

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 147 of 1999

IN THE MATTER OF THE ESTATE OF KINYUA GITHAIGA DECEASED

ANNAH GATHONI MWANGI PETITIONER

JUDGMENT

Following the death of Kinyua Githaiga, Annah Gathoni Mwangi petitioned for Letters of Administration intestate. She stated the surviving beneficiaries of the estate to be herself and eight children. She applied for confirmation of grant by an application dated 25th May 2006. In that application she sought the suit property MAGUTU/GATHEHU/725 to be divided equally amongst her and her children. An affidavit of protest was filed by Ngunyi Githaiga. This judgment relates to that protest herein. The ground upon which the protest was filed was that the petitioner was not a wife of the deceased and neither were the children listed children of the deceased. The protestor deponed that the said children were not the deceased children either by birth or through adoption. In oral evidence the protestor said that the deceased was his brother. The deceased was the registered owner of Parcel No. 725. This witness stated that he originally owned Parcel No. MAGUTU GATHEHU/446 which was registered in his name in 1959. Later he subdivided that land and gave his deceased brother one acre which is Parcel No. 725. He produced before court a green card to prove the subdivision. He said that the deceased lived alone on 725. He stated that he and other relatives had never been informed of the deceased marriage to the petitioner or that they had had children. He first got to hear of the petitioner when he came to bury his deceased brother. At that time he was summoned by the DO due to complains made by the petitioner. The petitioner was unable to produce a national identity card indicating that she was the wife of the deceased. The DO therefore concluded that she was friend of the deceased rather than a wife. The deceased only had the suit property which property he prayed would be given to him. He referred to a marriage certificate relied upon by the petitioner and stated that the same was not genuine. He said that the deceased never attended church and even at his burial they had a problem in getting a pastor to officiate the burial ceremony. He was cross examined and stated that he moved to Eldoret where he resides today. He said that no one was able to confirm that the petitioner was a wife of the deceased. But even the clan members could not confirm the same. After being informed about the death of the deceased he arrived at the deceased property but did not find the petitioner there. It was after he returned to Eldoret that the petitioner filed this succession in the lower court. PW2 was a marriage officer stationed at the Registrar General's office in Nairobi. His duties in that office entail celebrating marriages, registration of adoption orders and handling of certificate of impediment to marriage. He also does searches on marriages and issues marriage books to the church ministers and all district commissioners. He has in possession all the used and unused marriage certificates. On issuing marriage books to church ministers he always retains a record of those books. The ministers are required to file returns within 7 days of conducting a marriage. He referred to marriage certificate no. 841813 between Kevin Kinyua and Ann Gathoni. It was dated 10th March 1973. It showed that the marriage was officiated at independent church at Nanyuki, Laikipia District. This witness referred to the records he holds which he said indicated that certificate No. 841813 was not issued to the independent church Nanyuki but rather was issued to the PCEA Church. PCEA church was issued with the book containing marriage certificates between no. 8410 and 846400. This he said were issued to that church but collected by Revered Timothy Kiongo Githinji. According to his records there had not been a return made in respect of the certificate No. 841813 which the petitioner was relying on. He drew the courts attention to that certificate and stated that the number shown on top that is GPK 1075-5MBES 6/84 indicated that this marriage certificate was printed by the government printers in 1984. The marriage shown in that certificate however was celebrated on 10th March 1973. The witness said that in his opinion that marriage certificate was not genuine. He again reiterated that the marriage book where that certificate came from was issued to PCEA Church. He was cross examined and said that when that marriage book containing that marriage certificate was issued he was not working in the Registrar General's office marriage section. He also confirmed that he had not at one time worked for the government printers. He did not know how they operate. He said that he had not checked with the PCEA Church whether they had returned the marriage book containing that certificate. He also did not know whether churches exchange marriage certificates. He however said that they were not supposed to do such exchange. He also confirmed that an individual can not be issued with a marriage certificate. That it was only his office that could issue a marriage certificate. The petitioner in her evidence said that the deceased was her husband. They got married in 1966 traditionally in Nanyuki. Later they underwent a Christian marriage. During the traditional marriage Warutere took a goat as dowry. He did so in the company of Magondu. She was blessed with eight children with the deceased. One of those children Gabriel Mwangi had died. She produced baptismal card and identity card for her children. This indicated the children had the surname of Kinyua. She also produced her own baptismal card which showed that she was married. In respect of the suit property she said that after moving from Nanyuki they resided on that land. That land originally was owned by the deceased father but later was subdivided amongst his sons and the deceased was given his portion. Before being subdivided amongst the sons it was registered in the name of Ngunyi. Ngunyi on getting his portion on subdivision and sold it to a third party. After the death of her deceased husband Ngunyi chased her away from her husbands land. He demolished her house and sold her crops. She said that the DO who received her complaint advised her to first bury her husband then later to file a case in court. She had received a letter from the chief giving her authority to petition in this cause. On the issue of the marriage certificate she said that it was the certificate issued to her after marriage. She presently does not occupy her husband's land. DW 2 was Warutere. He was related to the deceased in that the deceased's mother and his mother were sisters. He confirmed that the deceased asked him to pay dowry to the father of the petitioner. They gave a sheep, a goat, kshs. 5,000 and kshs.8,000. He was in the company of Gichohi and Kinyua. Others he could not remember their names. The money given in dowry represented cooking pots, rope, sword, blanket and clothing. On cross-examination he said that on their first visit he was in the company of Kinyua and Magondu. Kinyua the deceased he confirmed had brothers and sisters. They however were not present when the dowry was given. This is because they were resident at Kipkelion. DW 2 was an assistant chief for 15 years at Magutu location. He came into contact with the petitioner who complained of being harassed by the brother of the deceased. This witness called the clan and relatives to an open baraza. He came to know that the petitioner was wife of the deceased. The witness confirmed that he retired in 1996. The time when he used to resolve the petitioner's complaints the deceased was alive. He could not remember the names of those clan members that were present at the baraza. He confirmed that he was not an assistant chief in Gathehu but he would go there when the other assistant chief was on leave.

PW 2 evidence cast doubt on the validity of the marriage of the deceased and the petitioner under the African Christian and divorce act cap 151. The certificate of marriage which the petitioner relied upon was issued to PCEA church. The petitioner's marriage allegedly was at

independent church. Looking that certificate the groom is described as Kevin Kinyua. The deceased as can be seen from the petition and other documents in support of the petition he is called Kinyua Githaiga. The question therefore that arises is whether the groom and the deceased are one and the same person. The marriage was supposedly celebrated in 1973. PW 2 stated that that certificate was printed in 1984. PW 2 has wide knowledge relating to marriage certificate which this court will take consideration of. His evidence in relation to marriage certificate cannot be ignored. It is not enough for the petitioner to say that her certificate was issued to her by the pastor. She needed to do more to prove the validity of her marriage. The petitioner stated that she was married to the deceased in 1966 traditionally. Warutere was supposed to have taken a goat as dowry amongst other things. To prove that they had eight children with the deceased she produced the baptism card. She however accepted that the details in those card were provided to the church by the holder of the card. In view of that those cards cannot assist this court. All the ID cards of the children produced before court show the surname of Kinyua. It should however be noted that they were issued after the death of the deceased. It is not clear what documentation was issued by the registrar of person to issue those identity cards. They were two birth certificates that were produced by the petitioner of her two children. Both were dated 5th December 2007. In that certificate the one who gave the information is stated to be the parent. That being so those certificates also do not assist the court. On the issue of traditional marriage it would seem if one accepts the evidence of the petitioner that the petitioner lived with the deceased for 18 years that is, from 1966. The book of **Eugene Cotran** RESTATEMENT OF AFRICAN LAW provides the essential ingredients of a valid Kikuyu traditional marriage. Those ingredients are as follows:-

“ The essentials of a valid marriage under Kikuyu law are:

- (a) CAPACITY: The parties must have the capacity to marry and also the capacity to marry each other.*
- (b) CONSENT: The parties to the marriage and their respective families must consent to the union.*
- (c) NGURARIO: No marriage is valid under Kikuyu law unless the Ngurario ram is slaughtered*
- (d) RURACIO: There can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid.*
- (e) COMMENCEMENT OF COHABITATION: The moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation, i.e, under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bridegroom's home.”*

As can be discerned the marriage described by the petitioner did not meet those standards. The court therefore cannot find that the petitioner was married traditionally to the deceased. Having considered the evidence in this case the submissions by counsel, I find that the petitioner has failed to prove that she was the wife of the deceased. She was even unable to call one witness who might have attended her church wedding if there was such a marriage. The judgment of this court is that the protestor succeeds in his claim and the grant shall be confirmed in that MAGUTU/GATHEHU/725 shall be registered in the name of NGUNYI GITHAIGA absolutely.

Dated and delivered this 15th day of December 2008

MARY KASANGO

JUDGE