



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

Succession Cause 18 of 2001

IN THE MATTER OF THE ESTATE OF APPOLLO MUKURU MBUTHIA – DECEASED

JUDGEMENT

The certificate of confirmation of grant in respect of this estate was issued on 2nd July, 2002 and two beneficiaries were distributed the assets namely Elaine Njeri Mukuru and Faith wanjiku Mukuru being the widow and the daughter of the deceased.

After the demise of the executor Bethuel Mbuthia Kurutu a brother of the deceased, the widow was substituted in his place to respond to the summons for revocation dated 14th October, 2003 filed by Hannah Njeri Mukuru the Objector herein.

According to the summons the objector has claimed that she also is a co-widow of the deceased with three children, namely

1. Samuel Kamau Mukuru born on 18th July, 1980
2. Anthony Wanjau Mukuru born on 15th January, 1982
3. Zipporah Gathoni Mukuru born on 15th July, 1988.

I may place it on record that none of the birth certificates of any of these children are produced by the objector.

The claim of the objector is denied by the Respondent.

It was agreed at the time of giving directions that the objection proceedings be heard by cross-examinations of the deponents of several affidavits filed which included those of the witnesses from both sides.

The affidavits on record are:-

1. Affidavit in support of summons for revocation dated 14th October, 2003 sworn by the objector on 24th July 2003.
2. Replying affidavit of the executor Bethuel Mbuthia Kurutu sworn on 15th January, 2004
3. Affidavit sworn by one Samuel Gichohi Muhota on 3rd July, 2007.

4. Affidavit sworn by one Antony Wanjare Mukuru on 3rd July, 2007
5. Affidavits sworn on 13th July, 2007 by Elaine Njeri Mukuru
 - a) Francis Mutitu Kamau
 - b) Benson Muchemi Gachuhi
 - c) Joseph Muturi Kurutu

The case of the Objector may be summarized as under.

The Objector relied on the contents of her affidavit sworn on 24th July, 2003. In her cross-examination, she only recalled one name of the parents of the deceased. Similarly, she knew some of the siblings named by her one of whom was the executor Bethuel. She did not know the name of the deceased clan. She claimed that she was present with other women, the name of only one of them she remembered, at the time the deceased came to her parent's home to pay dowry. She also could not recall or remember the time of payment of dowries but stated that Kurutu received the dowry with others with one Muhota.

Her testimony had to be adjourned as she stated that her mother was going to be buried on that day which fact even her counsel did not know. When she resumed her evidence she agreed that the declaration of customary marriage annexed to her affidavit (Ann. HMMT) was dated 27th April, 1998. The date of the marriage which showed as January, 1988 definitely was overwritten. She also stated that the form was filled in by a clerk and agreed that the status of the deceased was shown as a widower although she knew that his first wife was alive.

According to her the purpose of the declaration was to assist her to obtain an identity card.

She testified that the deceased had an accident in 1982 and that the dowry was paid to her father in 1999. This was said, I note with the agreed fact that the deceased was seriously injured and was kind of incapacitated and was very sick in the year 1999 – 2000. She stated that she visited the deceased at Masaba Hospital with her brother and neighbours. She denied that she was staying at the farm on the lands in dispute because she was a worker there and denied that she took over from one William Kamau whom she knew as one of the workers.

She also denied that because she pleaded with the widow and then it was agreed that she would vacate the farm within six months. She was shown Ann.5 to the supplementary affidavit of Elaine and agreed that the witnesses of that agreement are her brother, mother and sister. She also agreed that Elaine had come to the farm on that day i.e. 19th March, 2003, but denied that they sat down and reached an agreement.

She was shown the advertisement in the News paper and Eulogy annexed to the Replying affidavit of Bethuel (Doc. IX and VIII respectively). She also agreed that the Eulogy was distributed at the funeral where she was present and her or his children's names were not mentioned therein, but she did not object. As regards the advertisement she stated she did not read or see it, otherwise she would have objected. She did not explain why she did not object to eulogy even though she was present ,according to her, at the funeral.

She also conceded that she had not contributed anything towards the purchase of the parcels of land and of which she claims to be a beneficiary without giving details. She said that the deceased was working at a firm in Nairobi.

Second witness was Anthony Wanjau Mukuru and he relied on his affidavit of 3rd July, 2007. He averred that he is the 2nd son of the deceased and his mother was wife of the deceased. He said the

deceased used to come to Ng'arua in Laikipia on weekends to see them. He further averred that the deceased was educating them and enclosed a voucher of remittance from the deceased in the sum of Shs.12,350 to Ngumo Secondary School, Nyandarua. It is dated 7th February, 2000. He has enclosed KCPE certificate for 1999 Examination. Apart from the late payment of the alleged school fees, it is not shown that he was studying at the aforesaid school. He showed a church membership card whose date is not very legible. It is just stamped and not signed. It however, shows that the father is Apollo Mukuru.

In cross-examination, he stated that he did not know after whom his older brother Stephen Kamau Mukuru or himself, are named. He curiously stated that he did not know Kikuyu custom as regards naming of the children but he did know the kikuyu marriage customary law. He said he had witnessed *ruracio* ceremony between his parents, which was in 1998, and he was born in 1982. He said he saw his father's brother Bethuel Mukuru carrying a she-goat. He gave his maternal grandfather's names as Simon Mwangi Mwaura and not Zakayo Wanjau Wahome.

This is the case of the objector.

The Respondent's case, in brief, is as under:

Elaine Njeri Mukuru gave evidence and adopted replying affidavit sworn by late Bethuel Mbutia Kurutu sworn on 15th January, 2004 and her affidavit sworn on 13th July, 2007.

In short the late Bethuel Kurutu who was an elder brother to the deceased and an executor of his will, has denied the claims of the objector. He had produced marriage certificate between Elaine and the deceased under the African Christian Marriage and Divorce Act (Cap 151) on 9th December, 1972. He denied having participated as claimed in any customary marriage ceremony between the Objector and the deceased. According to him the objector came on the land as a worker since September, 1998 replacing one William Kamau.

Since the accident of the deceased in 1992 upto his hospitalization, he had not seen the objector and her family either as sympathizers or supporters. He also stated that as an executor, he had discharged his duties and the parcels of land were registered in the names of Elaine and Faith, the wife and daughter, who are the true beneficiaries of the estate. He had also produced the slips of payments to the Kenya Commercial Bank towards the payments of the purchase price, made by Elaine.

Elaine also has annexed further receipts towards the payment of the balance of the purchase price.

As regards the averments of payment of school fees for PW.2, she stated that herself and the deceased have helped many needy children by paying school fees. In any event, I have made my observations on that part of evidence of PW.2 Anthony Wanjau Mukuru.

She denied the claim of the objector being a co-widow. She commented on the alleged signature of the deceased on the declaration of customary marriage by saying that the signature thereon resemble that of the deceased but she could not affirm that it is his. Both the witnesses (PW.1 and DW.1) have not substantiated further on their respective claims. She agreed that kikuyus are generally polygamous. She agreed that the deceased was not illiterate but she was not aware where the will was made. In any event, the objector has not really objected to the validity of the will and no evidence is led by her on that issue. She reiterated that since the accident of the deceased, she was real source of livelihood and was behind acquisitions of all the properties during the deceased's lifetime.

On the agreement by the objector to leave the property averred by her in the affidavit, she said that they were ready to evict the objector but the objector was in a traumatic mood and came pleading to her for more time and claiming that she was a destitute. She was unable to sign but her brother and sister signed. She said she was shocked to learn of her claims made in the court. She maintained that she was a source of livelihood of the family and that it was not believable that the deceased could have got married in 1988 without her knowledge. Even though they did not have a son, they were a happy and satisfied family and she stressed that the deceased was incapacitated (disabled) since 1992 and even previous to

that he had lost his job as a Communication Engineer with Kenya Airways.

She stressed that, as both the counsel of the parties herein pleaded with her, she had consented to allow the objector to live on the land at the worker's houses. She was not supposed to occupy any other part of the land and if she did that would be a contempt.

The other three witnesses were Francis Mutitu Kamau, Joseph Muturi Kurutu and Benson Muchemi Gachugi who relied on their respective affidavits sworn on 12th July, 2007.

Francis averred in his affidavits that he was a councilor for Gitumba ward from 1992 to 1997 and knows the couple and their daughter Faith, as well as the objector. He described the deceased and the Respondent as a very generous couple who were ready to assist any person who needed their assistance.

He also averred that there were announcements for his death in the news paper and eulogy during the funeral of the deceased where there was specific announcements as regards the family of the deceased. Even though objector attended funeral, he did not hear any complaint as regards the contents of eulogy or the media announcement.

In cross-examination, he reiterated that the objector was a single mother of four children when she was residing at Karandi Village, which is at a distance of five km from the Laikipia farm of the deceased. He did not know any of her children called as Muturu and that they were all born before the accident.

Joseph Muturi averred that he is the only surviving brother of the deceased and that the deceased had only one wife whom he married on 9th December, 1972. Their marriage bore one daughter. As a family member he was not aware of any other marriage contracted by the deceased. He was also not aware of any customary rites performed in respect thereof.

In cross-examination, he stated that he had not seen the objector in his life. Even if she was present at the burial there were many people present and he did not see her. He simply stated that he was not aware of any relation between the two or that she was staying on the farm.

The last witness Benson had averred in his affidavit (which he adopted) that he is married to daughter of deceased's sister and worked closely with late Bethuel and Elaine (wife) during hospitalization of the deceased and during funeral arrangements.

He also was a witness attesting the will of the deceased and at that time the deceased requested Bethuel to take on responsibilities and also that of pending cases regarding his property.

The deceased thumb printed the will due to his physical frailty but he was mentally sound. He averred about Newspaper announcement and Eulogy during funeral and that the Objector did not raise any issue of being sidelined.

In cross-examination he stated that he had not seen the objector and do not know of any relation between her and the deceased. He witnessed the will as he had gone to visit the deceased at Masaba Hospital.

I may at the end, note one fact that the correspondence annexed by the Objector to her affidavit in support are after the death of the deceased and her resistance to efforts of evicting her from the land by the Respondent and other persons who laid claims (see HMM2) on the land and threatened to use force.

I also note that one Samuel Gichohi Muhoto who swore an affidavit on 3rd July, 2001 in support of the claim of the objector was not called to give his evidence and thus I shall not consider the averments made in his affidavit as no opportunity to test the same by way of cross-examination was afforded to the Respondent.

With these evidence before me the respective submissions were made.

It is not in doubt that the objector's claim is that she was married as per kikuyu customary law in the year 1988 (without any other details) and the onus to prove as per the required standard of balance of probability is squarely on her.

She had testified that dowry was paid to late Bethuel Kurutu which has been rebutted by his affidavit. I do agree that because of his death, even his averments made also remain without opportunity given to the objector of testing their veracity. The objector called her son to corroborate her averments who was not of age at the time of the alleged marriage and by addition stated that he only knew of kikuyu customary law on marriage and not that on the naming of the kikuyu children. It is evident that even the objector has not shown any other evidence like birth certificates of any of the children in support of her claims that they were the deceased's children. The only child who was born in 1988 was the last one Zipporah Gathoni Mukuru, a daughter, whose name definitely is not after the mother of the deceased. Even if I do not consider this as relevant in present way of life, except for one receipt of money order shown to have been made after the examinations were taken by PW.2 cannot be considered as sufficient proof to show that he was taken as a son of the deceased in view of other evidence of generosity of the couple.

I also note that no other evidence of any assistance or payment towards well being or upkeep of the other two children, is before the court. I shall also find that a copy of church membership card describing the deceased as a father and only stamped without any authentication or signature also cannot be taken as a proof of paternity of the deceased.

Lastly I shall consider the Declaration of Customary Marriage, which the Respondent agreed that the signature thereon resembles that of the signature of the deceased. I also note that in paragraph 2 of the column of Husband's Declaration it is stated that it was his second marriage, although in paragraph 2 of the wife's declaration his status is declared as '*a widower*'.

The objector explained the said contraction by saying that the same was filled in by a clerk and further that it was filled in so that she could get her ID. Card. But she did not produce her identity card to support her averments.

On the other hand I do agree with the contention of the learned counsel for the Respondent, that none of the rites of the kikuyu customary marriage has been shown to have been performed. The dowry was averred to have been paid and received. The persons who are alleged to have paid have denied and those who are alleged to have received are not before the court.

As against these scanty evidence led by the objector, I have the evidence from the Respondent who have traversed the claims made by the objector. The most important evidence is the death and funeral announcement after the death and eulogy during burial ceremony.. The objector had attended the funeral and still she kept quiet upto 14th October, 2003, and filed the application for revocation after she was asked to vacate the land. She also agreed that she was present when the Respondent came to the land and that was her relatives also were there, and yet she stated that she was not aware of the agreement signed by them and the Respondent.

It is thus difficult for the court to rely on her evidence as credible one. I must state that the evidence of P.W.2 was found to be nothing but untruth.

I have made my observations while mentioning the evidence led and I do reiterate them.

The upshot of all the above is that I find that the objector has failed to prove her claim made in her summons for revocation of grant dated 14th October, 2003 on the balance of probability. I thus dismiss the same with costs.

Dated and signed at Nairobi, this 25th day of June, 2008.

K.H. RAWAL

JUDGE

25.6.08