



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 24 OF 2003

**IN THE MATTER OF THE ESTATE OF CHARLES NJUKI
NDIRANGU.....DECEASED**

AND

MICHAEL NDIRANGU

NJUKIAPPLICANT

**MWAGO NYAMBURA PETER.....
PROTESTOR**

JUDGMENT

The subject matter of this judgment is the summons for confirmation of grant and affidavit of protest. A grant of letters of administration in respect of the estate of Charles Njuki Ndirangu, deceased was made in the joint names of Michael Ndirangu Njuki, hereinafter referred to as the Applicant and Mwago Nyambura Peter, hereinafter referred to as the Protestor. The Applicant thereafter applied for the grant to be confirmed vide the summons for confirmation of grant dated 12th January 2010. The Protestor was not impressed by the aforesaid summons hence her affidavit of protest. When the dispute came up for hearing, this court gave directions to the effect that the dispute should be resolved by the reception of oral evidence.

I have considered the evidence tendered by both sides. The Protestor testified alone in support of her protest whereas the Applicant tendered his evidence plus the evidence of one witness. According to the Protestor, the deceased married her under the Kikuyu customary law and rites. She claimed dowry was paid to her parents in 1992. In fact it is her evidence that the deceased died at the Rift Valley Provincial General Hospital while he was undergoing treatment. She produced a copy of the burial permit and the

death certificate which were issued to her as exhibits in evidence. The Protestor further produced photographs showing that she and her parents attended the deceased's burial. The photographs produced before this court included the following:

- i. ***Photographs of the funeral ceremony.***
- ii. ***A photograph of the Protestor together with her parents - in law.***
- iii. ***A Photograph of the Protestor's mother and the Protestor's mother –in law***
- iv. ***A photograph of the deceased, the Protestor and their 3 children.***
- v. ***A photograph of the Protestor and her mother-in law taken in Kisumu.***

The Protestor further produced before this court as exhibits in evidence the birth certificates of the children namely Rozzet Wanjiru Njuki, Judy Njeri Njuki and Ann Muthoni Njuki. The Protestor produced the deceased's N.H.I.F. card which was used for her treatment in 1998 in her capacity as the deceased's wife. The Protestor claimed that she only came to know of the existence of the succession proceedings when she visited the offices of the Public Trustee where she found out that the Applicant had also lodged a claim on the basis that his son (deceased) was not married. She also alleged that the Applicant had visited police headquarters claiming the deceased was not married at the time of his death. The Protestor averred that she got married to the deceased after which they cohabited as husband and wife in Kisumu, Homabay and Nakuru towns.

The Applicant told this court that he did not know the Protestor. He said he knew the deceased was married to Beatrice Wanjiru who was blessed with one child called Kelvin. He told this court that Beatrice Wanjiru is now dead. He claimed he was not informed by the deceased that he was married to the Protestor. He also told this court that he traveled to Nakuru where he managed to convince the deceased's superiors to transfer him to Sagana where he died. He said that he can only allow Kelvin to inherit his son's property. The Applicant admitted that he first saw the Protestor during the deceased's funeral. He contradicted himself when he admitted in cross-examination that the Protestor had actually prevented him and the other family members from taking the deceased's body for burial. Ann Muthoni Ndirangu (D.W.2), the deceased's mother claimed she did not know the Protestor was married by the deceased because she did not go for their engagement neither did they pay dowry. D.W.2 vehemently denied having ever seen the Protestor. She was shocked when she was shown a photograph she had taken with the Protestor when she visited the deceased at Kisumu where he served as a police officer. She changed her story when she was confronted by evidence of such photographs. She confirmed that the deceased introduced the Protestor to her as his friend when she visited him in Kisumu. She also admitted that she saw the protestor at the funeral.

Having set out in brief the evidence tendered by both sides, let me now consider the dispute before me vis-à-vis the evidence. In the summons for confirmation of grant dated 12th January 2010, Michael Ndirangu Njuki, sought to inherit alone the deceased's pension benefits held by the Public Trustee, though he claimed in his evidence that he was aware that the deceased had a child by the name Kelvin Mwangi Njuki from another relationship. The Protestor opposed this mode of distribution claiming she and her three children were entitled to inherit the deceased's estate in their capacities as widow and children of the deceased. She also proposed to take into consideration the deceased's son Kelvin Mwangi in sharing the estate. The mode of distribution in this dispute is not a matter which is difficult to determine because the law is very clear. The difficult part to determine the capacities of the parties involved in this dispute. There is no dispute that the deceased had a son by the name Kelvin Mwangi

being an issue from his relationship with one Beatrice Wanjiru, deceased. The question is whether or not Mwago Nyambura Peter was a wife to the deceased. The Applicant and his witness have disputed that fact. In fact they each denied ever meeting the Protestor. They only admitted having met the Protestor when they were confronted with evidence of their encounter with the Protestor. There is evidence that the Applicant's wife (P.W.2) met the Protestor in Kisumu when she visited the deceased. She admitted that the deceased had introduced her as his girlfriend. After a critical examination of the evidence tendered by the Applicant and his witness, I have come to the conclusion that they openly lied to this court. The oral and documentary evidence presented by the Protestor clearly show that the Applicant and his wife were aware that the deceased and the protestor cohabited as a wife and husband. It is not true that they came to know the Protestor for the first time during the deceased's funeral. The Applicant had visited Nakuru to collect the deceased's body for burial but was denied access due to the objection raised by the Protestor. It is not therefore true that the deceased died in Sagana as the Applicant portrayed in his evidence. I cannot comprehend why the applicant and his witness told lies. Their evidence cannot be relied upon since they are tainted with falsehoods. The evidence tendered by the Protestor appear to be consistent and credible. It is clear from the burial permit she obtained from P.G.H. Nakuru, that the deceased died at Nakuru as opposed to Sagana as alleged by the Applicant. That fact is corroborated by the death certificate. The copy of the N.H.I.F. card produced by the Protestor indicates that the deceased had indicated the Protestor as his spouse as early as 17th August 1998. The letter from the assistant chief, Gatung'ang'a location dated 5th August 2002 shows that the deceased was married to Beatrice Wanjiru (now deceased) and the Protestor. The District Commissioner, Nyeri also confirmed the above averments. The Protestor has averred that she got married to the deceased under Kikuyu customary law and rites. There is no evidence tendered to establish the traditional marriage. In my humble view this is a case fit to presume the existence of marriage due to the long cohabitation between the deceased and the Protestor. There is sufficient evidence that the deceased cohabited with the protestor as man and wife in Kisumu. The applicant's wife (P.W.2) confirmed she found the deceased and the Protestor living in one house in Kisumu. In fact she said the deceased introduced the protestor as his girlfriend. There is also evidence that when the deceased was transferred to Nakuru, he moved with the Protestor where they lived as husband and wife until his death. In my estimation I think their cohabitation was long and notorious to enable me presume that they were husband and wife.

Having come to the conclusion that the Protestor was a wife, let me now determine the distribution of the estate. Both sides agree that the deceased had a child from his relationship with the late Beatrice Wanjiru. The Protestor has not denied nor contested that the deceased was married to Beatrice Wanjiru. In the circumstances of this case I will treat the deceased as a polygamous man. His estate therefore should be shared under section 40 of the Law of Succession Act. The house of Beatrice Wanjiru, deceased will be treated as the first house and is represented by Kelvin Mwangi Njuki. The second house is that of the Protestor comprising of

(i) Rozzet Wanjiku Njuki

(ii) Judy Njeri Njuki

(iii) Ann Muthoni Njuki.

(iv) Mwago Nyambura Peter.

The only asset which is available for distribution is the pension money lying with Public Trustee. The Applicant has indicated that he was a dependant with his wife of the deceased. Though there is no evidence of the dependency but I am prepared to accept his assertion in view of the fact that the Applicant and his wife took care of Kelvin Mwangi Njuki. Though the Applicant did not proof dependency I will

nevertheless award him and his wife 10% of the estate of dependants. The grant will be confirmed in terms of the affidavit of Protest with the following modifications:

1. **1st House**

Kelvin Mwangi Njuki. To get 18% of the Estate

2. **2nd House**

(i) *Mwago Nyambura Peter.*

(ii) *Rozzet Wanjiku Njuki . To get 72% of*

(iii) *Ann Muthoni Ndirangu. the estate*

(iv) *Ann Muthoni Njuki.*

3. **Dependants**

(i) *Michael Ndirangu Njuki. to get 10%*

(ii) *Ann Muthoni Ndirangu. of the estate*

Since the dispute involves members of the same family I order that each party meets his or her own costs.

Dated and delivered this 18th day of February 2011.

J.K. SERGON

JUDGE

In open court in the presence of Miss Keli for the Applicant N/A for the Protestor.

J.K. SERGON

JUDGE