



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 367 of 2003

IN THE MATTER OF THE ESTATE OF HARUN KAGECHU KAHAGI (DECEASED)

AND

ESTHER WANJERI KAGECHU 1ST PETITIONER

MICHAEL GICHUKI KAGECHU 2ND PETITIONER

VERSUS

DAVID MAINA KAGECHU 1ST PROTESTOR

GEORGE MWAI KAGECHU 2ND PROTESTOR

R U L I N G

This dispute relates to the estate of **Harun Kagechu Kahagi** who passed on sometimes on 29th August 2003, hereinafter referred to as “*the deceased*”. It would appear that the deceased at the time of his death was married to two wives; **Ronah Wothaya Kagechu** and **Esther Wanjera Kagechu**. Subsequent thereto, **Ronah Wothaya Kagechu** petitioned for the grant of interim letters of administration. However, **Esther Wanjera** and her son, **Michael Gichuki Kagechu** objected to the issuance of the said temporary grant. When the cause subsequently came before **Okwengu J** on 27th September 2005 for directions, the judge directed that “.. **In view of the objection raised by the respondent to the granting of temporary letters of Administration to both parties, the matter to proceed to hearing by way of viva voce evidence with a view to determining who should be appointed administrators and who are the lawful heirs. For purposes of hearing the objection the petitioners and objectors will be jointly appointed temporary administrators.**” Thereafter no steps were taken by either party to have the cause set down for hearing so as to determine who to be appointed administrators of the estate. Instead on 3rd April 2007 **Esther Wanjera Kagechu** filed an application seeking confirmation of grant which had been issued to her jointly with **David Maina Kagechu & George Mwai Kagechu** and her son **Michael Gichuki Kagechu** on 27th September 2005. In between **Ronah Wothaya Kagechu** had passed on and her two sons, **David Maina Kagechu & George Mwai Kagechu** successfully applied to be substituted in the cause in place of their mother, **Ronah Wothaya Kagechu**.

By this move, one can rightly assume that both parties had abandoned their earlier desire to have the objection to the issuance of a grant heard. In her application for confirmation of grant, she proposed that the estate of the deceased consisting of the following assets be share equally between the two houses:-

(i) Chinga/Gathera/D113

(ii) Chinga/Gathera/D110

(iii) Chinga/Gathera/974

(iv) Chinga/Gathera/975

(v) Plot No. Nairobi/Block 116/393 Roysambu

(vi) Plot No. 24 Gichichi Market

(vii) Account No. 113109468 KCB, Othaya Branch

(viii) Account No. 653-01-2052, Tea Sacco Othaya Branch

(ix) Motor vehicle KYF 715 be valued and sold and the proceeds thereof be shared equally between the 2 houses.

These proposed scheme of distribution was opposed by **David Maina Kagechu** on behalf of the house of **Ronah Wothaya Kagechu** whom I shall hereinafter refer to as “*the protestors.*” In the affidavit of protest, the 1st respondent deponed that he was acting on behalf of all his sisters and brothers namely **Elizabeth Wakanyi Kagechu, Catherine Gathoni Kagechu** (deceased), **Joyce Nyambura Kagechu, Agnes Nyambura Kagechu** and **George Mwai Kagechu**. It was their contention that **Esther Wanjera Kagechu** and **Michael Kariuki** hereinafter referred to as “*the Petitioners*” were not entitled to inherit the estate of the deceased as they were strangers. That the deceased and their mother solemnised their marriage in church in 1964 and accordingly he lacked any capacity to contract any other marriage, customary or otherwise. That their mother was involved in a road traffic accident in 1993 and was confined in hospital for 9 months and on discharge, she became wheel chair bound. It was then that the deceased requested his uncle, **Mr. Charles Kibira Kibe** to find him a house help. The house help availed was the 1st Petitioner who was his niece and aunt to the protestors. The 1st petitioner was then married to one **Paul Ng’ang’a Kagira** and had three issues, the 2nd Petitioner, **Joseph Ritho** and **Zipporah Wangui**, now married. That upto the demise of the deceased, he had not married the objector in any known ceremony of marriage or lived with her as wife nor did they have any issues. Lastly on account of degrees of consanguinity, the protester maintained the deceased could not have married the 1st Petitioner as she was her first cousin. They determined therefore that the estate of the deceased be shared between them alone to the exclusion of the Petitioners and their family.

The Petitioners had the support of **Charles Maigwa Kibe**, an uncle to the deceased. In an affidavit sworn on 26th October, 2007 he deponed in pertinent paragraphs; he denied having been instructed by the deceased to look for him a house help. That he was one of the elders who witnessed the marriage of the 1st Petitioner to the deceased and payment of dowry thereof. The 1st Petitioner was married by the deceased due to the inability of the Protesters’ mother to perform any of the duties of a wife. That **Rachel Muthoni**, an aunt of the deceased and himself masterminded the 1st Petitioner’s marriage to the deceased due to the disability of the 1st wife. The marriage was under the norms and rites of kikuyu customs and that she was in no way related to the deceased. Though she came along with 3 children not sired by the deceased, they all lived with the deceased before he passed on. Finally he deponed that the 1st Petitioner having been taken in by the deceased as a wife and not house help, he recommended that his estate be shared equally between the two houses. Further affidavits in support of the 1st Petitioner’s claim to the estate of the deceased were put in by **Joseph Ritho Kagechu** and 2nd Petitioner, both sons of the 1st Petitioner. In so far as they were concerned, the deceased was their father having married their mother, the 1st Petitioner in 1995 under Kikuyu custom. Though they had come with the 1st Petitioner, the deceased had in 1997 assisted them to obtain their national identity card under his name by swearing an affidavit that they were his sons. That since their mother was legally married to the deceased she was

entitled to half share of the estate of the deceased. That the deceased had been financially supporting them and even paid dowry for their wives. However after the burial of the deceased the protestors became hostile to them and chased them away from the estate of the deceased.

On 22nd October 2007, the cause came up for directions. **Kasango J.** directed that the protest be heard by way of viva voce evidence. On that basis the hearing commenced before me on 17th November 2008. First on the stand was the 1st Petitioner. Her evidence was that she was born in Kipkelion. He married the deceased on 17th June 1995 after meeting him in Kipkelion. She knew the deceased's aunt and uncle – **Rachel Muthoni** and **Charles Kibe** respectively. The deceased told her that though he was married, his wife had been involved in a road traffic accident and had been confined to a wheel chair and was staying in Nairobi. He expressed his wish to marry her and she agreed. He visited her parents, **Micah Gichuki Wanjugu** and **Zipporah Wangui** for that purpose. They were then residing in Kipkelion. Both of her parents have since passed on. He paid Kshs.10,350/= as dowry; witnesses present were **Njuguna Kaguayi Gikuru** and **Samuel Gichohi**. An agreement in writing followed. Thereafter she accompanied the deceased back to Chinga and Cohabited with him as man and wife. By that time, she already had her own 3 grown up children from previous relationships. They accompanied her to Chinga as well. At Chinga she did not find the 1st wife. The deceased's sons did not approve of their union though and even assaulted the deceased. The deceased had received the dowry of her daughter. It was received on his behalf by a **Mr. Wachira**, his cousin who had since passed on also. She stayed with the deceased until 2003 when he passed on. After one year, the deceased's sons chased her from the deceased's residence and she went back to Kipkelion. She denied that she was a mere house help to the deceased. She maintained that she was indeed his wife. That being the case, she claimed that the estate of the deceased be shared equally between the two house of the deceased.

Cross-examined by **Mr. Kimani Githongo**, learned advocate for the protestors, she maintained that the deceased was her husband. She conceded however that the deceased was his cousin. **Charles Maigua Kibe** (PW2) was an uncle to both herself and the deceased. Her children were born between 1967 and 1974. When the deceased paid dowry he was accompanied by PW2, **Zipporah Mbithe** and **Samuel Gichohi**. On her side those present were **Priscilla Wachuhi**, her father, her step mother and her son, **Michael Gichuki**. She did not know the number of goats required to be paid for a valid kikuyu customary marriage. Though Kshs.10,350/= was paid she did not know the value placed for each goat. She had never seen her co-wife until the day of burial of the deceased. No ceremonies were held to welcome her to the deceased's home. The wedding of her daughter was held in the deceased's home though she came along with her adult children. Prior to that Kshs.10,000/= was paid as dowry. Finally she conceded that when she married the deceased, she knew that he was her cousin since PW2 was her grandfather as well as grandfather to the deceased and that the deceased knew that they were related when he offered to marry her.

Next to the stand was **Charles Maigua Kibe**. Much of what he testified to orally has been captured in his supporting affidavit reproduced elsewhere in this judgment. Suffice to add that the deceased was a son of his sister. That the deceased gave him first Kshs.2000/= for the hand of the Petitioner in marriage which he transmitted to the father of the Petitioner in 1995. Later he paid the balance making a total of Kshs.10,000/= plus Ngoima. During Ngurario, **Njuguna Kaguai** and **Kimotho Ndirithe** were present. It was held on 7th December 1995. He stated further that the deceased was his nephew but the Petitioner was not related to him at all.

Under cross-examination, he maintained that the deceased was his nephew. As the cross-examination intensified, the witness offered to change his earlier testimony that he had never known the Petitioner at all. He now wished to say that he knew the Petitioner from childhood but maintained that she was not his niece. That the deceased had sent him to the Petitioner's father to ask on his behalf permission to marry his daughter. By then the Petitioner was already living with the Petitioner. He was not accompanied by any elders. Though the Petitioner had not married, she had boyfriends with whom she had sired her three children. That only one goat was slaughtered when the deceased made various payments towards dowry totalling Kshs.10,320/=. They never took Ngoima. Instead a sum of Kshs.2000/= was paid. He further stated that **Joseph Ritho** was a son of the Petitioner. He had initially been issued with a national identity

card in the names of **Joseph Ritho Nganga**. He also agreed that cousins cannot marry but maintained that the deceased and Petitioner were not cousins.

The Petitioner's third and last witness was **Sammy Gichohi Gichuki**, a brother to the Petitioner. He confirmed that the deceased married her sister in 1995 and paid dowry amounting to Kshs.10,350/=. However he never witnessed any of the ceremonies leading to the marriage. The petitioner had 3 adult children when she moved to Chinga upon marriage to the deceased.

Cross-examined he stated his father was married to one **Janet Ngima** amongst his other wives. The said **Janet Ngima** was an aunt to the deceased. According to Kikuyu custom there must be alcohol during a marriage ceremony leading to payment of dowry. He never witnessed any such ceremony with regard to her sister. With this the Petitioner closed her case.

The Protesters called a total of 2 witnesses. First on the stand was **Samuel Githaiga Wambugu**, a 74 year old man. He prided himself as a kikuyu elder who had previously been a teacher. He gave a chronology of events leading to a successful kikuyu customary marriage. First, a boy identifies the girl and in the company of his peers goes to the girls place to persuade her to marry him. Once she agrees a date is set for a formal meeting between their respective parents which ordinarily will be held in the girl's home. A she and he goat will be delivered to the parents of the girl. This is followed by dowry negotiation. Ruracio is thereafter taken by young men. Ruracio ceremony is thereafter followed by Ngurario ceremony where at least 3 sheep are slaughtered. It his evidence that the deceased was a clansman and had solemnised his marriage in church. He knew the petitioner as a cousin of the deceased. Her mother was an aunt to the deceased. In so far as he was concerned Ruracio and Ngurario ceremonies were never performed with regard to the alleged marriage. Accordingly the petitioner cannot claim to have validly married the deceased under kikuyu custom. All he knew was that the Petitioner used to work for the deceased. He never introduced her to him as his wife. He confirmed that the estate of the deceased should be shared between the children of the deceased solely to the exclusion of the Petitioner and her children.

Cross-examined by **Mr. Njuguna**, the learned advocate for the Petitioner, he stated that he knew that the Petitioner's father was staying in Rift Valley. He was not aware that the deceased had gone looking for the Petitioner's hand in marriage from Rift Valley. He was also not aware that the deceased started cohabiting with the Petitioner in 1995. As far as he was concerned, the 1st Petitioner used to work for the deceased. He knew PW2 as uncle of the deceased.

The last witness was the 1st Protester, **David Maina Kagechu**. He testified that the deceased was his father having married their mother in church in 1956. Together they had 6 siblings. In 1993 their mother, **Ronah Wothaya Kagechu** was involved in a nasty road traffic accident and was seriously injured and bound to a wheel chair. Whereas their father passed on 2003 their mother aforesaid did so in 2004. He denied that the Petitioner was his step mother. In so far as he was concerned she was his aunt as well as first cousin to the deceased. She was a daughter to **Janet Ngima** who was a sister to **Elizabeth Wakayi** who was his paternal grandmother. The Petitioner had no other relationship with the deceased other than family. She was assisting the deceased with farm and household chores. No marriage ceremonies involving the deceased and the Petitioner were ever conducted. PW2 lied therefore when he claimed so. He knew the petitioner's children. However they were never sired by the deceased. The Petitioner did not qualify to have a share of the estate of the deceased as she is not a member of the immediate family of the deceased. He asked that the estate of the deceased be shared among the children of the deceased solely.

Cross-examined, he stated that he was not aware of the marriage between the deceased and the petitioner. He had never heard of the deceased having paid dowry for the Petitioner. The Petitioner came to their home in 1995 following the accident involving their mother which resulted in her being confined to a wheel chair and relocated to Nairobi. That the Petitioner did not stay on until the deceased passed on. Rather she went back to Kipkelion immediately the deceased fell sick in 2003. He denied that they chased her away. He was not also aware that the deceased had consented to the Petitioner changing her name to include his. He was also not aware that her sons' names had been changed to include the

deceased's name. He did not expect the deceased to marry his cousin in any event.

That marked the close of the Protestors' case. Thereafter parties agreed to file and exchange respective written submissions. This was subsequently done. I have carefully read and considered the written submissions and the authorities cited.

So what are the issues for determination in this dispute? To my mind, they are basically three:-

(i) Whether the petitioner was married to the deceased.

(ii) The answer to the above notwithstanding whether the petitioner is entitled to share in the estate of the deceased.

(iii) Costs

It is common ground that the deceased and **Ronah Wothaya Kagechu** were married in church on 7th November 1964 under the provisions of the African Christian Marriage and Divorce Act and the said marriage was still in existence at the time of the demise of the deceased. It is also common ground that out of that marriage they had six siblings. It is also common ground that sometimes in 1995 the Petitioner and her adult children sired from her previous relationships moved in to the home of the deceased following a serious road traffic accident involving **Wothaya** that rendered her immobile and condemned her to a wheel chair. Following that accident **Wothaya** relocated to Nairobi to live with her children in order that she may be close to the doctors managing her condition. By then it would appear that the deceased was staying alone in Othaya following **Wothaya's** accident. It is also common ground that the 2nd Petitioner and his siblings were not children sired of or by the deceased. It is also common ground that when the 1st Petitioner moved into the home of the deceased with her children she later on and presumably with the consent of the deceased changed her and her children's names to include the deceased's. It is further agreed that the deceased's estate consisted of the properties set out in the petition. Finally it is also common ground that the deceased and the petitioner were somehow related.

The Petitioner herself conceded that she was a cousin of the deceased much as her witness (PW2) made spirited efforts to deny the existence of such relationship. In her own words under cross-examination "..... **When I married the deceased I knew that he was my cousin.....**" In re-examination by her advocate she also stated thus "..... **The deceased knew that we were related when he offered to marry me.....**" From the general flow of the evidence on this issue it is apparent that the petitioner was a first maternal cousin of the deceased. PW2 was a maternal uncle to both the deceased as well as the Petitioner. The deceased and the Petitioner had a common maternal grandfather in the name of **Kibe Maigwa**. There is therefore no denying that the deceased and the petitioner were close relatives. As correctly submitted by **Mr. Kimani**, it is common knowledge that not all members of one's opposite sex are potential marriage candidates. There are two general sociological rules that define one's potential marriage partner; consanguinity and Affinity. Consanguinity demands that a person to select a marriage partner outside one's bloodline. As for affinity, some communities permit marriages by relatives such as sister in law, brother in law. Indeed there are communities who permit marriages between close cousins for instance Swahilis, Arabs, Indians etc. However kikuyus are not among such communities. It is unheard of for a kikuyu to marry a person with blood connections to him. In the instant case it was conceded by the petitioner that she was a cousin of the deceased. Accordingly she could not have contracted a valid kikuyu customary marriage to the deceased.

There is evidence that the petitioner had been residing with the deceased at Othaya since 1995. The Petitioner's evidence was that she was living with the deceased as man and wife and she was fulfilling all the duties of a wife despite the fact that they were not blessed with any children. That may well be so. However it does not alter the fact that they were too close relatives and therefore incapable of contracting a valid kikuyu customary marriage. Even a presumption of marriage due to their long cohabitation and representation to their friends and relatives of the fact that they were man and wife is not available to the Petitioner.

Did the deceased in any event have capacity to contract any other marriage when his marriage to **Wothaya** had not been dissolved even if such subsequent marriage was under kikuyu customary law? I do not think so. The deceased's marriage to the **Wothaya** was under the African Christian Marriage and Divorce Act. This act expressly provides for a monogamous marriage. In other words it expressly prohibits any party to a marriage under it to contract a subsequent marriage as long as the earlier marriage has not been dissolved in accordance with the law by either divorce proceedings or death of one of the spouses. In the instant case, as at 1995 when the Petitioner purported to marry the deceased, the deceased earlier marriage to **Wothaya** had not been dissolved. Indeed the said **Wothaya** was still alive. Once again therefore the purported marriage of the petitioner if at all was illegal and indeed a nullity.

This court is of course aware of the provisions of Section 3(b) of the Law of Succession Act which provides that **“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act....”** The deceased was a kikuyu which community professes polygamy. The deceased too had married under a system of law which permits monogamy. However had the deceased validly married the petitioner, this provision of the law would perhaps have come to her aid. However as I have already demonstrated their purported marriage if at all was doomed to failure from the what go because of consanguinity considerations.

The foregoing notwithstanding, it is also doubtful whether indeed the petitioner celebrated a valid kikuyu customary marriage if we were to ignore the issue of consanguinity as well as the deceased's previous marriage having been under a system of marriage that only espouses monogamy. According to DW1, a valid kikuyu customary marriage is only legal after going through the following rites and or stages.

(i) Identification of the intended bride

(ii) The would be bridegroom visiting the intended bride's home and asking for her hand in marriage which is accompanied by local brew.

(iii) Subsequent meeting of both parents of the bridegroom and bride

(iv) Negotiations of bride price and payment-Ruracio

(v) Ngurario

This evidence was not discounted at all by the Petitioner and or her witnesses.

The evidence of the petitioner on the issue was that the deceased travelled from Othaya to Kipkelion where the Petitioner was residing and asked for her hand in marriage. She accepted and her father too consented. The evidence of PW2, a close relative of both the Petitioner and deceased was to the effect that some money amounting to Kshs.10,350/= was paid as dowry between 1995 and 1996. In the meantime the Petitioner had moved in with the deceased in 1995 and resided with him and until he passed on. Further the petitioner caused her to include his name in her national identity card. To the petitioner the fact of payment of dowry and change of her name to include the deceased's was sufficient prove of her marriage to the deceased. The contrary view was however propagated by the protesters and their witnesses. Their stand was that the petitioner was merely hired as a house help by the deceased following the tragic accident involving their mother. She was never married to the deceased as she was a relative and secondly, they were not aware of the kikuyu rites being performed with regard to the purported marriage.

Both the Petitioner and her witnesses alluded to some form of ceremonies that were performed to signify the alleged marriage. However they were not emphatic as to which ceremony was performed and if so when and where. They only made a passing reference to some of the rites. Indeed they were unable to tell which ceremony came first and which came last. In my view they were deliberately vague and evasive on the issue. They deliberately failed to articulate and describe the ceremonies performed. That being the

case one cannot tell whether Ruracio and Ngurario ceremonies were performed. In the absence of such rites and or ceremonies, there can be no valid kikuyu customary marriage. In the case of **Njoki v/s Mathara and others civil appeal number 71 of 1989** (UR), Kneller J. A. reading the judgment of the court held that:-

- (i) The onus of proving a customary marriage is on the party who claims it.**
- (ii) The standard of proof is the usual one for civil action, balance of probabilities.**
- (iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.**

Bearing these considerations in mind, I am far from being persuaded that the petitioner has discharged the burden of proving the existence of a kikuyu customary marriage between herself and the deceased.

I am also cognisant of the fact that following the death of the deceased an obituary was placed in both the Daily Nation as well as the radio (KBC). In all those announcements neither the name of the petitioner nor her children feature as being part of the family of the deceased. The same thing was repeated with the death of Wothaya. The same goes for the Eulogies read during the burial of the two. Surely if the petitioner considered herself a wife of the deceased couldn't she at least have protested at her exclusion from these important undertakings.

For all the foregoing reasons, my answer to the first issue framed is in the negative. The Petitioner was not the deceased's wife.

Can she nonetheless inherit the deceased's estate the foregoing notwithstanding. That would have been the case if perhaps she had anchored her claim on the basis that she was a dependant. However as already demonstrated above the claim was based on the fact that she was a wife of the deceased. The 2nd Petitioner's claim was based on the fact that he had been adopted by the deceased as his son much as he had not sired him. The 2nd Petitioner was born in 1968. Therefore by 1995 when his mother allegedly married the deceased he was aged 27 years. He could not therefore have been legally adopted as he was adult. Neither was he adopted by the deceased through any known customary regime. I am not aware of any valid adoption that may be inferred merely because the would be adoptor allows his name to be inserted in the adoptees' national identity card. There was also scanty evidence of the Petitioner's daughter having been married and dowry paid in the home of the deceased. However the evidence on record suggests that the alleged dowry if at all, was not received by the deceased directly but by one **Mr. Wachira**. In any event nothing much should be attached to this evidence. The deceased and the petitioner were after all relatives. There could be nothing for betrothal rites and wedding to be held in his homestead.

In terms of section 29 of the Law of Succession act, the Petitioner and her children cannot pass for dependants who can be considered for purposes of inheriting a portion of the deceased's estate. This being my view of the matter, I would hold that the Petitioner and her children are not entitled to inherit the estate of the deceased or a portion thereof. The answer to the 2nd issue framed is once again in the negative.

How about costs? This being a family dispute, I am not inclined to condemn any member to costs. Accordingly there shall be no order as to costs

The end result of this matter is that the grant shall be confirmed in terms of paragraphs 15 of the affidavit of protest sworn by the 1st protestor dated 12th October 2007.

Dated and delivered at Nyeri this 21st day of May 2009

M. S. A. MAKHANDIA

JUDGE