



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE 330 OF 2002

IN THE MATTER OF THE ESTATE OF JOSEPH NJUGUNA MWANIKI – DECEASED

ELIZABETH NDATHURU KAMAU.....1ST PETITIONER

FELIX KINYANJUI KAMAU.....2ND PETITIONER

VERSUS

DAVID GICHUHI MWANIKI.....1ST OBJECTOR

JOHN NJOROGE MWANIKI.....2ND OBJECTOR

JUDGMENT

The deceased, Joseph Njuguna Mwaniki (*hereinafter referred to as the deceased*) died on the 11th of May 2001. The cause of his death as evidenced by the certificate of death issued by the Registrar of Births and Deaths was cardiopulmonary arrest due to severe pneumonitic due to immunosuppression due to anaemia. David Gichuki Mwaniki applied to administer the estate of the deceased in **Kiambu SPM Succession Cause No. 130 of 2001**. He was issued with grant of letters of administration on the 24th of July 2001. When Elizabeth Ndathuru Kamau (*hereinafter referred to as the petitioner*) learnt that the said David Gichuki had applied for letters of administration for the deceased's estate, she made an application to this court vide **Nakuru HC Misc. Civil Application No. 82 of 2002** to have the said letters of administration issued revoked or annulled. By the consent of the parties, the said letters of administration issued to David Gichuki Mwaniki were revoked on the 11th of June 2002. The court restrained the said David Gichuki Mwaniki from interfering with the deceased's estate pending the hearing and determination by the court of who was to be entitled to be granted letters of administration to administer the deceased's estate.

Before the court could determine who was to administer the estate of the deceased, the petitioner herein applied to be granted letters of administration to the deceased's estate. She applied for the said letters of administration with her brother, Felix Kinyanjui Kamau. She was issued with letters of administration to administer the deceased's estate on the 4th of October 2002. When David Gichuki Mwaniki and John Njoroqe Mwaniki (*hereinafter referred to as the objectors*) learnt of the development, they made an application to this court to have the said letters of administration issued to the petitioner revoked. By the consent of the parties, the said letters of administration issued to the petitioner were

revoked on the 5th of March 2003. The parties agreed to have the issues in dispute, and particularly the determination of who was to administer the deceased's estate, to be heard by way of the parties adducing *viva voce* evidence.

During the hearing of the case, the objectors called five witnesses. PW1 Natharina Wangui, an Assistant Registrar of Births and Deaths produced a birth certificate of Ben Mwaniki which was issued on the 19th of December 1991. The said birth certificate indicated that Ben Mwaniki was born on the 23rd of October 1991 and his parents were Joseph Njuguna Mwaniki and Elizabeth Ndathuru Kamau. PW2 David Gichuki Mwaniki (*one of the objectors*) testified that he was the elder brother of the deceased and at the time he testified in court, he was a resident of Kiambu District. He recalled that prior to his death, the deceased used to live with his younger brother called John Njoroge Mwaniki (*the other objector*). He denied that the petitioner was married to the deceased under the Kikuyu Customary Law because no ceremony was performed to celebrate the same marriage. He testified that after the death of the deceased, the family of the deceased buried him and authorised PW2 to apply for letters of administration to the deceased's estate. He did so and was issued with the letters of administration by the Kiambu Senior Principal Magistrate's Court.

He testified that according to the records kept by Barclays Bank and the Kenya Banker's SACCO the deceased had indicated his next of kin to be himself (*i.e.* PW2). He reiterated that although the petitioner had produced an affidavit allegedly signed by the deceased, in his view the said affidavit was not genuine because no marriage took place under the Kikuyu Customary Law between the deceased and the petitioner. He conceded that the petitioner could at one time could have been the girlfriend of the deceased but he denied that they were formally married or that they had lived together prior to the death of the deceased. He recalled that prior to his death, the deceased had lived with his younger brother and a girlfriend called Caroline. He testified that during his last years, the deceased was sick and used to be taken care of by his younger brother and his girlfriend Caroline. He conceded that he had withdrawn the sum of Kshs 119,000/= from the account of the deceased. He urged this court to find that the deceased had not married the petitioner and therefore the persons who would rightfully administer the deceased's estate were the objectors.

PW3 Peter Gichuhi Mwaniki, a step brother to the deceased testified that he knew the petitioner as a person who was resident of a village near their rural home at Kiambu. He testified that he did not at any time attend a Kikuyu Customary marriage ceremony between the deceased and the petitioner. He did not recall having seen the petitioner at their rural home at Kiambu. It was his testimony that although he had a good relationship with the brother of the petitioner, to his knowledge the deceased had not married the petitioner, neither was he aware that the deceased and the petitioner were blessed with a child. He however conceded that he could not have known if the deceased and the petitioner had lived together as husband and wife or if the deceased swore an affidavit indicating that the petitioner was his wife. It was his further testimony that if the petitioner established that she was married to the deceased, he would not object to the petitioner being considered as a beneficiary to the deceased's estate. He testified that he was not aware that the deceased had a son by the name Ben Mwaniki.

PW4 Isaac Watoro Njoroge, the operation manager at the Barclays Bank Nakuru Branch, testified that according to the records kept by the bank, the deceased was married to one Elizabeth N. Kamau. They had a son called Ben Mwaniki Njuguna. He produced a document which was signed by the deceased and which indicated his dependants to be Ben K. Mwaniki and David Gichuhi Mwaniki. He testified that the said document was prepared and signed by the deceased as the bank required the said information in the event that an employee died so that the bank would have no difficulty in identifying his dependants. He testified that the loans which were owed by the deceased to the bank were paid off and further that the balance which was reflected in the account maintained by the deceased as the 8th of July 2004 was Kshs 1,781,959/90.

PW5 John Njoroge Mwaniki, a brother of the deceased, testified that the deceased was his guardian. He had lived with him from the time he was in primary school. He testified that the deceased had educated him until he completed his university education at Egerton University. He recalled that the deceased used to have many girlfriends who included the petitioner. He denied that the deceased had

married the petitioner or that they had lived together. He further denied that the deceased had sired a child with the petitioner. He recalled that when the deceased used to live at Free Area Nakuru, the petitioner used to live within the same estate but in a different plot. He testified that, two months prior to his death, the deceased relocated to his house at Kiamunyi estate where he lived his girlfriend called Caroline until his death.

It was his further testimony that the documents which the petitioner had produced indicating that she was married to the deceased and that the deceased had fathered a child of the petitioner to be forgeries. He testified that he knew the petitioner to be a person of loose morals who at one time had many boyfriends who included an Indian and a man known as Mwaniki of Kenya Photographers. He testified that for the doubts to be removed as to the parentage of Ben Mwaniki, a DNA test should be undertaken to establish if indeed the deceased was the father of the said Ben Mwaniki. He conceded that the deceased could have been a boyfriend to the petitioner when she was pregnant but he denied that the petitioner was impregnated by the deceased. He denied that he had threatened the petitioner to the extent that she had to seek police protection when she attended the funeral of the deceased. He testified that the court should find that the petitioner was never married to the deceased and therefore should not be considered as a beneficiary of the deceased's estate. It was his testimony that the only beneficiaries of the deceased's estate were his brothers.

The petitioner called three witnesses to support her case. She testified that she met the deceased in 1989 at Kimende Trading Centre after she had completed her form four education. They became friends and thereafter became lovers. She conceived and gave birth to a child Ben Mwaniki on the 23rd of October 1991. It was her testimony that she got married to the deceased in July 1991 under the Kikuyu Customary Law. When she was due to deliver, she relocated to Nakuru where she resided with the deceased until the birth of their son. She produced an affidavit which she alleges was sworn by the deceased on the 31st of October 1991 confirming that he had married her under the Kikuyu Customary Law. She testified that she transferred from Nairobi where she used to work to Nakuru because they had decided to live together as his wife. She produced several photographs to establish her evidence that she had lived with the deceased as husband and wife.

She testified that she lived together with the deceased at Free Area estate, Nakuru from 1992. She recalled that she lived with the deceased together with his two brothers namely John Njoroge Mwaniki who was then a student and Peter Gichuhi who was then supervising the construction of their house at Kiamunyi. It was her testimony that her relationship with the deceased took a turn for the worse when the deceased was diagnosed to be HIV positive in 1999. She recalled that the deceased refused to accept his HIV status and insisted on having sex with her irrespective of the fact that she was HIV negative and could therefore be infected. Because of this misunderstanding, and the fact that the petitioner alleges that the deceased became violent and even at one time raped their maid, the petitioner made a decision to relocate to another house within the same estate. It was her testimony that the decision for her to relocate to another house was made jointly between herself and the deceased.

She testified that although they were living apart, the deceased used to pay their rent and also provide for her needs and that of their child. She testified that she used to visit the deceased when they were separated. She testified that she contributed part of the purchase consideration of the properties which were registered in the name of the deceased. She further conceded that she had withdrawn the sum of Kshs 100,000/= from the account of the deceased so that she could pay for the education of their son. She testified that the deceased recognised her as his wife and further recognised Ben Mwaniki as his son. She recalled that when the deceased died, his brothers made an effort to exclude her from the funeral arrangements until she was forced to seek police escort so that she could attend the said funeral.

It was her view that the reason why the brothers of the deceased were disowning her, is because they wanted to inherit the property of the deceased. She testified that the documents which she had produced in evidence including the affidavit of marriage sworn by the deceased were genuine. It was her testimony that their decision to separate was made in good faith because if she had not done so, she would have been infected with the HIV virus by the deceased. She recalled that in spite of being counselled, the deceased never accepted his status until only a few months before his death. She urged this court to find

that she was a beneficiary to the deceased's estate.

DW2 Francis Mogira Rorua recalled that he used to work with the deceased at Barclays Bank Nakuru Branch. He recalled that the deceased had introduced the petitioner as his wife. He testified that the deceased was his friend. He used to visit him at his residence where he found the petitioner living with him. He testified that the petitioner had lived with the deceased from 1991 when they got married. He however did not visit the deceased when he relocated to Kiamunyi estate a few months before his death. He conceded that he did not know under what system of marriage the deceased got married to the petitioner. DW3 Annah Gachambi Mangat, a sister to the petitioner testified that the deceased married the petitioner under the Kikuyu Customary Law. She recalled that the deceased had visited her home in the company of the petitioner and indicated that he had married the petitioner. This was in 1991. Since then and until the death of the deceased, DW3 knew the petitioner as the wife of the deceased. She also knew that the deceased and the petitioner had been blessed with one child, namely Ben Mwaniki.

The issue for determination by this court is who the beneficiaries of the deceased's estate are. According to the objectors, the deceased was unmarried and therefore, as the brothers of the deceased, they are his sole dependants. On the other hand, it is the petitioner's contention that she was married to the deceased. I have considered the pleadings filed by the parties in this succession cause. I have also considered the evidence that was adduced by the objectors and the petitioner. The objectors concede that the deceased could have been the boyfriend of the petitioner in 1990. They however are vehement in their denial that the petitioner was married by the deceased under the Kikuyu Customary Law. The objectors do not recall having attended any ceremony where the said Kikuyu Customary marriage took place.

On the other hand, the petitioner testified that the deceased married her under the Kikuyu Customary Law in July 1991. Having evaluated the evidence, it is clear that the deceased visited the parents of the petitioner when the petitioner became pregnant. However the deceased did not celebrate any marriage under the Kikuyu Customary Law during this time. This is because no ceremony was performed which is recognised under the Kikuyu Customary Law and which could have been considered to be a customary marriage under the said Kikuyu Customary Law. However, it is evident that when the petitioner gave birth to Ben Mwaniki, on the 23rd of October 1991, she was living with the deceased as his wife. The deceased and the petitioner lived together as husband and wife at Free Area in Nakuru from that time to about 1999 when the two separated.

Now, if the petitioner and the deceased were not married under the Kikuyu Customary Law, then under what system of marriage were they living together as husband and wife? It is clear that the deceased and the petitioner made tentative steps to be married under the Kikuyu Customary Law, but they did not complete the ceremonies required under the said custom. However in spite of this, they went ahead and lived together as husband and wife. Their marriage was therefore what is referred as common law marriage. As was held by Mustafa J.A. in **Hortensiah Wanjiku Yawe –vs- Public Trustee CA Civil Appeal No. 13 of 1976 (unreported):**

“I can find nothing in the Restatement of African Law to suggest that Kikuyu Customary Law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu Customary Law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages howsoever celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage ...”.

In the instant case, the long cohabitation between the petitioner and the deceased raises a presumption that they were married. I therefore hold that the petitioner and the deceased were common law man and wife. The fact that the deceased and the petitioner were so married was recognised by the deceased himself who swore an affidavit on the 31st of October 1991 confirming that he was married to the

petitioner. The said affidavit was produced as *objectors' exhibit No. 8*. Further, the deceased informed his employers, Msrs Barclays Bank of Kenya Ltd in a form signed on the 28th of March 2001, two months before his death, that his wife was the petitioner (*objectors exhibit No. 6*). He further listed his dependants to be Ben Mwaniki and David Gichuhi Mwaniki. I therefore hold that the effort that the parties to this case put in trying to prove that no customary marriage had been celebrated between the deceased and the petitioner to be misplaced.

The acrimony between the petitioner and the objectors begun when the petitioner '*abandoned*' the deceased when the deceased was very sick. The testimony of the petitioner to the effect that the said separation was by mutual consent is not supported by evidence on record. It is clear that the petitioner left the deceased when she realised that the deceased was too sick and she could not take care of him. Her testimony that she had separated from the deceased because she feared to be infected with the HIV virus is self serving. What is clear from my evaluation of the evidence is that the petitioner, once she became aware that the deceased was HIV positive, made a decision to leave him because she did not want to be associated with him. Her evidence that the deceased had refused to accept his HIV status cannot therefore be true because the petitioner abandoned the deceased at his hour of greatest need. The petitioner's action proved the marital vow that the couple made that they could stay together in sickness and in health to be just but a hollow promise. Once the deceased became terminally ill, the petitioner abandoned him to the care of his siblings. The evidence adduced before me clearly establishes that the petitioner, being selfish, put her interest above the interest of a person whom she then considered as her husband. In the last two years of his life, the deceased was taken care of by his brothers, particularly the objectors in this case. It is no wonder that the objectors were bitter when the petitioner resurfaced after the death of the deceased and started laying claim on the deceased's estate. In their bitterness, the objectors went overboard and even denied the existence of the marital relationship between the petitioner and the deceased. They further denied Ben Mwaniki, whom the deceased considered as his son.

According to **Section 29 of the Law of Succession Act**, a wife is considered as a dependant of a deceased person. Similarly a brother of a deceased person shall be considered to be his dependant if the deceased maintained him prior to his death. In this case therefore, it is my holding that the petitioner in this case, Elizabeth Ndathuru Kamau and her son Ben K. Mwaniki are the beneficiaries of the deceased's estate. Similarly, I hold that John Njoroge Mwaniki, the younger brother of the deceased, is a dependant of the deceased's estate by virtue of the fact that the deceased maintained him for more than ten years prior to his death. Evidence was adduced by the objectors, and which was confirmed by the petitioner herself, that the deceased paid the school and college fees of the said John Njoroge Mwaniki until the time of his death. He also provided for the daily needs of the said John Njoroge Mwaniki. Therefore according to **Section 29 of the Law of Succession Act**, he is a dependant of the deceased.

I will therefore issue the letters of administration intestate for the administration of the estate of the deceased jointly to Elizabeth Ndathuru Kamau and John Njoroge Mwaniki. However, in view of the bad blood that exists between the brothers of the deceased and the petitioner, I am of the opinion that the best way to resolve the outstanding issue in respect of the administration of the deceased's estate, is to distribute the deceased's estate so that the sole function of the said administrators of the deceased's estate would be to give effect to the distribution of the deceased's estate as ordered by this court.

The deceased's estate is comprised of the following properties:

- (i) Njoro/Ngata/Block 1/1387 measuring 0.1 ha (*there is a partially built house on the land*).
- (ii) Njoro/Ngata/Block 2/529 measuring 0.815 ha.
- (iii) Kiambogo/Kiambogo/Block 1/777 measuring 0.045 ha.
- (iv) KCB shares.
- (v) Firestone shares.

- (vi) NIC bank shares.
- (vii) Uchumi supermarket shares.
- (viii) TPS Serena shares.
- (ix) Kenya Airways shares.
- (x) HFCK shares.
- (xi) Savings with the Banker's SACCO (Kshs 407,318/60 which was withdrawn by David Gichuki Mwaniki, one of the objectors herein on the 21st of September 2001-see petitioner's exhibit No. 7).
- (xii) An account at Barclays Bank with Kshs 1,781,959/90 as at 8th of July 2004 (there was evidence that the petitioner had withdrawn the sum of Kshs 100,000/= from the said account. The objector David Gichuki Mwaniki withdrew the sum of Kshs 119,000/= from the said account).

I will distribute the deceased's estate taking into consideration the age of his son and the fact that his brother John Njoroge Mwaniki has now completed his schooling and is in a position to fend for himself. I have also taken into account the provisions of **Section 28 of the Law of Succession Act**. The deceased's estate is therefore distributed as follows:

- (i) Njoro/Ngata/Block 1/1387 together with the incomplete house erected thereon shall be inherited by John Njoroge Mwaniki.
- (ii) Njoro/Ngata/Block 2/529, where the deceased was buried shall be inherited by Elizabeth Ndathuru Kamau in trust for the son of the deceased, Ben K. Mwaniki.
- (iii) Kiambogo/Kiambogo/Block 1/777 shall be inherited by Elizabeth Ndathuru Kamau in trust for the son of the deceased, Ben K. Mwaniki.
- (iv) All the shares listed in paragraph (iv, v, vi, vii, viii, ix & x) shall be inherited by Elizabeth Ndathuru Kamau in trust for the son of the deceased Ben K. Mwaniki.
- (v) Since one of the objectors David Gichuhi Mwaniki has benefited from the sum of Kshs 606,318/60 that comprised part of the deceased's estate, he shall inherit the said amount.
- (vi) The sum of Kshs 1,781,959/90 shall be distributed as hereunder:
 - (a) The sum of Kshs 1.25 million shall be deposited in a fixed deposit account in a reputable bank on account of Ben K. Mwaniki for his education until he reaches the age of majority upon which the remainder of the said sum shall be inherited by the said Ben K. Mwaniki. The said account shall be maintained by the petitioner and the deputy registrar of this court.
 - (b) The sum of Kshs 531,959/90 shall be inherited by John Njoroge Mwaniki.

Any other property of the deceased that has not been disclosed to the court shall be distributed upon application being made to this court. Since this matter involved family members there shall be no orders as to costs.

DATED at NAKURU this 13th day of June 2006.

L. KIMARU

JUDGE