



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Civil Case No. 99 of 2000**

**TERESIA WAMBUI KIIRU.....PETITIONER**

**VERSUS**

**JOHN GITAHU KIIRU.....1<sup>ST</sup> RESPONDENT**

**PUBLIC TRUSTEE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The petitioner, Teresia Wambui Kiiru filed this originating summons under **Section 11 (1)** of the **Public Trustee Act** and **Order XXXVI rule 1(a) and (g)** of the **Civil Procedure Rules** seeking the orders of this court to declare her to be the sole heir and beneficiary of the estate of Raphael Kiiru Gitahi – deceased (*hereafter referred to as the deceased*). She further prayed for orders of this court to compel the 2<sup>nd</sup> respondent to transfer parcel number *Nakuru Municipality/Block 1/1654-453/3/111/23* to her, the said property being what was comprised of the estate of the deceased. She further prayed for orders that the monies held by the 2<sup>nd</sup> respondent on behalf of the deceased's estate be released to her as the sole heir and beneficiary of the deceased's estate. The originating summons is supported by the annexed affidavit of the petitioner. The 1<sup>st</sup> respondent, John Gitahi Kiiru filed a replying affidavit in opposition to the originating motion. In the said affidavit, he deponed that he was a son to the deceased and therefore was entitled to a share of the estate of the deceased. He urged this court to distribute the two properties equally between himself and the petitioner. Directions were issued by this court to the effect that the originating motion be heard by the parties adducing *viva voce* evidence to establish their claim.

During the hearing of the originating motion, the petitioner called four witnesses. As the first witness, the petitioner testified that she was married to the deceased on the 2<sup>nd</sup> of August 1958. She produced her marriage certificate as plaintiff's exhibit No. 1. She testified that their marriage was not blessed with any children. The deceased died on the 28<sup>th</sup> of September 1969 when he was involved in a fatal road accident. Prior to his death, the deceased had purchased a parcel of land at Lakeview Estate in Nakuru measuring half an acre. This parcel of land was registered in the name of the deceased. A civil suit was filed after the death of the deceased and the estate of the deceased was paid damages. The money was however deposited with the Public Trustee the 2<sup>nd</sup> respondent. To-date, the said amount was still held by the Public Trustee. The petitioner testified that she was the only wife of the deceased. She denied that the deceased had married Mary Gathoni, the mother of the 1<sup>st</sup> respondent John Gitahi Kiiru. It was her testimony that the deceased could not sire any children because he had a low sperm count. That is the reason why they were not blessed with any children with the deceased.

It was her further testimony that the deceased could not therefore impregnate any woman least of all the mother of the 1<sup>st</sup> respondent. She testified that after the death of the deceased she was able to conceive

and give birth to four children one of whom she named John Gitahi Kiiru after the father of the deceased. She testified that the said Mary Gathoni was married to one Daniel Mutungi Kuguru whom they had lived together as husband and wife. She testified that the 1<sup>st</sup> respondent lived with his said parents and had not made any claim on the deceased's estate until the year 2000 when he was incited by Mathew Gitahi the brother of the deceased to lay claim on the deceased's estate. It was her testimony that the said Mathew Gitahi had claimed the parcel of land of the deceased at Lakeview Estate and when he was frustrated by the petitioner, he went and encouraged the 1<sup>st</sup> respondent to lay claim on the deceased's estate. She testified that she was the sole heir of the deceased's estate. She did not recognize the claim by the 1<sup>st</sup> respondent. She urged this court to grant her the prayers sought. She denied the suggestion put to her that she had lived with the mother of the 1<sup>st</sup> respondent before and after the deceased's death. She testified that at the material time, she did not know the mother of the 1<sup>st</sup> respondent and had only heard rumours that she was a girlfriend to the deceased.

PW2 Jefferson Maina Gikonyo the Assistant Chief of Wiyumiririe Sub-location Nakuru District testified that he had known the 1<sup>st</sup> respondent as the son of Daniel Mutungi Kaguru. He testified that the said Daniel Mutungi Kaguru was a resident of his location and whose wife is called Mary Gathoni Mutungi. It was his testimony that the 1<sup>st</sup> respondent resides in the farm of the said Daniel Mutungi Kaguru with his wife and two children. He testified that, as the Assistant Chief of the sub-location, he kept a record of all the residents in the location. He produced a copy of the voter's roll of the year 1992 and the list of the residents in the sub location as plaintiff's exhibit No. 3 and 4. In the two exhibits, the names of the 1<sup>st</sup> respondent appear as John Gitahi Mutungi. The identity card of the 1<sup>st</sup> respondent is number 8642407/70. He denied that the 1<sup>st</sup> respondent was known by the name John Gitahi Kiiru. When he was shown the identity card of the 1<sup>st</sup> respondent during cross-examination which read John Gitahi Kiiru he admitted that the name of 1<sup>st</sup> respondent was similar to the one that appeared in the 1<sup>st</sup> respondent's birth certificate.

PW3 Peter Kariuki Gitahi testified that he was the elder brother of the deceased. He knew that the deceased was married to the petitioner. He was not aware that the deceased married any other woman during his lifetime. He testified that the petitioner had in the year 1970 agreed to have the Public Trustee manage the deceased's estate. He however denied that he was aware that the deceased had any other children or that he had married one Mary Gathoni. PW3 recognised the petitioner as the sole heir and beneficiary of the deceased estate. PW4 Mwangi Muhoro testified that he was a bossom friend of the deceased. He testified that he first met with the deceased in 1962 when they became friends and later business partners. He testified that he knew the petitioner to be the only wife of the deceased. He testified that the deceased had not told him that he has married to any other wife. He testified that the deceased and the petitioner were not blessed with any children. He however conceded that the deceased could have concealed the relationship he had with the mother of the 1<sup>st</sup> respondent.

The 1<sup>st</sup> respondent called three witnesses in support of his case. DW1 Mathew Kingori Gitahi testified that the 1<sup>st</sup> respondent was the son of the deceased. He testified that the 1<sup>st</sup> respondent was born on the day that the deceased was involved in the road accident and died. It was his testimony that the deceased had died when he had traveled to Kitale to pay his school fees at the then President Kennedy High School (*now Kitale High School*). He testified that when he learnt of the death of the deceased, he traveled from Kitale and participated in the funeral arrangements. He testified that he was the one who discharged the mother of the 1<sup>st</sup> respondent from the maternity hospital where she had been admitted to deliver the 1<sup>st</sup> respondent. He testified that the deceased had married the mother of the 1<sup>st</sup> respondent Mary Gathoni and had lived with her for a period of one year before his death. He testified that the deceased married Mary Gathoni because the petitioner could not have any children. He stated that it was untrue that the deceased could not sire any children. He gave an instance where the deceased impregnated a woman called Wambaire and the family was obligated to pay her parents pregnancy compensation. He denied that he had incited the 1<sup>st</sup> respondent to lay a claim on the deceased's estate. He testified that as a son of the deceased the 1<sup>st</sup> respondent was entitled to inherit part of the deceased's estate. He admitted that he had disagreed with the petitioner in the manner in which she was managing the rental premises at the Lake

view Estate. He reiterated that the deceased lived together with the petitioner and Mary Gathoni prior to his death. He produced photographs in evidence which showed Mary Gathoni with the deceased.

The 1<sup>st</sup> respondent testified as DW2. He stated that he was married with one child and was currently residing at Wiyumiririe at the farm of his maternal grandmother. He testified that he was born on 29<sup>th</sup> of September 1969 the day his father Raphael Kiiru Gitahi died. He produced his birth certificate and notification of birth in evidence as defence *exhibit No. 1 (a) and (b)*. He also produced photographs which allegedly showed him with the petitioner whom he referred to as his elder mother. He testified that he had not benefited at all from the estate of the deceased. He testified that when his mother was married by Mutungi he was left with his maternal grandmother who has taken care of him upto date. He testified that he had grown up as a destitute and dropped out of school due to lack of school fees. He testified that he learnt about his father's family and first visited them in 1996. He again visited them in the year 2000. He denied that he had been issued with identity card No. 8642407/70. He denied that he was ever referred to as John Gitahi Mutungi. He testified that he had always been referred to as John Gitahi Kiiru. He testified that his identity card with the names John Gitahi Kiiru was issued to him in 1997. He told this court that his father was Raphael Kiiru Gitahi and not Mutungi who married his mother. He testified that he was currently residing on two acres of land which is owned by his maternal grandmother. He urged this court to find that he is entitled to inherit and to be a beneficiary of the deceased estate.

DW3 Mary Gathoni Mutungi the mother of the 1<sup>st</sup> respondent testified that she was married to the deceased in 1968 and were blessed with one child the 1<sup>st</sup> respondent who was born on the day the deceased was involved in an accident and died. She testified that she lived together with the petitioner for three years until when they disagreed and she was forced to return to her parents home. She testified that she was a co-wife to the petitioner and was not a girlfriend. She later got married to Mutungi when the 1<sup>st</sup> respondent was ten years old but was forced to leave him with his mother where the 1<sup>st</sup> respondent was taken care of and grew up to adulthood. She testified that she was married to the deceased under the Kikuyu Customary Law. She testified that all the customary rites were fulfilled signifying that she was the wife of the deceased. She testified that when the respondent was eight years old, she introduced him to his paternal grandparents. She testified that the 1<sup>st</sup> respondent was now residing with his maternal grandmother and was married with two children called Gathoni and Njeri. She denied that the 1<sup>st</sup> respondent was referred to as John Gitahi Mutungi. The 2<sup>nd</sup> respondent was neutral. It did not support either the petitioners nor the respondents' case.

I have considered the pleadings filed by the parties to this originating motion and also considered the evidence adduced thereof. I have read the written submissions filed by the parties to this originating motion. After carefully evaluating the facts of this case, the issues for determination are two fold; firstly, whether the deceased married the mother of the 1<sup>st</sup> respondent and further whether the deceased had capacity to celebrate the said customary marriage with the mother of the 1<sup>st</sup> respondent. The second issue for determination is who are the beneficiaries and heirs of the deceased and therefore are entitled to inherit the properties that comprise the deceased estate. On the first issue, the petitioner has established that she was married to the deceased under the **African Christian Marriage and Divorce Act** on the 2<sup>nd</sup> of August 1958. She lived with the deceased as husband and wife until his death on the 28<sup>th</sup> of September 1969. They were not blessed with any children. From the evidence adduced by the petitioner's witnesses, it appears that the petitioner had a happy marriage with the deceased prior to his death. The petitioner testified that the marriage was not blessed with any children because the deceased was diagnosed to have a low sperm count. It was therefore her evidence that the deceased could not have impregnated any woman.

This evidence is however disputed by Mary Gathoni (DW3) who testified that she was married to the deceased under the Kikuyu Customary Law and she was able to conceive by the deceased and thereafter gave birth to the 1<sup>st</sup> respondent. DW3 denied that she was a girlfriend to the deceased. She was supported in her evidence by DW1 Mathew Kingori Gitahi, the younger brother of the deceased who testified that the deceased was married to DW3. Another brother of the deceased PW3 Peter Kariuki Gitahi denied any knowledge of the marriage of DW3 by the deceased. He denied that the deceased was

married to any other wife other than the petitioner. The petitioner called PW4 Mwangi Muhoro a friend and a business partner to the deceased who testified that he was not aware that the deceased had married DW3. He testified that he only knew the petitioner as the wife of the deceased. He further testified that the deceased prior to his death used to live with the petitioner alone. The evidence of PW4 contradicts the evidence of DW3 and DW1 who testified that DW3 lived with the deceased and the petitioner in one house.

Having carefully evaluated the evidence adduced by the witnesses, it is clear that the petitioner's and the 1<sup>st</sup> respondent's witnesses contradict each other. Having observed the demeanour of the witnesses as they testified in court, I was persuaded that the petitioner, PW3 and PW4 were telling the truth. I was not convinced that DW1 Mathew Kingori Gitahi was telling the truth. From his demeanour, I assessed that he was concealing the truth and was not at all candid. On evaluation of the said evidence I do hold that the deceased was married only to the petitioner. The allegation by DW3 that the deceased married her under the Kikuyu Customary Law was not proved. She did not relate the ceremonies that were performed to consummate the said marriage. It is highly unlikely that the deceased would have married DW3 under the Kikuyu Customary Law without involving his parents and particularly his brothers PW3 and DW1. I am not persuaded therefore by the evidence of DW3 of the existence of the marriage. There is anecdotal evidence that the deceased could have had an affair with DW3. This affair could not however result in the birth of a child because the deceased was incapable of impregnating any woman. I believed the petitioner when she testified that the deceased was incapable of siring any children. The incapacity of the deceased was established when the petitioner was able to conceive children with another man after the death of the deceased. The petitioner was unable to have any children during the lifetime of the deceased because she was faithful to him.

Even if I were to hold that DW3 was married to the deceased at the time, the operation of the law at the time was against such a marriage. The deceased was incapable of celebrating any marriage with any other woman having married the petitioner under Statutory Law. As was held in the case of **Irene Njeri Macharia –vs- Margaret Wairimu Njomo & Anor C.A. Civil Appeal No. 139 of 1994 (Nairobi)** (*unreported*) at page 3:

***“The decision of Re Ruenji’s Estate and Re Ogola’s Estate were, at the time when they were passed, namely 14<sup>th</sup> February 1977 and 6<sup>th</sup> February 1978, respectively, correctly reflected the position of the law as it then stood. The Law of Succession Act though enacted by parliament in 1972 did not become operational until the 1<sup>st</sup> of July 1981 vide legal notice No. 93 of 1981 so that in 1977 and 1978 the courts had to rely solely on Section 37 of the Marriage Act in order to determine whether the deceased persons (Ruenji in Re Ruenji’s Estate and Ogola in Re Ogola’s Estate) were capable of having other wives in addition to their statutory wives. The courts correctly held that Ruenji and Ogola were incapable of contracting other marriages during their existence of their statutory marriages and accordingly the two women who claimed to be entitled to a share in the men’s estate were not wives in law and could not inherit. We repeat that those decisions were correct at the time they were made.”***

In this case the deceased having contracted a statutory marriage in 1958 lacked capacity to contract any other marriage and could not therefore have contracted another marriage with DW3 under the Kikuyu Customary Law.

Another aspect of this case that is disturbing is the conduct of DW1. From the evidence adduced, it is clear that DW1 the younger brother of the deceased collected rent from the deceased property at Lake view Estate for a period of sixteen years without accounting the same to the beneficiaries of the deceased's estate. DW1 did not render accounts to the 2<sup>nd</sup> respondent, the Public Trustee of the monies that he received as rent. During this period DW1 conveniently “forgot” that the deceased had a son by DW3 called John Gitahi Kiiru (*the 1<sup>st</sup> respondent*). He did nothing to cater for his welfare. It is only when the petitioner disagreed with DW1 in the manner in which he was managing the said property, that DW1 suddenly “remembered” that the deceased had a child who ought to have benefited from the said estate of the deceased. It is then that DW1 informed the 1<sup>st</sup> respondent that he should claim part of the deceased's estate. On evaluating the evidence it is clear that DW1 was motivated in raising the issue of

the 1<sup>st</sup> respondent as “*a son*” of the deceased to frustrate the petitioner from inheriting the deceased’s estate. DW3 did not tell the 1<sup>st</sup> respondent that the deceased was his father. Infact during his childhood, the 1<sup>st</sup> respondent never bothered to have contacts with his alleged paternal grandparents and uncles.

From the evaluation of the evidence adduced, it is clear that the 1<sup>st</sup> respondent was not sired by the deceased neither was his mother married by the deceased. I detected the fact that the 1<sup>st</sup> respondent changed his name when he decided to collude with DW1 to lay a claim on the estate of the deceased. To this end, the 1<sup>st</sup> respondent first masqueraded as the son of the deceased by producing a photograph in evidence showing the petitioner with her son of a similar name John Gitahi Kiiru who was born in 1970. The 1<sup>st</sup> respondent shamelessly claimed that he was the one who was appearing in the picture with the petitioner. This was obviously with a view to misleading this court that there existed a connection between the petitioner and the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent further obtained a new generation identity card in 1997 when he was twenty eight years old and refered himself as John Gitahi Kiiru. He abandoned the names that appeared in his old identity card which were John Gitahi Mutungi. PW2, the Area Assistant Chief of the location where the 1<sup>st</sup> respondent reside, produced the electoral roll of the year 1992 which clearly shows that the 1<sup>st</sup> respondent was then referred as John Gitahi Mutungi and his identity card number was 8642407/70. I suggest that the 1<sup>st</sup> respondent be investigated to establish how he was able to obtain a new generation identity card in a different name without first swearing a deed poll.

In the circumstances of this case, it is evident that DW1 foisted the 1<sup>st</sup> respondent to lay the claim on the deceased’s estate so as to frustrate the petitioner from inheriting the said estate. DW1 was dishonest because for over twenty years he never bothered about the welfare of a person he considered to be the son of his deceased brother. Furthermore, DW3 only came to court when she realized that the deceased had left a substantial estate which could benefit his son. For a period of thirty years, DW3 laid no claim on the estate of the deceased. She suddenly woke up after thirty one years when she realized that the deceased estate could be up for grabs. I will disabuse her intention to get a wind fall on behalf of her son, the 1<sup>st</sup> respondent.

The sum total of the evidence adduced is that I find the petitioner has established her case on a balance of probabilities. I hereby declare the petitioner, Teresia Wambui Kiiru to be the sole heir and beneficiary of the estate of the late Raphael Kiiru Gitahi. The 2<sup>nd</sup> respondent is hereby ordered to transfer the property that comprised the estate of the deceased to the petitioner forthwith. The 2<sup>nd</sup> respondent is further ordered to release all the monies that are held on account of the deceased together with the accrued interest to the petitioner. The petitioner shall have the costs of this suit which costs shall be paid by the 1<sup>st</sup> petitioner. It is so ordered.

**DATED at NAKURU this 17<sup>th</sup> day of March 2006.**

L. KIMARU

**JUDGE**