



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**H.C. SUCCESSION CAUSE NO. 782 OF 1999**  
**IN THE MATTER OF JAMES GITUMBI KAGWIRI (DECEASED)**

**NELIA WANJIRU GITUMBI ..... APPLICANT**

**V E R S U S**

**JACINTA WANJIRU GITUMBI**

**JOSEPH KAGWIRI GITUMBI ..... RESPONDENT**

**R U L I N G**

The applicant has filed an application dated 4th November, 1999 under Section 76 of the Laws of Succession Act (Cap 160) seeking revocation of grant of letters of administration to the petitioner. She claims she was the first wife of the deceased and the Petitioner who was the second wife has concealed the material fact of her existence and that of her daughter.

In her affidavit in support the applicant has averred that she married the deceased in 1953 as per Kikuyu customary Law and that the Petitioner married the Respondent in 1973. Apart from the facts that she had filed a succession cause and has mentioned the Petitioner and her children as beneficiaries of the estate and that she has paid the dues on the estate property from her own means after the death, she has not averred any facts of her own life after 1979.

A receipt of Kshs.4,000/= is annexed which is in the name of the deceased. It is pertinent to note that she has not stated that she had been separated from the deceased for many years.

Anyway, these facts are brought forth in the replying affidavit of the Petitioner. These averments have also been confirmed in testimonies of several witnesses. It cannot thus be denied that the Applicant left the deceased's house in 1979 never to return, and that she has been given a parcel of land by her father where she lives now.

The counsel agreed that only two issues should be determined which are:-

- (1) Whether at the time of death the Objector was the wife/widow of the deceased, and
- (2) Whether the daughter of the deceased from 1st wife is a married daughter and whether she is entitled to inherit a portion of the estate.

In her evidence the Applicant reiterated what she averred in her affidavit and added that she used to take the deceased to the hospital and produced a hospital card. But she also said that she has been living at

her father's home. In response to a question on a letter by the deceased disqualifying her from inheritance she said that the letter was not read to her and then she went on to state that her understanding was that the letter only forbade her to attend his funeral which she did not agree or obey. She denied that her daughter was married and stated that she is a single mother with four children. She also denied that one Joseph Nduati was her husband, but agreed to the court question that her daughter first born is fathered by him. She stated that she is called Nduta and that the first born was named after her, but agreed that her Identity Card does not bear that name. She also denied that she refused the reconciliation offers and that she declared she did not want anything from the estate of the deceased.

Her daughter deponed that so far as she saw her parents, they were living as man and wife, that she was maintained by the deceased who was paying her school fees till she finished courses at Dress Making College. She denied to be married to one Joseph Nduati Chege and denied he was in court during previous proceeding of the matter, but added that if her mother has told so to the court it should be true. She admitted that he is the father of her first born and repeated Nduta was the nick name of her mother.

Unlike her mother she stated that she was mother of two daughters only. She denied any knowledge of efforts of reconciliation between her parents. She admitted however that the Chief ruled against her mother when the dispute between her and the Petitioner was referred to him.

Although she stated that the handwriting on the letter of the deceased expressing his wishes were not his, I do not think anything turns on that without independent confirmation and specific evidence of the Son of the deceased (D.W.1). The third witness reiterated that the Applicant is the first wife and did not take any goat or sheep with her when she left the house of the deceased in early 1980s. He said he was aware of the letter, which he was told, was written by the deceased, But he did not know its contents as he could not read. He said that Applicant's daughter lives with Joseph Nduati Chege as a friend and not as a man and wife. The fourth witness although stated about the marriage of the Applicant with the deceased in 1953, his detention and release therefrom in 1958, also further stated that he was not aware that they were separated but later said she lives on her father's land and along with statement that he did not know Joseph Nduati went on to state the daughter does not stay with him.

This in short is the evidence of the Applicant's case.

The defence case centered firstly on the departure of the applicant in 1979 and attempts by the deceased to call her father to settle the matter as well as offer to the applicant in 1984 and during the burial of the deceased to return the goats she has taken to the deceased home and come back to him. Those attempts were not successful because the applicant refused.

Secondly, the son of the deceased testified and narrated the circumstances under which he wrote the letter of last wishes of the deceased and how he signed the same and that a copy thereof was given to the Sub-Chief. The existence and reading of this letter during the meeting of clan after the funeral was corroborated by witnesses of the Petitioner. The fact of the Applicant's departure from the deceased's home and settlement on her father's land has been unequivocally reiterated by all the witnesses from the Petitioner. It is also accepted that the deceased did not receive any dowry for applicant's daughter's marriage but all of them have stated that she is married with four children and the last witness stated that the daughter herself introduced her husband to him. He also said that the deceased had told him that he would not accept any dowry for his daughter's marriage. On the basis of the above evidence submissions were made, and I have carefully considered them.

The Applicant's case is that she was married to the deceased in 1953 and that she cohabited with him upto 1979 and had a daughter with him. Thus even if she may have lacked or failed to prove the requirement of the customary marriage, under the common law, the marriage can be presumed due to the long cohabitation and repute. I shall have no difficulty in the later contention. The Petitioner and all her witnesses have agreed that she lived with the deceased as his wife. The time from 1953 to 1979 is long enough to enable this court to presume the marriage. So far as customary marriage is concerned, even if the deceased's brothers gave evidence, none of them gave any details as to the marriage ceremonies performed as per Kikuyu Custom. In my opinion, the moot question is not the marriage between the two

but the effect of total and continued separation from 1979 and the Applicant being given a portion of her father's land. Even as per the counsel for the Applicant he stressed more on the presumption of marriage due to long cohabitation and repute. If so, the long separation will, in my humble opinion, be presumed as evincing an intention on the part of the Applicant of dissolution of the marriage. More so when her father has taken her back and settled her on his own land by apportioning a piece from the land. She has never gone back except for attending two funerals. No evidence was led that she participated in those funerals as a daughter in law and a widow. I must confess that I did not get much help from any precedents, which I tried to look for General perusal of Contran's book of Customary Law cannot guide me in the instant case. In my opinion, for all practical purposes the couple has severed the relation of marriage with the knowledge of all concerned.

I can thus find and do find that the Applicant, at the time of the death of the deceased Gitumbi Kiguni was not his wife

The second issue is whether the Applicant's daughter is married. I do not agree with the evidence led by the Applicant that the daughter was not staying with one Joseph Nduati Chege. By her intentional pronouncement that she has only two children that too by contradicting her own mother, the Applicant's case gives credibility to the case of the Petitioner that she is married to him and has four children. The mention of only two children was to conceal the naming of her children as per Kikuyu custom.

In the balance of probability, after considering the evidence from both sides, I do find that the daughter of the deceased from the first marriage Mary Muthoni Gitumbi is presumed to be married with Joseph Nduati Chege. If so, whether she can inherit the estate? The petition is filed under the provisions of Laws of Succession Act (Cap 160). The deceased died on 9th October, 1997. Clearly then the provisions of the Act shall apply to his estate. Section 2 of the Act stipulates and I quote:

***“2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.***

***(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”***

The Act does not distinguish the entitlement of inheritance between a married and an unmarried children which include a daughter. Furthermore, as per Section 33 of the Act the customary law as to intestacy shall only apply to

- (a) Agricultural land and crops thereon, or
- (b) Livestock

The Act thus makes it clear that a daughter is equally entitled to the estate of her father. Only limitation shall be to her inheritance on the agricultural land and crops thereon as aforesaid.

It is not within my purview to decide on the nature of the estate in this application.

I can only find that she is a beneficiary to the estate and that her share can be determined as per Section 32 and Section 40 of the Laws of Succession Act.

To sum up the above, I find that the applicant was not the wife of the deceased at the time of his death and thus is not entitled to any benefit from the estate.

I further find that Mary Muthoni Gitumbi is a married daughter of the deceased and as per the Act she is a beneficiary of the estate subject to limitation imposed under Section 32 and Section 40 of the Act.

The parties shall thus take further steps according to the said finding.

**Each party to bear its costs.**

**Dated and delivered at Nairobi this 21st day of March,  
2003.**

**K. H. RAWAL**

**JUDGE.**