customary law marriage could only be effectively dealt with by way of *viva voce* evidence. Affidavit evidence alone is inadequate to deal with such issues. However, it was the court that directed that the matter be disposed of by way of affidavit evidence only.

I have identified only one critical issue for determination – whether the 1st applicant was a lawful wife of the deceased to warrant her being provided for from the estate of the deceased. I feel that all the other issues would naturally be answered once this critical issue is determined.

On the customary law marriage between the deceased and the 1st applicant, very little light has been shed on the matter. The only reference to it is in the affidavit of marriage marked in the affidavit of the 1<sup>st</sup> applicant as annexure PGN1. No details are given at all as to when this happened and the specific customary law rites that were performed. The applicants lost the opportunity to present evidence on this point when it was directed that the matter be disposed of by affidavit evidence.

For a marriage to be said to be a Kikuyu customary marriage it must meet certain requirements. These requirements are well documented in such texts as the ***Cotran's Restatements*** and ***Jomo Kenyatta's Facing Mount Kenya***. They have also been stated in several cases such as *Gituanja vs. Gituanja* (1983) KLR 575 and *Muigai vs. Muigai* (1995-1998) EA 207. The most important requirements are the performance of *ngurario and ruracio*. The affidavit of the 1<sup>st</sup> applicant does not make any reference to these all important Kikuyu ceremonies. I note that the 1<sup>st</sup> respondent has not touched on the aspect of the customary marriage between the deceased and the 1<sup>st</sup> applicant. The 1st applicant's evidence has therefore not been challenged or controverted, and I therefore conclude, based on that affidavit of marriage, that the

deceased was married to the 1<sup>st</sup> applicant under Kikuyu customary law.

There appears to be ample evidence that the deceased and the 1<sup>st</sup> applicant related as husband and wife. The funeral programme recognized them as such and it was on that basis that the applicants are listed as members of the nuclear family of the deceased. The respondents have not adverted to the issue of the funeral programme. The authenticity of the document attached to the 1<sup>st</sup> applicant's affidavit as PGN2 has been not challenged. I therefore find that the applicants were in fact recognized as widow and children of the deceased. The documents from the Emirates have also not been challenged. The bank statements also indicate that the deceased and the 1<sup>st</sup> applicant conducted themselves as man and wife.

The respondents' response to this is that the deceased had contracted a statutory marriage with the mother of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It would appear that their argument is that once the deceased contracted a statutory marriage with their mother he lost capacity to contract other marriages thereafter under whatever system of law. Consequently, there was no capacity for the deceased to marry another woman. The provision which states this position is **Section 37** of the Marriage Act. The High Court has stated in *Re Ruenji's Estate [1977] KLR 21* and *Re Ogola's Estate [1978] KLR 18*, that men who contract statutory marriages have no capacity to contract other marriages under any system of law.

However, **Section 37** of the Marriage Act has no consequence when it comes to inheritance. It is has been circumvented by **Section 3(5)** of the Law of Succession Act, which allows the woman married under a system of law which allows polygamy to a man who is already married under statute to be treated as a wife for succession purposes. The relationship between section 37 of the Marriage Act and **Section 3(5)** of the Law of Succession Act has been stated with finality in *In Irene Njeri Macharia v Margaret Wairimu Njomo and another* Nairobi Court of Appeal civil appeal number 139 of 1994. If the 1<sup>st</sup> applicant is found by this court to be a customary law wife, it follows that **Section 3(5)** of the Law of Succession Act applies and she would be entitled to a share in the estate.

She could also be treated as a wife by dint of the principle of presumption of marriage. There is uncontroverted evidence that the two had two children between them. The evidence that he caused his employment records to reflect the 1<sup>st</sup> applicant as his wife and the 2<sup>nd</sup> and 3<sup>rd</sup> applicants as his children has also not been controverted. So is the evidence that the two operated the Savings & Loan account at Kenya Commercial Bank. All these point to conduct of persons who treated and held themselves as a married couple.

The Kenyan law on this was authoritatively stated in *Hortensia Wanjiku Yawe vs. The Public Trustee* Court of Appeal Civil Appeal Number 13 of 1976. The fact of a prolonged co-habitation between a man and a woman can give rise to a presumption of a marriage in favour of the woman, which presumption can only be rebutted or displaced by cogent evidence to the contrary. *Hortensia Wanjiku Yawe vs. The Public Trustee* has been followed in a long line of decisions. In *the Matter of the Estate of John G. Kinyanjui Nairobi HCP&A No. 317 of 1984* it was held that cohabitation can be evidence from which it can be presumed that the parties to the cohabitation are married. In *In the Matter of the Estate of Evanson Kungu Mureithi* Nakuru HCP&A No. 163 of 1995, it was held that the birth of children who are named after the husband's parents is a factor to be taken into account. In *Christopher Nderi Githambo vs. Samuel Muthui Munene* Nairobi HCCC No. 1372 of 2001, in defining cohabitation the court took into account the cohabitant's financial arrangements.

The respondents' response to the evidence presented by the applicants has not shaken the applicants' case. The fact of the statutory marriage is answered by the application of **section 3(5)** of the Law of Succession Act, which has clearly circumvented **section 37** of the Marriage Act. The NHIF cards and the Alico applications came long before the 1<sup>st</sup> applicant and the deceased allegedly contracted the customary law marriage. The fact that the deceased had a Barclays Bank of Kenya Limited account does not rule out the possibility of his having other accounts in other banks jointly with other persons. There is nothing placed before me to contradict the evidence that the Ngong house could have been constructed by the deceased in collaboration with the 1<sup>st</sup> applicant with funds raised from the Savings & Loan of the Kenya Commercial Bank Limited. I would like to reiterate that the respondents have not dealt with the affidavit

of marriage and the funeral programme which clearly point to a marriage between the deceased and the 1<sup>st</sup> applicant.

The law on revocation of grants is Section 76 of the Law of Succession Act. The court may revoke or annul a grant where:-

- (a) the proceedings to obtain the grant were defective in substance,
- (b) the grant was obtained fraudulently by the making of a false statement or concealment from court of something material.
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law.

The matter to be determined here is whether this application comes within the ambit of Section 76 of the Law of Succession Act.

I am convinced that the respondents knew of the 1st applicant as the wife of the deceased. The funeral programme recognized her as such. The names of the applicants would not have been inserted into the funeral programme without the knowledge of the respondents. I am satisfied that there was concealment or suppression of material information. The statement that the deceased had only one wife and was survived by three children only was false, and this made the process of obtaining the grant fraudulent. In *In the Matter of the Estate of David Kamethu alias David Maina Kinyanjui (Deceased)* Nairobi High Court P&A No. 130 of 2002, it was held that a grant is liable for revocation for failure to disclose in the petition some of the survivors of the deceased. The respondents are guilty of the wrongs listed in Section 76 of the Law of succession.

Having taken everything into account I am disposed to make the following orders:

1. That I revoke the grant made to the 1<sup>st</sup> respondent on 28<sup>th</sup> January 2011;
2. That I appoint Pauline Githigia Ndirangu and Mwaniki Njuguna administrators of the estate of Isaac Gidraph Njuguna Mukururo;
3. That a grant of letters of administration intestate shall issue accordingly to them;
4. That the names of Pauline Githaiga Ndirangu, Susan Wamaitha Njuguna and Georgina Wangui Njuguna shall be entered into the list of the survivors of the deceased;
5. That the deceased's shares in Trans Eastern Airline Aviation College shall be entered into the list of the assets;
6. That as the rest of the prayers in the summons dated 12<sup>th</sup> August 2011 relate to the administration of the estate I dismiss them, the administrators herein appointed shall deal with the matter raised in this prayers in the course of administration, but there is liberty to apply in the event of any difficulties;
7. That to promote reconciliation there shall be no orders as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 29th DAY OF April, 2013.**

**W.M. Musyoka**  
**Judge**