



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 395 of 1994

IN THE MATTER OF THE ESTATE OF BARNARD MURITHI MAINGI (DECEASED)

JUDGMENT

Philip Nteere Maingi (Nteere) petitioned for letters of administration of the deceased Bernard Murithi Maingi (deceased). He petitioned for those letters as a brother of the deceased. Consent to petition was given by Evelyn K. Mugambi. It has transpired during the hearing of this case that Evelyn was the wife of the deceased. In petitioning Nteere stated that he was seeking the release of the deceased death gratuity to enable him take care of the deceased wife and children. He however did not name them in that petition. An application dated 11th April 1995 was filed by Beatrice Gakiiru (Beatrice) who described herself as the first wife of the deceased. She stated in that application that she had two children with the deceased namely, Edis Kinya Bernard (Edis), Lucy Kiende Murithi (Kiende). She annexed to that application their birth certificate. Birth certificate number 2412 317/1984 belong to Edis and it showed she was born on 1st September 1984. Certificate number L2400484/1993 belonged to Kiende and it showed that she was born on 6th October 1987. Both those two birth certificate reflect the deceased as the father. The parties in this matter on 10th February 2003 consented before court that the issue for determination in this cause was whether Beatrice was a wife of the deceased and whether the two children Edis and Kiende were children of the deceased. With that consent in mind, the submissions made on behalf of the petitioner that Beatrice did not file an objection in compliance to the Rules is of no consequence. Beatrice in evidence stated that she was married to the deceased in 1983 under the Kimeru custom. The deceased with members of his family according to her, took goats one a he and the other a she goat to her parents. Her parents received the goats in the presence of six other persons but one of them has since died. Beatrice stated that she was blessed in her marriage with two children, Edis and Kiende. That before his death, the deceased was educating the children. Following his death, one of the children had dropped out of school due to lack of school fees. During her marriage to the deceased, she said that she was a housewife. She lived with the mother of the deceased and other members of the deceased family which included the petitioner Nteere. The deceased due to his employment lived mostly away from home. She said that she planted on the family land tea bushes and other crops. That the deceased married a second wife during the subsistence of their marriage who was called Evelyn. The deceased had 3 children with Evelyn. That when her husband the deceased died Nteere wanted to inherit her as a wife and on her refusal he chased her away from the home with a panga. She therefore said that she no longer lives on the family land. Evelyn however agreed to be inherited by Nteere and resides on the family land. When she was cross examined, Beatrice was unclear on the date when the dowry was paid. She further denied that she had a husband called James Kinyua. The next witness was the mother of Beatrice called Agnes Nkabu. She stated that Beatrice was married to the deceased under the Kimeru customary law. She further stated:-

“She got married under Kimeru customary law because the dowry was paid. I was at home during the marriage ceremony. There was a tea party prepared for her. Young men and women then came for her. It was a small tea party. Dowry was paid consisting of two goats, one male and one female. There was no other dowry that was paid. We only had negotiations between the in-laws. I then gave my daughter away.”

She then confirmed that her daughter’s marriage with the deceased was blessed with two children Edis and Kiende. She confirmed that Beatrice had been chased away from the family land by Nteere. Nteere in evidence stated that the deceased was his younger brother. The deceased worked at G.S.U Station at Gilgil. That the deceased had tea bushes at the family land which was being taken care of by his wife Evelyn. He denied that the deceased had another wife. He also denied that the two children Edis and Kiende were children of the deceased. He however stated that the deceased at one time was preparing a list of all his children to give to his employer. The deceased sent Nteere together with two other persons to go and get Edis from her grandparent’s home. When they went, the mother of Beatrice refused to allow them to take the child with them. Although the mother of Beatrice was a witness in this case, PW2, it should be noted that this evidence was not put to her in cross examination. It therefore can only be treated as an afterthought by Nteere. It however goes to show that Nteere was aware that at least one of the children of Beatrice was a child of the deceased. Nteere denied that Beatrice was married to the deceased under the Kimeru customary law. In respect of the child, Kiende, he stated that she was a child of James Kinyua who was a husband of Beatrice. On being cross examined, Nteere said that he knew the children of the deceased to be Gershon Mwirigi, Karendi Bernard, Mutwiri Bernard and Kinoti Bernard. Nteere confirmed that he had been paid some money out of the deceased dues which he used for the education of the said deceased children. James Kinyua was called as a witness by Nteere and in evidence in chief stated that he was married to Beatrice from 1976 to 1978, that is, for two years. During their marriage, they had one child, Kiende. That Kiende had been born on 6th October 1987. James Kinyua after giving evidence in the morning he was cross examined in the afternoon by counsel for Beatrice. As he begun being cross examined he said:-

“In the morning, I was drunk but I am ready to tell the truth..... It is my wife who telephoned me to come to court today. My wife is Mercy Igoki. I married Beatrice Gakiru in 1976..... I stayed with Gakii for two years from 1986 to 1976, yes, those years are correct. The wife I married in 1976 is (sic) Agnes Gakii no other names.”

As can be seen, this witness evidence cannot be relied on by this court to confirm the contention of Nteere that he was married to Beatrice. Not only was his evidence unclear, but as can be seen, he confirmed that his wife was called Agnes Gakii. He was also not clear on the period of the alleged marriage. When he was further cross examined, he confirmed that he married Agnes Gakii and not Beatrice. It therefore follows that the evidence of Fredrick Kaburu and Henry M’Arimu to the effect that Beatrice was married to James Kinyua cannot be relied upon since James Kinyua himself stated that he was married to Agnes Gakii. All those witnesses contradicted themselves on the date that Beatrice allegedly got married to James Kinyua. In the end I find that the evidence of Beatrice that she was married to the deceased was supported by her mother and that evidence was uncontroverted by Nteere. I find that Beatrice cannot be termed as an imposter in this estate as alleged by Nteere’s counsel. It is material that Evelyn the wife of the deceased was not called by Nteere. After all, Nteere in petitioning for grant stated that he intended to use the death gratuity to take care of the deceased wife and children. He does, after all, recognized Evelyn as the only wife of the deceased. The fact that he did not call Evelyn to give evidence to this court can only lead this court to find that Evelyn was not called because her evidence would have been adverse to Nteere. Instead, Nteere called a number of witnesses with the sole intention of besmirching the character of Beatrice by intimating that she was an immoral woman. Having considered the evidence on record and submissions of counsel, I make the following declaration:-

- 1. That Beatrice Gakiiru was the first wife of the deceased.***

2. *That Edis Kinya Bernard Lucy Kiende Murithi were children of the deceased.*
3. *An order is hereby issued for the revocation of the grant issued to Philip Nteere Maingi and a fresh grant is hereby issued to Beatrice Gakiiru.*
4. *Leave is hereby granted for an application to be made for the confirmation of that grant immediately notwithstanding that the six months period have not expired. In making that application for confirmation, second wife and children of the deceased are to be provided for in the distribution of the money held as at fixed deposit at KCB Meru in fixed deposit number 97/516 deposited on 12th June 1997.*
5. *Costs of Beatrice Gakiiru in this action shall be paid by Philip Nteere Maingi.*

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE