



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO.50 OF 2003

MILLICENT NJERI MBUGUA.....APPELLANT

VERSUS

ALICE WAMBUI WAINAINA.....RESPONDENT

(Appeal from original Judgment of the Senior Principal Magistrate's Court at Murang'a in SPM.SUCC.No.202 of 1993 dated 18th April, 2002 by F.F. WANJIKU – S.P.M))

J U D G M E N T

On 2nd December, 1986, one **Murachia Burugu** hereinafter referred to as “the deceased” passed on. He was survived by **Millicent Njeri Mbugua**, hereinafter referred to as “*the appellant*” and **Alice Wambui Wainaina** hereinafter referred to as “*the respondent*.” On 30th August, 1993, the respondent took out a petition for a grant of letters of administration intestate. In the affidavit in support of that petition, the respondent deponed in the pertinent paragraphs that the deceased died intestate and left her and the appellant surviving him. They were all daughters in law to the deceased. She also deponed to the fact that the only asset of the estate of the deceased was land parcel No.**Loc.7/Gakoigo/545**.

On 26th April, 1994 a limited grant was issued to the respondent subject to confirmation. Come 14th February, 1995 and the respondent applied to court to have the limited grant aforesaid confirmed. When the application came up for hearing on 17th February, 1995 there was an objection to the confirmation of the grant by the appellant. Indeed she had already filed an affidavit of protest to the confirmation of the grant. Accordingly the matter had to be heard and determined by way of Viva Voce Evidence.

The hearing then commenced before **Honourable A.M. Kingoo**, the then Resident Magistrate at Murang'a Law courts who presided over the evidence of the respondent and her two witnesses. Midway through the case, it was taken over by **Honourable F.F. Wanjiku**, then Senior Principal Magistrate in the same court in unclear circumstances. The latter Magistrate then heard the appellant and her witness, respective submissions, wrote and delivered the judgment.

The respondent's case as can be gathered from the pleadings and evidence is that she was married to the deceased's wife according to Kikuyu custom. This was a wife to wife marriage. After the said marriage she cohabited with the deceased and his wife. Later her “*husband*”, the deceased wife passed on and she was left caring the deceased. Her deceased husband, **Prisicila Wanjiru** was buried on the suit premises. It was at that juncture that the appellant surfaced and was given a portion of the suit premises to utilize. The suit premises was later subdivided into two portions. The respondent has been utilizing 2.3 acres and the appellant the remainder. The respondent took the view that the suit premises as subdivided should inform the distribution of the deceased's estate. She denied that she was a mere employee of the deceased not entitled to inherit any portion of the estate of the deceased.

On the other hand, the case for the appellant is that she is the only and rightful heir of the estate of the deceased. She was the only surviving relative of the deceased. That the respondent was never a daughter in law to the deceased but was an employee of the deceased. Consequently the respondent was not in any way entitled to inherit the deceased's estate as she had no priority or entitlement to it.

The learned magistrate having considered and evaluated the evidence reached the verdict thus:

“The Kikuyu customary law allowed a wife to marry a wife and such a wife would be dependent on the properties of the husband. The wives in Kikuyu customary (sic) used to own no land, yet the custom allowed them to marry and such a married wife would come to use the land of the husband of the wife who had married her. So in this case though the petitioner was a wife of the wife of the deceased, she is entitled to the share of the deceased's estate as a dependant of the deceased. The dependant of deceased person is not just his wife or wives or children.

The court therefore finds that the estate of the deceased should be shared as was proposed by the petitioner. To be shared between her and Millicent.”

That finding has provoked this appeal. Through **Messrs J.N. Mbutia & Co. Advocates**, the appellant faults the judgment of the learned Magistrate on the following grounds:

- 1. The learned magistrate erred in law in finding that the Levirate Marriage of the respondent to the deceased's wife had been proved despite the absence of the ingredients to support the said marriage under Customary Law.**
- 2. The learned magistrate erred in fact in finding that the respondent was not an employee of the deceased just because no salary was quoted.**
- 3. The learned magistrate after concluding that there was a marriage to the wife of the deceased came to the further wrong conclusion that such a marriage entitled the respondent to inherit the property of the deceased.**
- 4. The learned magistrate erred in law in involving (sic) the law of dependency which cannot be possible when a person claims under a marriage and therefore had not applied as a dependant in terms of the Succession Act.**
- 5. The learned magistrate was wrongly swayed by matters which happened after the deceased died such as the collection of the Burial Permit, a self-serving act that did not add any weight to the respondent's claim.**
- 6. The learned Resident Magistrate misdirected herself infact and in law in not dismissing the respondent's claim due to her confusion and lying in that in the petition she described herself as a daughter in law without swearing any fresh affidavit declaring her relationship with the wife of the deceased.**
- 7. The learned Magistrate erred in fact and in law in not making an adverse finding against the respondent when she referred to a written will without bothering to bring it to court.**

When the appeal came up for hearing the appellant was represented by **Mr. Mbutia**, learned counsel whereas the respondent was represented by **Mr. Mwangi**, also learned counsel. The two counsels reached an agreement that the instant appeal be argued by way of written submissions. The court endorsed the agreement. Subsequent thereto, respective written submissions were filed and exchanged between the parties.

I have carefully considered the record before me, the written submissions by both counsel on the rival points of facts and law as this is a first appeal as well as the judgment of the trial court and the law as I am bound to do in law – see the case of **Selle VS Associated Motor Boat Co. Ltd (1968) EA. 123.**

Under Kikuyu custom, a woman to woman marriage is a recognized form of marriage. However, according to Eugene Cotrans Book “**Restatement of African Law, volume 1, the law of marriage and divorce,**” for such marriage to be valid it must meet certain criterion. In his own words,

“...where a husband dies leaving a childless widow, who is past child bearing age, the widow may marry a wife. The widow pays *ruracio* to the family of the woman selected, and arranges for a man from her deceased husband’s age set to have intercourse with her. Children resulting from such intercourse are regarded as the children of the widow’s deceased husband.....”

So that for woman to woman marriage to be valid and which the respondent claims she was, the husband of the woman marrying another must have died, the woman marrying must have been left childless by her deceased husband, she must be past child bearing, the said woman or widow must pay *ruracio* to the family of the woman she is marrying and must subsequently arrange for a man from her deceased husband’s age group to have intercourse with her wife. From the evidence on record, none of the above conditions were met in the circumstances of this case. The evidence on record is to the effect that the respondent came into the life of the deceased and his wife **Priscilla Wanjiru** in their lifetime. **Priscilla Wanjiru** who is alleged to have married the respondent was then not a childless widow, she did not pay *Ruracio* to the family of the respondent nor did she arrange for a man from her husband’s age group to have intercourse with her. She could not have done so as her husband was after all still alive. There is some indication of dowry of sorts having been paid. However it was not paid by **Priscilla Wanjiru** as required for a woman to woman marriage to be valid. The respondent and her witnesses claimed that the deceased and his wife (**Priscilla Wanjiru**) went for her and dowry of Ksh.3,000/= or was it ksh.30,000/= paid to her father plus a cow. In keeping with what Eugene Cotrans has said as aforesaid, this could not amount to a woman to woman marriage. The respondent’s case would have been understandable if she claimed perhaps that she had been married to the deceased as a second wife. In the light of the foregoing, I think the learned magistrate fell into error when she held that the respondent was “.....**a wife of the wife of the deceased because the Kikuyu customary law allowed, a wife to marry a wife and such a wife would be dependant on the properties of the husband.**”

There were material contradictions in the evidence of the respondent and her witnesses regarding the purported marriage to even render it untenable. Whereas the respondent claimed that his father was paid Ksh.3,000/= and one cow as dowry, **David Mururi Kiumbi** (PW3) who claimed to have been present during the payment of dowry claimed that a sum of Ksh.30,000/= in cash was paid. Whereas the respondent claimed to have been married to the deceased wife, some of her witness claimed that she had in fact been married to the deceased’s son, the **late Paul Mbugua**. She also stated that she was not married to the deceased. However when pressed and was told that there was an affidavit which she swore stating that she was a daughter in law to the deceased meaning she had been married to the deceased’s son, she exclaimed that such documents would be false and should be struck out. PW2 **Patrick Kuria Waihenya** testified that the respondent was married to **Priscilla** as **Murachia**, as wife to her son. He gave Priscilla’s sons name as **Mbugua**. To this witness therefore the respondent was a co-wife to the appellant. How about **David Muiruri Mumbi**. He stated that the respondent was married by Priscilla as a wife to her son as he had no children. Thus the evidence of the respondent and that of her witnesses was at variance and irreconcilable. Based on the foregoing I would agree with counsel for the appellant that the respondent did not prove the existence of a marriage to Priscilla. The trial court’s finding that such a marriage existed was erroneous.

It should also be noted that the respondent described herself in the petition for the grant of letters of administration intestate, the supporting affidavit thereof and the affidavit in support of the summons for the confirmation of grant as a daughter in law to the deceased. It is a general principle of law that a party is bound by his/her pleading. By describing herself as such, she meant that she was a wife to the deceased’s son. She never amended the said pleadings to be in tandem with her oral evidence which ran counter to what she had pleaded. Having sworn in affidavits in support of the petition and application for confirmation of the grant that she was a daughter in law to the deceased how could she possibly recant and or resile from that position. In any event the deceased only son, Mbugua died in 1960. How then could she have been married to a dead person. This is absurd and goes to the credibility of the respondent as a witness. In my view and considering the foregoing, I do not think that the respondent was a credible

witness. The respondent's reaction to the question as to whether she was a wife to Priscilla or daughter in law to the deceased was that the confusion is one of semantics but not the substantial meaning. This is because according to her counsel, there is no direct English term to describe the relationship between the deceased and a wife of the deceased's wife. English language with its Christian influence couldn't contemplate such a relationship. Counsel went on to submit that such a person can therefore in English be termed as a daughter in law. However, in oral explanation, it may turn out that she is a co-wife to the deceased. This is a semantic lacuna due to failure of English language to appreciate existence of such relationships.

Although learned counsel's argument appears attractive I do not however buy it. A daughter in law, in common parlance and simple English is a wife to a son of a parent. That definition has gained worldwide acceptance. It cannot describe any other relationship. The respondent having allegedly married the deceased's wife, nothing stopped her from describing herself as a widow to the deceased's wife. After all her husband (Priscilla) had already passed on by the time she was petitioning for the grant of the letters of administration.

Even if we were to assume again for purposes of argument only that indeed the respondent had been validly married to Priscilla, would that entitle her to a share of the deceased estate? I do not think so. Why? In my considered judgment, by virtue of such marriage, the respondent would only have been entitled to the share of the estate of Priscilla as a widow and not the deceased. It would appear therefore that the respondent's remedy had she been lawfully married would have been against the estate of Priscilla and not the deceased.

Could the respondent have been treated as a dependant in the circumstances of this case. To the respondent's counsel, a claim of marriage does not preclude a declaration of dependency. These two concepts (**marriage and dependency are not mutually exclusive**). Secondly, one need not apply for a declaration that he/she is a dependant for him/her to be entitled to inheritance. The appellant's counter argument is that no evidence of such dependency was adduced and secondly, under the law of Succession Act, the respondent does not qualify as a dependant. I agree with the appellant on this issue. *Section 29* of the Law of Succession Act defines who qualifies to be a dependant in the following terms:-

“For the purposes of this part, “dependant” means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sister, as were being maintained by the deceased immediately prior to his death; and**
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

From the foregoing definition of a dependant, the respondent does not qualify as such. The respondent's argument to the contrary clearly does not hold water. Much as the learned magistrate was right in holding that **“a dependant of a deceased person is not just his wife or wives or children.....”** The learned magistrate ought to have considered the respondent's claim to dependency as against the aforesaid definition of dependency. Much as the respondent may have lived with the deceased and his wife and after her husband Priscilla died, she continued to live with the Priscilla's husband until he died and she buried him, those facts perse do not confer on the respondent the title of a dependant. In any event the court could not have made any provision for the respondent as a dependant as there was non compliance with *section 30* of the Law of Succession Act which required that the respondent apply for a provision before the confirmation of the grant. The respondent should have allowed the appellant to petition for the grant of letters of administration and once issued and before confirmation, apply to be treated as a dependant. Accordingly the learned Magistrate's finding that; **“.....the petitioner.....is entitled to a**

share in the deceased estate as a dependant” had no basis at all in law.

It must be clear from the foregoing that I am satisfied that the appeal has considerable merit and is for allowing. Accordingly I allow the appeal and set aside the order of the learned Senior Principal Magistrate dated 10th April, 2002. In substitution I order that the appellant’s protest be allowed with costs to the respondent. The grant shall be confirmed to the respondent in terms of the affidavit of protest. However **Stanley Maringa Gathogo** and **Julius Ngugi Ngaruiya** shall not be entitled to a share of the estate of the deceased as purchasers as their alleged purchase of the portion of the suit premises was illegal and clear breach of the law.

Dated and delivered at Nyeri this 29th day of September, 2008.

M.S.A MAKHANDIA

JUDGE