



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 2208 of 2008

AGNES KATTO NJOROGE ..... APPLICANT

versus

ALICE WAKIINI WACHIRA ..... RESPONDENT

RULING

This is an application by **AGNES KATTO NJOROGE** ('the applicant') who after filing a citation herein now seeks an order to restrain **ALICE WAKIINI WACHIRA** ('the respondent'), from interfering with the estate of the late **JACKSON WACHIRA MIANO** ('the deceased'), a businessman who died on 21/7/2008, and who at the time of his death was a resident of Kayole Estate Nairobi.

The applicant claims to be a wife of the deceased, also acknowledges that the respondent is the deceased's first wife. She seeks further orders to restrain the respondent who is allegedly intermeddling with the said estate, from interfering with her quiet possession of house number 443-2 Kayole, and/or collecting rents or such other income there from. She claims that on the said premises stands her matrimonial home.

She deposes that the deceased married her in the year 1998, and that the respondent who had allegedly abandoned her husband started interfering with his estate soon after his death, a matter which was reported to the chief who requested the respondent to desist such action and to maintain status quo till an administrator is appointed; that she did not comply forcing the applicant to report the matter to the police after which she allowed the respondent to occupy a room within the premises, but that the respondent finally locked her out of the premises.

The application is however opposed on the grounds that having contracted a statutory marriage with the respondent under the African Christian Marriage and Divorce Act, the deceased had no capacity to contract another marriage with the applicant in which case, the latter has no locus standi in to file a citation or for that matter this application.

I have considered the pleadings herein as well as the submissions of both counsel, and at this particular moment As for now I need not reiterate the fact that for purposes of succession, the court will take cognizance of second and later unions even where the deceased had a valid subsisting marriage. Such is the position which is clearly laid down in section 3 (5) of the Succession Act Cap 160 of the Laws of Kenya 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, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act*'.

I have no doubt that the above legal position was the basis for Justice Nambuye's decision in the case of **Re Estate Keitany [2002] 2KLR Page 720**, and it is therefore obvious that the case of **Patrick Kilonzo Matheka vs Timina Kilonzo Matheka HCCA (Mks) No 32 of 1994**, which the respondent's counsel relied on, cannot aid him in view of the aforementioned legal provisions.

The fact that the applicant alleges to have been married will require proof and will thus be a matter of evidence which will of essence be taken at a later stage, but for now, she has produced a letter from their

local at Kayole to confirm that she was one of the wives of the deceased, and has also exhibited two affidavits, one of which was sworn by the deceased on 20/12/2004 in which he deposes that they got married in the year 1998, while she deposed likewise in her affidavit of 30/11/2004. I will for these reasons give her the benefit of doubt and I find that she stands to suffer irreparable loss should I deny her the orders which she seeks, especially because the respondent does not controvert the fact that she has locked her out of the premise or that she is collecting the rents.

I do in the circumstances grant her orders in line with her prayers 2 (a), (b), and (c), save that the applicant who shall henceforth collect all rents and dues from the said premises shall be required to deposit the same in court on a monthly basis, until an administrator over the subject estate is finally appointed, and for which she will be fully accountable.

Costs will however be in the cause.

Dated and delivered at Nairobi this 24<sup>th</sup> day of October 2008.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of: