



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO.1048 OF 1999
IN THE MATTER OF THE ESTATE OF MBURU WAKABA

RULING

The Petitioner Elizabeth Nyakaru Mburu widow of the deceased Mburu Wakaba filed this petition for letters of Administration of the Estate of the deceased on 24th May, 1999. Alice Gachambi Mburu the Objector herein filed her objection on 10th September, 1999 to the above petition on the grounds inter alia that she was also a co-widow and that her four children were also heirs to the estate being children of the deceased as per Laws of Succession Act. It is also on record that this petition was filed after the petitioner herein was served with a citation in succession cause No. 808 of 1999 filed by the objector. I shall refer in this ruling Petitioner as Elizabeth and the Objector as Alice.

Alice after filing the above objection also filed a petition by way of crosspetition for grant of Letters of Administration to her. Both petition and cross-petition disclose properties of the estate more thereof being shown in cross-petition. Be that as it may, I am, for the purposes of this ruling, not concerned with the veracity or otherwise of the estate properties.

Although directions given in the matter were not specific, it was understood by all concerned that the issue whether Alice is a co-widow of the deceased has to be determined and after the same is determined order as to grant of Letters of Administration be made. Both sides adduced oral evidence.

Elizabeth started the proceedings which commenced on 2nd October, 2000, which unfortunately, mainly due to the counsel of Alice and also due to the fact that I was transferred, first to Civil Division and thereafter to Criminal Division of the High Court, completed on 8th September, 2004.

As the matter was very elaborately contested, it shall be prudent to state briefly evidence of all the witnesses.

PW.1 Michael Ndichu Mburu is a son of the deceased. He met Alice in 1979 as a Bar-maid in Flamingo Bar owned by the Deceased. He concentrated on his (deceased) business at a place called Gitambaya in Ruiru. The deceased was admittedly carrying on business as a contractor but also had other businesses of Bars and shops. The deceased had built rooms and had a bar and a shop in that plot. He was using one room as office cum sleeping place. Alice had three rooms in that place which were near the shop, and the room of the deceased was next to her house (rooms) across the corridor. All others including him had one room. He admitted Alice had four children staying with her. He also stated that in their home at Mangu, Thika District the deceased had many rooms. He insisted that Alice only disclosed that she was a co-wife after the death of his father and that her status according to him was that of an employee which never changed since 1979 up to 18th September, 1998 the day of the death.

He however conceded that there was a funeral committee formed by him as “shadow committee” at Alice’s home after the death. He also identified two photographs taken during marriage of his sister (Ex.1 and Ex.2) where Alice was pictured with other family members including the deceased and the petitioner. The second one showed only three of them, i.e. Alice, Elizabeth and the Deceased. He alleged that Alice removed all documents from the deceased’s room and she removed keys from his jacket before he was taken to the hospital after he was shot at the shop. He also identified a photograph (Exh.3) in front of Alice’s home at Ruiru with casket of the deceased, her children and other family members including himself. He could not say what was the reason for that photograph. He also identified photographs (Exh.4, 5 and 6), taken at burial of the deceased, of Elizabeth and Alice with a preacher and near the grave of the deceased. He also conceded that an Advertisement in the Daily Nation showed that the deceased left two wives. (Exh.7).

PW.2 is Elizabeth. She conceded that since 1979 Alice moved with the movement of the businesses of the deceased, at Yadini and lastly at Gitambaya in Ruiru. She also conceded by saying that **“Alice was looking after the business of Yadini alone. Nobody supervised her but she got the goods to sell from my husband.”** She insisted that Alice was paid salary but could not give its details. She admitted that the deceased’s business was concentrated at Ruiru and that he did not come to Mangu after moving from there. She also stated that she did not stay night at Ruiru and that she had to visit him at Ruiru to get school fees for the children. She explained her not staying overnight at Ruiru by stating that she was too busy looking after farm at Mangu and children. There is ample evidence although that all her children are grown ups as shown in her own petition. She insisted that Alice was not the wife of the deceased and stated, if it was so, deceased could have asked permission from her or at least would have informed her. It was according to her only after his death that Alice claimed to be a co-wife. Mburu family called meeting but Alice failed to give any evidence that she was a co-wife. She refused to accept four children of Alice as children of the deceased. She dismissed the name of Nyangambi of her (Alice’s) last child merely by stating that there would be many Nyangambis although she agreed that the name was that of her mother-in-law. The names Mburu of other three children was similarly dismissed by her. She identified the photographs taken at her daughter’s marriage but stated that Alice was in those photographs as an employee. She contended that Alice has obtained her I.D card after the death and that her complaint of forgery made thereof, was dismissed when Alice was acquitted of the offence of forgery. She did not know that Lucy the first child of Alice obtained her ID card during life time of the deceased. She identified photographs of the funeral and explained that she had at that time claimed to be a co-wife and that is the reason those photographs were taken. She denied having heard during funeral that the deceased left two wives and thirteen children. When shown photograph (Exh.5) of herself and Alice holding a basket along with a pastor, she said she did not know what pastor was telling them. She denied that a brother to the deceased Josphat Njuki was in the meeting and conceded she is not in talking terms with him. She denied that in that meeting it was agreed on division of estate properties except of cattle heads. She denied also having participated in the ceremony when dowry was alleged to have been paid through her. She agreed that Alice and deceased had been together as employer and employee since 1979 and that she was also not aware that Alice was married to someone else. She reasoned that as the children (except last one) were not named as per kikuyu custom, they were not children of the deceased. But agreed that those three were born after 1979. She also agreed that her in-laws went to Ruiru when they became sick but was fast in stating that they were looked after by the deceased and her daughter and finally conceded that they both died at Ruiru. She further stated that during most times of that period she was at Juja and had no chance to go to Ruiru. Lastly, I shall state that this witness despite her identifying herself and Alice with a pastor on microphone deliberately denied the fact that she and Alice were holding a Kiondo (basket). (Exh.5) the photograph clearly confirms that fact. Although during re-examination she stated that they were not separated as per custom, she conceded that the deceased had never come to stay either at Juja or Mangu after Ruiru. She also stated that at Ruiru during her visits she only entered a room where the deceased kept his documents and added that there was also a bed.

PW 3 Josphat Wanyoike Mburu is another son of the deceased. He described the construction at Ruiru plots. First one was a Bar, a butchery and a shop; second was a shop and third was a residential premises. He looked after the shop. According to him Alice was working at the shop and Bar in the first building as an employee. He used to visit the deceased in the room which was his office as well as his sleeping room while Alice had four rooms which included a verandah. He stayed in the premises for

about two months. According to him his sister used to cook for him and the deceased. He stated further that he thought he (deceased) was sleeping in office as he used to keep his things there. He knew Lucy and Mary the children of Alice and that in 1991 Lucy was going to school and agreed that her ID card was issued in 1995 when the deceased was alive. He identified photographs at funeral and that taken outside Alice's home with the casket. He denied having seen Alice at his sister's marriage but when confronted with two photographs he agreed they were taken at her (sister) wedding and that Alice was next to his mother Elizabeth in both photographs. The wedding was admitted to have been celebrated in 1985. He contended that Alice was not his step mother as he had never called her as mother and similarly Alice has never called him as her son. Her children were not treated as step sisters and brothers.

On the date of death he stated that he was called by one Mwara and Peter Mwangi and informed him that his father was shot. He went to the scene and saw his father on the ground. Before he was taken to the hospital he remembered seeing "mama Wamuhu" taking some documents from his pocket. But thereafter he stated he was calling Alice as Gachambi during lifetime of his father.

PW 4 Ephantus Njuguna was working with the deceased since 1973. According to him Alice was employed by the deceased since 1977, when she started working at Flamingo Bar at Mangu. In 1979 the deceased left Mangu and shifted to Yadini estate and Alice was transferred there. She stayed there up to 1987 and then was transferred to Gitambaya in Ruiru. The deceased, as per his testimony, was staying in his room which was also used as his office. He was staying in a room in the next building, Alice was also staying there and stated that **"I would not know whether he and Alice were staying together as he was saying one room which was used as his office was his house"**. His son Wanyoike (PW 3) and daughter Wanjiku were also staying at that plot. He denied knowing any other relation of the deceased with Alice apart from that of an employer and employee. He used to visit the deceased in his room but agreed during cross-examination that mostly he used to be at construction sites. After stating that he was not friendly with the deceased and that they only had working relation he went on stating **"if Alice was married to the deceased, she would have named her children from his family and I would have known if the deceased had visited her family as per custom"**. He knew Lucy Wamuhu since she was a child and that Alice came with her in 1977 when she started work. He agreed that out of all employees only Alice went to Yadini and stated **"if one says Mburu was staying most of the time at Yadini I would not deny"** and **"I would not know whether the deceased had physical relation with Alice since 1979 to 1998. The other three children were born during this period."**

He stated that he could not comprehend what was going on during funeral as he was mourning the death of a person whom he had known for 24 years and thus denied having heard in eulogy that he (deceased) had two wives.

I note here that this witness was aged 49 years at the time he gave evidence in December, 2002 and the deceased died at the age of 73 years in the year 1998. Thus this witness must be 45 years at the time of the death. At any standard he cannot be termed as age-mate of the deceased.

The last witness from the petitioner was Anthony Wambugu the younger brother to the deceased. He used to stay at Ruiru in one of the rooms constructed by the deceased but had to vacate the same at the instance of Alice after the death of the deceased. He denied that the deceased was married to Alice. He worked for the deceased in his construction business and used to move with construction sites. In 1998 he was staying in one of the rooms at Gitambaya, Ruiru. He stated that the deceased had one room and Alice had "one room" in the same plot. He said he never heard that Alice was claiming to be wife of the deceased. He reiterated like other witnesses that the deceased was using his room as office and was also sleeping there. On cross-examination, he agreed to have heard that there were funeral arrangements at Alice's place. He said they passed through her house to enable the neighbours to view his body. He agreed he was in the photograph taken outside her house and also that except Alice all others were the family members and stated he did not know how Alice came into the photograph. He denied knowing children of Alice and also denied that they were calling him "Baba". He insisted only Elizabeth's children call him "Baba". He denied knowing that deceased, Elizabeth and others went to pay dowry to Alice's parents in 1983. He denied that he used to eat at her home when in Ruiru. He denied any knowledge of funeral advertisement in the Nation. He denied having any quarrel with Alice.

This is what was led in evidence by Elizabeth.

In my perception from what is in evidence of her side, Elizabeth is not denying that Alice has been looking after the business of the deceased at least since 1979 and that she moved when the businesses were moved from Mangu to Yadini and then to Gitambaya – Ruiru, that she was always staying at the places of business, that the deceased had not gone to Mangu to Elizabeth since he moved to Yadini and that Lucy the first child of Alice came along with her when she started at Flamingo Bar and that the other three children were born since 1979 to 1998 before the death of the deceased. They all lived with Alice who was solely looking after the Bar and shop without any supervision. None of them is aware of any other husband or friend of Alice. At least nothing is suggested by anyone. What is stressed is absence of compliance of customary rites of marriage and naming of children.

All of them agreed presence of Alice in photographs produced but gave their own explanations insisting it was not due to the fact of her being a co-wife. The advertisement and announcement of eulogy are similarly ignored but not denied. I shall deal with legal submissions on the evidence of photographs in later part of the ruling.

The evidence led by Alice is now put forth summarily hereinunder.

Alice herself started her case by deponing that she came to meet the deceased when she was working with her step-sister in 1979 at Mangu. According to her testimony they became friends and married on 12th December 1979. At that time the deceased was also running a Bar and rented a room for her in the place and she started managing that business of Flamingo Bar as supervisor. She came with her child Lucy Wamuhu. She left Mangu around February, 1980 to go to Yadini. She managed there a grocery shop. During the above period, she used to visit Elizabeth who, after her introduction by the deceased, told her that they should share the domestic chores which she did when she was at Mangu. At Yadini plot there was a bed-room, shop and store and she lived there for six years. She gave birth to twins on 10th August, 1980 named Jane Wangari and Joseph Gikunyu. She admitted they were not named after the deceased's parents because they agreed to do so due to the fact that the deceased had not visited her house. Later in 1983, after last born was born in December, 1982, who was suckling her, when they visited her home. Her mother was a casual worker at Machure Estate and they took two crates of beer, two crates of soda and Shs.15,000. The money was given to Elizabeth who counted the same before giving to her aunt Margaret Njeri (OW.5). She stated that her father was from Mangu and there was a dispute on his ancestral home and although she was born at Mangu she grew up at Machure Estate. On the first visit dowry was paid, beer drunk, and food eaten which was prepared by her people. The next time she, the deceased, Elizabeth, one Kamau and his wife Wangari only went and similar ceremony was performed.

She said although none of deceased's brothers joined them in the ceremony at their ancestral home, she was introduced to them as wife of the deceased.

After about six years at Yadini, they shifted to Ruiru. In 1987 after she was asked by the deceased, a house was constructed for her in the said plot which consisted of four rooms. There were 24 rooms in all. Hers was a self-contained home and others were separate rooms. According to her Josphat (PW.3) whom she referred as her step-son initially lived with them but shifted later to a room constructed in 1990-91 in another plot. Similarly Anthony (PW.5) stayed with them for a year or so. While they both stayed with them she used to cook for them. She and deceased looked after the shop and cultivation at the plot. She conceded that in the plot she has rented some rooms and two houses income whereof she may have to disclose at an appropriate time. She further stated that half of seven acres farm at Juja was cultivated by her and other half by Elizabeth. Similarly two parcels of 2 acres each in Makuyu farm are cultivated by two of them. She said after the death she was denied these cultivation by a son of deceased called John Ndungu. She also deponed that on her side of Juja farm she has an incomplete house while that of Elizabeth is complete. She always welcomed and cooked for Elizabeth when she visited the deceased at Ruiru. She visited her houses at Juja and Mangu. She then identified and described the two photographs taken at a wedding of 1st daughter of Elizabeth in 1985. She named the person as Kairu who took those photographs. They were produced in evidence without any objection on the part of Elizabeth's

counsel.

She, upon the death of her husband, went to inform Elizabeth and then they arranged for funeral. She obtained the permit for burial from Assistant Chief Peter Ngugi. A letter from the said Chief was produced in evidence. She similarly identified and described and produced photographs taken during funeral. Similarly the advertisement in Nation and Eulogy were produced in evidence. Both documents stated that the deceased had two wives, and that Elizabeth had 9 children and Alice had four children.

There was no problem during funeral which arose afterwards due to division of properties and specifically that of cattle heads which were claimed by Elizabeth as hers. As the dispute could not be resolved, she filed the petition. She explained her ID card which according to her was applied about five months before the death. She was charged of forgery but was acquitted.

She further stated that parents to the deceased stayed with her for about four years and that they could not have done so if they did not recognize her as their daughter-in-law. I hereby recall testimony of Elizabeth and PW 3 Josphat Wanyoike Mburu. The latter stated that his grand parents were brought to Ruiru when they were sick and were looked after by his uncle, himself, his sister and deceased and that they lived only for four days.

Going further to her evidence she said that school fees for all her children were paid by the deceased. She agreed that titles to the properties and log books of vehicles were all with her.

During her cross-examination, she conceded that nothing happened at the ceremonies except that the deceased informed her parent that he wanted to marry her. She conceded further that in her affidavit sworn on 12th January, 2000 the year of her marriage is stated as 1976 but insisted it was in 1979 and should be so. She then described her first introduction by the deceased to Elizabeth in the same year and that Elizabeth had no problem and they stayed with her for about a week. Thereafter a house at Gakiyu was rented where his business was. She conceded that despite the fact that they were married, twins were not named as per kikuyu customs only because the deceased had not visited her home. She referred to baptism cards of the children which mentioned the deceased as their father. She conceded no one from her father's side was present during dowry ceremony and that no photographs were taken of the ceremony. Kamau and his wife who were present are dead. She agreed that that day was the first time deceased acknowledged to her mother that she (Alice) was his wife. She also agreed that there was no adoption ceremony as per custom in respect of her daughter Lucy.

She reiterated that she was wife to the deceased and that they used to sleep in the room described by others as his office. She said she cannot say why Anthony and Ephantus denied their marriage. She stated they could easily have known about their relation, by the way she was living with the deceased in the same compound. She reiterated that on 19th December, 1979, she joined the deceased in his home and that is why she described the date as that of their marriage. She also explained why she did not have any place which she could claim as her ancestral place which was due to dispute between her mother and her uncle after her father's death. Her mother left the home and moved to estate. His brothers (her uncles) sold the land and they were all dead.

OW.2 is mother to Alice. She claimed to know Elizabeth and identified her. She described the day when the deceased came to give dowry and informed her that he had married Alice. She stated that Elizabeth was present at the ceremony. She also visited Ruiru and attended funeral of the deceased.

She reiterated that Elizabeth gave money after it was taken out by deceased, counted by Babu. She agreed that customary rites of Ngurario were not completed. However, after stating that she had sons who were alive and present at the time of ceremony, she did not explain why money was given to Margaret and not to a male member as per custom. She also agreed that neither she invited the deceased to come to her house as the same was only a room at the Estate nor Mburu invited her to his home, after the ceremony.

I did notice that this witness who was an old lady did not seem to be with the matter so much.

She seemed to lapse in her own thoughts many times.

OW.3 was Lucy Wamuhu Mburu, who is first child of Alice. She described deceased as her father. She stated that she schooled at Mweyu in 1983 with her stepsiblings and used to stay with Elizabeth at Mangu, while Alice was staying at Yadini. She named her step-brothers with whom she was schooling namely Joshpat Wanyoike and John Ndungu. She deponed that all her educational fees up to Apex College at Githurai were paid by the deceased. She further stated that Alice and the deceased were sharing the same bed-room. She denied knowledge of any adoption ceremony by her parents.

Ow.4 is Josphat Nyakei Wakaba, a brother to the deceased. He averred that the deceased had two wives – Elizabeth married him in 1956 and Alice in 1979 and had children from both. He confirmed the twins were not named as per custom because of agreement between Alice and the deceased because he had not gone to see her parents. He was the regular visitor to Ruiru home and noticed them both living as husband and wife in the same house. So were they in Gatikuyu in a Bar called Flamingo Bar, when they got married. He also confirmed that his father stayed with Alice at Ruiru for about four years and she was looking after him. She also looked after his ailing mother at Ruiru. He finally confirmed that Alice was introduced to the family and that during funeral in eulogy she was announced as a co-wife.

This witness agreed that for a while he was present in court when witnesses for Elizabeth were giving evidence, but further stated that he was not present when Elizabeth and Anthony gave evidence. He agreed that Anthony (PW 5) knew more about deceased's business but insisted that he would know more about his personal life. He expressed shock on him (Anthony) and others denying Alice being deceased's wife. According to him they all did so only after the funeral for reasons not known to him. He described the structures and business places at Ruiru and stated specifically that Bar was run by his brother. He also stated that his father was hospitalized for a long time and in 1979 he was at Thika Hospital. He agreed he did not participate in dowry payment and that he only heard of that ceremony and that Babu and Gicheha who went with the deceased are not alive.

OW.5 is Margaret Njeri, Alice's maternal aunt who was present during dowry ceremonies and who was paid Shs.15,000 at both occasions. She deponed that she knew that Alice was living together with the deceased and her last three children were born during this period. She told the court that on the day dowry was paid the deceased came with Gicheha, Babu and Elizabeth, who was identified as elder wife of the deceased. The workers at the camp and one Gitanga and her brother Joseph Kariru were also present. Her parents were also dead at that time. She also confirmed that their homestead was sold and did not belong to her family but did not know how and by whom it was sold. She described the ceremony and how money was given through Elizabeth.

During cross-examination she agreed that she was illiterate and had remained forty five years of age for some time as she did not know when she was born. She also agreed that she only happened to be at the place where Alice's mother lives when deceased came with others to pay dowry. She also contradicted her sister (Alice's mother) by stating that Alice had no brother or sister, and that she was the only child. She denied knowing one Wangari Wanjiru as Alice's sister, or brothers named Kibe Gakungu, Kamau Gakungu or Wandabwa Gakungu. According to her all the children died on birth and only Alice was surviving. She also stated that the ceremony was performed when the last born was about three years old which fact contradicts that given by Alice as well as her mother. According to her even at the time of their second visit on a Sunday she happened to be at mother's place and the same persons were present from both the side. She knew the deceased had parents and brothers but she did not ask at the time of ceremony why none came. She collected money on both occasions as agreed by all including her brother. And according to her it was not against Kikuyu custom. She described it as her privilege. She finally stated that she used to visit her sister very frequently. She however agreed that Kibe and Wandaka were brothers and Wangari was sister to Alice but they had all died.

OW.6 Correta Muthoni Wachege is a neighbour and intimate friend to Alice whom she knew since 1987. She described the relation between them as very close and further stated that she was frequent visitor to Mburu's house. She also knows Elizabeth and states that she had met her at a visit at her house when she was with her husband, Alice and the deceased. It was around 1989. She knew Elizabeth's

children whom she named as Ndichu, Nyoike, Wanjiku (all witnesses in the case) and Wanjiru out of which except for Wanjiru the three were staying at Ruiru (she described it as Gachambi's place). She also described the school where Lucy studied. She also confirmed that deceased's father stayed with Alice and her husband invited him to their house. She confirmed that the deceased used to stay and eat at Alice's house as she (witness) was their frequent visitor. She told the years of death of father and mother of the deceased. She also attended their funeral with Alice and the deceased. They used to call Alice as Mama Wamuhu (which name was given by PW.3) and deceased as Baba Wamuhu. For all purposes according to her Alice and deceased were wife and husband. She described in cross-examination the two structures erected on the plots at Ruiru and that is what she referred to as two houses having altogether 19 rooms. She said deceased's bedroom was in Alice's house. She also found him in that bedroom when he was sick and she visited him. She also told how his businesses were run. She also explained how they used to see them almost every evening. She had seen deceased carrying day's income to Alice's home. She knew Anthony and Josphat Wanyoike – brother and son of the deceased, and said that the room described by them was shared by the deceased and Alice. used to talk more with deceased and Alice than they would and thus she was closer to them. She was also confronted with her evidence in criminal case against Alice

When confronted with evidence led by Elizabeth (her witnesses) she said that she is recorded that she participated in the dowry ceremony. She insisted that she did not, even though the same was recorded in proceedings. She had also visited Elizabeth's houses at Mangu and Juja and gave particulars of her visits with deceased and Alice. In both visits, they were welcomed by Elizabeth.

The above is the summary of evidence led by both sides.

Thereafter both counsel submitted elaborately orally and the same were also reduced in writing.

Mr. Aswani the learned counsel for Elizabeth contended, and rightly so in my opinion, that burden to prove that she was a wife of the deceased is on Alice. He further contended that she has not discharged that burden. None of the essentials of a valid marriage as per kikuyu custom has been shown to have been present. More specifically he submitted that Ngurario or Ruracio has not been performed and thus no valid marriage existed as per kikuyu customary law. He also pointed out contradiction between affidavit and testimony of Alice. As per affidavit she averred that marriage was performed in 1976 while in evidence it was in December, 1979. But the purported dowry was alleged to have been paid only in 1983.

He relied on the case of **ZEPPORAH WAIRIMU –vs- PAUL MUCHERU H.C.C.S. No.1280 of 1970** where late Madan J., as then he was adopted passage from case book on Kenya Customary Law by Hon. Mr. Justice Eugene Cotran, while elaborating on essentials of kikuyu customary marriage.

He also brought to my attention a passage on the custom on naming the children when dowry or Ngurario has not been performed and I quote:

“If a boy starts living with a girl as a man and wife and there are children then notwithstanding that dowry has not been paid and Ngurario not performed the children may be named in accordance with kikuyu custom .” (emphasis mine).

Ngurario is a Kikuyu custom of slaughtering a ram which the boy or his parents take to the girl's home. There is no doubt that there is no evidence of performance of Ngurario. However, we do not have also evidence of delivering of Mwati and Harika (two young animals) before Uthoni which establishes the relationship between the parties. And in the said case of Zipporah at page 55 it is stated and I quote ***“if children are born before Ngurario is performed the y are named in accordance with kikuyu custom because of Mwati and Harika which gives right to it”***.

In view of the two statements aforesaid the evidence from Alice that twins born were not named as per custom because the deceased had not gone to visit her parent and not paid dowry, seem to be more acceptable.

I also note that Mr. Aswani did not submit anything on commencement of cohabitation which is one of the essentials of a valid marriage.

From the evidence which I have also stated herein before, Mr. Aswani submitted that no marriage as per kikuyu custom has been proved by Alice. I do agree that the marriage as per strict customary law has not been proved by Alice. It is stressed by Mr. Aswani that absence of participation by any male members of Alice's family is pertinent to the issue of validity of the marriage. Such is the case as none of the male relation of the deceased also took part in the occasions of payment of dowry (Ruracio).

The credibility of OW.6 Correta Muthoni Chege was questioned because in her testimony in Cr.C.689 of 2000 wherein Alice was charged with forgery, she testified that she was present during dowry ceremony. This fact she has denied before this court. She has however consistently deponed that she had known the deceased and Alice since 1988.

On the admissibility of photographs Mr. Aswani relied on Sec.35 of the Evidence Act (Cap 80) which inter-alia requires the evidence of maker having personal knowledge of the matters dealt with by the statement. As the maker was not called, according to him, the photographs could not be relied upon. In my humble opinion, the above contentions are not well placed. First of all the photographs were produced without objection and all the witnesses had admitted their validity, existence and identity of persons pictured. Moreover, there is sufficient and adequate explanation why the maker of those photographs could not be called as witness by Alice. I also note from the provision of Sec.35 aforesaid that the requirement of personal knowledge of the maker is in alternative to other conditions mentioned therein. I therefore not only admit them but would consider them while deciding the matter. I also note that all the witnesses from Elizabeth including herself gave different reasons for photographs therein in their respective evidence. Hence, I agree with contention raised by Mr. Kibe learned counsel for Alice that the photographs are documents and not strictly statements and the case of **Mwangi –vs- Wambugu (1984) KLR 453** is in my view, not relevant to present case. The photographs are documentary evidence which spoke their own story. Similarly I shall consider the evidence of News paper advertisement in Daily Nation of 29th September, 1998 while determining this matter.

With the aforesaid observations made, I shall now endeavour to consider the evidence and issues on hand.

The first issue which is asserted and denied is whether Alice married the Deceased as per kikuyu customary law.

As per evidence led by Alice and her witnesses she started co-habitation with the deceased as man and wife on 12th December, 1979. I shall not give much reliance to different years mentioned in her affidavit. She was introduced to Elizabeth in the same month and stayed with her for about a week. I have detailed evidence of all the witnesses and from cumulative effect thereof, one thing comes out loud and clear that since that day she has not left company of the deceased till his death.

The essentials of a valid Kikuyu Customary Marriage has been distinctly restated in Hon. Mr. Justice Cotran's book entitled "**Restatement of African Law, The Law of Marriage and Divorce**" The essentials of kikuyu marriage as stated therein are:

(i) Capacity of the parties

(ii) Consent of the parties and their respective families

(iii) Ngurario

(iv) Ruracio

(v) Commencement of cohabitation.

Alice's side of the case has toiled to show that except for Ngurario all the elements of the Kikuyu marriage existed after the year 1983 when the deceased paid Ruracio after the birth of the last child Mary Nyangambi in 1982. With contradictions as to details of persons present at the ceremony it is brought out that there was a feast, the representatives of both sides were present, beer was drunk and money was paid as dowry.

It is also true that OW.5 Margaret Njeri was not clear in her evidence as to the time of ceremony and has created some confusion when she deponed that Lucia (the first child of Alice) was a small child when marriage took place. Alice's mother Lucia (OW.2) also agreed that what was performed was only Ruracio and that Ngurario has not been performed.

Mr. Kibe urged me to find that substance of the kikuyu customary law was present from the above evidence.

I have taken due consideration of his submissions and I find that as a result of unclear picture presented by the witnesses and major contradictions in the depositions of OW.2 and OW.5, I shall hesitate to make a clear finding that there is sufficient evidence that marriage ceremony was performed as per kikuyu customary law. I shall hasten to add that I do agree with Mr. Kibe's contention that stringent application by courts of the customary law will definitely negate the letter and spirit of Sec.3 of the Judicature Act (Cap.7) and that with fast growing modern concepts in our society the customary law should be interpreted with flexible and broader view. Had I, before me, clear picture of the ceremony, I would not have hesitated to find that despite the inadequacy or nonfulfillment of all ingredients of kikuyu customary law, and despite the payment of dowry was made to a female relative as well as the absence of any male relatives on either side, there existed a valid marriage under customary law.

Finding this will not prevent me to go further into realm of common law to presume or otherwise the existence of the marriage under common law.

As I have observed earlier, there is an unchallenged and consistent evidence which is adduced from both sides that Alice and the deceased were together since 1979.

Elizabeth in her own evidence has stated that since the deceased had moved to Yadini he has not returned to Mangu and that she has not slept at Ruiru even for one night. She used to go to Ruiru only to get school fees for children. There is clear evidence that nobody knew whether Alice had another boy friend or husband. The twins and Mary Nyangambi were born during the period when Alice and the deceased were together. Even PW.3 Josphat Wanyoike in his evidence referred to Alice as "Mama Wamuhu" which later on was changed to that of Gachambi. The same name is disclosed in evidence of Corretta wa Chege (OW.6).

It is also admitted by Elizabeth that Alice used to look after business of the deceased on her own without supervision. While sons, daughter and brothers of the deceased were given single room at Ruiru plot, Alice was staying with her children in a house of three rooms. The room of the deceased which was claimed to be his office cum bedroom was next to her house. In his testimony Ephantus Njuguna (PW.4) has clearly stated the constant movement and stay of Alice with the deceased since 1979. He also said candidly that "***I would not know whether Alice and the deceased used to sleep in one house or whether they had physical relationship. Three of her children were born between 1979 and 1998***".

Contradiction in evidence of Corretta (OW.6) to the effect that she is shown to have stated that she participated in dowry ceremony in the criminal case which fact she denied before me, does not, in my humble view affect the presumption of marriage under common law. From evidence led by both the sides the continuous cohabitation of Alice and the deceased since 1979 and her recognition as a co-wife is abundantly proved.

I have deliberately restated the above portion of evidence on record which goes to strengthen claim of Alice and tend to destroy the claim of Elizabeth.

Photographs and advertisement in Nation (which are specified in detail in earlier part of this Ruling) give abundant support that Alice was not a stranger but a part of the family of the deceased.

Against this strong evidence, the claim of Elizabeth that Alice was simply an employee cannot stand. To add insult to injury Elizabeth has not produced any evidence to support her claim burden whereof to prove rests squarely on her as per Sec.109 of the Evidence Act (Cap 80).

Elizabeth has tried to impute that before the deceased was taken to hospital after he was shot on the fateful day, Alice stole keys from him and removed documents from the cupboard which was in his room. I cannot find that she has proved her claim on balance of probability simply because of contradictions in the testimonies of her witnesses. There are two claims (i) that Alice removed keys by other witnesses and (ii) that as per PW.3 (the eye witnesses) he saw Mama Wamuhu taking some documents from the deceased's pocket. From this, I cannot but find that the title documents have been kept by Alice after the death as a co-wife of the deceased. I may add here that even if the said act was done it was done openly in front of the people gathered without anybody raising an eye brow. She is not charged of stealing as was done in the charge of forgery. This fact, in my view supports Alice, if it was done.

I therefore rely on dissenting judgment of late *Madan J.* which I view as a correct position of law at present in the case of *Mary Njoki –vs- John Kinyanjui Matheru (1982 -88) I KAR* wherein he stated and I quote:

“The concept of presumption of marriage is not new in Kenya. It was recognized and accepted by the former Court of Appeal in Hortensiah Wanjiku Yawe vs. the Public Trustee in Civ. Appl.13 of 1976, and by this court in Mbithi Mulu vs. Miwa Mutunga in Civ.Appl.Nai 13 of 1983.

In Yawe Mustafa J.A. delivering the leading judgement of the court said that there is nothing in Kikuyu customary law opposed to the concept of presumption of marriage. Wambuzi P. said the presumption is nothing more than an assumption that the parties must be married irrespective of the nature of the marriage actually contracted. I would add also irrespective of marriage if one is not actually contracted.

It is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the ‘husband’ , or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of ‘wife ’ upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased ‘husband’,”

I shall also quote the following passage from the case of Hortensiah Wanjiku Yawe vs. Public Trustee (unreported supra) – namely

“I can find no thing 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 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, and even if no specific submission on that point was made by Mr. Muite, I do not think that he is precluded from relying on it before us. It is directly concerned with the burden of proof to be

discharged by the appellant, and this presumption enhances the quality of the evidence adduced on her behalf and weighs heavily in her favour. There was no evidence adduced in rebuttal of that presumption. The trial judge omitted to take this crucial matter into consideration: if he had, he would probably have held that the appellant was married to the deceased and was his wife.”

From the evidence on record and law relating to presumption of marriage under common law doctrine applicable to Kenya as per Sec.3 of the Judicature Act (Cap.7), I can and do find without any hesitation that the deceased and Alice were man and wife and declare them to be so. I therefore find that Alice being married to the deceased is a co-widow of the deceased.

Having declared so, I shall have no further hesitation to find that the twins and Mary were children of the deceased. I have sufficiently considered the law on the issue of naming of the twins and do not intend to repeat it.

So far as issue of Lucia, the first child is concerned, she is admittedly not a biological child of the deceased but Alice brought her in 1979 when cohabitation began. She has constantly remained with them and evidence of Alice as well as Lucia is very clear coupled with that of Correta (OW.6). The deceased had considered her as his own child during his life time and maintained her as such. The present petition is filed under and governed by provisions of Laws of Succession Act (Cap.160). Section 29(b) of Act stipulates inter-alia:

“Section 29: for the purposes of this part dependent means:

(a)

(b) Such of the deceased’s parents children whom the deceased had taken into his family as his own as were being maintained by the deceased immediately prior to his death.”

I shall therefore hold and do so hold that Lucy Wamuhu is a dependent of the deceased and be treated as such.

In the premises, I find and direct that the petition for letters of administration in respect of deceased Mburu Wakaba be filed jointly by Elizabeth and Alice that is to say Petitioner and Cross-Petitioner/Objector. The heirs of the estate are children of both the above widows.

There shall be no orders as to costs as the estate is yet to be administered.

K.H. RAWAL

JUDGE

Dated at Nairobi this 8th day of October, 2004