



**IN THE MATTER OF THE ESTATE OF FAUSTIN NGARI NTHIGA (DECEASED)**

**WINFRED MUTHONI NJAGI.....APPLICANT**

**VERSUS**

**HENRY KIVUTI NGARI.....1<sup>ST</sup> RESPONDENT**

**JOHN MWANIKI NTHIGA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein, Faustin Ngali Nthiga died on 18<sup>th</sup> April 2004 and on 17<sup>th</sup> February 2005, Henry Kivuti Ngari and John Mwaniki Nthiga petitioned for a Grant of Letters of Administration Intestate to his estate. They stated that they were sons of the deceased and on 21<sup>st</sup> April 2005, a Grant was duly issued to them.
2. On 21<sup>st</sup> July 2006, Winfred Muthoni Njagi filed a Summons under **Section 76** of the **Law of Succession Act** seeking orders that the grant be revoked for reasons that the Petitioners concealed from the Court the fact that she was married to the deceased and that they had two children; Dennis Mwaniki and Daisy Mukami.
3. In her Supporting Affidavit sworn on 21<sup>st</sup> July 2006 and in oral evidence before this Court, her case is as follows;
4. That she met the deceased in 1985 and in 1995 she began living with him as husband and wife in Kariobangi, Nairobi, and after that, the deceased paid dowry to her parents. The dowry was converted into cash, Kshs.80,000/- and the deceased paid Kshs.70,000/- in 1996 and Kshs.10,000/- in 2001.
5. She added that the deceased paid school fees for their children and also paid rent for their rented house and introduced his other children to her.
6. Upon the deceased's death, it was her complaint that whereas it was agreed that the deceased's eldest sons would petition for a grant of Letters of Administration and that they would also have regard to her welfare and interest, together with her children, they failed to do so and left her out of the estate altogether.
7. That therefore the grant should be revoked and the estate distributed with her and her children listed among the beneficiaries.
8. In a Replying Affidavit sworn on 9<sup>th</sup> October 2006, Henry Kivuti Ngari deponed that the deceased never married the said Winfred Muthoni Njagi and never sired any children with her and that all the assertions in her Affidavit were false and a pack of lies.

9. Geoffrey Basilio Njagi by an Affidavit sworn on 24<sup>th</sup> April 2008 stated that he was a paternal uncle to the deceased and he was emphatic that had the deceased paid dowry to Winfred's family, he would have known about it. That the Mbeere custom of a ceremony known as "**Ngurario**" to formalize a marriage was never performed in respect of the said Winfred and so her claims cannot be true. Annexure "**A**" to the Affidavit of the said Njagi is a letter dated 10<sup>th</sup> March 1997 written by one "**Mama Dennis**" to one "**Nthiga**" allegedly confirming that the deceased and Winfred were only business associates and not a husband and wife.

10. In oral evidence, both Ngari and Njagi adopted the contents of their Affidavits and upon reading the Submissions by the Advocates, there are only three issues to address;

- i) *Was Winfred Muthoni Njagi a wife of the deceased?*
- ii) *Are Dennis Mwaniki and Daisy Mukami children of the deceased?*
- iii) *Should the grant be revoked or annulled?*

11. On issue No.(i), he who alleges must prove. Winfred has alleged the existence of a marriage but save for her bare statements that lacked corroboration, nothing came out of her evidence on the subject. Customary Law marriages have certain ceremonies that signify the formalization of the union between the parties. I therefore agree with Njagi that "**Ngurario**" is a significant custom in that regard – see Restatement of African Law Vol 1; The Law of Marriage and Divorce by Eugene Cotram at page 13.

12. In the instant case, there is no independent witness who was present when dowry was paid and without such evidence, I can only dismiss Winfred's assertions that any dowry was paid to her parents. She may have cohabited with the deceased but no formal ceremony of marriage was undertaken to denote them as husband and wife.

13. She has not claimed that the period of co-habitation may have led to a presumption of marriage and so I will say nothing in that regard.

14. On (ii) above, Winfred stated that she had one child prior to her co-habitation with the deceased and later she begot two children with him. She has produced two marriage certificates dated 18<sup>th</sup> March 1999 showing that Dennis Mwaniki was born on 24<sup>th</sup> July 1995 and Winfred Muthoni Njagi was born on 25<sup>th</sup> November 1998. In both certificates, the deceased is recorded as being their father. The deceased died on 21<sup>st</sup> April 2005 and so I am unable to deny the authenticity of their birth certificates. In Gachigi vs. Kamau [2003] KLR 169, the authenticity of birth certificates obtained during the pendency of litigation was doubted and their evidential value was found to be less than adequate but the converse is true in the instant case.

15. I am aware that children born without their parents being lawfully married are still entitled to inheritance as dependants of the deceased and so I am certain that the two are so entitled.

16. On (iii) above, I see no reasons to revoke the Grant merely because Winfred was not informed of it. Once I have ruled on (ii), it follows that once the grant is confirmed both her children are entitled to their share of the estate.

17. Lastly, I shall order that the Administrators should file their Summons to confirm the Grant forthwith and make provision for Dennis Mwaniki and Daisy Mukami as children and dependants of the deceased. The Summons filed on 21<sup>st</sup> July 2006 is dismissed save for the above orders.

18. Each party should bear its own costs.

19. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2012.**

**31/1/2012**

**CORAM:**

ISAAC LENAOLA – JUDGE

Kajuju – Court Clerk

Mr. Wanala hold brief for Mr. Okello for Petitioner/Respondent

No appearance for Applicants

**ORDER**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**