REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Succession Cause 279 of 2005

IN THE MATTER OF THE ESTATE OF SAMUEL MWANGI NDIRANGU – DECEASED

JOHN WACHANGA KIAMA…….PETITIONER

Versus

BEATRICE NJAMBI NDIRANGU……PROTESTER

R U L I N G

The issue for determination in this dispute is fairly simple and straight forward. It is whether the protester is a wife of **Samuel Mwangi Ndirangu** who died on 2nd October, 2000. Upon his demise, **John Wachanga Kiama**, a brother of the deceased, hereinafter referred to as *"the petitioner"* applied for a grant of letters of administration in Kisumu HC SUCC. Cause Number 127 of 2001. **Beatrice Njambi Ndirangu** hereinafter referred to as *"the protester"* objected to the petition and contemporaneously filed an answer to the petition by way of cross-petition or cross-application. Essentially, the protesters position was that she was entitled to benefit from the estate of the deceased in priority to the petitioner as she was his wife as opposed to the petitioner who was a mere brother.

On 24th March, 2005, the protester filed successfully an application for the transfer of this cause from High Court of Kenya at Kisumu to the High Court of Kenya at Nyeri. On 13th April, 2005 **Warsame J** made the order transferring the cause to this court. Upon such transfer, **messrs Wagiita Theuri and Company Advocates** for the protester filed on application seeking to have the grant of letters of administration issued in the joint names of the petitioner as well as the protester. However in making this application, it is apparent that the protester was aware that a grant of letters of administration had already been issued to the petitioner alone way back on 12th July, 2002 by the High Court of Kenya at Kisumu. The application having been overtaken by events as aforesaid, the protester was compelled to withdraw the same. She thereafter bid her time waiting for the application for confirmation of grant to be filed by the petitioner. Surely that time came on 4th December, 2008 when the petitioner filed an application dated 28th November, 2008 for confirmation of grant. In the affidavit in support of the application, the petitioner proposed that the entire estate of the decease should be inherited by him.

The protester as expected filed an affidavit of protest in which she reiterated that the petitioner did not rank higher than her in relation to the deceased. That she got married to the deceased in December, 1996 and initially had their matrimonial home at Othaya but in December 1998, they moved to Lamuria, in the deceased father's home where they resided until the deceased passed on. Their marriage was customary in nature, if not a presumption of the same would arise. The deceased had been survived by the following; **herself**, **Felists Nyambura Mwangi,** daughter aged 22 years, **Symon ndirangu Mwangi**, son aged 19 years and **George Kariuki Mwangi** son aged 15 years. She proposed that the entire estate of the deceased should got to her.

On 27th February, 2009, the application as well as the protest came up for directions. Directions were given that both the application for confirmation of grant and protest should be heard simultaneously

by way of viva voce evidence. When the hearing commenced before me **Mr. Wagiita** and **Mr. Muchira** learned counsel for the protester and petitioner respectively framed the issue for determination in this dispute. The issue was whether the protester was a wife of the deceased. Accordingly the evidence tendered was limited only to that single issue.

The protester testified that she was a teacher at Tanyai Primary School. The deceased was her husband whom she had married in December, 1996. It was a customary marriage. At the time of the marriage they were staying at Othaya. Later in 1998, they moved to Lamuria, the deceased's fathers home. However the deceased passed on before he could go through with the Kikuyu customary rites of marriage. They had 3 children though not fathered by the deceased. However they were his dependants as he used to pay their school fees. The petitioner was his brother in law. He was staying at Kisumu at the time and never used to visit them in Lamuria. She was introduced to the other members of the family in 1999 at a family gathering at Lamuria by the deceased. He introduced her as his wife. The deceased died on 2nd October, 2000 and was buried at Lamuria. She attended the burial but was never recognized as his wife as his relatives claimed that the deceased died a bachelor. Her name too was not included in the obituary. The petitioner alleged that the deceased had many girlfriends and to avoid any trouble, they thought it wise not to include any of the girlfriends in the obituary. During the burial, she was staying in the home. On 10th December, 2000, the petitioner and his brothers ordered her out of the home. She moved into a rented house in Lamuria. As far as she was concerned, though she had not fulfilled kikuyu customs as regards marriage, she was still a wife of the deceased as plans were afoot to do so. Indeed neighbours used to treat her as a wife of the deceased.

Cross-examined by **Mr. Muchiri**, she confirmed that she had not been married to the deceased under kikuyu customary law. However plans were afoot to do so. They had stayed together for 4 years though. They had lived in her father in law's compound. She did not file a suit against the petitioner to stop him from evicting her because the land did not belong to the deceased and also the house she was residing in was not the deceased but belonged to the parents of the deceased and petitioner. Under kikuyu custom it is unheard of for a son to marry and reside with the wife in his parent's house. However in this case, both the deceased's parents had passed on and that is how they came to occupy their house. She denied having been married to one, **Paul Mwangi Kariuki** before she met the deceased. At the burial, the eulogy of the police force was read. That eulogy did mention her as a wife. The eulogy was addressed to the petitioner. Though the deceased used to pay school fees for her children, she had nothing to show for it.

The only witness called by the protester was **John Wanjohi Githinji.** She testified that he knew the protester in or about 1999 when she was a teacher at a nearby school, Loire primary school where his children used to attend. Through her, he came to know the deceased as her husband. Following his death, he visited the home and assisted in funeral arrangements as a parent and also because they belonged with the protester to the same church, St. Monica Catholic Church. A letter from the said church confirmed that they treated the protester as a wife of the deceased. He went on to testify that later on the deceased's brothers chased her away. He was present when this happened. Indeed he assisted her to relocate. As far as he knew, the deceased was a husband of the protester.

Cross-examined, he stated that he came to know that the deceased was married to the deceased through the church. However he did not know the husband. That marked the close of the protesters case.

Only the petitioner testified in support of his case. He stated that the protester was never his brother's wife nor did he know her children as they did not belong to the deceased. The protester and her children had no legal right to inherit the estate of the deceased. He conceded though that he was aware that the protester and her children were cohabiting with the deceased. That the deceased was his elder brother. The deceased was a police officer. When the deceased fell sick, it is him who took him to hospital and met all the expenses. The protester never showed up at the hospital as any wife would. Finally he met the protester at Mathari Hospital when the deceased was unconscious and yet she was bent on wedding him in hospital. To him the protester was a stranger to the estate of the deceased. There were no marriage ceremonies in accordance with kikuyu culture.

Cross-examined by **Mr. Wagiita**, he stated that he first met the protester at Mathari Hospital. During the funeral he came to learn that she had been staying in the homestead but could not tell under what circumstances. After the funeral, they sat down as a family in her absence and agreed that she had to move out. When later he visited the homestead, he found that the protester had demarcated their mother's land. He uprooted the fence and she reported the matter to the Assistant chief. The deceased had not put up a house. However the protester was staying in his mother's house who had passed on. The

deceased was never married but had a string of girlfriends, the protester could have been among them. At Meru police station which was the last posting of the deceased he was told that a woman had come claiming that she was a wife of the deceased. However he could not tell whether that woman was the protester. During the funeral, the protester was present but was not introduced as she was not married to the deceased.
That marked the close of the petitioner's case.

Parties then agreed to file and exchange written submissions. That was subsequently done. I have carefully read and considered the same together with the authorities cited.

As already stated the main issue for determination in this cause is whether the protester was married to the deceased. It is common ground that at the time the deceased passed on, the deceased and the protester were cohabiting at Lamuria in the deceased's parents house. It is also common ground that the protester was present during the burial of the deceased. It is also common ground that throughout the burial she was not mentioned and or referred to as a wife of the deceased. It is also common ground that the protester was not married to the deceased in accordance with kikuyu customary law as the requisite rites had nor been performed. Indeed the protester herself conceded that much when she stated that they had wanted the deceased to go on leave so that the long process of kikuyu customary marriage rites could commence. It is also common ground that the petitioner never visited his home during the deceased's and protester's period of cohabitation. It is further common ground that the deceased had not constructed any house but used to stay with the protester in his deceased parent's house. It is also conceded that the deceased and protester had cohabited for 4 years or so.

It is however instructive that there is a letter authored by the deceased addressed to the OCS, Timau in which the deceased authorized the protester to collect his salary for the month of August and take it to him at mathari. In that letter, the deceased introduced the protester to the OCS aforesaid as a wife. That letter is annexed to the affidavit of protest. The contents of that letter were never challenged nor controverted by the petitioner. From the annextures in the affidavit sworn by the petitioner dated 26th February, 2001 there are two letters from the deceased's area chief confirming that the deceased was married to the protester. There is also a letter dated 11th October, 209 from St. Monica Catholic Church to the effect that the protester had lost her husband, the deceased on 2nd October, 2000. Then there is the evidence of the protester's sole but independent witness who knew the protester as having been married to the deceased.

What is the totality of the foregoing? It points to the fact that the protester's cohabitation with the deceased was not a simple relationship of boyfriend and girlfriend, and or come we stay as the petitioner would wish this court to believe. It went much deeper. Indeed it was in my view a marriage of sorts.

However the petitioner thinks otherwise. The protester was not married to his deceased's brother under Kikuyu customary law. What constitutes a marriage under Kikuyu Customary Law was stated in the **Restatement of African Law, Kenya Volume 1: Marriage and Divorce (1968) by Eugene cotran.** He stated that the essentials of such marriage are capacity, consent, ruracio, ngurario and commencement of cohabitation. In the present case it is conceded by both sides that the deceased and protester had not gone through the aforesaid essentials. Accordingly there was no valid Kikuyu customary marriage.

However, is this the only marriage recognized by our laws? In the cause of her testimony, she invited the court to presume a marriage. Contrary to the submissions of **Mr. Muchiri** this fact was deponed to in the affidavit of protest, see para.12 of the affidavit of protest. Even if it had not been so pleaded this court cannot be barred from considering it since the petitioner cross-examined her at length on the issue and indeed made no attempts at all to lock out that evidence. It is trite law that presumption of marriage is a form of marriage recognized by our laws. However for a presumption of marriage to be sustained it has to be established by cogent evidence that there was general repute that the couple were married. In the case of **Njoki V Mutheru (1985) KLR, 874**, **Nyaranji JA** held that before a presumption of marriage can arise, a party needs to establish that there was long cohabitation and acts of repute and that the long cohabitation is not a close friendship between a man and a woman but that it has crystallized in marriage.

From the evidence on record, I am satisfied that there is sufficient evidence on record for me to invoke the doctrine of presumption of marriage. First and foremost, the deceased took the protester and her children to reside in his parent's house. However though under kikuyu custom a son cannot marry and reside with his wife in his parent's house, the situation here was different. Both the deceased's parents were dead and yet there was their house that was unoccupied. It is most unlikely that the deceased could

have taken the protester to live in his home when she was a mere girlfriend. They had cohabited for a period in excess of 4 years. This was a long period indeed. The protester was in the home during the burial. Much as she was not referred to in the eulogies read as such, that counts for nothing in view of the subsequent acts of the petitioner. He is hell bent, on inheriting the estate of the deceased solely. If his act of petitioning for the grant of letters of administration was made in good faith, how come he wants the entire estate to go to him solely yet the deceased had other brothers by the names of **Joseph Njagi Kiama** and **Ibrahim Murage Kiama**. Why has he not made a provision for them. Indeed he never even called them as witnesses in support of his claim. I doubt even whether his said brothers are aware of these proceedings.

The protester testified that she was introduced to the members of the family save for the petitioner. This contention was not seriously challenged by the petitioner. How could he if he never used to visit the home. The fact that the petitioner never visited the home to know who was staying there does not mean that nobody including the protester was staying there. He could have been able to counter this evidence by adducing other evidence to the contrary from perhaps his brothers aforesaid and or even neighbours. He did not and therefore the evidence of the protester and her witness stands.

As correctly submitted by **Mr. Wagiita**, the petitioner's contention that the deceased had many girlfriends and the protester was merely one of them only helps to advance the protester's contention to have been a wife of the deceased only that the petitioner never used to visit his rural home to know that his brother had a wife. In any event I do not think that it was the business of the deceased to introduce his wife to him. He was under no obligation to do so.

In any event and as already stated elsewhere in this judgment, the deceased himself treated the protester as his wife. He wrote a letter to that effect to the OCS Timau police station. Who is the petitioner to countermand that position. There is also the two letters from the local chief confirming that the protester was a wife of the deceased. By the petitioner's own admission, on one occasion, he found the protester at Mathari Hospital in the process of having the deceased marry her in church although he was comatose. Surely this cannot be an act of a woman who merely had a casual relationship with the deceased. How come the alleged strings of women that the petitioner claimed that the deceased had did not appear during the burial or even when the deceased was hospitalized? There is also evidence again by the petitioner that one day he came home to find that the protester had subdivided their mother's land. He proceeded to uproot the fence whereupon the protester reported the incident to the Assistant Chief of the area. The act of subdividing the land as aforesaid could not have been carried out by a mere girlfriend as the petitioner would want this court to belief. Clearly the subsequent eviction of the protester by the petitioner points to the protester's occupation of the land of their parents courtesy of the deceased. How about the letter from St Monica Catholic church? The contents thereof were not challenged. The church considered the protester a wife of the deceased. Finally, I would refer to the evidence of PW2. He knew the protester as a teacher of his children. He knew that the protester was married to the deceased though he had not met him in person. To my mind therefore, the protester had a reputation of a married woman both in the church, to the neighbours and or even to the parents of the children she was teaching as well as the provincial administration. This evidence is sufficient to invoke the doctrine of presumption of marriage I think.

In the result I find and hold that the protester was a wife of the deceased courtesy of the doctrine of presumption of marriage. That being the case, I rule that the grant be confirmed to her as opposed to the petitioner. The entire estate of the deceased should thus devolve to the protester. If she feels philanthropic enough she may consider sharing a portion thereof with her brothers in law aforesaid. However she is not obligated to do so. Because of close affinity between the parties, I make no order as to costs.

Dated and delivered at Nyeri this 21st day of January, 2010.

M.S.A. MAKHANDIA
JUDGE