

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Succession Case 476 of 2003

EUNICE WAIRIMU GIKONYO.....PETITIONER

VERSUS

EZEKIEL MWENJA NGURE.....OBJECTOR

JUDGMENT

Richard Ichoya Mwenja (*hereinafter referred to as the deceased*) died on the 24th of July 2003 at the Nakuru Provincial General Hospital. On the 23rd of October 2003 Eunice Wairimu Gikonyo, (*hereinafter referred to as the petitioner*) claiming to be his widow applied to be issued with letters of administration in respect of the deceased's estate. The petitioner applied for the said letters of administration on behalf of the estate of the deceased whose beneficiaries she listed as herself, Patrick Gikonyo Ichoya (13 years), Teresia Wanjeri Ichoya (10 years) and Naomi Njoki Ichoya (3 years). She listed the properties of the deceased as motor tractor registration number KKF 911 Ford, motor vehicle registration number KPV 549 Volvo and motor tractor registration number KPY 847 Ford. The petitioner was issued with a grant of letters intestate on the 15th of January 2004. However before she could collect the said grant of letters of administration, Ezekiel Mwenja Ngure (*hereinafter referred to as the objector*) applied to have the said letters of administration revoked or annulled on the grounds that the said letters of administration had been fraudulently obtained. The objector claimed that he was the father of the deceased and was therefore entitled to administer the estate of the deceased and settle the outstanding debts that the deceased had left behind. Directions were taken after which this case was listed for hearing.

At the hearing of the case the objector testified that although the petitioner had lived with the deceased, the two of them had not been formally married. He took issue with the manner in which the petitioner obtained the burial permit and the death certificate of the deceased. He testified that when the deceased started living with the petitioner, the petitioner already had a son who was named after the father of the petitioner. He testified that he only recognized the two daughters of the petitioner, who were fathered by the deceased. He testified that one of the girls was named Teresia Wanjeri after his wife. He testified that ten years prior to his death, the deceased had resided at his farm at Lanet but later moved to Nyahururu where he operated a sawmill that was owned by the objector. He testified that the deceased operated the said sawmill until he became too sick and was brought to Nakuru where he lived with his parents until his death.

He further testified that during the funeral arrangements the petitioner and her family refused to provide material support for the burial. He testified that he had single handedly shouldered the costs of burying the deceased at his farm in Nakuru. He further testified that the machinery which the petitioner was claiming belonged to him. He testified that he had given the sum of Kshs 100,000/= to the deceased to operate the sawmill. He further testified that he had contributed the sum of Kshs 25,000/= for the purchase of motor tractor registration number KPY 847. He also contributed the sum of Kshs 20,000/= for the purchase of the Volvo motor vehicle. He however conceded that he did not contribute any sum towards the purchase of motor tractor registration number KKF 911. He testified that the saw bench which the deceased used in the sawmill was his (*the objector's*). He testified that he had given the deceased the sum of Kshs 60,000/= to operate the said sawmill. It was his testimony that he had given the

said assistance to the deceased to help him as his son. The objector therefore testified that he was entitled to inherit the said properties or to have them returned to him because he was a substantial owner of the same. He conceded that the deceased had used the machinery to earn a living and take care of his family.

The petitioner and her witness Naomi Njoki (*her mother*) testified that she had been legally married by the deceased. They were blessed with three children one of whom died at infancy and was buried in the farm of the objector. The petitioner testified that she had no problem with the objector save for the fact that the objector did not want her to remain at Nyahururu and operate the saw-milling business. Instead the objector wanted her to live at his farm at Lanet in Nakuru. She testified that since the death of the deceased, she has been able to take care of the children of the deceased by using the said machinery to earn a living. She was not willing therefore to go and live on the farm of the objector because she was certain that the objector would not provide for her. She testified that the machineries which the objector was claiming belonged to the deceased and not the objector. In her view, the objector wanted her to go and reside on the farm at Nakuru so that he could take possession of the machines and the sawmill. She testified that she was entitled to administer the estate of the deceased as his widow.

I have considered the evidence adduced in this case. The issue for determination is really who is entitled to administer the deceased's estate. The other issue for determination is on the mode to be adopted by this court to distribute the deceased's estate. It is not disputed that the deceased lived with the petitioner for more than ten years before his demise. Although evidence was led to the effect that no marriage ceremony was celebrated to formalise the said marriage, there is no doubt in my mind that the deceased and the petitioner considered themselves as husband and wife. They were recognized as such by their parents. The deceased and the petitioner were blessed with three children. Two daughters and a son. The son however died at his infancy. The petitioner had a son by another relationship prior to being married by the deceased. The deceased accepted the said son of the petitioner as his own. According to the evidence which was adduced in this case, the deceased ran a saw milling business at Nyahururu. He also used to travel from one place to another splitting timber for clients. At one instance before his death, he had traveled to Bureti to split timber. Evidence was adduced how the deceased purchased one of the tractors and the motor vehicle after the objector, his father, had financially assisted him. The objector testified that he had given the money to enable the petitioner purchase the said machinery to enable him run a successful business.

Having established that the petitioner was the lawful wife of the deceased, the issue for determination by this court is who between herself and the objector should be issued with the letters of administration in this case. **Sections 29, 35, 39 and 40** of the **Law of Succession Act** are clear as to who is to apply for letters of administration for an estate of a deceased person. Where the deceased was married, then his wife would have a first priority to administer the deceased's estate. The father of the deceased can only apply for letters of administration if the deceased was unmarried and had no children. In the circumstances of this case, it is clear that the petitioner was the rightful person to apply for the letters of administration on behalf of the estate of the deceased. However since the children of the deceased are minors, she was not entitled to apply for the said letters of administration alone. She was required in law to apply for the said letters of administration with another person. This she did not do. However that is an issue which can be rectified before she is issued with the grant of letters of administration intestate. In this case, the objector had no business challenging the issuance of the grant of letters of administration to the petitioner. The objector acknowledges that the petitioner was a common law wife of the deceased and therefore he cannot deny that the two lived together as husband and wife during the lifetime of the deceased.

On the issue of whether or not the objector was entitled to inherit some of the properties which were listed by the petitioner in the application for grant of letters of administration, the petitioner has established that the said properties were owned by the deceased prior to his death. Although there is evidence that the objector contributed to the purchase of some of the machinery in question, in his own testimony, the objector confirmed that he had given the money to the deceased to assist him as his son. The objector did not expect the deceased to repay him back neither did he expect the deceased to make him a partner in the said saw milling business.

In my considered opinion, the objector brought these objection proceedings because the petitioner had refused to relocate from Nyahururu to the objector's farm at Lanet. When the objector testified during the hearing of this case, this court formed the opinion that he was a man of forceful character and who could not vouch any dissent from anyone who he considered to be under his authority. In his view, the petitioner's refusal to follow his instructions amounted to insubordination which should attract sanction from him. Unfortunately for the objector, in doing so he revived issues which were irrelevant to the matters at hand. He revived the issue of how he assisted the deceased acquire some of the machinery. He however confirmed to this court that he had assisted the deceased with no intention of ever claiming back the money. He only changed his mind when the petitioner refused to relocate to his Lanet farm according to his wishes.

In the circumstances of this case therefore, I find no merit whatsoever with the objection proceedings brought by the objector. I proceed to dismiss it. I will however make no orders as to costs as the matter in dispute involve family members. The grant of letters of administration shall be issued to the petitioner and another person whom she shall avail to the court within fourteen days of the delivery of this judgment. It is so ordered.

DATED at NAKURU this 16th day of March 2006.

L. KIMARU

JUDGE