



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.38 OF 2008

IN THE MATTER OF THE ESTATE OF FRANCIS KAMBO NDIRANGU – DECEASED

JUDGMENT

The petitioner (HANNAH WANJIKU KAMBO) had applied that grant of letters of administration intestate made to her be confirmed, having obtained a temporary grant in June 2010. She described herself as widow of the deceased, and the beneficiary whom she listed as herself alone proposed that the assets left by FRANCIS KAMBO (the deceased) being **Plot No.16 Section 111 Nakuru Municipality, and Nakuru Municipality LR 415 Block 10/59** be distributed in her favour.

However an affidavit of protest was filed by DORCAS WAIRIMU KAMBO, who described herself as the sole widow of the late FRANCIS KAMBO NDIRANGU who died intestate on 28th March 2007 and that she had obtained a Limited grant of administration (ad litem) on 3rd September 2008 at the High Court Nakuru, in Succession Cause No.100 of 2008, she deposes that she had married the late FRANCIS KAMBO NDIRANGU in the year 1971 and the union was blessed with five children namely:

JOSEPH NDIRANGU – (Deceased) aged 37 years

LEAH WANGUI – 38 years

APOLLO WAINAINA – 35 years

CHARLES KANYORO – 34 years

RUTH WANGARI – 30 years

She states that she lived with the late FRANCIS KAMBO NDIRANGU in their matrimonial home situated within **Nakuru Municipality on property LR No.451/16/111 (Title No. IR 6966) Nakuru** known as **MARKAMBO HOUSE**.

She does not know the petitioner either as a co-wife or as being married to her late husband. She also states that she does not know of any other dependants other than herself and her household. The deceased's estate comprised the following properties:

1. LR 451/16/111 Title No.6966 Nakuru also known as MARKAMBO House (Nakuru Municipality)

2. Motor vehicle registration No.RVCU 416 Toyota Corolla
3. Household items in the matrimonial home

She contends that these properties devolve to her as the sole widow and heir apparent of her late husband.

At the hearing the petitioner (HANNAH) told this court that the deceased (FRANCIS) married her in 1995 and thereafter they lived in JAWATHO (Njoro) MOMBASA and then at his home where she lives to-date (i.e., at her father-in-law's home). She explained that FRANCIS visited her home and reported that they were living together. He took dowry on 2nd January 1999, accompanied by his brother JOHN KIROTE, NGANGA (a step brother) and GITAU (a friend).

They held discussions with her father KIMANI WACHIRA, uncle MWAURA and neighbours. Photos of the occasion showing deceased in the company of her relatives are produced as Exhibit 1(a) – (g). At the time of the marriage, deceased told her that he had another wife but they had separated. Upon his demise, petitioner obtained a letter from the Njoro Chief (Exhibit 1) seeking a permit for funeral gathering.

She is aware that her co-wife also obtained a letter permitting her to hold such gatherings. The deceased had died at Nakuru Provincial General Hospital where she had taken him, and upon learning of his death, petitioner moved his body to the mortuary. Both the petitioner and objector were issued with the notification of death (produced as Exhibit 3).

By the time deceased married petitioner, she had a child, but subsequent to that they got two other children GRACE and JOSPHAT. It is her evidence that the other child ESTHER WAIRIMU was accepted by the deceased as his own child – copies of their birth certificates have been produced as **Exhibit 4 (a) (b) (c)**. No one has ever evicted her from the matrimonial home and she maintains that she is deceased's wife.

On cross-examination she stated that they married under Kikuyu custom although payment of dowry had not been completed saying dowry is a continuous process. They first lived in Jawatho Njoro, then Mombasa and she explains that she was not given a house at the onset at the home of deceased's parents because at the time, she was working and living in Jawatho, so it was convenient to live there. However they later returned to Ngongongeri where her father-in-law lived. She also explained that she was not introduced to Dorcas (the objector) because they had separated with deceased and she lived in Nakuru in one of the deceased houses but deceased had said he had not given objector the house. She quipped as follows:

“I have no problem living in the same house with Dorcas if that is the only option available.”

She maintains that during the deceased's lifetime, she lived with him in Njoro.

Her witness **JOHN KIROTE NDIRANGU (PW2)** is a younger brother to the deceased and he recognizes the petitioner as his brother's younger wife as he was involved in her marriage negotiations. He accompanied the deceased to her father's home and paid dowry – he was in fact present during the negotiations. They spoke about marriage and gave out Kshs.20,000/= for **Ruracio**, i.e., dowry so as to be allowed to formally marry petitioner. He confirms that petitioner has three children and she lives on their father's farm in Njoro. He further informed this court that deceased had a plot in Nakuru known as MAKAMBO (registered in the names of the deceased and their other brother) – it having been purchased by their father for his two aforementioned brother.

On cross-examination he stated that they visited petitioner's home in 1999, being a team of about eleven persons. He also knew the objector whom he says lives in Nakuru but says the deceased and objector had disagreed and he lived in Njoro with the petitioner.

The objector DORCAS told this court that she got married to the deceased under custom of the Kikuyu ethnic group in 1971 and they have five children. She was given a house as a wife to the deceased – this

was at his father's home. They then move to Free area then back to Njoro. After her father-in-law had subdivided the property, the deceased and objector moved to Nakuru and lived at Makambo farm. She maintains that she is not aware of the existence of a co-wife as she was not introduced to her and she only first met her when they were preparing for the burial of the deceased and petitioner arrived with a court order stopping the burial, as she wanted to be involved in her capacity as a wife. Dorcas told this court that she had never separated from the deceased saying the deceased left for Mombasa on a business trip in 1993, and he lived in Mombasa, but she was not aware that he had another wife. She also points out that they have not had a divorce under Kikuyu custom nor was she returned to her parents home neither has dowry ever been demanded back from her parents. She does not know any of petitioner's children and prays that the property which she lives in remains in her favour because she was given the property jointly with the deceased, by their father-in-law.

On cross-examination regarding the alleged separation/disagreement she stated:

“Of course the deceased and I disagreed, just like any ordinary family set up but not to the extent of separating or divorcing.”

She confirmed that she reported the deceased to the Children's Officer because he appeared to have abandoned them and gone to Mombasa and that indeed they had marital problems BUT they had not divorced. When deceased left for Mombasa, the objector/protester was financially stable as she had a business dealing in grains which she supplied to the Cereals Board, and she even bought a lorry but registered it in the deceased's name. She confirms that deceased had nine (9) rental houses in Nakuru and that she lives in one of them.

In the written submissions filed by Mr. Gakinya on behalf of the petitioner he submits that although there is no evidence that due to many problems in the marriage between the deceased and the objector, the deceased separated from the objector and married the petitioner under Kikuyu custom. He urges the court to find that the evidence establishes that petitioner and her children are beneficiaries and dependants of the deceased's estate, and since the death of deceased it has been very difficult to cater for the children since all the money is collected by the objector from the rent of houses and she does not assist the petitioner. He urges this court to distribute all the rent collected as it forms part of the deceased's estate and that petitioner has proved that she is a wife under the law.

The objector's counsel Mr. Githui submits that the deceased married under a system of marriage which allowed polygamy and **Section 40** of the **Law of Succession Act** provides that:

“40 (1) Where an intestate has married more than once under any system of law permitting polygamy, his person and household effects and the residue of the net estate shall in the first instance, be divided among the houses, according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in section 35 – 38.

It is his contention that for any of the parties to be treated as falling under **Section 40** or **Section 35** of the **Act**, they have to prove that the marriage was polygamous or monogamous, and whether one was a wife or a former wife is determined by the regime of marriage pursuant to which the marriage was contracted because one cannot be a former wife, if she was never a wife in the first instance.

Mr. Githui argues that from the scenario described by the petitioner and her witness, there was one visit made which was meant to prepare parties for a second visit, when the suitor would be informed what to pay, but the deceased passed on before making that visit and no payment of dowry was made and so marriage as recognized under Kikuyu custom was never solemnized and petitioner cannot claim to be a wife. He draws this court's attention to the practice in Kikuyu custom, saying the first ceremony is known as **NGURARIO** which is followed by the slaughter of a ram provided by the man's family, during which ceremony, parties exchange gifts. After this ceremony the bride is brought to the groom's home in a mock

capture. The consideration for marriage is called **RURACIO**, which is paid by way of sheep or goats or the monetary equivalent. A marriage cannot be valid without the payment of dowry and the slaughter of a ram. He refers to the Text by **EUGENE COTRAN** "**LAW OF MARRIAGE AND DIVORCE**", the author states:

“Ruracio is the payment of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father or the other guardian of the bride which is necessary for the validity of the marriage and to establish an affiliate or the legal control of the issue of the union and which may be repayable in whole or in part on the dissolution of the marriage. Ruracio must be distinguished from collateral payments and other gifts made at the time of the marriage which are not returnable on dissolution of the marriage.”

Mr. Githui argues that the procedure for the payment of the dowry follows an elaborate procedure and marriage is never complete until the entire procedure is done to detail. It is his contention that petitioner has failed to prove that she was married under Kikuyu customary law and she is therefore not a wife and her petition cannot succeed. He urges the court to dismiss the claim.

Counsel further offers on a without prejudice basis, that the petitioner and objector lived on separate portions of land at the instance of the deceased even during his lifetime. None of the parties shared income with the other and he urges the court that if it is to share the property of the deceased between the parties, then each party should remain in the parcel of land where they were left by the deceased.

The position adopted by the petitioner Hannah is that they are two widows, the other one being Dorcas Wairimu. In her affidavit in support of the petition she listed both her children and those of the objector as persons who are surviving the deceased. She also listed the assets as:

1. Un-transferred share of plot No.326/1 Ngongongeni Farm.
2. Toyota Celica Saloon registration No.12VCU 418
3. Plot No.16 Section III Nakuru Municipality
4. Un-transferred plot at Bahati/Kabatini Block 1/902.
5. Nakuru Municipality LR 415 Block 10/59

The first issue for determination is whether the petitioner is a wife for purposes of the Law of Succession. This is because the objector Dorcas denies knowledge of her existence in that capacity or that deceased sired children with her saying deceased only had five children with the objector.

Hannah had already been issued with grant of letters of administration on **11th June 2010** and the same was due for confirmation as six months had lapsed, and that is when the objector filed a protest. Hannah says she got married to deceased under Kikuyu custom, fully aware that deceased had another wife but deceased made her believe that they had separated as they were not living together. The petitioner lived with the deceased as man and wife although the deceased had not paid dowry. **Ngurario** is not dowry and must not be mixed up with it – dowry is known as **Ruracio**. **Ngurario** is the final ceremony sanctioning the validity of a marriage and indeed every Kikuyu contemplates the performance of **Ngurario**. Yet it is recognized that there is no time limit and cases are known where couples have lived together to have grown up children, some of them even married without performing **ngurario**. However, according to **Contran’s text**, no Kikuyu marriage is finally valid unless **ngurario** is performed. From what the petitioner has presented, had there been a prelude to a marriage? Was the visit by the deceased and his brother which she describes, enough to fit in with what is known as **mwati** and **harika** which establishes **UTHONI** (a marriage relationship between the families or was this **kuracia** as described by PW2? According to petitioner on cross-examination she stated:

“I was formally married even though dowry had not been completed.”

Petitioner's evidence on cross-examination is that in January 1999, the deceased went to her home to declare that he was living with her, and left what she refers to as "**Kihara**", signifying opening an avenue for negotiations. This **Kihara** was in form of cash which was handed over to her uncle. Then she states:

"Dowry was paid on that day – my husband did not visit our home to make payments."

Her witness John says he accompanied the deceased for what he terms as dowry negotiations and that they gave out Kshs.20,000/= for "**Kuracia**", i.e., give dowry so as to be allowed to formally marry – this was the visit in January 1999.

After that visit they were not given another date to make a return visit nor were they given any list of demands. From what is described I don't think that visit constituted **ruracio** at all – it was the prelude establishing **uthoni** but the Kikuyu essentials to constitute a valid marriage were not performed. However it seems that thereafter the parties considered themselves not only as husband and wife, but were so recognized by the deceased brother (PW2) and deceased's father who gave petitioner a place on his farm to live. Could there be a presumption of marriage? Does Kikuyu custom think it alien for such a situation? It is now accepted that long cohabitation as man and wife gives rise to a presumption of marriage.

The case of **Hortensiah Wanjiku Yaweh V Public Trustee** Civil Appeal No.13 of 1976, examined this kind of situation and Kneller J, even took into account the text by **Eugene Contran** on the **Restatement of African Law** and stated as follows:

"I can find nothing in the Restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar . . . I do not see why the concept of presumption of marriage in favour of the appellant in this should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of the marriage."

The court held the presumption of a marriage is not in conflict with Kikuyu customary law especially where there is nothing to rebut that presumption.

This decision was followed in the case of **Stephen Mambo V Mary Wambui** Civil Appeal No.3 of 1976.

My finding is that there did exist a marriage between Hannah Wanjiku and the deceased by virtue of cohabitation there is nothing to prove that deceased and Dorcas had legally separated, they seemed to have had their differences and lived apart, but no formalities were performed nor were any steps taken towards that separation and indeed the objector continued living in the deceased's property. For the cohabitation between the petitioner and deceased to constitute a valid marriage I then need to examine the system of law under which deceased and the objector were married. From the evidence presented they seemed to have more or less adopted the same approach as in petitioner's case – she says they married under Kikuyu custom although the customary rites were not performed and only one visit was made to seek approval of the union, and deceased was given a list of items to bring but this was not fully achieved. She seems to suggest that **ruracio** had been partly paid but her father died before completion of payment.

So if it is the Objector's case that she was married under Kikuyu customs then that is a system of law which recognizes polygamy and which would then entitle the petitioner to be considered a wife.

Under Section 40(1) of the Law of Succession Act:

"Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net estate shall, in the first instance, be

divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unto to the number of children.”

The objector remained a wife and even if they physically lived separately due to certain differences, that relationship subsisted. Moreover for purposes of the Law of Succession, then even if she were to be considered as having separated from the deceased, then she would be considered a former wife and therefore a dependent within the meaning of **Section 29** of the **Law of Succession Act**. The grant issued to petitioner was improper as it gave her sole administration and an unfair distribution, shall not be confirmed as it is revoked. A grant of letters to issue to petitioner and objector as joint administrators.

Of course there is a problem as regards the distribution of properties as proposed by the Petitioner Hannah Wanjiku – she has listed two properties, i.e., **Plot No.16 Section 111 Nakuru Municipality** and **Nakuru Municipality LR 415 Block 10/59**, to be solely inherited by herself.

Mr. Gakinya (counsel for petitioner) is not being entirely candid, how can he submit that the deceased left only one property being **LR No.16 Section 111** within Nakuru Municipality owned by deceased and his brother Mathewson Kimani, yet the petitioner has listed another property being **LR 415 Block 10/59**.

The plot where the building known as Makamo House stands is said to be jointly owned by the deceased and his brother, and evidence has been led to show that he is now deceased. Both widows listed the property as belonging to the deceased. The so called brother’s family has not lodged any protest contesting such claim.

In ordering for distribution, I take into account that the 1st house (Objector’s) has five dependants, whilst the 2nd house (Petitioner) has four dependants. The value of each asset or even the size is not given. There is a loud silence as regards the whereabouts of the saloon car referred to. Since each party is of the view that the other should be entitled to absolutely nothing, then it is my duty to ensure a fair distribution of the deceased’s net estate and to do so on a sound legal and factual basis.

I bear in mind the definition of a **“house”** found under **Section 3** of the **Law of Succession Act**. In the case of a deceased person who has married under any system of law allowing polygamous marriages means a family unit comprising a wife, whether alive or dead at the date of the death or the husband, and the children of that wife. Does this then call for equal distribution?

I am guided by the sentiments expressed by Omolo J.A. in the case of **Rono V Rono** Civil Appeal No.66 of 2002 refer to Section 46 of Cap 160:

“While the net intestate is to be distributed according to the houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section, that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal injustice particularly in cases of a young child who is still to be maintained, educated and generally seen through life. If such a child . . . were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice. . . . I am satisfied the Act does not provide for that kind of equality”

The learned judge appeared to hold the view that unequal distribution may be appropriate if there is reasonable factual basis. Certainly I cannot confirm the grant with the distribution as proposed by the Petitioner because it is grossly skewed. I find myself in a difficult situation to order for distribution based on the information presented before me – the property Title No.LR No.451/16/111, Title No.IR 6966 situated in Nakuru Town and whose title is annexed show that deceased certainly does not disclose that deceased and Mathewson Kimani were tenants in common, the last transfer is shown to have been made to one Seth and I can only presume that deceased and his late brother Mathewson were tenants in common with regard to that property. The said brother is shown to have died in the year 2004 as per the

death certificate which is annexed. The costs of valuation be shared by the two houses.

As noted the value of each asset listed has not been described, so before I give final orders on mode of distribution, I direct that a further affidavit be filed by each party clearly stating the size and value of each property so as to enable the court make a fair assessment. Title relating to the other properties should also be annexed, and a valuation report thereto be annexed.

The same be done within 45 days hereof. Mention be on 16th March, 2012.

Delivered and dated this 3rd day of February, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**