



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

**Prob & Admin Cause 244 of 2002**

**IN THE MATTER OF THE ESTATE OF THE LATE EPHANTUS GITHATU WAITHAKA  
(DECEASED)**

**BETWEEN**

**ESTHER WANJIRU KIARIE ..... PETITIONER**

**VERSUS**

**MARY WANJIRU GITHATU ..... OBJECTOR**

**JUDGEMENT**

The Petitioner, Esther Wanjiru Kiarie petitioned for Letters of Administration for the Estate of the late Ephantus Githatu Waithaka claiming to be the widow married under Kikuyu Customary Law. The Objector Mary Wanjiru Githatu filed Objection proceedings claiming that she was the only widow of the late Ephantus Githatu Waithaka.

This Court took evidence from both parties and their witnesses. At the close of the testimonies by witnesses on both sides several issues arose for determination by the Court, these are:-

1. Whether the parties had contracted valid Kikuyu customary law marriages capable of being recognized by law.
2. Whether the Petitioner and the deceased had cohabited for a long period (15 years) and had three children and whether by virtue of such facts the Court is entitled to infer and declare the existence of a marriage by presumption between the Petitioner and the deceased.
3. Whether the parties i.e. Objector and the Petitioner are both entitled to Letters of Administration of the Estate of the deceased.
4. Whether the children of two relationships are entitled to benefit as heirs.
5. What mode of distribution should the Estate take.
6. Who should bear the costs of this cause.

The Objector led evidence of how she got married to the deceased in 1968. She gave details of the ceremonies that were performed to solemnize the same. Her witnesses corroborated the same. The essentials of Kikuyu Customary marriage have been documented at p. 15 of **Eugene Contran's treatise "Restatement of African Law" Vol. 1 – "The Law of Marriage and Divorce"** These are:-

1. Capacity
2. Consent
3. Ngurario – slaughtering of a ram
4. Ruracio – bride price
5. Commencement of cohabitation

From the evidence on record part of which was heard by Justice Dulu, I do find that the Objector and the deceased went through a Kikuyu Customary Marriage. They went through the aforesaid processes. They had the capacity and their marriage had all the essential ingredients of a Kikuyu Customary Marriage.

With respect to the Petitioner, this Court finds that she and the late Ephantus Githatu Waithaka lived together as husband and wife from 1986 until his death on 9<sup>th</sup> April, 2002, a continuous period of approximately fifteen (15) years during which period three children were born of the relationship. Documentary evidence adduced at the trial shows that after the death of Ephantus Githatu Waithaka, the Petitioner was indeed recognized as one of his widows as shown in the funeral programme and obituary in the ‘Daily Nation’ Newspaper of 15<sup>th</sup> April, 2002 which was produced in evidence.

The records show that the Objector Mary Wanjiru Githatu admitted in cross-examination that the children of the Petitioner were children of her husband. She denied that Esther, the Petitioner was a wife of the deceased but was agreeable that the properties of the Estate be shared with the children of Esther. She confirmed that her late husband had informed her before his death that the said children should get a share of his properties. There is evidence on record that the Elders attempted to share the estate between the Petitioner and the Objector and their children.

I do find that there was no formal marriage between the deceased and the Petitioner. However, both the Petitioner and the Objector hail from the Kikuyu Community. Kikuyu Customary Law is a system of law which permits polygamy.

Notwithstanding, the absence of a formal marriage under Kikuyu Customary Law between the Petitioner and the deceased, I do find that by virtue of the long cohabitation of fifteen (15) years, recognition and acceptance by the family members, relatives and friends that the two were “husband and wife”, coupled with the birth of the three children this Court is entitled to and I hereby infer and declare the existence of a marriage by presumption and/or cohabitation between the Petitioner and the late Ephantus Githatu Waithaka.

I also do find that the deceased was survived by the following then (10) children

**1. MARY WANJIRU GITHATU’S HOUSE**

1. George Waithaka
2. Nancy Wanjiku
3. Stephen Mwangi
4. Anthony Mwangi
5. Jerusha Githatu
6. Nelly Githatu
7. John Maina

**2. ESTHER WANJIRU KIARIE'S HOUSE**

1. Edgar Waithaka
2. Kevin Kiarie
3. Angela Wangare

By virtue of the provisions of Section 3 (5) of the Law of Succession Act (See Statute Law Repeals and Miscellaneous Amendments) No. 10 of 1981), Esther Wanjiru Githatu is a wife and her children are children within the purposes of the Law of Succession Act and are accordingly entitled to take part in the administration and later to a lawful share of the Estate of the deceased.

I hereby order the issuance of the Grant of the Letters of Administration in the joint names of the Petitioner and the Objector.

The deceased left a substantial Estate. The distribution thereof shall be done in accordance with the law and after hearing representations on the same before this Court.

The costs shall be borne by the Estate of the deceased. Orders accordingly.

**DATED AND DELIVERED AT ELDORET ON THIS 13<sup>TH</sup> DAY OF MAY, 2008.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:-**