



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 16 of 1999

IN THE MATTER OF THE ESTATE OF M'RIMBERIA M'MBUI (DECEASED)

**JANET KAJUJU M'RIMBERIA PETITIONER
VERSUS**

ISABELLA GAITI M'RIMBERIA OBJECTOR

JUDGMENT

The issue for determination in this judgment was formulated by the parties herein by consent on 7th November 2005. The issue to be determined is “*what is the status of Martin Mwenda Rimberia as a beneficiary of the deceased estate.*” The deceased at the time of his death had two wives. Namely, Janet Kajuju first wife and Isabella Gaiti 2nd wife. Isabella in evidence stated that during her marriage to the deceased, they were blessed with 3 children. That is, Martin Mwenda, Kenneth Kinyua and Samuel Mwititi. To prove that Mwenda was the son of the deceased, she produced the birth certificate issued on 19th October 1991. She said before the death of the deceased herein, there was no dispute relating to the paternity of the said Mwenda. That the deceased paid Mwenda’s school fees. She was however unable to state when she got married to the deceased but said that she got married according to the Kimeru custom. She said that they cohabitated with the deceased from 1970 which was a period before their marriage. The marriage when it took place she was 7 months pregnant. She accepted that she was married to Andrew Mbaya by the time she cohabitated with the deceased. She however insisted that Mwenda was the child of the deceased and that he was born before her marriage to Andrew Mbaya. She said that Mwenda was born at Kiirua Mission Hospital. She denied when cross examined that she obtained Mwenda’s birth certificate by means of lies to show that Mwenda was the son of the deceased. She was unable to produce documents to prove that the deceased was supporting Mwenda. PW1 stated that the deceased was the father of Mwenda. He said that Mwenda attended school with his daughter at Garbatulla School in Isiolo District. PW2 was Joseph Murithi a civil registrar of Births and Deaths in Meru Central District. He brought to court records relating to the birth of Martin Mwenda. He said that the birth certificate was applied for by Isabella the mother of Mwenda. The records he held showed that the father of Mwenda was the deceased. Birth certificate number 2401068/81 was issued. The information in the birth certificate he said corresponded to the particulars in the register which he held in his custody. He however failed to provide to the court copies of those documents which supported the application for birth certificate. On being cross examined, he accepted that the application for birth certificate was made 10 years after the birth of Mwenda. The witness was stepped down in order to return to court on another date to produce documents in support of the application for birth certificate of Mwenda. When the case resumed, Joseph Murithi PW2 had been transferred to a new work station and in his stead was Mary Muriuki who was the present registrar of births and deaths in Imenti North. She gave evidence and produced the birth certificate. She however stated that there was another birth certificate issued in respect of Mwenda which was issued after he was born. She said it was as a result of a search she carried out in her office she found that that registration filed on 5th May 1971 in respect of Mwenda was the genuine one and did not resemble the birth certificate that was exhibited previously in this case. In the birth certificate which she termed as being genuine, the father of Mwenda was reflected as Andrew Mugambi Munyua and not the deceased. The mother was reflected as Isabella Gaiti Marete. The informant in respect of that genuine birth certificate was the mid wife who delivered Mwenda. Ordinarily she said the mid wife obtains her information from the mother of the child. The case was adjourned and when it resumed for further hearing, Isabella and her advocate did not attend. At that hearing, Janet Kajuju in evidence stated that she had 8 children with the deceased. She moved out of the matrimonial house for a period of 12 years. On returning, she found Isabella. She however said that by the time Isabella begun to cohabit with the deceased, Mwenda had been born. DW2 is the elder brother of the deceased. He too said that Mwenda was not a child of the deceased. He was a child of Andrew Mbaya. That at one time, Mwenda’s grand father Marete and the father of Andrew Mbaya approached the chief of Kibirichia asking that they be allowed to see his grandson Mwenda. After a meeting before the chief, Marete took Mwenda to his home in order to show Mwenda the land he would inherit from him. This witness said that Isabella was employed by the deceased but soon they got two children together. That is, Samuel Mwititi and Kenneth Kinyua. He said that there is no dispute that those two children were fathered by the deceased. DW3 confirmed the evidence of DW2 of how Marete the grandfather of Mwenda went to the chief’s office to ask for his grandson.

On the issue which was identified by consent by the parties, having received that evidence in court my response is that Mwenda was not the son of the deceased. The registrar of births and deaths stated that there had been earlier registration of the birth of Mwenda. The information of that registration was given by the mid wife who in turn had obtained it from the mother of the child. That information showed that Mwenda was the child of Mbaya and Isabella. It does look like after the damning evidence of the registrar was tendered, that Isabella accepted the fact that Mwenda was not the son of the deceased. This became clear from the submissions filed on behalf of Isabella. Those submissions are as follows:-

“It does not matter whether the deceased was the biological father of the said Martin Mwenda, but whether he had taken him and accepted him as his son.The petitioner’s evidence one Janet Kajuju M’Rimberia is that she knows that her co-sons Martin Mwenda included and the said Martin Mwenda has been living with the deceased as a son and has been given a place in the deceased estate where he has constructed his house and the deceased had given him a share in the estate.”

Contrary to what is stated above, Janet Kajuju did not state all that Isabella has reproduced in her submissions. In her evidence, Janet stated:-

“Mwenda is a policeman. There is a small house Mwenda built on the deceased land.”

Isabella stated in evidence that Mwenda’s school fees were paid by the deceased. Does that entitle Mwenda to claim he was a dependant. Section 29 of the Law of Succession Act defines who is a dependant. The sub section that is relevant in this case is (b). That section is in the following terms:-

“For the purpose of this part, “dependant” means –

(a)

(b) Such of the deceased’s parents, step parents, grandparents, grand children, step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters, as were being maintained by the deceased immediately prior to his death;”

Mwenda, according to that definition, was not a child or a step child of the deceased. Although he was said to have been in the deceased household, there was no evidence brought before court to show that he was maintained by the deceased during deceased’s lifetime. The evidence before court is that Mwenda at the date of death of the deceased was 25 years old. He is said to have been a policeman. There is no evidence that as the date of death he was in the deceased house. Mwenda himself did not give evidence of what, if any, maintenance he received from the deceased. I make a finding that Mwenda was not a dependant of the deceased. In the end, the judgment of this court is that Mwenda was not the child of the deceased and was not a dependant of the deceased. I make no orders as to costs. Further, I direct, because of the age of this cause that summons dated 18th December 2003 for confirmation of grant be fixed for hearing at the reading of this judgment by way of *viva voce* evidence.

Dated and delivered at Meru this 7th day of May 2010.

MARY KASANGO

JUDGE