



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
MISC. APPLICATION NO. 93 of 2006

MARY WANJIRU KARANI APPLICANT

VERSUS

ALBERT MURIITHI KARANI..... 1ST RESPONDENT
JAMES KINYUA KARANI 2ND RESPONDENT
LEONARD KATHUMU KARANI 3RD RESPONDENT

RULING

Mary Wanjiru Karani herein referred to as the Applicant filed this application under section 76 of the Law of Succession Cap.160 Laws of Kenya and Rule 44 of P&A Rules for an order revoking the Letters of Administration granted on 21/10/2003 and confirmed on 14/5//2004 on the ground that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case by the Respondent ALBERT MURIITHI KARANI.

Her main ground is that she was a wife of the deceased ELIJAH KARANI KAMBA a fact which was known to the Respondent herein. And that at the time of the demise of the deceased she resided with him at Ngurubani town. And that part of the deceased's estate was left out of the succession proceedings.

The Application is dated 7th August 2006. In her affidavit of support she avers that she cohabited with the deceased since 1975/76 to his time of death on 3/5/2004. They had 7 children together.

The Respondent filed grounds of opposition saying the application should be dismissed for being incompetent, bad in law, frivolous, vexatious, lacks merit and is an abuse of the court process.

In her evidence the Applicant explained that the grant complained of was issued vide succession cause No.185 of 2003 Kerugoya. The Respondent is a son to one of her co-wives. She says her co-wives settled on the deceased's land in Kerugoya, while she settled on a plot in Ngurubani, where the deceased told her was her portion. She got married in 1970 under Kikuyu customary law. And plot 5 where she stays was cited as one of the properties in the succession cause. The plot was inherited by Muriithi who gave it to Kinyua and Kathurima. She produced birth certificates plus a chief's letter confirming that the deceased was the father of Tabitha Karani (PEXB 1a-d). She also produced an identity card bearing her husband's name (PEXB 2). They attended a meeting at the D.C's office (PEXB 3). The chief had even given her a letter to collect the body of her husband as he recognized her as a wife (PEXB 4). She pays rates on that plot 5 (PEXB 5).

In cross-examination it transpired that the Applicant's first 3 children did not belong to the deceased but he accepted them and looked after them. She was left out in the Newspaper obituary. She insisted that

she was never informed about the cases going on at Kerugoya court. She only knew about them when she was served with an eviction order.

The witness (PW 1) said he was a good friend of the deceased but never attended his funeral because of the hostility that persisted between the two families. He knew five (5) of the children of the Applicant and the deceased. He said some were big and were not staying there.

The 2nd Respondent testified denying that the Applicant was a wife to the deceased. He said he only came to know the Applicant after their father's death, when she started claiming a plot left behind by the deceased. She then claimed to be a wife to the deceased. He said his father had only two wives who have both died. He admitted that the deceased stayed on a plot at Ngurubani and added that he stayed alone. He said he was given letters of grant of the deceased's estate. And that their father had given this plot in Ngurubani to him and Leonard Karani. He produced copies of orders issued in Kerugoya Civil Case No.241 of 2005 (D. EXB 1).

In re-examination he said he knew all his father's properties including land in Kerugoya, ICDC shares and Plot 5 Ngurubani. He admitted that his father had issued them with title deeds for land he gave to them. Plot 5 Ngurubani was the deceased's business premises. He denied that the Applicant took care of their father.

The Applicant herein is saying she wants the Grant issued to Albert Muriithi Karani in respect of the estate of Elijah Karani Kamba revoked because of 2 issues

1. She was not recognized as a widow
2. Some properties belonging to the deceased were never disclosed to the court.

The 2nd Respondent in his own evidence admitted that the deceased had land in Kerugoya, other businesses in Kerugoya besides the ICDC shares and the plot 5 Ngurubani.

I have looked at the confirmed grant (MW2) and it only mentions (i) ICDC shares plus (ii) plot 5 Ngurubani. This already shows that full disclosure of the properties was not made by the Respondent in Kerugoya prior to the issuance of the grant and confirmation of the same.

Under section 75(b) of Cap.160 Laws of Kenya Non-disclosure is one of the grounds for revocation of a Grant. Non disclosure of the properties forming an estate is material because if it's not disclosed what is it that is being administered?

According to the Applicant she got married to the deceased in the 1970's under Kikuyu Customary Law, and they had children together. What has come out is that the Applicant came to the deceased when she had three (3) children of her own two (2) of whom have died. Though no evidence has been laid to show how the Kikuyu marriage was conducted there is evidence that whatever the relationship, there are issues of this relationship.

The D.C. has even done a letter (P EXB 3) saying there are two families one in Kerugoya and another in Mwea who were not agreeing since the death of the deceased. The chief of Tebere location which is in Mwea also recognized that the Applicant was a wife of the deceased (P EXB 4).

The Applicant has produced three birth certificates plus an assistant chief's letter P EXB 1 a-d showing that KARANI KAMBA (the deceased herein) was the father of WACHIRA KAMBA, JACOB MURIITHI WAKERA and TABITHA GATOI KARANI. She has further produced her identity card (PEXB 2) showing her names as MARY WANJIRU KARANI ID NO.2899699. None of these documents i.e. birth certificates, identity card and Assistant chief's letter have been challenged as being forgeries. I also have no reason to doubt their authenticity.

The main issue to determine here is whether the Applicant was a wife of the deceased. We shall not discuss under what law she was married because she said they married under Kikuyu customary law. She did not however elaborate on how this customary law marriage was performed. No kikuyu customary law

rites were carried out.

She however clings on the fact that she started cohabiting with the deceased in the 1970's until his demise on 31/5/2003. And that out of this relationship several children were sired. Infact from the documentary evidence produced it is 4 children who were born out of this cohabitation. Under customary law polygamy has been recognized. In this case there has been no evidence to show that the deceased by virtue of an earlier marriage lacked capacity to enter into a marriage under customary law.

This case can be distinguished from the case of **MACHANI –VS- VERONOR 1985 KLR 859**. The Respondent in the Machani case had earlier on been in a legal marriage with Mr. Vernoor under the Marriage Act (Cap.150) which had before she got to a relationship with Machani and then cohabiting and they started getting children. An issue arose as to whether the Respondent had the capacity to get into the marriage and if she did at what point.

In the current case the Applicant had gotten 3 children while at her parents home. There is no claim of a marriage to someone else. She then started cohabiting with the deceased. A fact that is recognized by the Administration (P EXB 3&4). This long cohabitation lasted over 30 years according to the Applicant.

The deceased died at the age of 90 years from the death certificate before this court. This is quite an advanced age yet he was not living in Kerugoya where the Respondents and their mothers were staying. Who then was taking care of him in Ngurubani if the Respondent's evidence is to be believed?

In the case of **NJOKI –VS- MUTHERU [1985] KLR 874** the Appellant had cohabited with the deceased for about 6 years with no formalizing of the marriage. There was no issue out of the relationship. The deceased's family denied knowledge of the relationship between the Appellant and the deceased. The court found for Respondents saying the period of the alleged cohabitation was not long and there was no issue out of it, presence of an issue or issues may have buttressed the cause for the Appellant, but there was none.

In the present case there is change of name (PEXB 2), children's birth certificates (P EXB 1a-d) plus communication from the Administration (P EXB &4). This is not evidence that can just be wished away. In the case of **YAHWEH –VS- PUBLIC TRUSTEE CIVIL APPEAL NO. 13 OF 1976** (unreported) it was held:

- (i) ***The onus of proving customary law marriage is generally on the party who claims it. The Applicant never called evidence on this.***
- (ii) ***The standard of proof is the usual one for a civil action, namely, one the balance of probabilities.***
- (iii) ***Evidence as to the formalities required for a customary law marriage must be proved to that standard (Mwagiru Vs Mumbi [1967] EA 639, 642 (K)).***
- (iv) ***Long cohabitation as a man and wife give rise to a presumption of marriage in favour of the party asserting it.***
- (v) ***Only cogent evidence to the contrary can rebut the presumption (TAPLIN, WATSON VS TATE, [1973] 3 ALL ER 105) Children Division.***
- (vi) ***If specific ceremonies, and rituals are not fully accomplished this does not invalidate such a marriage Ref: TAYLOR [1961] 1 ALL ER 557 (COURT OF APPEAL) GEORGE VS THYER [1904] 1 ON 456.***

From the evidence on record I find that a presumption of marriage in favour of **MARY WANJIRU KARANI** has been established. No cogent evidence to the contrary has been laid by the Respondents to rebut that presumption. That being the position the Applicant and the children whose birth certificates and notification (PEXB1a-d) have been produced are entitled to a share in the property left behind by the deceased

The grant that was issued and later confirmed by the Senior Principal Magistrate's court Kerugoya did

not:

- (i) Consider all the property belonging to the deceased.**
- (ii) Consider all the dependents of the deceased and in particular Mary Wanjiru Karani as a widow and her children.**

That grant cannot therefore stand. And under the provisions of Section 76 of the Law of Succession Act. I hereby revoke the confirmation of the said grant issued on 14/5/2004.

The Senior Principal Magistrate Kerugoya in Succession Cause No. 185 of 2003 is hereby directed to reconsider the distribution of the deceased's estate a fresh taking into account the issues pointed out above. At the same time that court will address the issue of jurisdiction after all properties have been listed for distribution.

No orders as to costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 8th DAY OF NOVEMBER 2011.

H.I. ONG'UDI

JUDGE