



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.127 OF 2011

**IN THE MATTER OF THE ESTATE OF GEORGE ROBINSON WANGOME THIGA
(DECEASED)**

BECKY NJOKI THIGA.....PETITIONER

VERSUS

**ROBINSON WANGOME THIGA
LOICE NELIMA THIGA
GEOFFREY WACHIRA**

THIGA.....OBJECTORS

RULING

George Robinson Wangome Thiga, the deceased to whose estate these proceedings relate, died on 26th December 2010. The deceased ailed the last years prior to his death. The deceased was admitted to various hospitals, including the Nairobi Hospital and a hospital in India prior to his death. Upon his death, a dispute arose between the petitioner and the objectors in regard to the petitioner’s status in the life of the deceased. According to the objectors, the petitioner was not married to the deceased at the time of his death but was merely a friend. It is objectors’ contention that the deceased was legally married to Loice Nelima Thiga (the 1st and 3rd respondents’ mother) and therefore had no legal capacity to enter into any other marriage. With the petitioner’s insistence that she was married to the deceased, a decision was made by the funeral committee to exclude the names of the petitioner and that of Loice Nelima Thiga from the notice that was published in the local newspapers announcing the death of the deceased. After the funeral, it is the petitioner’s contention that the objectors made an attempt to remove her from her matrimonial home at King’ong’o farm in Nyeri. This prompted the petitioner to move this court.

On 26th January 2011, the petitioner petitioned this court to be granted letters of administration intestate to administer the estate of the deceased. In the petition, the petitioner listed the dependants of the deceased as Beatrice Thiga (widow) (presumably she meant Loice Nelima Thiga), Robinson Wangome Thiga and Geoffrey Wachira. She also identified herself as a widow to the deceased. She listed several properties which she contends comprise the estate of the deceased. This includes property described as King’ong’o farm east of Nyeri township measuring 37 hectares or thereabout. Contemporaneous with lodging the petition, the petitioner filed summons pursuant to the provisions of **Rules 49 & 59** of the **Probate and Administration Rules** seeking orders of the court to restrain the deceased’s sons namely Robin Wangome Thiga and Geoffrey Wachira Thiga, by themselves or through their servant or agents, from evicting or in any way interfering with applicant’s quiet occupation of her matrimonial home at

King'ong'o farm in Nyeri. The petitioner further prayed for orders of this court to allow her to withdraw such monies as may be required for the purposes of paying workers in the deceased's farms at Chinga, King'ong'o and Lusoi. She further prayed that she be allowed to operate the deceased's accounts at Equity Bank and Imperial Bank to enable her pay workers at the deceased's company, Sigma Engineering Limited. The application is supported by the grounds stated on the face of the application and the annexed affidavit of the petitioner. The petitioner swore an affidavit in further support of the application. The application is opposed. Robinson Wangome Thiga swore a replying affidavit in opposition to the application.

At the hearing of the application, this court heard rival oral submissions made by Mrs. Thongori for the petitioner and by Mr. Ojiambo, senior counsel, for the objector. I have carefully read the contents of the rival affidavits filed by the petitioner and that filed on behalf of the objectors. I have also considered the rival arguments made by counsel. The issue for determination by this court is whether the petitioner established a case to entitle this court grant her the temporary reliefs sought in her application. The petitioner seeks orders of interlocutory injunction. The principles to be considered by this court in determining whether or not to grant the orders sought are well settled. The petitioner must establish a prima facie case with a likelihood of success. She must further establish that she would suffer irreparable harm that may not be compensated by an award of damages. If this court shall be in doubt, it shall determine the case on a balance of convenience (**see Giella vs Cassman Brown [1973] EA 358**). This being a succession matter, the petitioner is further required to establish that she is a dependant of the deceased or at least she qualifies to be considered as a dependant of the deceased.

It was the petitioner's case that she is a widow of the deceased. She acknowledges the fact that the deceased was statutorily married to Loice Nelima Thiga. She however contends that the deceased was separated from the said Loice Nelima Thiga in 1980. It is her further assertion that she was married to the deceased in 1993 under the Kikuyu customary law. She claimed that from thence on, she had lived and cohabited with the deceased as husband and wife. The objectors dispute this fact. It was their case that the petitioner was not married to the deceased but was just the deceased's friend. It was their argument that the petitioner had failed to prove or establish the existence of any marriage under Kikuyu customary law or that such marriage was celebrated between the petitioner and the respondent to entitle the petitioner assert that she was so married under Kikuyu customary law. The petitioner argued that even if she is not able, at this stage of the proceedings, to establish that she was married to the deceased under Kikuyu customary law, the fact that she had cohabited with the deceased for a long period of time, established her credentials as a widow of the deceased. In support of her case, the petitioner relied on **Section 3(5) of the Law of Succession Act** which provides as follows:

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where a husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of the Act.”

Mr. Ojiambo for the objectors raised an interesting point in regard to his interpretation of this section of the **Law of Succession Act**. Whereas it was the petitioner's contention that she qualifies to be considered as a widow of the deceased by virtue of the length of the period of cohabitation with the deceased, Mr. Ojiambo argued that for the petitioner to be considered as a wife of the deceased under the section, she must establish that she was married under a system of law which permits polygamy. It was his submission that cohabitation does not constitute a system of law which entitles a woman to claim that she was married to the deceased under a system of law that permits polygamy. Mrs. Thongori on her part argued that **Section 3(5) of the Law of Succession Act** recognizes the petitioner as a widow of the deceased for the purposes of succession.

It is apparent that the dispute between the petitioner and the respondent is in regard to whether the petitioner is a dependant of the deceased as envisaged by **Section 29** of the **Law of Succession Act**. At this interlocutory stage, this court cannot make a definitive pronouncement regarding whether or not the petitioner is a dependant of the deceased. What is required of this court at this stage is to make a

determination whether the petitioner established a prima facie case that there is a likelihood that the petitioner will establish her case that she is a dependant of the deceased. There was evidence, and indeed it was not disputed by the objectors, that the petitioner and the deceased cohabited together at the house at the deceased's King'ong'o farm prior to the death of the deceased. This cohabitation appears to have been acknowledged by the sons of the deceased if the correspondence exchanged between the petitioner and Robinson Thiga is anything to go by. The petitioner lived in the farm house at King'ong'o farm.

The sons of the deceased, including the deponent who swore the affidavit on behalf of the objectors, visited the petitioner and the deceased at the Kingo'ong'o farm. Mr. Ojiambo's submission that the petitioner had not established that she was married under a system of marriage recognized by the law by virtue that she had only cohabited with the deceased, is not supported by legal authority. The Court of Appeal in **Mary Wanjiru Githatu vs Esther Wanjiru Kiarie [2010] eKLR** held that the common law concept of presumption of marriage is not precluded where a claim was made that the concerned marriage had not been celebrated under customary law, and in particular, Kikuyu customary law. It was apparent to the court that, prima facie, the petitioner had established that she was entitled to reside at the King'ong'o farm house pending the hearing and determination of the succession dispute herein. This court's ruling in this regard does not mean that the petitioner will be allowed to administer the estate of the deceased. To the contrary, she shall only be allowed to reside in the King'ong'o farm house and manage the particular farm.

The other properties of the deceased are managed by companies incorporated by, among others, the deceased. According to the objectors, the deceased was a shareholder and director with others in Sigma Engineering Limited. I think it now established that companies where the deceased was a shareholder can only be managed and directors appointed under the memorandum and articles of association of the respective companies. In that regard, the Court of Appeal decision in **David Mereka vs Margaret Mereka [2004] eKLR** is a guide to this court. In that case, the Court of Appeal held that shares held in a company cannot be considered as matrimonial property and could only be dealt with under the constitutive instrument of the company. In the present case, it is apparent that the companies in which the deceased was a shareholder are still operating under the management of the remaining directors. The issue regarding who shall inherit the shares of the deceased in the said companies shall be resolved during the hearing and determination of the succession dispute.

In the premises therefore, having carefully evaluated the facts of this application, I will allow the petitioner's application in terms of prayer 2 of the application. The petitioner shall reside at the King'ong'o farm and manage the farm pending the resolution of the succession dispute. The other properties of the deceased shall be managed in accordance with the memorandum and articles of association of the companies that managed them prior to the death of the deceased. The Deputy Registrar of this court is hereby ordered to sent for publication the notice of the petition filed herein in the Kenya Gazettee to enable the succession dispute to be made ready for hearing and determination. For the avoidance of doubt, the objectors shall be entitled to file objection to the petitioner being issued with the intended letters of administration to administer the estate of the deceased. There shall be no orders as to costs.

DATED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2011

**L. KIMARU
JUDGE**