



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Succession Cause 1871 of 1999**

**IN THE MATTER OF THE ESTATE OF JAMES MUIRURI WAWERU – DECEASED**

**JUDGMENT**

After the certificate of confirmation of grant in the present estate was issued on 21<sup>st</sup> January, 2003, the two Applicants filed the summons for revocation or Annulment of grant under provisions of Section 26, 27, 28, 38, 41, 47, 66, 76 and 84 of Law of Succession Act (Cap 160 Laws of Kenya) and Rules 26, 44 and 73 of the Probate and Administration Rules under the said Act.

The first substantive prayer of the said application is:

**“That the surviving minor children of the Deceased James Muiruri Waweru namely Wangechi Ng’arua and Jimmy Muiruri Ng’arua be catered for as Dependants of the Deceased from the estate and in particular the estate money payable under the d**

**eceased’s policy claim Nos.0789/0900/N10276 and 01900/0700/W2692 being the subject matter of a Decree dated 6<sup>th</sup> April, 2001 in H.C.C.S. No.56 of 2001 (Milimani Commercial Court, Nairobi).”**

Obviously the said prayer is sought under the provisions of Section 26 and 27 of the Law of Succession Act (hereinafter referred to as ‘*the Act*’). The prayer is to cater for the two minor children, alleged therein to be the children of the deceased, as dependants of the deceased. I have already given dates on which the grant of representation was confirmed and the present application was made.

Section 30 of the Act specifically provides (which falls under part III of the Act entitled “**Provision for Defendants**”) namely,

**“Section 30. No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71”.**

The said part III comprises of Sections 26 to 30 of the Act.

Thus the application to seek provisions for dependants filed after the confirmation of the grant of representation cannot be entertained as per the law.

I am aware that the Learned counsel for the Administration has failed to raise this issue but as it is a point of law, this court is within its power to observe and find so, which I hereby do.

However, as the said application also seeks for revocation of the grant on concealment of fact that the

deceased had two living minor children and a living father, I shall determine this issue on its merit.

The two Applicants are respectively, mother of the minor children and biological father of the deceased herein.

I must point at this juncture that the fact that the 2<sup>nd</sup> Applicant Peter Maina Waweru is a biological father of the deceased is not disputed. Similarly it is a common ground that after the birth of the deceased the father left to join Army and the deceased's mother and he never married. He married another lady and has a family with her. It is also not disputed that the deceased always stayed with the mother as well as with her maternal grandparents and has never lived with the father although he claimed and testified that he has maintained him in education and business.

The 1<sup>st</sup> Applicant similarly has conceded that she and the deceased did not marry and did not live together. It is however contended that both children were sired by the deceased. It is also evident that the Applicants filed the application to annul the grant after the death of the mother of the deceased, the original administratrix who also did not mention in the petition that the deceased had two children.

I also note that one of the Applicants Peter Maina Waweru filed an application dated 4<sup>th</sup> May, 2001 for revocation of the grant made to the earlier late Administratrix Rose Mungara Mwiwaki Kiarie the mother of the deceased. She had filed a replying affidavit sworn on 3<sup>rd</sup> October, 2001. I shall refer to the said affidavit in due course. The said application was withdrawn on 15.1.2003.

The application is also filed after the decree in the H.C.C.S. No.56 of 2001 was issued in favour of the deceased's mother who was the original administratrix of the estate of the deceased.

After various applications, appearances and hearings the application for revocation took off before Hon. Koome (Judge) on 5<sup>th</sup> August 2004. After her transfer outside Nairobi, both the counsel agreed that this court shall hear the matter from where it stood.

The objector's case produced following evidence:

Joyce Gakenia Ng'arua one of the Applicants deponed that her two children Wangechi Gakenia and Jimmy Muiruri were children and dependants of the deceased. The first child was born 2 and ½ years prior to the death of the deceased and she was three months pregnant with the second child at the time of his death. She deponed that the late administratrix the mother of the deceased was known to her and had come to visit her shortly after the first child was born in 1998 and continued till the death of the deceased. She relied on copies of photographs annexed to her affidavit in support. The first four pictures were taken in April, 1998 at UniAfric and in the car of the deceased. I note here that according to her the mother of the deceased visited her shortly after the birth of the first child in 1998 and the four photographs taken in April, 1998 on the same day by the deponent showed a grown up child.

Be that as it may, she also produced other photographs showing the mother of the deceased and her first child. Those pictures obviously were taken on 2<sup>nd</sup> birth day of the daughter. There are many people around. There is a photograph taken at the funeral of the deceased which showed the late Administratrix standing assisting the deponent and the daughter to lay wreath on the graveside. There is one photograph taken once again by the deponent showing the deceased's mother and one of the administrators herein holding, according to her, the second child. There is another photograph of the funeral showing Peter Kiarie holding the first child with the second objector.

She also deponed that the memorial announcement of 23<sup>rd</sup> July, 2000 mentioned her name. I however note that the announcements and funeral programme on record after the death of the deceased in July, 1999 do not mention her or her children at all, and in her affidavit she referred the date as 21<sup>st</sup> July, 2000.

She further relied on a letter admittedly typed by her and signed by the deceased's mother to claim the credit of Shs.120,883/57 from the Kenya Breweries. She deponed that in course of her duty as a debt

collector she found that the deceased had the said credit in the name of James Waweru. She informed and advised the deceased's mother to claim the same by attaching the death certificate and letters of administration granted to her in the estate of the deceased. According to the letter the deceased's mother reserved the said amount for the benefit of her children but later stated that she was given Shs.60,000/- by the deceased's mother in cash when she was in need. She agreed that the birth certificates of both her children were obtained in 2000 and did not bear the name of the deceased as the father. She reasoned that if the name of the father was not indicated at the hospital, one cannot include the name of the father. She further averred that the deceased's mother accepted her children as her grand children. She however stated that she would take DNA Test.

At the end of her evidence in chief, I only note that to prove that the letter to claim the deceased's credit with Kenya Breweries was signed by the deceased's mother, she has produced a replying affidavit sworn by the deceased's mother on 3<sup>rd</sup> October, 2001 in response to the application for revocation filed by Peter Maina Waweru the Co-objector (see Ex.5 'D').

In paragraph 4 of the said affidavit the deceased's mother has averred and I quote:

**“I did not conceal any facts from the honourable court as alleged and all notices were issued and no objections were received or filed and that further deceased did not leave behind any children surviving him as alleged or at all and indeed no evidence like birth certificates have been annexed to support such claims”.**

I also note that when the said application for revocation was filed this objector/deponent was not a party to that application.

She also did not give any evidence how the deceased accepted the children as his own and maintained the first child during his life time. She simply said that the deceased was assisting her for the first daughter.

In her cross-examination she accepted that she did not marry the deceased and that their cohabitation cannot be presumed as marriage. She also agreed that the deceased had never introduced her to her co-applicant but did so to her mother, brother and sister (I do not have any evidence to the effect that the deceased had a sister).

She also stated that although she knew that the deceased's mother has applied for grant of representation she did not object as she trusted her. She agreed that the deceased had not met her parents nor their parents were introduced or met, despite the birth of two children and the fact that first child was named after her mother. The deceased even did not come to see the baby in the hospital and the bills were paid by her. Even she bought her clothings. The second child is named after the deceased death as she became emotional.

She also denied having any knowledge of the liabilities of the deceased. She was only aware that the deceased's insurance claim of KShs.2,800,000 was deposited in the court due to the present dispute.

Eventhough she agreed that she would request for DNA test she did not make any efforts to do so.

The 2<sup>nd</sup> Objector Peter Waweru is an accepted biological father of the deceased. He narrated which schools the deceased attended. He helped him to set a job at Kenya Breweries and also helped him to establish the business after he retired from Kenya Breweries. He is a Military Officer and helped him with ex-Army lorries to transport his goods. While he was away the deceased met with the fatal accident. He then narrated how they organized the funeral arrangement. I may observe here that in all the death and funeral announcements he is named as a father and that is not in dispute. However, he also agreed that the deceased always lived with his grandparents till his death. He also stated that he only met the co-objector in the funeral although the deceased had told him about a girl friend and also talked about a daughter but not in details.

According to him the deceased's mother and himself were agreed to be the joint administrators but she

went ahead to get the grant. She was stressing that he had never taken parental responsibility. He has accepted that the children of the co-objector are the deceased's children.

In cross-examination he accepted that after the birth of the deceased in 1964 both of them went their ways. The mother joined Secretarial College and he went to Army. It is also agreed that they were very young when the deceased was born. Despite his parents being in Nairobi, the deceased was handed over to the maternal grand parents. He later married and had children from the marriage. He also agreed that the deceased was buried at maternal grandparents home, despite he had parcels of land in Nanyuki and Karen. He also accepted that the deceased's mother did not recognize him as a father of the deceased and that he did not attend her funeral. He also agreed that he has no proof to show that he paid school fees for the deceased or helped him.

He also stated that he was aware that the deceased was footing his mother's bills to the extent of Shs.50,000 but stated that he was not aware that she was ailing. He also agreed that he did not finance the deceased in his business. He stated further and I quote:

***“When I wrote to the chief of Nyathuna I knew of Joyce Gakenia and I knew of her daughter Wangeci although I did not mention the deceased's mother, Joyce Gakenia or the child Wangeci. I am not posing as the only person who should be granted to me (sic) I did not disclose the fact of the child because the deceased was not married”.***

He then testified that he has assisted the co-objector but did not know which schools her children go to and has not visited them except they visited him once.

He also stated about off-setting debts of the deceased but did not give any details or proof. He also sold the deceased's vehicle for Shs.100,000 and is using the military vehicle allegedly given to the deceased for his personal use. He was however unaware of how the present administrators were substituted, and also other claims against the estate of the deceased. Of course, he is aware of the Insurance claim paid by Apollo Insurance which he has managed to intervene and block its payment to the estate.

Lastly, he said and I quote:

***“I have applied for the grant to be annulled because we had agreed with the deceased's mother that we would have a joint letter of administration” (emphasis mine).***

Then he stated that he saw the children 1 and ½ years ago. He was testifying on 25<sup>th</sup> October, 2004. That means he saw the children after two and half years since the death of the deceased. He also showed willingness to administer the estate jointly with the co-objector.

In cross-examination he further stated that even though he did not mention the co-objector and her children in the letter to the chief, he is ready to take the grant jointly with her so that needs of the children are met.

DW 3 is Mackenzie Mwau a document examiner who confirmed that the letter seeking claim of the deceased from Kenya Breweries was signed by the deceased's mother. I do not think the Administrators have any issue on that. They may only make submissions on its contents.

DW 4 is Peter James Kiragu Mwangi who knew the biological parents of the deceased namely Rose Mwhaki and Peter Waweru the co-objector. He is good friend of the co-objector. He met Joyce another objector in funeral of the deceased for whom they made provision to enable her make tributes to the deceased and she placed a wreath on the grave. Although he said that the objector was introduced to him by the deceased's mother he did not specify how was she introduced.

In cross-examination he did agree that he used to visit the co-objector at his Karen home and had never found the deceased there when he was a baby. He was brought up by his mother and spent most of his life with her mother. He also used to meet the deceased but he had never introduced him to any girl

friend or wife.

He reiterated severally that he tried reconciliatory efforts when the deceased's mother obtained grant in her name and after her death.

All these witnesses have acknowledged the existence of a step-brother of the deceased. The objector Joyce has also conceded that he should be given '*something*'.

This was the evidence adduced from the objectors.

The Administrators had two witnesses.

The first witness was Edward Kiarie a step-brother of the deceased. In other words their fathers were not the same. He has been staying with her deceased mother at Madaraka Estate, Nairobi. He is the sole beneficiary of the estate of the mother and the present administrators are also the administrators of her estate in P.& A. 2895 of 2001. He produced the certified copy of confirmed grant. His deceased mother was a sole beneficiary of the estate in issue as per the record herein. He testified that he stayed with the deceased who was paying his educational fees in schools and higher studies. He was 13 years younger to the deceased. He also emphasized that their mother was sick and worked as a Secretary with meager salary. She was suffering from heart ailment since he was in primary school and was admitted to hospital at least thrice. She was under medication till her death. The deceased moved from Madaraka estate when he joined Kenya Breweries and moved to Kiranguni at his grand mother's place and lived with their maternal Uncle Peter Gitau one of the administrators herein till his death.

He denied knowing Peter Maina Waweru and stated that the deceased was maintained by their mother and maternal grand mother and that the deceased did not mention his father to him. He denied that he was introduced to the father even during mourning period.

Similarly he denied knowing the other objector Joyce and stated that neither the deceased nor his late mother mentioned about her or the children. He stated that the decretal sum of Shs.2,800,000/- was given to the late mother and the same was bequeathed to him as a sole heir to his mother. He mentioned other properties which were bequeathed to him but stated that they are undeveloped and do not earn any income.

The cash money at the Bank amounting to around Shs.100,000/- was used by him for his fees in the year 2002. He stated that his late mother wanted to use the Insurance claim to build flats on Umoja Estate Project, so that the same can generate income for the family. He then detailed his needs. According to him he pays fees of Shs.96,000 per term, pays City Council rates of the properties and house rent of Shs.7,800 per month inclusive of water and electricity. He also said that he needs transport and pocket money on top.

Due to the dispute, at present the two administrators who are his aunt and uncle are supporting him.

In cross-examination he was confronted with details of the funeral announcements and funeral programme which do show Peter Maina as the father of the deceased. But he stated that he was not part of their preparation and that he also did not attend any meetings at Pan Afrique and he had earlier stated that he was at Madaraka Estate home where people used to come for condolence.

He reiterated that he had not met either of the objectors.

The second witness was Peter Gitau Kiarie who is one of the Administrators of the estate. He is maternal uncle to the deceased and DW 1.

He stated that the deceased's mother was in form I when she gave birth to the deceased and that she continued staying with the family with the deceased. He knew Peter Maina as the father of the deceased. He stressed that the deceased was brought up by his family and that he was like a younger brother to

him. Peter Maina disappeared from their life when he joined Army. He denied the testimony of Peter Maina to the effect that the deceased was brought up jointly by both the families. He clarified that the deceased went to Government Road Primary School and not to St. John's Primary School as testified by Peter Maina and thereafter to Makongeni West. But he agreed that deceased went to a High School in Gilgil where he was a Boarder and never lived with Peter Maina. He stated that Peter Maina never paid any fees for the deceased which was given by the grandmother but he stated that he could not know or comment on his averments as to assisting him in his job or business.

He also stated that he was heading funeral committee at Kerangari and never attended any meeting at Pan Afrique – and that Peter Maina did not raise any issue on the burial place for the deceased and also did not offer any alternative place for his burial. Except for him no one else from his family attended the funeral. He also stated that the funeral announcement at Annexure PNW 2 was from Pan Afrique Committee and he did not know any of the step brothers of the deceased or his wife. He emphasized and reiterated in short that there was no relation between the two families.

He stated that Joyce (co-objector) had come to his home in his absence and then he reciprocated by visiting her in her house when she said that she knew the deceased and had come to visit him. It is to be noted that it is an undisputed fact that the deceased lived with this witness since he started working. This witness also testified that the deceased used to support his mother and his brother DW.1.

He testified that during his stay with him the deceased never talked to him about the co-objector or his children.

He agreed that he and his co-administratrix are supporting DW 1 at present. He also supported the averments by DW 1 that the decretal sum of the Insurance claim is to be used to develop Umoja Estate.

He specified that there is a claim of Shs.1,112,226/- against the estate of the deceased. He also stated that he had to borrow money to sustain DW 1.

In cross-examination he was shown the photographs mentioned in earlier part of this judgment. He was also shown the letter signed by the deceased's mother to claim the credit of the deceased from Kenya Breweries.

He emphasized that Peter Maina has not contributed to the maintenance of the deceased. He emphasized that the deceased has lived with him and thus he would know that fact. He also stated that the child of Joyce whom he was holding in one of the photographs (JNW 7) could be any one from many children who attended the funeral.

He frankly stated that if Peter Maina is made an administrator of the estate, there could be problem as he does not recognize Edward D.W.1 who is a dependant of the estate according to them.

This witness struck me as a credible witness as he denied to make any comment on the averments made by the other witnesses which were not within his own knowledge like the averments of Peter Maina as to his assistance to the deceased in getting him job and in strengthening the business.

This is the evidence before the court.

The Learned Counsel for the objectors Mr. Karanja submitted that he relies mainly on the photographs produced and the letter signed by the deceased's mother addressed to Kenya Breweries wherein she has acknowledged the two children. These two facts go to show that the objectors have proved their case on balance of probability. He also submitted that Peter Maina has deponed that the deceased disclosed to him the existence of a daughter.

He also emphasized that the Objector has agreed to a request for a DNA test if that would resolve the matter. I have also observed this piece of evidence earlier herein. The said answer was to a question posed by the court, but nothing further is done in response to that poignant question, which would have

clinched the issue positively in her favour.

Her non-action raised a grave doubt in the seriousness of her pronouncement. In my view that piece of her evidence cannot be taken in her favour.

Coming to the letter it is not disputed by her that the letter was typed by her and the deceased's mother only signed the same. There is ample evidence to that. I also note that the said letter was written after the grant of representation was issued to the deceased's mother wherein she has mentioned herself as a sole heir to the deceased. I also note that the account was in the name of James Waweru and there is no proof that the deceased was also known by that name.

Be that as it may, the cheque was written in the name and deposited in the account of the deceased's mother. The letter was dated 18<sup>th</sup> May, 2001. Moreover, I have also observed earlier that the objector annexed an affidavit of the deceased's mother sworn on 3<sup>rd</sup> October, 2001. She has deponed that the deceased did not leave behind any children surviving him.

With these two contradictory evidence placed by the objector herself, the objector in my humble view, has to put forth stronger evidence to prove her allegations of her two children being the dependent of the deceased.

I can understand the reason why the objector has named them as children instead of dependent. That has to be because of the provisions of Section 30 of the Laws of Succession Act. I have already made my observations on this issue herein before.

However, as rightly submitted by the Learned Counsel of the Administrator the objectors are obliged to prove the fact of the two children being children of the deceased as provided in Section 3(2) of the said Act which stipulates viz:

**“2. Reference in this Act to ‘child’ or ‘children’ shall include a child conceived but not yet born (as long as that child is subsequently born alive) and in relation to a female person, a child born to her out of wedlock, and in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility”.**

So far as the two children of the co-objector are concerned, unfortunately she has been unable to prove that as regards the first female child the deceased accepted her as his child or voluntarily assumed permanent responsibility.

She has already agreed that the deceased did not come to see her at the hospital at her birth, did neither pay hospital bills nor bought clothes. The birth certificate does not show the deceased as the father. Some photographs taken on one day with the deceased and the child do not prove the requirements of law. I have already commented on the letter signed by the deceased's mother. With much hesitation, I have to bow down to the law and find that the daughter called Wangechi Ng'arua is not a child of the deceased.

Similarly as regards Jimmy Muriruri Ng'arua there is no sufficient evidence to prove that he was conceived by the deceased and that the deceased recognized him as his child prior to his death. His birth certificate also does not mention him as the father of the child. The co-objector has agreed that she did not disclose the father's name on his birth at the hospital.

I am thus once again constrained to find that the second child Jimmy also is not proved to be a child of the deceased.

I thus reject the application by Joyce Gakenia Ng'arua for declaration that the two aforesaid children are children of the deceased and dismiss her application to revoke the grant of representations so as to substitute her as one of the administrators.

So far as the application of Peter Maina, the biological father of the deceased is concerned, I have on record that the deceased's mother obtained the grant of representation of the estate herein as a sole beneficiary. His application for revocation of the said grant was voluntarily withdrawn after the death of the deceased's mother.

This application was made on 16<sup>th</sup> October, 2003 after lapse of two years from the death of the deceased's mother. That apart, his averments that he has been a real father to the deceased and had good relation with the mother, have not been satisfactorily proved. He could not and did not deny that since the birth, the deceased stayed with his maternal family and that he himself got married and had his own family. The mother did not marry but had D.W.1 Edward as her son out of wedlock once again. Thus Edward being a child of the deceased's mother, becomes the sole heir to the deceased's mother which cannot be denied as per law. It cannot be denied that the deceased and Edward were brought up together as brothers and I cannot doubt the testimonies of DW.1 and DW.2 that the deceased looked after the mother and DW.1 when he started working. Even Peter Maina (PW.2) has not denied that the deceased had been paying medical expenses for his mother when he did not contribute anything. It is a generous act of his maternal family to accept Peter Maina as deceased's father even during funeral.

But I think he came a bit too late to exercise his parental right and even if I do accept that he had helped the deceased in some ways as regards his job and business, that fact only will not give him an absolute right of the grant of representation of the deceased's estate, under the circumstances of this cause.

The deceased lived all his life with the 2<sup>nd</sup> Administrator Peter Gitau and definitely was cared for emotionally and socially by him throughout his life. Moreover, Peter Maina the co-objector does not recognize the existence and right of Edward step-brother of the deceased as a dependent of the deceased. He furthermore does not want to have any claim over the estate of the deceased.

With all the facts and observations stated hereinbefore, I do think that the estate be administered by the present two administrators.

I dismiss the application for revocation of confirmed grant issued in this cause by the two objectors.

Considering the circumstances of the case, I shall not make any order of costs in favour or against any party.

Dated and signed at Nairobi this 15<sup>th</sup> day of November, 2006.

**K.H. RAWAL**

**JUDGE**

**15.11.06**