



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
H.C. SUCCESSION CAUSE NO. 1678 OF 1999
IN THE MATTER OF THE ESTATE OF MWAURA GATHARI -DECEASED)

1. GRACE WANGARI MWAURA

2. ALEX MWANGI MWAURA.....PETITIONER/RESPONDENT

V E R S U S

WANJIRU MWAURA.....OBJECTOR/APPLICANT

R U L I N G

The Petitioners who are wife/widow and son of the deceased filed the petition, wherein it is stated that all the daughters of the deceased are married.

One of the daughters namely Wanjiru Mwaura filed the Objection to the petition on 30th August, 1999 on grounds that family members did not inform her of their intention to apply for letters of administration and that she is entitled to the estate as a beneficiary. She thereafter filed a cross-petition on 17th December, 1999 reiterating the said grounds except that in her cross-petition she described herself as 'Daughter'. The difference in the two petitions is that in the petition she was described as Margaret Wanjiru Gakinya and her cross-petition she described herself as Margaret Wanjiru Mwaura but she has not contended anywhere specifically that she was not married.

2nd Objector Mwihaki Mwaura similarly filed first an objection on 17th January, 2000 and thereafter filed the crosspetition on 6th June, 2000 claiming to be the co-wife of the deceased and her two daughters who are stated to be married daughters in her cross-petition. She has also mentioned four plots at Ngorongo in addition to those mentioned in the Petition. Contrary to her averment in the cross-petition, she has deponed in her evidence that Flora Njoki Mwaura one of her two daughters is not married. Her claim which contradicts her pleading cannot be sustained and I can at this juncture dismiss her claim in this respect. Apart from general assertion that the two daughters stayed with her and deceased in the shop, no further details are coming from the horse's mouth, so to speak, as to their dependency on the deceased. They are admittedly not biological children of the deceased, and in view of the scanty evidence I reject the claim of the 2nd Objector that her two daughters named whether married or not are beneficiaries of the estate of the deceased.

As regards the two Cross-petitions, I shall first dwell on the 1st Objector's Cross-Petition. The Petitioners have neither denied nor left out her name as surviving daughter of the deceased. Whether she is married or unmarried is, in my view, immaterial at this juncture. The deceased died after the Laws of Succession Act came into operation which was on 1st July, 1981. The Act does not discriminate between male or

female children or between married and unmarried children. The only provision where the Act applies customary law to the intestate estate is section 33 which provides for distribution of the properties specified in section 32 of the Act as per Law or custom applicable to the deceased's community or tribe as the case may be.

Section 32 specifies the properties contemplated in section 33 as aforesaid. They are (a) Agricultural Land & Crops thereon and (b) Livestock.

1st Objector with the exception of the above provisions is a dependant and beneficiary of the estate. As stated herein above, her name is stated in the petition whether the married name was chosen or not is of not much relevancy so far as the Cross-petition is concerned.

But due to the above provisions, I shall have to determine her marital status because there is a specific averment in the replying affidavit sworn by the 1st Petitioner that Objector was married to one John Gakinya Gatuiku sometimes in 1964, under Kikuyu customary law.

Directions were given to determine the cross- petitions by way of oral evidence. 1st Objector denied having married but agreed that the person aforesaid named by the 1st Petitioner was her friend and they had four children out of which three survived. They were also named as per Kikuyu custom. She also agreed that herself and John lived in a house constructed by her father over a piece of land given to her by him. The land has not been identified by her or any of the witnesses of the Petitioners who also deponed the same fact. According to 1st Objector John has left her after she moved out from her father's land in 1975 to settle at Ruaraka . John left her since then. She denied having any knowledge of 2nd Objector in her deposition. Other witnesses PW2 & PW3 also have stated that they have not seen John during their visits to her house.

As against that the 1st petitioner her mother, her maternal uncle (P.W. 2) and her brother (P.W. 3) have deponed that she was married to John after ceremonies were performed as per Kikuyu custom. Dowry of 100 goats was paid by him and a goat was slaughtered. They were accepted and recognized as a man and a woman by all concerned. Coupled with this evidence, the long cohabitation of almost 11 years and the birth of four children evinces the performance or presumption of a marriage. The deceased having settled them on his own plot also gives comfort to my finding that 1st Objector is a married daughter. There is no evidence of dissolution of this marriage from either side.

In short I find that the 1st Objector is a married daughter of the deceased and subject to the exceptions stipulated in section 33 of the Act, she is the beneficiary of the estate of the deceased. It is not up to me to decide on her share at this premature stage of the proceedings.

This leaves me with the cross-petition of the 2nd Objector. She contradicted her pleading and evidence when she stated that her second daughter is not married. Her evidence that before the ceremony of marriage was performed, she was introduced by the deceased to the 1st Petitioner cannot be accepted. First of all, if she was thus introduced, why no one from the deceased's side participated in her marriage ceremony which she herself accepted, was attended only by friends. She could not put any dent on the evidence of the Petitioners that the deceased was staying on his ancestral land except for his visits outside. If she was openly introduced as a co-wife, there is no evidence of any home built for her. On her own admission she stated that they were staying in the shop and the store behind it. Her admission that she did not participate in his funeral as a co-widow does not lend further support to her claim. The narration of the ceremony of marriage by her and her father does not appeal to me because of her assertion that she was previously introduced to the household of the deceased as a co-wife.

She also did not appeal to me as a truthful witness. The I.D Card bearing the name of only 'Mwaura' after her first name without the evidence of her previous names produced do not and cannot strengthen her claim of a married woman. She did not produce the affidavit allegedly sworn by her and the deceased to confirm their marriage. She could have called at least her neighbours to support her claim that they were living as husband and wife since 1964. There has to be someone who could have seen them together as husband and wife to enable me to accept the relationship from long cohabitation and repute.

She accepted that she did not bear any child from the deceased during long period from 1964 to 1999. No reason is given for such non-conception. I cannot presume marriage from these background only from the fact that she claims to have title deeds of four plots. The title deeds were not produced and details of how and from whom she obtained the possession of those title deeds or share certificates, if they are at all in existence, were not given. Simple mention from her that the deceased gave her those documents is not enough evidence to prove this claim also.

I am thus satisfied that the 2nd Objector has not proved her claim of being a co-wife on the balance of probability and thus dismiss her objection and cross-petition with costs to the petitioners. I shall also further direct that she should file the documents pertaining to the four plots in the court file so that the same can be dealt with in accordance of law.

The first Objector being a daughter and beneficiary, I shall not award any costs for her Cross-petition. The Petitioners shall consider her as a beneficiary except for the statutory provisions of the Act specified in this ruling.

The petition filed by the petitioners is allowed and grant of letters of administration be issued to the petitioners.

Dated and delivered at Nairobi this 4th day of June, 2003.

K. H. RAWAL

JUDGE.