



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

Succession Cause 685 of 1992

IN THE MATTER OF THE ESTATE OF CHEGE KABIRU – (DECEASED)

RULING

The grant of letters of representation was issued to the Petitioners/Respondents herein on 8th March, 1991 in respect of the estate of Chege Kabiru, the Petitioner being the wife of the deceased. The said grant was confirmed on 11th October, 1991 and the Land Parcel No. Githunguri/Gathangari/600 was registered in the name of the Petitioner.

The Objector Felista Wairimu Kabiru then filed the Objection proceedings in this court after the similar application filed in the subordinate court was dismissed. The matter was sent for arbitration to the elders whose award was set aside and hence the summons to revoke the said grants was heard.

The objector contended that she was a co-widow of the deceased and got married to him in the year 1986 who adopted her three children with whom she came to him. According to her the deceased left a will dated 14th August, 1987 but in her evidence she did not refer to the said will at all. She has also stated that she has lived on her portion (as given to her by the deceased) peacefully since 1986. She further contended that the 1st Petitioner with Simon Chege applied for the grant without her knowledge. She agreed that the deceased had three wives, the first wife being deceased and having left a daughter Virginia Waceke Kabiru.

I may pause here and note that even the Petitioners do not deny that the said Virginia Waceke Kabiru is a daughter of the 1st wife and thus a beneficiary to the estate of the deceased. As both parties conceded to her right to inherit I do hereby find that she is an heir and beneficiary to the estate of the deceased.

Coming back to the case of the objector, she further averred that herself and the 1st Petitioner both live on the estate parcel of land on their respective portions which were given out to them by the deceased. She also stated that when she married the deceased, the 1st Petitioner was not staying on the land and the deceased told her that 1st Petitioner could not manage to cultivate coffee. The deceased built for her a separate house in 1988. After stating as above, she further said that she was settled on a portion of tea plantation admeasuring 1 and ½ acres. Similar portion also was given to the 1st Petitioner as well as the 2nd Petitioner, Simon Chege also was given his share, being the son of the 1st Petitioner. She thus asks her share as given out by the deceased during his life time.

The objector called two witnesses.

Paul Njau Kamau adopted his affidavit wherein he has averred that the deceased was not in good terms

with the 1st Petitioner and in 1984 he constructed a separate house for him leaving the 1st Petitioner and thereafter the 1st Petitioner left the matrimonial home in 1985. Thus in 1986 the deceased married the objector with whom he cohabited till his death in 1989. He witnessed the deceased subdividing his land before his death. The 1st Petitioner returned to matrimonial home in 1987 and started living at her home on the land. He added that his brother was married to the deceased's first daughter Grace Wairimu, although I do note that the only daughter of the deceased who is mentioned, is the aforesaid Virginia Waceke Kabiru.

In cross-examination he conceded that the deceased was 20 years older to him and cannot recall his first wife or when he got married to the second wife or to that effect even the objector.

Similarly her second witness Geoffrey Kamau, in his affidavit sworn on 11th December, 2002, averred that he was close friend to the deceased and he wanted to marry a woman who really loved him and he did so by marrying the Objector in the year 1986. He talked about the deceased's will of 14th August 1987. As per the objector's case, the deceased left two acres to his brother, 1.7 acres to the 1st Petitioner's son, 1 acre to the objector and 0.71 acres to the said daughter Virginia Wairimu.

In his cross-examination, however, he could not remember the year of the marriage between the objector and the deceased.

This is the close of the objector's case, Neither in the affidavits filed by and on behalf of the 1st objector, the details of the customary rites (Kikuyu) of marriage been given. No evidence also to that effect was adduced during the hearing.

The 1st Petitioner relied on her affidavit sworn on 1st April, 2003, wherein she has denied that the deceased ever married the objector, and averred that she was simply an employee on the farm, and she bought her three sons on the land after the deceased's demise.

She denied having abandoned the deceased or neglecting him. She produced the medical bills to show that she paid for his ailment. She also produced a plinth level construction which is alleged to have been started by the 1st objector after the death of the deceased. She denied that she has obtained the grant and certificate of confirmation unlawfully.

In her evidence, she produced her marriage certificate. She said they had four children of the marriage and two daughters of the first wife.

In cross-examination, she agreed that Virginia is entitled to share being the daughter of the deceased and who stays on the land without any portion to cultivate.

She also agreed that she married the deceased and came with two children of her own. Three daughters are married and he has one son.

With the aforesaid evidence, the learned counsel from the objectors, the Petitioners and Virginia submitted on the skeleton submissions filed by them. I have carefully considered the affidavits, evidence and submissions made.

It was rightly contented that the 1st Objector has failed to adduce evidence of her marriage under customary rites. The Law of Succession Act was amended to cater for such wife whom a man marries after solemnizing a monogamous marriage. Section 5(3) of the said Acts provides:

“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”.

This is what has happened in this case as per the objector. According to her after contracting a monogamous marriage with the 1st Petitioner, the deceased married her under Kikuyu customary Law. But she has fallen short of proving the said marriage.

The plain language of Section 3(5) of the Act makes it clear that to enable the objector to claim her right as a wife of the deceased, she is obligated to prove the said marriage showing how and when the said marriage was solemnized as per customary rites.

I rely for the said proposition on the case of **Irene Njeri Macharia Vs. Margaret Wairimu Njomo and another (Civil Appeal No.139 of 1994)**.

The Court of Appeal in the said case observed that in the absence of evidence at such a marriage they were unable to say whether she, could qualify as a ‘wife’ under the provisions of Section 3(5) of the Act.

I thus find that the 1st Objector has failed to show her right to inherit the estate of the deceased as a ‘wife’ and thus I dismiss the summons for revocation dated 13th August, with costs.

After finding as aforesaid, I can and do find that, the deceased was survived by the 1st Petitioner and her children and two daughters of the 1st wife while finding so, I reject the contention raised by the learned counsel for Virginia Waceke Kabiru that the two children of the 1st Petitioner who came with her at the time her marriage with the deceased, cannot be considered as children of the deceased. The definition of the dependant do include such children within its scope.

However, none of the three daughters of the deceased, who, I presume, are married has come forward to claim their rights as daughter or dependants.

The certificate of confirmation dated 12th October, 2001 issued by the Kiambu Court, has given the whole parcel of land in question to the 1st Petitioner which is contrary to Section 35 of the Act. I shall thus have to revoke the same with or without the concession from the 1st Petitioner (Though she has agreed to do so in this case), and I do revoke the same.

That leaves me with the two versions of distribution of the estate proposed by the 1st Petitioner and that by Virginia. The 1st Petitioner has proposed to hold the parcel of land with life interest and thereafter in equal shares by all the six children of the deceased, and Virginia has asked to distribute equally between Simon Chege, the son of the 1st Petitioner and herself.

After due consideration, and looking of the three remaining daughters of the deceased, I direct that:

The 1st Petitioner file a summons for confirmation within 15 days from the date hereof proposing her interest on half portion and half portion to Virginia. Her son to inherit the half portion on her demise. However, she has to annex the consent of remaining daughters to such proposal.

Registrar of Lands shall thereafter rectify the Title Deed accordingly.

Dated and signed at Nairobi this 23rd September, 2008.

K.H. RAWAL

JUDGE

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