



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO.2191 OF 1999**

**IN THE MATTER OF THE ESTATE OF MICHAEL MUTHEE KIGUNDU (DECEASED)**

**ROSE NYATHIU MUTHEE.....1<sup>ST</sup> PETITIONER/APPLICANT**

**MILLICENT WAMUYU K. MUTHIORA.....2<sup>ND</sup> PETITIONER/APPLICANT**

**VERSUS**

**LUCY NJERI KINA.....1<sup>ST</sup> RESPONDENT**

**MARGARET MUMBI KUNA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The deceased herein was a Police Officer who died on 26<sup>th</sup> August 1999 at Bungoma District Hospital in circumstances that are unrelated to this case but I am aware that he was shot and fatally injured in his office within Bungoma Police Station.

2. On 30<sup>th</sup> September 1999, Rose Nyathiu Muthee and Millicent Wamuyu Kwinga Muthiora applied for a grant of Letters of Administration intestate and in the Petition the following survivors were listed;

1) *Rose Nyathiu Muthee – Wife - 40 years*

2) *C.M.M – Son – 17 years*

3) *S.W.M – Daughter – 16 years*

4) *R.W.M – Daughter – 14 years*

5) *J.K.M– Son – 12 years*

6) *Z.W.M – Daughter – 10 years.*

3. The assets listed were;

1) *Death Gratuity Kshs.372,120/-*

2) *Co-operative Shares Kshs.104,524/-*

3) *Piece of Land 4 Acres Kshs.300,000/- Approx.*

4) ***K.C.B. Nyahururu Branch Kshs.30,000/- Approx.***

***Total estimated Value Kshs.806,644/-***

4. On 9<sup>th</sup> March 2000, Elishiba Waruguru Kabatha filed an objection to the making of a grant and claimed that she was a widow of the deceased and had children with him. The children were named as;

- 1) ***S.W.M – 12 years***
- 2) ***C.K.M – 10 years***
- 3) ***R.W.M – 2 years***
- 4) ***D.M.M – 15 years***

5. She listed the deceased's assets as;

a) ***Murichu Farm Plot No.289 – 5 Acres***  
***Kshs.250,000/- approximately.***

b) ***Murichu Farm Plot No.315 – 1 ½ Acres***

c) ***Gatarakwa Farm Plot No.1361 – 4 Acres***

***Kshs.80,000/- approximately.***

d) ***Gatarakwa Farm Plot No.185 – 4 Acres***  
***Kshs.80,000/- approximately.***

e) ***Turukumwa Farm Plot No.350 – 2 Acres***

***Kshs.120,000/- approximately.***

f) ***Death gratuity – Kshs.372,120/-.***

g) ***Co-operative shares – Kshs.104,524/-.***

h) ***Piece of Land 4 Acres***

***Kshs.300,000/- approximately.***

i) ***Kenya Commercial Bank Nyahururu Branch***  
***Kshs.30,000/-***

***Total estimated value: - Kshs.1,461,644/-***

***Liabilities: - None***

6. On 19<sup>th</sup> December 2000, the said Elishiba Waruguru Kabatha filed a summons and sought provision for herself and her children pending the distribution of the estate. On 19<sup>th</sup> December 2000, however, a grant of Letters of Administration intestate was made to the Petitioners and on 14<sup>th</sup> January 2010, the Petitioners sought to confirm the grant and on 29<sup>th</sup> January 2010, Elishiba Waruguru filed an Affidavit of Protest seeking Orders that since the Administrators had made no provision for her, the grant should not be confirmed until she and her children are recognized as dependants of the deceased.

7. When parties tendered oral evidence before this Court, both PW1, Rose Nyathiu Muthee and PW2, Saveria Wangari denied that Elisheba was ever married to the deceased and that none of them was aware

of any children sired by the deceased outside wedlock. Reference was made to Nanyuki SRMCC No.119/1991 where the deceased and Elisheba were parties and in that Suit, the deceased denied having married the latter.

8. Rose Muthee denied knowledge of an Affidavit sworn on 19<sup>th</sup> July 1987 in which the deceased allegedly confirmed that he was married to the said Elisheba.

9. On her part, Elisheba stated that she was lawfully married to the deceased under Kikuyu Customary Law in January 1993 and that the deceased confirmed that fact in the Affidavit aforesaid. That thereafter she co-habited with him as husband and wife and her children and herself are entitled to the estate as his dependants.

10. During cross-examination, she stated that except for co-habitation in the early 1990's she never lived with the deceased but she would visit him during school holidays (*she was a teacher*). She also stated that although she had no evidence to back her claims, the deceased used to pay school fees and medical bills in respect of her children.

11 Regarding Nanyuki SRMCC No.119/1991, she stated that she had filed the Suit to stop the wedding of the deceased to Rose Nyathiu Muthee and that later she abandoned the Suit at the instigation of the deceased.

12. When asked about the assets she had listed in her Affidavit of Protest, she stated that she had no evidence of their existence save that the deceased ***“used to tell [her] about those properties.”*** She also added that she had no claim to title No.Nyandarua/Ndaragwa/Block 4/289.

13. I have read the Submissions by Advocates for the parties and I agree that the following issues need to be resolved;

***i) Whether the Deceased and the Protestor, Elishiba Waruguru Kibatha had a valid marriage in accordance with Kikuyu Customary Law.***

***ii) Whether the Deceased and the Protestor lived together/cohabited as man and wife.***

***iii) Whether the Deceased was the father of the four (4) children of the Protestor.***

***iv) Whether prior to his death the Deceased was supporting the Protestor and her children.***

***v) Whether the Protestor and her children are entitled to inherit from the estate of Michael Muthee.***

***vi) What constitutes the estate of the Deceased.***

14. Is Protester, Elisheba Waruguru Kibatha a wife of the deceased?

15. In her evidence, Elisheba merely stated that in January 1993, the deceased married her under Kikuyu Customary Law. That statement then begs the question; **what was done to signify Marriage?** In Cotran, Restatement of African Law, Vol.1 (Marriage and Divorce) at page 13, the ceremony known as **“Ngurario”** among the Wakikuyu and related communities is extremely important and without it, no marriage under their custom can be inferred. I also agree with the Petitioner that following Mwagiru vs. Njumbi [1967] E.A. 639 and Case vs. Ruguru [1970] E.A 55, unless a party can establish that the necessary traditional ceremonies have been performed, then marriage cannot be said to have been formalized. In this case, there is absolutely no evidence in that regard.

16. Turning back to the evidence before me, I am unable to find anything placed before me to show that the deceased actually married Elisheba under Kikuyu Customary Law.

17. Although Elisheba never asked this Court to presume marriage between her and the deceased, again

her own evidence cannot lead to such a presumption. She said that she co-habited with the deceased in the early 1990's for an unclear period and until his death, they never lived together and with that scanty evidence I am also unable to presume any marriage – see Njoki vs. Mutheru [2008] I KLR (G F) 288.

Issues Nos (i) and (ii) above must consequently be answered in the negative.

**18. Was the deceased the Father of Elisheba's children?**

Elisheba produced the birth certificates of D.M, S.W, C.K and R.W as evidence that the children were sired by the deceased. **Is that sufficient evidence?**

19. From the Affidavit sworn on 19<sup>th</sup> July 1987, and the pleading in Nanyuki SRMCC No.119/1991, I am convinced that the deceased and Elisheba had a relationship which did not crystallize into marriage but may have borne children. By 1991, only three of the four children named above had been born and in his Affidavit sworn on 13<sup>th</sup> December 1991, the deceased did not categorically deny that fact and in fact deponed that **“there may have been issues of the said love affair”**. He went further to state that **“C.K was certainly not sired by myself.”** In other words, he was not denying that D.M and S.W were his children but denied C.K absolutely.

20. When by letter dated 30<sup>th</sup> June 1992 the above Suit was withdrawn with the above issues unresolved in Court, I can only conclude that in fact the deceased had at all times accepted the first two children of Elisheba as having been sired by him and I have no reason to think otherwise. **Why would he deliberately deny one of the three children if he really had sired him?**

21. In any event from the evidence before me only the first two children belonged to him and I so find. I have deliberately chosen not to say anything about the last child as from the evidence before me, by the 1991 disagreement, and by the evidence of Elisheba that they stopped co-habiting with the deceased in the 1990's, it is most likely than not that any contact between them ceased and a child in 1997 cannot plausibly be a child sired by the deceased and more seriously so when he had categorically denied the third born child who was born years before the last born.

**22. Are the two children, dependants of the deceased?**

This question was not addressed in any serious depth by any of the parties. It is of course understandable when the Petitioners state that they were not aware of the children and so said nothing of the matter. However, all that Elisheba said was that the deceased used to pay school fees for the children and that he also took care of their medical needs. Not an iota of evidence was tendered to support that one statement and yet to make favourable Orders in that regard, this Court must take into account **Section 29** of the **Law of Succession Act** which provides as follows;

*“A ‘dependant’ means-*

***a)The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

***b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken not his family as his own, sisters, as were being maintained by the deceased immediately prior to his death; and***

***c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.” (Emphasis added)***

23. To be fair to the parties, I will take the view that whether or not there was evidence of maintenance, an order of reasonable provision for the deceased's children ought to be made and the two children named above should be provided for, *“whether or not [they were] maintained by the deceased immediately prior to his death”* as is the Law above.

**24. What assets are available for distribution?**

I will spend little time on this question. There is scant in what Elisheba said that can lead me to conclude that the assets that she listed actually belonged to the deceased. She did not even know exactly where they were on the ground. In the event, I can only go by the list that the Petitioners produced which is set out elsewhere above.

25. In conclusion, I shall make the following Orders in determining the Summons for Confirmation dated 11<sup>th</sup> January 2010;

*i) The Petitioners should file an Amended Summons for Confirmation of Grant and make reasonable provision for David Macharia Muthee and Serah Wangu Muthee.*

*ii) The Amended Summons should be served on Elisheba Waruguru Kabatha and the said David Macharia Muthee and Serah Wangu Muthee.*

*iii) Thereafter this Court will determine the matter in the usual manner.*

26. Let each party bear its own costs as none has fully succeeded.

27. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2012.**

**17/2/2012**

**CORAM**

**BEFORE LENAOLA – JUDGE**

**MIRON – COURT CLERK**

**MR. GACHERU FOR PETITIONER**

**MR. CHEGE FOR OBJECTOR**

**ORDER**

**RULING DULY DELIVERED.**

**ISAAC LENAOLA  
JUDGE**