



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 137 OF 2011**

LILIAN WAITHERA MWANGI.....APPLICANT/PLAINTIFF

**VERSUS**

SALOME MUKAMI MUGO.....RESPONENT/DEFENDANT

**RULING**

**Harrison Gatheru Gachuka** died at St. Mary's Hospital on 9<sup>th</sup> June, 2011. On 14<sup>th</sup> June, 2011, **Lilian Waithera Mwangi** filed this suit against Salome Mukami Mugo, seeking the following orders;

- (1) **A temporary injunction to restrain the defendant from arranging, carrying and or burying the body of the late Gatheru Gachuka;**
- (2) **A declaration that the plaintiff is the lawful wife of the deceased and is the one entitled to make funeral arrangements and bury the body of Harrison Gatheru Gachuka and an injunction do issue to restrain the defendant;**
- (3) **Any other order that court deems fit to grant;**
- (4) **Costs.**

At the same time, the plaintiff filed a Notice of Motion dated the same day seeking the following orders;

- (2) **THAT a temporary injunction do issue to restrain the defendant, her agents, servants or employees from arranging, carrying from St. Mary's Mission Hospital mortuary, burying and or in any way disposing the body of the late Harrison Gatheru Gachuka pending hearing and determination of this Application interpartes.**
- (3) **THAT the defendant, her servants or agents be restrained by way of an order of injunction from conducting funeral arrangements, burying the body of the late Harrison Gatheru Gachuka and further be restrained from in any way interfering with his funeral arrangements by the plaintiff.**
- (4) **THAT the Plaintiff be allowed to conduct funeral arrangements for the late Harrison Gatheru Gachuka, carry his body from St. Mary's Mission Hospital and bury the same.**

The motion is premised on grounds found on the face of the application and an affidavit sworn by the Plaintiff/Applicant on 14<sup>th</sup> June, 2011, a further affidavit of the applicant dated 20<sup>th</sup> June, 2011. Other affidavits in support of the application were sworn by **Gilbert Ngiria Gachuka** and **Antony Gatheru Gachuka**, brothers of the deceased. The application has been strenuously opposed and the defendant filed

a Replying affidavit dated 17<sup>th</sup> June, 2011 and a Replying affidavit to further affidavits dated 22<sup>nd</sup> June, 2011.

It is the applicant's case that she is the deceased's lawful wife having married him on 9<sup>th</sup> July, 1983 at P.C.E.A., Wanyororo Church and were issued with a certificate 45065, which she could not trace the original certificate because it was in the husband's custody. She produced a certified copy on entry of Marriage from the Registrar General. They were blessed with 5 (five) issues, Job Gichimu, Grace Wanjiru, Mercy Wambui, Jack Isaack Mwangi and Faith Wanjiku as per exhibited birth certificates – **(LWM1)**. They started a business in Eldama Ravine in 2005 and she went to look after it while the deceased took care of the business in Nakuru. The deceased was admitted at St. Mary's Hospital on 6<sup>th</sup> June, 2011 and died on 9<sup>th</sup> June, 2011 and the defendant emerged claiming to be the next of kin and wanted to pick the body for burial on 16<sup>th</sup> June, 2011. The applicant denies knowing of the relationship between the deceased and the Respondent and that if any relationship existed, it was secretive and illegal.

**Gilbert Ngiria** and **Antony Gatheru**, both brothers of the deceased deponed that they know the applicant as the only wife of their deceased brother, Harrison; that they solemnized their marriage at P.C.E.A. Church in 1983 and have 5 issues of the marriage. They deny having known of the existence of the Respondent and if any relationship existed, it was secretive and is illegal.

In her replying affidavit, the Defendant/Respondent deponed that she met the deceased in 2005, they started to live together as husband and wife together with her 2 children whom the deceased accepted and took over parental responsibility. They started a business together and in 2008, he swore an affidavit in which he stated that the Respondent is his wife **(SMM1)**. Since she started living with deceased at Teachers, Nakuru, no other woman has come to claim him. She also deponed that all the close relations of the deceased knew her including the two brothers who have sworn affidavits denying her. That it is the deceased who wrote her name as next of kin at the hospital and that the Applicant has not been a wife. That when the plaintiff appeared to claim the body of the deceased, neither the village elders nor the chief could identify her.

Having considered all the pleadings, the submissions and authorities relied on by counsel of both the applicant and Respondent, there is evidence on record that there are five issues/children born out of the union between the Applicant and deceased. That is evidenced by the birth certificates. That is not disputed. The first one was born in 1982, second in 1984, 1986, 1988 and 1993. The brothers of the deceased, have also sworn affidavits to confirm the marriage of the applicant to their deceased brother. Both of them corroborate the applicant's evidence that they were married in the P.C.E.A. Church in 1983. The Applicant produced in evidence a certified copy of an entry of marriage, issued on 17<sup>th</sup> June, 2011 by the Registrar General. The Respondent questions the authenticity of the certificate for the following reasons; that churches do not issue certificates under the Marriage Act, Cap. 150 Laws of Kenya, that churches issue certificates under Cap. 151, that the annexed certificate does not show under which law it is issued and that there is no seal from the Registrar.

Though the copy of the certificate was exhibited, the actual (*original*) certified copy of entry of Marriage procured from the Registrar General, was shown to court and I do find that it bears the seal of the Registrar General. It indicates that it is issued under the Marriage Act. By virtue of **Section 4 of the African Christian Marriage and Divorce Act, Cap. 151 Laws of Kenya**, the Marriage Act applies to Marriages contracted under Cap. 151. Section 4 reads;

**“Except as otherwise provided in this Act, the provisions of the Marriage Act shall apply to all marriages celebrated under this Act.”**

It means that provisions of Cap. 150 apply to the marriages under the African Christian Marriage and Divorce Act Cap. 151 which the Plaintiff/Applicant claims to have contracted with the deceased. Under **Section 34 of the Marriage Act**, the Registrar General shall cause all certified copies of Marriage registers to be made and kept in the Registrar General's office. Section 34(1) reads as follows;

**“The Registrar General shall cause indexes of all the said certified copies of the marriage registers to be made and kept in the Registrar General’s office, and every person shall be entitled to search the said indexes at any reasonable time and, on payment of the prescribed fee, shall be entitled to have a certified copy of any entry in the said certified copies of the registers; and all certified copies of entries purporting to be sealed or stamped with the seal of the registrar General, and every certificate of marriage which has been filed in the office of the registrar of any district or a copy thereof purporting to be signed and certified by the registrar of such district for the time being, and every entry in a marriage register book, shall be received as evidence of the marriage to which the same relates without any or other proof of such entry.”**

What is before the court is a certified copy of the copy of marriage as required by Section 34 of the Marriage Act. Apart from alleging that the certificate is a forgery, there is no evidence shown to the court that it is indeed a forgery. Without evidence to the contrary, the document before the court is evidence of a marriage between Harrison Gatheru and Lillian Waithera until the contrary is proved. By virtue of **Section 37 of the Marriage Act**, once one has contracted a marriage under that Act, he is incapable of contracting another valid marriage under custom or native law. The section reads as hereunder.

**“Any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”**

Mr. Machage, counsel for the Respondent, also contended that the marriage between the Applicant and deceased, if at all it existed, was contracted under Kikuyu customary law which is potentially polygamous and that therefore, Kikuyu customary law should apply. The certified copy of entry of marriage indicates that the parties had been married under customary law. However, the status of the marriage changed in 1983 when they solemnized their marriage in church under Cap. 151. Section 9 of the African Marriage and Divorce Act provides that such a marriage can be converted into a statutory marriage under the said Act. Section 9 read as follows;

**“9.(1) Whenever any persons already married or professing to be married to each other by native law and custom desire to convert that marriage into a marriage by which they are legally bound to each other as man and wife so long as both shall live, they may subject to the provisions of sections 7 and 8 of the Act, contract a marriage before a licensed minister in a place of worship or before a registrar in this office, in either case in the presence of two witnesses, with open doors, between the hours of 6 o’clock in the forenoon and 6 o’clock in the afternoon and in the following manner.”**

In this case, Section 6 of the Judicature Act is inapplicable. It would be applicable where the marriage was contracted under customary law.

The only evidence produced by the Respondent is; an affidavit allegedly sworn by the deceased on 19<sup>th</sup> November, 2008 to the effect that he was married to her; a loan security declaration form that the deceased guaranteed her to take a loan; that the deceased lived with her at Teachers Estate; that the deceased has been looking after her children as his own and lastly, that the deceased wrote her name at the hospital as next of kin. Having considered the evidence placed before the court by the applicant and the Respondent, I am satisfied that prima facie, the applicant has demonstrated that there exists a marriage between her and the deceased. Unless the contrary is shown at a later stage of these proceedings, the deceased would have had no capacity to contract another marriage with the Respondent or anybody else. (*See Re Ruenji’s Estate case*). Whether or not the deceased had some relationship with the Respondent, that is not the issue at hand. What is before the court at the moment is the issue of burial of the deceased and the proper person to be accorded that right is the applicant who as provided under Section 9 of Cap. 151;

**“...they were legally bound to each other as man and wife so long as they both shall live...”**

From the arguments put forth by the Respondent's counsel, the Respondent wants to be recognized as a widow of the deceased and wants to be allowed to take part in the burial. Whether or not the Respondent is a wife of the deceased is periphery to the issue at hand and can only be determined at a later stage on the issues of inheritance or succession. In **M. W. G. Vs E. W. K. (2010) Civill Appeal No. 20 of 2009**, Justice Bosire correctly observed that a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. This court cannot presume the Respondent's marriage to the deceased as it seems that the deceased was already married under statute. The Respondent claims that the applicant is an opportunist and a gold digger, a very strong language to use indeed, but it will be determined at a later stage as to which of them is, if at all, that description fits. There is no reason why the deceased's body should remain lying in the mortuary causing anxiety, anguish and attracting unnecessary costs. There is no property in the body at all and the reasons why the Respondent may want to be involved in the burial relates to issues of succession. Burial is a sentimental issue that needs to be dealt with expeditiously and put to rest. The lawfully recognized widow and the children of the union should be allowed to bury their deceased, husband or father. For the above reasons, I hereby grant prayers 3 and 4 of the Notice of Motion. Costs to be in the cause.

**DATED and DELIVERED this 29<sup>th</sup> day of June, 2011.**

**R. P. V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Mboga for Applicant

No appearance for Respondent

Kennedy – Court Clerk