



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

SUCCESSION CAUSE NO.1689 OF 2001

IN THE MATTER OF THE ESTATE OF MWANGI NGANGA WATHONI

***aka* MUIRURI NGANGA – (DECEASED)**

RULING

The Administratrix Alice Muthoni Mwangi (referred to as ‘Alice’) obtained a Certificate of confirmation in her favour initially on 2nd March, 1990 wherein the asset of the estate i.e. Loc.6/Gikarangu/1016 was registered in her name in trust for her children. Those children were named in her affidavit of support – viz F N M, M W, G N, J N, M M and E W M

Thereafter a rectified certificate of confirmation was issued on 3rd May, 2001 wherein the aforesaid asset was distributed amongst A, F N M and J M M.

Thereupon J W J K N and S N (referred to as ‘the Objectors’) filed a summons dated 12th July, 2001.

They claim that grant was obtained by making false statements and/or concealment from the courts specifically that Alice did not name the Objectors as beneficiaries of the estate being a co-widow and sons of the deceased.

The matter was directed to be heard by oral evidence and the issue to be determined was whether the Objectors are the beneficiaries as alleged in the summons for revocation.

The 1st Objector, Jane testified and called three witnesses.

Jane testified that after the death of the deceased and his funeral, she had gone on several times to ask Alice to file the Petition but Alice said that she did not have money to go to the court. She further testified as under:

She married the deceased in 1950 as per Kikuyu Customary Law and had four children of the marriage named Kamonde, Joyce, Wanjiru and Ndungu, who are all alive. She stated that the deceased was called Mwangi Nganga and that her mother in law before her death had informed her that the deceased’s other name was Njoroge. The deceased had an earlier wife called Nyambura and she married the deceased after her death. She left a daughter called W. A and her witnesses have not denied the fact that Wanjiru is a daughter of the deceased’s first wife.

The deceased died in 1975 as a result of an assault and was dumped along the Railway line. She came to know about this succession cause after her son Joseph Kamonde filed a civil suit, against Alice. It was

also stated that Alice refused her children to build their houses on the land and her eldest son Kamonde who had built a house and was married there. In his absence, when he faced a criminal charge, A drove away his wife from the house and demolished his house.

She did not recall the date when the deceased visited her father with relatives to pay dowry . She confirmed that she attended funeral and had visited the deceased when he was in the hospital before his death. She stressed that she was identified as one of the wives at the funeral where no photographs were taken.

In cross-examination, she identified the deceased's clan as Munjiru and that the deceased was from the house of Mbuti. She reiterated that the deceased was assaulted and then taken to a Railway line to show it as an accident. She agreed that the letter from Chief obtained by Alice does not mention her name as a wife. She also reiterated that the deceased lived in Kaharati before the land (subject-matter of the estate) was obtained and she agreed that the said land is not in Kaharati and she would not know the names of village – sub-location location of the present house. She said that the deceased hailed from Muthithi before they shifted to Kaharati.

Second witness was H W who is an admitted daughter of the deceased from the first wife. She categorically stated that Jane is her step-mother and so is A. She further stated that it was J who brought her up with her grand parents. She also confirmed that her father died in August, 1975 and that the deceased was assaulted at railway line, and they took him to Muraga and from there to Gaichanjiru where he died, and that Jane used to visit him regularly at the hospital, that Jane had four children and Kamonde had constructed his home on the land before her marriage, and that she does not live there now. She testified that before filing the petition Alice did not get her consent and did not include her name in the list of beneficiaries. She said categorically that if Alice said that Jane was not the wife of her father it would be untrue as she found her at home when she grew up.

She estimated the age of the deceased at 80 on his death and if the same was not written in the Death Certificate, she specified, it does not mean she is not telling the truth. As regards the location of the land, she said that the area is called Muthithi Loc.6 and the land is on the boundary of Loc. 6 and 7.

She gave names of her clan as Isakamuyu or Airimu. She also clarified that her grandmother's name was Wanjiru.

The third witness was Wanyoike Njoroge residing at Gikarangu, Muthithi sub-location, Kaharati and works as a watchman. He knew the deceased as his step-brother. He described Alice as a third wife of the deceased and Jane as a second wife. The first wife Nyambura is deceased leaving a daughter called Hannah Wanjiru.

He said the deceased was called by many names being Nganga Mwangi, Mwangi Wathomi, Njoroge Nganga and Muiruri Nganga. He stayed adjacent to the deceased and knew the deceased very well. In 1970, the deceased was called by Jane's father who was sick. Five of them went to his house. The deceased was told to account for things he paid as dowry. After the deceased did so, James' father asked for a he-goat and the same was then slaughtered. The children of Jane used to visit the deceased at home and sometimes stayed there also. He described the clan as Aisakamuyu of Mbari ya Gitau and place is called Gikarangu sub-location and village is Kaigumba. He clarified that Ndungu in Kikuyu language is same as Ng'ang'a. Deceased's father was called Ng'ang'a wa Kamau.

He confirmed that eulogy at funeral included Jane's name, but he did agree that Jane was employed at Nairobi and the children were schooling there but they used to come home.

After saying that the deceased died on 25th August, 1975 and then he said he was buried on 25th August, 1975. However, the court observed that the witness was an aged person and in my view the evidence that death and funeral occurred on the same date cannot be fatal to the credibility of this witness.

His evidence went mostly unscathed and he gave much of the details as regards the family and the land

including its measurements.

He also stated that he accompanied the deceased to the house of Jane's father in 1970 and only he-goat was given away. He named the others who accompanied him including the deceased and his mother. He named Jane's parents also. Thus this evidence is not and cannot be termed as that of a stranger.

Lastly the eldest son of Jane gave evidence. He described Jane and the deceased as his mother and father respectively and Samuel Ngungu as his brother. He reiterated that the deceased died as a result of assault and thereafter he was placed near the railway line and later died at Gaichanjiru hospital.

He narrated the number of wives the deceased had and that before the death of the deceased he used to live on the land in a house constructed by him.

He was arrested in 1973 and on his release in the same year he found his house demolished which he constructed once again and got married. Then he was arrested again after the deceased's death. On his release he returned home and found the house demolished and his wife absent. Still he used to visit home despite demolition.

When he asked Alice about the land, she told him she did not know him and should not return to the land and if he wanted the same, he should go to the court.

He also produced a photocopy of the chief's letter informing the land Registrar that he intended to file a caution on the land in question. He reiterated that his earlier wife was chased away by Alice in his absence.

He explained that he did not go to police on the issue of his house having been demolished as it was a family issue.

He said that there was a lapse of one week from his father's death and burial. He confirmed that PW.3's father and his grandfather was called Gakahu and could not explain why he was not named after him despite being the eldest son. But then, he explained that Gakahu was his maternal grandfather and not the paternal one.

This was the case of the Objector.

Alice denied in her evidence that the deceased married any one except her and stated that she got married in the year 1959. He died when he was 56 years and not 80 as has been testified by PW 2 and PW 4, and that he died in a train accident. I do note that these facts are mentioned in the Death Certificate relied by Alice.

She testified that the deceased was from Muirimu and from the house of Kiviru. She claimed not to know Jane or her son PW.4. But she knew Wanjiru as a daughter of the deceased from the first wife. She gave two names of the deceased as Mwangi Nganga and Muirimu Nganga and claimed he had no other names.

She then stated that she followed the process of obtaining letters of representation and certificate of confirmation without any objection before Muranga subordinate court and the Objectors came before the court after certificate of confirmation was obtained in 2001.

In cross-examination she denied that the deceased was left at railway line after the assault and insisted that he died in a train accident. But agreed that she did not file any suit against Kenya Railways for damage as she was financially unable to do so. She also agreed that she under valued the land at Shs.90,000 as stated in the petition. Without giving any reason she stated that Wanjiru the daughter of the deceased (PW 2) turned against her although she was initially aware of her filing the petition and gave her some money to file the same. She insisted that she did not know Jane even though P.W.2 had testified that she was the second wife of the deceased.

She, in re-examination changed her earlier version by stating that she knew Ezekiel (PW.3) and that his farm is not at a distance from their land and he would hear her shouts if he was in his house. She denied however, that he and the deceased were good friends and did their things together. She denied that Kamonde PW.4 had built his house on the land and that she chased his wife away and demolished his house. She denied that Jane had visited her severally on the issue of filing the petition, but she then stated and I must quote the same;

“I have not seen her since 1975, the death of the deceased.”

These words definitely go against her earlier testimony that she did not know Jane and it is clear that, even as per her own words, she had seen Jane in 1975 the time of death of the deceased.

Obviously, she then stated that Jane did not attend the deceased’s funeral as a co-wife and did not attend her mother-in-law’s funeral. She fell short in stating that if not as a co-wife then in what capacity Jane attended the funeral of the Deceased. She, also agreed that Deceased’s mother was also called Wathoni but denied that he used that name. Although she denied that she has used the said name in her petition before Resident Magistrate’s Court Muranga, on perusal of the form P&A 80 filed on 18th January, 88, the names of the deceased are stated as **“Mwangi Nganga Wathoni alias Muiruri Nganga”**

I may observe that the testimony of Alice was not only contradictory in material aspects (as stated herein above), but also was full of simple denials without substantiation as to why PW 2 (Wanjiru) and PW.3 (Ezekiel) should give evidence against her and in support of Jane. I have stressed on her evidence hereinbefore when she stated that she had not seen Jane since 1975 and that, she did not attend the deceased’s funeral as a co-wife.

DW.2 was Joseph Wanyiki who was a Chief of Muthithi Location. He candidly agreed that he wrote and signed the letter of 11th January, 1988 disclosing the names of beneficiaries of the deceased after consultation with the relatives and his sub-chief. He agreed that in the said letter the mention of the previous wife or her daughter was not made and that he did not know the deceased, and this evidence was strengthened by him saying that Kahumba where he came from and Kagumba where the deceased was living are far apart. One is on one end and the other on another end.

The third witness called by Alice was Silas Kimuhu. He is a step-brother of the deceased and lives at South Muranga which is 10 k.m. from Kiagumba, the village where the deceased was living.

The deceased, according to him, had two wives and six children. The first wife having only one daughter. He reiterated the details of the deceased’s age and cause of death as per the Death certificate filed in the petition. He attended the funeral of the deceased and did not find Jane or Kamonde (PW.4). He further stated that only Alice and her children were living on the land and that he did not know Ezekiel (PW.3) who, even according to Alice was a next door neighbour of the deceased, and yet he stated that it was not possible that the deceased could have married without his knowledge. He is 68 years of age and I must note that at the date of the Deceased’s death he could be around 35 years of age and in 1950 when Jane alleges the marriage, he would be around 10 years of age. In cross-examination these questions were asked and I do agree that this witness could not be termed as an age mate to the deceased.

The last witness was Gitau Kamau Mbutia coming from Githoya village and is a cousin to the deceased who was living in Kiagumba. According to him originally the Deceased was from Githoya village and during demarcation was moved to Kiagumba which is not very far from Githoya. The deceased was, as per his testimony, from Muicakamuyu clan Kiviro home. He denied knowing Jane and stated that he participated in Alice’s marriage and received dowry. In cross-examination he stated that he was in Mombasa in 1950 and stayed there upto 1953, running a butchery business owned by an Asian. He denied conspiring with Alice. After that he stated that if the deceased married Jane in 1950, it could not have been without his involvement.

He stated that he did not see Jane, before or after the death when he was buried. He said he could have

seen Jane at the funeral if she was present during placing of sand or flower planting.

This is the evidence before the court.

It was contended by the learned counsel for the objectors that the testimonies of Hannah Wanjiru (PW.2) and Wanyoike Njoroge remain largely unchallenged and they had nothing to gain. I do agree that in the evidence of Hannah Wanjiru (PW.2) who is admittedly the first daughter of the deceased it is specifically stated that she grew up with Jane and her grandmother. Alice in her examination or in cross-examination of Wanjiru could not challenge that evidence and did not give reasons for Wanjiru to lie for a strange lady and a strange man (Kamonde) in the estate cause of her father. She also told the court that she was happily married and did not want to lay any claim on the estate of her father. PW.3 Wanyoike also was a close friend of the deceased and his identity was accepted only in cross-examination by Alice after she denied totally knowing him in her examination-in-chief.

I have given my comments on the testimony of Alice wherein I found many contradictions. It is also on record that Jane had lived in Nairobi due to her employment and her children were also staying with her. But that fact only cannot debar her from claiming her relation with the deceased.

The contentions that Jane could not specifically tell the location, sub-location etc or the village, the age and cause of death of the deceased, cannot prove that she was not the wife. Once again the issue of age and cause of death also, in my view, has been inappropriately stressed against the objector's case only by placing sole reliance on the Death Certificate. There is no independent evidence as to the age or cause of death of the deceased and thus, in my opinion, this issue is nothing but a storm in a tea cup as the versions of two parties only differ whether the death was due to train accident or the deceased was dumped on the railway line. I also get further reinforcement on my view on the fact that Alice did not file any claim against Railway if it was an accident which case was expected to enhance capacity of the estate.

As against that, the witnesses called by Alice did not strike me as credible. None of them was living near the deceased's homestead to assert their closeness with him. None of them satisfied me thus that without their knowledge the deceased could not have solemnized his marriage with Jane.

Evaluating and balancing the evidence before me, I tend to agree with the evidence produced by Jane. I thus find that she has proved her claim that she is a co-widow of the deceased on balance of probability.

In the premises, I direct that the Certificate of confirmation be revoked and fresh grant be issued in the joint names of the Objector and the Administratrix herein.

I also direct that the order made herein be served upon the Land Registrar and further direct to rectify the entries made in respect of the land parcel Loc 6/Gikarangu/1016 by reentering the same in the name of the deceased, till certificate of confirmation is issued by the court.

Orders accordingly.

Dated and signed at Nairobi, this 17th day of September, 2008.

K.H. RAWAL

JUDGE

17.9.08