



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

Succession Cause 500 of 2002

IN THE MATTER OF THE ESTATE OF MUOHO KINYANJUI MUOHO (DECEASED)

JUDGMENT

MUOHO KINYANJUI MUOHO who was also known as JOHN MUOHO S/O KINYANJUI MUOHO, died intestate at the age of 46 years on 3/11/2000 at 46 years. He was a resident of Mataara in Thika. I shall now refer to him as ‘the deceased’

ANN WANJIRU MUOHO (‘Ann/administratrix’), MARTIN KINYANJUI MUOHO and PETER GATURA MUOHO (jointly referred to as ‘the co-administrators’), who claimed to be the wife and two sons of the deceased respectively, petitioned this court on 1/3/2002 for letters to administer his estate, which letters were issued 30/4/2002.

The above turn of events seems to have aggrieved FRANCIS NDUMBI GATURA, who is the elder brother to the deceased, for he moved the court on 20/11/2002 in an application in which he seeks an order for the revocation of the aforementioned Grant on the basis of the grounds that it was obtained fraudulently by making of a false statement or by concealment of material facts, and it is his contention that the deceased who was never married, neither did he have any children was survived by his mother and two other brothers. As expected, the three oppose the application.

Be that as it may the parties hereto have agreed that the main issues for determination are whether the 1st administratrix was the deceased’s wife and, secondly whether her two co-administrators are the children of the deceased, entitled to inherit him, and in which case, whether the applicant can support his request for the nullification or revocation of the Grant which was issued to the aforementioned three.

Section 76 of the Succession Act, which the applicant relies on in support of his application, provides that::

“A Grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion -

- (a) that the proceedings to obtain the Grant were defective in substance;*
- (b) that the Grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
- (c) that the Grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently;*
- (d) that the person to whom the Grant was made has failed, after due notice and without reasonable*

cause either –

- (i) to apply for confirmation of the Grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or*
- (ii) to proceed diligently with the administration of the estate; or*
- (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
- (iv) that the Grant has become useless and inoperative through subsequent circumstances”.*

In as much as a court can move suo moto to either annul or revoke a Grant under the above provisions of the law, where an applicant moves the court, then the onus of proof lies on him and he shall be required to prove any one of the above circumstances on a balance of probability.

Ann who is the 1st administrator and who claims to be the widow of the deceased testified that she got married to the deceased in a customary marriage in 1980 after which, they started living together on his land which he had acquired from his father, where they established tea and where she still lives; that they got two sons out of that union who were born in 1981 and in 1982 respectively, and who are also her co-administrators; that their second son Peter is named after the father of the deceased who was known as Gatura or Kinyanjui, because their first son died soon after birth; that the two sons were baptized at the Kiriku Catholic Church, in Mataara on 25/8/1984. She produced their baptismal cards in which she is named as their mother while the deceased is named as their father.

It was also her evidence that after about one year, the deceased in this cause, whose father had died before the said marriage, went to inform his mother who was then based in Njoro, about the marriage, and that his mother visited them and later went to see her parents while accompanied by an elder, after which she returned to Njoro; that she paid them another visit before the deceased's death. Ann who never visited Njoro, was however not sure whether her parents had received any dowry for her or even whether the “ngurario” ceremony was performed, but that nobody had ever claimed that she was not the wife of the deceased during his life-time, and that it was only after her husband's death that the objector had reported her to the chief with a view to forcing her to vacate the land.

Muoho Gachunga of Mataara also gave evidence in this cause to the effect that the deceased who was his first cousin and that though he was never invited to any marriage ceremony between Muoho and Ann, he was however aware that the two got married in 1980, and that until his death the two lived together as husband and wife, and had two sons, namely Kinyanjui Muoho and Gatura Muoho, who are the co-administrators herein.

Joseph Gathu Njuguna, a resident of Mataara, who has known the administratixt since they were young and whose aunt was married to the father of the deceased, also testified that the deceased and the administratixt got married in 1980, in a customary marriage; that he was part of the team which went to pay dowry to her parents in December 1992, at Mataara; that the two had two sons, and that the three administrators still live in the deceased's home in Mataara.

Francis Ndumbi Gatura (‘Francis’) who is the objector herein and who claims ownership of the land which is known as Mataara/1584 (‘the subject property’) in Mataara which is currently occupied by Ann denied knowing the three administrators, and he wants them out of his land.

It was his evidence that his late brother who had ailed for ten years prior to his death had no money or assets to his name; that he had not married, and had lived with him in his compound and was dependent on him; that he never sired any children nor did he have any dependants, and was survived by their mother, two siblings and him. It was also his evidence that Ann had surfaced after his brother's death and has remained on the subject property since then.

Their mother Priscilla Wambui, was not aware that her deceased son was married, for she had left him behind when she moved to her new residence in Njoro in the Rift Valley a long time ago before he was initiated into adulthood. It was her evidence that she did not attend his marriage ceremony, nor did she know Anne or her two sons

The deceased's neighbour of 30 years, Mathew Ndungu Chege testified how he had leased land from Francis for ten years, and how he had been in close contact with the deceased over that period. It was his evidence that the deceased had never talked of a wife; that the issue was never discussed at all and that the deceased had never made any reference to his children; that he never saw a wife or even children in the compound of the deceased. He however admitted knowing Ann as she lived in his village; that she had two sons, but he was not aware of what her relationship with the deceased would have been or even whether the two had children. He had however heard that Ann claims to be the wife to the deceased.

It was the submission of Mr. Kamonde who appeared for Ann and her two sons that the objector had not made out a sufficient case to warrant revocation of Grant issued to his clients. He pointed out that in view of the fact that there was a pending matter in this court in which his clients have filed an Originating Summons under section 38 of The Limitation of Actions Act, to wit HCCC (Nrb.) No 1270 of 2002 (OS), which was filed against this very objector and in which the three wish to have the court determine the proprietorship of the subject property, revocation would not serve any useful purpose.

He however urged the court to find that there is a strong presumption that Ann is a widow of the deceased and that her two sons are children of the deceased, for which reason, they ought to be administrators of his estate.

Mr. Mureithi, who appeared for the objector however urged the court to find that Ann was not a wife nor are her two sons the children of the deceased especially because his client had adduced sufficient evidence to show that nobody was aware of the alleged marriage or the existence of the two said sons, and further that there were no ceremonies that would have led to the alleged marriage. It was his submission that a marriage cannot be assumed because someone alleges it.

I do take special note of the fact that the father of the deceased was known as Gatura Muoho or Kinyanjui Muoho, while Ann's father's name is Gathii or Kinyanjui. There was no evidence to show that the names Gatura and Muoho were very common names in Mataara or its vicinity so that many families would carry both names at the same time. The issue that comes to mind therefore is whether the similarity in the administrators names with those of the members of the family of the deceased was a mere coincidence or whether there was or could have been actual relationship between the two sons and the deceased. I have considered the evidence before me and have also taken note of the fact that Ann was able to prove on a balance of probability that at their baptism on 25/8/84, her two sons bore the same names as they do now and that the deceased was named as their father. It is evident from her exhibits, and there is no doubt that this same applicant was the one who sponsored the two and was named as their godfathered. Given the circumstances, it would in my mind beat all logic to sponsor or act as a godfather for children who you do not know. It can not therefore lie for the applicant to pretend that he did not know the two when both bear his brother's name as their surname, and while one bears his (applicant) father's name. There is no doubt in my mind that the two are sons of the deceased.

The next issue for my determination then, would be whether Ann was Muoho's wife.

The applicant relies on the case of **James Njuguna Kangiri vs. Mary Wanjiru Njuguna CA (Nku.) 215 of 2002**, in which the issue before the court was whether there was a marriage capable of being dissolved by court and where Koome J. held, on appeal, and I readily agree with her, that *"I have carefully considered this appeal with an anxious mind. The Kikuyu Customary Law of marriage and the steps taken thereto are not static and like every other custom must have undergone tremendous change due to the exigencies of modern day living. But one feature that has remained constant is that of the payment of dowry. I agree with Counsel for the respondent that the "ngurario" ceremony or the Kikuyu wedding ceremony is a culmination of various ceremonies that may not take part in the beginning but can take part in the course of a relationship depending on whether the parties started their*

relationship by cohabitation which is a common trend in modern day. Lack of performance of this ceremony may not necessary lead to a finding if no marriage if other ingredients such as capacity, consent, payment of dowry and commencement of cohabitation are proved’.

I find that the witnesses who gave evidence in support of they were not candid; his mother was clearly evasive. Their evidence did not controvert that of the respondents at all. Needless to say, the applicant who was under a duty to provide cogent evidence to the contrary in a bid to rebut that presumption, did not so, which gives Ann the benefit of doubt.

Evidence which I find more credible points in Ann’s favour for not only am I convinced that she had lived with the deceased as man and wife for many years before his death, but that she had changed the name in her identity card to show that she had taken up his name on 10/1/1997, which was three years prior to his death, which situation would not have been allowed by the local administration especially the local Chief who recommends the issuance of such cards, who would always be very conversant with the goings on in every home within his area of jurisdiction. This is supported by Muoho Gachunga who testified that though he was never invited to any marriage ceremony between Muoho and Ann, he was however aware that the two got married in 1980, and that until his death the two cohabited together as husband and wife for a long time, which evidence was supported by Joseph Gathu Njuguna who confirmed having been part of the team that paid dowry for Ann. There are however doubts whether the ‘ngurario’ ceremony was ever performed for Ann, but in my humble opinion, once dowry was paid, which I find was paid, and the parties started living together, lack of the ‘ngurario’ ceremony would not have invalidated their marriage or even negated the fact that the two lived together as man and wife and that they were known as such, and everybody assumed that they all lived as a family, which would tend to support the notion of presumption of marriage, which is *“a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the “husband”, or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband”* (**Njoki v. Mutheru [1985] KLR 874**).

Having found as I do, it is only imperative that I point out that Ann had the priority to petition this court for the letters to administer the estate of her late husband, she could enjoin the sons of the deceased as she rightly did. Indeed such a right is conferred upon her by section 66 of the Act, and the allegation of fraud on the part of the three is thus unfounded.

Finally, he also doubts that the three administrators are capable of providing surety for the value of his late brother’s estate, which the three administrators estimated to be Shs. 600,000.00, which issue is controverted by the three, each of who deposes that he or she might not be a landowner but that each has sufficient assets worth the said amount.

Section 29 (1) of the Act provides that:

“In the exercise of its discretion as to the person to be appointed an administrator (with or without the will annexed) the court shall endeavor to satisfy itself as to the financial solvency of such person and, having regard to the nature and extent of the estate of the deceased likely to come to his hands, as to the probability of his being able properly to complete the administration of the estate.

(2) *For the purpose of subrule (1) the court may require the proposed administrator to furnish an affidavit in Form 12 as to his means.*

(3) *As a condition of granting letters of administration (whether with or without the will annexed) the court may, for reasons to be recorded and subject to the following provisions of this rule, require one or more sureties to guarantee that they will make good, within any of the surety or sureties, any loss which any person interested in the administration of the estate of the deceased may suffer in consequences of a breach by the administrator of his duties as such.*

(4) A guarantee given in pursuance of any such requirement shall take effect for the benefit of every person interested in the administration of the estate of the deceased as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly and severally.

(5) Every guarantee shall be in Form 56, 57 or 58, as the case may be, and no action shall be brought on any such guarantee without the leave of the High Court previously obtained.

(6) This rule shall not apply where administration is granted to the Public Trustee or to a widow of the deceased or, except in special circumstances and for reasons to be recorded, where it is granted –

(a) a trust corporation;

(b) an advocate of the High Court holding a current practicing certificate who has never (save at his own request) been struck off the roll of advocates or suspended from practicing as an advocate;

(c) a public officer acting in his official capacity;

(d) a person specifically authorized in writing by a Government Department to apply for administration and to act as such administrator if appointed;

(e) the attorney of an executor who is absent from Kenya, there being no executor within Kenya who is willing to act, for the use and behalf of his principal and limited until such principal shall obtain probate or letters of administration granted to himself.

(7) Except where the surety is a corporation, the signature of the surety on every such guarantee shall be attested by an advocate or by a commissioner for oaths or other person authorized by law to administer an oath.

(8) Unless the court otherwise directs –

(a) a guarantee shall be given by two sureties, except where either the gross value of the estate does not exceed Sh.10, 000 or a corporation is a proposed surety, and in such cases one surety shall suffice;

(b) no person shall be accepted as a surety unless he or it is ordinarily resident in Kenya;

(c) no officer of a registry shall be accepted as a surety;

(d) the liability of the surety or sureties under a guarantee shall be such sum as the court thinks fit but shall not exceed the gross amount of the estate as sworn on the application for the Grant:

Provided that the court may in any case where the gross amount has in its opinion been underestimated require that before confirmation of the Grant the amount of the guarantee shall be increased to such amount as it thinks fit;

(e) every surety, other than a corporation, shall justify in Form 11.

(9) Where the proposed surety is a corporation there shall be filed an affidavit by the proper officer of the corporation to the effect that it has power to act as surety and has executed the guarantee in the manner prescribed by its constitution, and containing sufficient information as to the financial position of the corporation to satisfy the registrar that its assets are sufficient to discharge all claims which may be made against it under any guarantee which it has given or is likely to give for the purposes of these Rules:

Provided that the court may, instead of requiring an affidavit in every case, accept an affidavit made not less often than once in every year together with an undertaking by the corporation to notify the court

forthwith in the event of any alteration in its constitution affecting its powers to become a surety under these Rules’.

It is clear that the above provisions will apply prior to the grant of the letters of Administration. It is also clear that rule shall not apply where administration is granted to amongst others, a widow of the deceased. There is no doubt that having been satisfied that the petitioners had met the prerequisite conditions by offering sureties for the value of the estate and also having offered acceptable guarantees, this court issued the Grant on 30/4/2002. Needless to say having found that Ann was a wife to the deceased, the above provisions can not apply, and that being the case then, the applicant’s contention cannot lie and I would disregard it completely.

The upshot of all this is that I find that the applicant has no case against the three and I would dismiss his objection with costs.

I however feel that it is important that I deal with the issue of the ‘estate’. It is evident from the pleadings herein that the three administrators listed a sum of Shs. 600,000/00 as the net estate. At no point did they claim that the deceased owned any immovable property. I believe that this would explain why they later moved this court by way of an Originating Summons on 29/7/2002 (which was three months after obtaining the Grant herein), where they clearly aver that having lived on the subject land for over twelve years, the estate of the deceased is entitled to it. They did attach a copy of the register of the title thereto which show that the Francis became its registered proprietor on 15/9/1992. it is trite that parties are bound by their pleadings, and that situation which held eight years before the death of the deceased will obviously hold until the issues raised in the Originating Summons are finally determined.

Dated and delivered at Nairobi this 27th day of November 2008.

JEANNE GACHECHE

Judge

Delivered in the presence of: