REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Succession Cause 452 of 2003

IN THE MATTER OF THE ESTATE OF NELSON KARANJA WAGAYA (DECEASED)

TERESIAH WANGARI.....PETITIONER

VERSUS

MONICAH WANJURU KARANJA.....OBJECTOR

JUDGMENT

Nelson Karanja Wagaya (the deceased) died intestate on 15th April, 2001. On 15th October, 2003, one Teresiah Wangari claiming to be his wife petitioned for a grant of representation and the same was issued to her on 24th March, 2004. On 8th September, 2004, Monicah Wanjuru Karanja (the objector) applied for revocation of that grant on the ground that the same was obtained fraudulently by a false representation that the petitioner and her children were heirs of the deceased when in actual sense the petitioner had been divorced and with her children lived away from the deceased for 33 years prior to his death; that Ruth Njeri and Joel Wachuma having been born to the petitioner out of wedlock after the divorce are not heirs of the deceased; that the petition was presented without the consent of the objector and that being the only wife of the deceased, the objector and her six children are the ones entitled to the grant and to inherit the deceased's only asset-the piece of land situate in Nyandarua and known as Title No. Nyandarua/Mawingo/335 (the suit land).

The petitioner strongly opposed that application. In her replying affidavit, she asserted that after marrying the deceased in 1960, they settled on the suit land. Later an arsonist razed her house down. In the interest of her and her children's security, the deceased moved and settled them in a rented house in Nakuru. He paid the rent and generally supported her and educated her children. It was after the burning of her house that the objector moved on to a portion of the suit land. Later, with the petitioner's blessings and those of the deceased, her son Rufus Wagaya moved on to a portion of the suit land and constructed a house thereon.

The petitioner further stated that the deceased agreed to construct a house for her on the suit land. Before he could do that, the objector evicted her son from the land in 1997. When the deceased learned of that eviction, he vowed to settle her on half of the land. With that understanding, and without any protestation by the objector, in 1998 the deceased buried her daughter Lucy Wachuka and in 1999 her grandson Edwin Karanja on the suit land. The deceased thereafter said he would talk to the objector and have the suit land shared equally between her and the petitioner but he died before he could do that. On his death bed, the deceased gave 5 acres to the petitioner's grandson, Anthony Mwangi Wachuka. After the deceased's death when the objector refused to share the suit land with the petitioner, the latter took the

matter to the elders who ruled that the suit land be shared equally between the two households. She therefore prayed that after setting aside 5 acres of the suit land for Anthony Mwangi Wachuka as the deceased had directed, the remaining 40 acres of the suit land should be shared equally between the two houses.

The objection was not heard. Instead, by consent of the parties and in the presence of their respective advocates, on 7th July 2006 this court (Lady Justice Koome) revoked the grant that had been issued to the petitioner and issued a fresh one to the objector jointly with the petitioner's son, Rufus Wagaya. On 21st December, 2006, Rufus Wagaya applied for the confirmation of the joint grant and the sharing out of the suit land as proposed by his mother, the petitioner. His siblings, Beth Wanjiru, Ruth Njeri and Joel Wachuma as well as his nephew Anthony Mwangi and the petitioner swore affidavits in support of that distribution.

The objector could not hear of that. She swore an affidavit in protest disowning the petitioner and her children except Rufus Wagaya who she claimed the deceased recognized as his son and to whom he had given 5 acres of the suit land. She contended that the deceased did not sire the petitioner's children Beth Wanjiku, Ruth Njeri and Joel Wachuma as, like the petitioner's grandson Anthony Mwangi, they were not named after the deceased's relatives in accordance with the Kikuyu custom. The petitioner bore those children out of wedlock after divorcing the deceased. If I understand her case well, it is only Rufus Wagaya from the petitioner's house who should inherit 5 acres of the suit land.

The parties took directions and the issue of the distribution of the estate was heard by viva voce evidence in which the parties maintained their respective positions as summarized above. In her testimony, the objector said when she married the deceased in 1965, the petitioner was not living with him. She first heard of her when Rufus Wagaya wrote to the deceased to take him back as his son. She said the deceased told her the petitioner was not his wife but a mere woman he had an association with out of which Rufus was born and because he had returned while he was alive, he decided to give him 5 acres of the suit land and bought for him a residential plot in a shopping centre.

In cross-examination she also said the deceased accepted the petitioner's late daughter Wachuka as his daughter. She conceded that she appears with the petitioner, the deceased and their children on the photos taken at Wachuka's burial. She said she never objected to Wachuka's burial on the suit land because she was buried on the 5 acres given to her brother Rufus. She denounced the elders' verdict directing the sharing of the suit land equally between her and the petitioner. She concluded that although she assisted the deceased pay the SFT loan on the suit land she has no objection to Rufus inheriting the 5 acres his father gave him. Her witness, Nahashon Ndungu Mwangi, a close friend of the deceased, corroborated her testimony that she was married under Kikuyu Customary Law with all the rites of that marriage being performed. He said he had never even heard of the petitioner or her children.

In her testimony the petitioner reiterated the averments in her affidavit in support of the petition and added that she married the deceased under Kikuyu Customary Law. Dowry was paid to her father and all the rites of a Kikuyu Customary Law marriage were performed. She begot eight children with the deceased. At the time when her house on the suit land was burnt by a neighbour who was claiming it was on his land, she had had three children with the deceased. After that the deceased rented a house for her at Nakuru. Besides paying the rent and educating her children, he took care of all the other maintenance expenses as she was not working. Although she later had differences with the deceased causing him to stop going to her house, her brother reconciled them and the deceased resumed his cordial relationship with her.

In cross-examination the petitioner said she took the ID card in her father's name when he had a matrimonial problem with the deceased. She refuted the suggestion that she was a mere girlfriend of the deceased.

The petitioner's first witness was her son Rufus Wagaya. He testified that he initially lived with his mother in a house the deceased rented for them in Nakuru. When the deceased stopped visiting them because of minor differences he had with the petitioner, he wrote to him and he came to Nakuru in 1980-

81 and sorted out those differences. In 1984, at the deceased's request he went to the suit land to prepare for the petitioner's return there. He built on the portion the deceased showed him from where the objector and her children evicted him. He produced the photos taken at Wachuka's burial. He said it was his mother, the petitioner who paid the mortuary expenses of Kshs. 3,000/= in respect of the deceased's body and that he attended his funeral with the petitioner. He claimed they were not photographed at the funeral because of the chaos that arose there.

Rufus further testified that the 5 acres the objector claims were given to him were actually given to the late Wachuka's son Edwin Karanja who died in 1999 and was buried on it. He said he does not want that piece because before he died the deceased gave it to Wachuka's other son, Anthony Mwangi. He demands half of the remaining land for his mother and siblings. In cross-examination, he conceded that the petitioner's ID card does not have the deceased's name and that his brother Wachuma and sister Njeri are contrary to the Kikuyu custom named after the petitioner's relatives.

The petitioner's other witness was Wanjuki Macharia who used to work with the deceased in SFT at Sotik. He testified that during weekends in 1975 the deceased used to visit the petitioner, whom he had introduced to him as his wife, at Freehold in Nakuru Town. The petitioner's third witness, Francis Kiai testified that he lived with the deceased and his wife, the petitioner, on Mawingu farm until 1965 when a mentally deranged man burnt the petitioner's house and the deceased moved her and her children to Nakuru. It was after that that the deceased took the objector as a second wife. He said at no time did the deceased tell him that he had separated with the petitioner. When Wachuka died and he asked why he did not want to bury her at Nakuru where her mother lived, the deceased said he could not bury his daughter in Nakuru when he had land. In cross-examination he said none of the deceased's brothers who attended the land dispute before the Chief denounced the petitioner.

After a careful consideration of this evidence, I find that the deceased married the petitioner under Kikuyu Customary Law and that the deceased paid dowry to her father. The objector did not in any way challenge Francis Kiai's evidence that the deceased lived with the petitioner on the suit land until 1965 when her house was burnt and the deceased moved her to Nakuru. She also did not challenge Wanjuki Macharia's evidence that when he was working with the deceased at Sotik, the deceased used to visit the petitioner in Nakuru. True the petitioner did not produce any documents to prove for instance that dowry was paid to her father but the objector did not produce any herself.

If I am overruled on there having been a Kikuyu Customary Law marriage between the deceased and the petitioner, I need to consider whether or not there is a presumption of marriage. What is a presumption of marriage and when is it made or when does it arise?

As the late Madan JA stated in Njoki Vs Mutheru, [2008] 1 KLR 288, the presumption of marriage "… is a concept born from an appreciation of the needs of the realities of life when a man and a woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage…." Being an assumption, it does not therefore require proof, of any attempt to go through any form of marriage known to law. All that is required is evidence of cohabitation. Before it is made there must be evidence of the parties begetting children, owning bank accounts or acquiring property jointly and or being visited by friends and relatives who would be surprised if not shocked to hear that the two were after all not husband and wife.

In the same case, Nyarangi JA alluded to these kinds of things when he said that:-

"before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but

that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage."

In this case, on the evidence of the two witnesses I have referred to and the authorities of Hortensiah Wanjiru Yawe Vs Public Trustee, Civil Appeal No. 13 of 1976, Njoki Vs Mutheru, [2008] 1 KLR 288 and Mbogoh Vs Muthoni & Another, [2008] 1 KLR 357, I find that the deceased having cohabited with the petitioner for a long time and had children with her, although all the rites of a valid Kikuyu Customary Law marriage may not have been carried out, he is presumed to have married her.

I find no merit in the objector's contention that except for Rufus the other children of the petitioner were not sired by the deceased. There is no evidence of the petitioner having lived with any other man. From the evidence of Wenjuki Macharia the deceased regularly visited the Petitioner at Nakuru. I therefore find that all of the Petitioner's children were sired by the deceased. The fact that the petitioner's other children are not named after the deceased's relatives is neither here nor there. My understanding of the Kikuyu custom of naming children is that after naming two to three children after the husband's relatives, the others are named after the wife's.

Even if the deceased had divorced the petitioner or separated, the definition of a wife in Section 3 of the Law of Succession Act entitles her to inherit his estate. In the circumstances I find and hold that the petitioner and her children are entitled to share with the objector and her children the deceased's estate. This being my view of the matter, pursuant to Section 40 of the Law of Succession Act, I take the petitioner and her five children as six units and the objector and her six children as seven units. Though one of the petitioner's children is deceased, the deceased in this case having given her son a portion of the land, I take the deceased's said grandson as a unit and to be fair to all, I will ignore the fact that the deceased had given him 5 acres. Consequently, I order that the deceased's only asset, Title No. Nyandarua/Mawingo/335 comprising of 43.7 acres or thereabouts be shared equally among the thirteen units. That works out to 3.361 acres to each of the deceased's two widows and their respective children with, as I have said, the deceased's grandson, Anthony Mwangi, being considered as one of his children.

This being an estate matter, I order that the parties do bear their respective costs.

DATED and delivered this 15th day of October, 2009.

D.K. MARAGA

JUDGE.