



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION CAUSE NO. 161 OF 1994
IN THE MATTER OF THE ESTATE OF FRANCIS KIMANI
(DECEASED)

REGINA WANJIRU KIMANI..... APPLICANT

V E R S U S

TERESIA WANJIRU HEZEKIA RESPONDENT

R U L I N G

The grant for letter of confirmation was issued to the mother of the deceased Teresia Wanjiru Hezekiah. Regina Wanjiru Kimani thereupon has filed summons to revoke the said grant on the ground that she was the wife of the deceased and concealment of that fact in the petition is fraudulent. She has also sought interim order to restrain the Petitioner from sub-dividing and selling the estate property. In her affidavit in support to the said application she said that herself and issues of marriage namely Rebecca Njoki, Kimani, and Mary Wambui Kimani should be included as dependents and beneficiaries of the deceased in the petition. An award of elders wherein she is recognized as a wife to Kimani the deceased was annexed to the application for revocation.

The Petitioner denies that the Objector Regina was married to the deceased. She specifies that the deceased was mentally sick and was incapacitated to undergo a marriage ceremony. She denied that deceased had any children. She explained the presence of the Objector in their house by stating she was brought as a housemaid to help the deceased. But Kimani committed suicide after 34 days and it was impossible for him to sire children during this short time. Directions were given that the application be heard and determined by oral evidence and thus the same was heard. Three issues were also framed namely:

- (i) Whether the Objector is a wife/widow of the deceased as per the Laws of succession Act,**
- (ii) Whether the Petitioner has fraudulently omitted objector's name as a beneficiary.**
- (iii) Whether the children of the objector are the children and dependant of the deceased.**

Objector called 3 witnesses and also gave evidence before me.

Her mother stated that Petitioner visited her home four times before she collected Objector from her home. They bought sodas and she was paid Kshs.7,000/=. Regina went with them along with her two children. She stayed with the deceased and after his death she was chased away. She however did not remember the dates of any of the aforesaid visits.

Second witness corroborated the story of visits to objector's home and said she was the negotiator. She gave versions of all the visits and persons who accompanied her which included the Petitioner. She also said on fifth visit Soda and Ksh.7,000/= was given to her mother. They were allowed to take Regina and

before they left photographs were taken. She also said that after the death, the objector stayed at deceased's home for two years. She also confirmed that Regina came with two children. When asked why deceased did not accompany them during any of those visits, when she described him as a normal person, she only replied that she did not know.

The third witness who came like an expert on Kikuyu custom, told the court that even if goat is not slaughtered, but if the dowry is paid and girl is taken, there could be a valid Kikuyu marriage. He added that Ngurario can be performed at any time.

Finally the Objector told the court how she developed friendship with the deceased who wanted her to be his wife. He had also taken her to his home three times. She however said that as per her family tradition, before she could join him some arrangements had to be made and that she should be collected by his family. She also narrated visits by his mother and others. She was chosen by his mother out of a group of her sisters. She was taken and before they left photographs were taken. She also produced photographs of the funeral of the deceased. After his death she stayed on. The Petitioner transferred Deceased's Bank Account in her name and also transferred a piece of land by way of share certificate. She left the house because the petitioner was trying to give her to a man and she refused to do so.

She also denied knowledge of circumstances of his death but during cross-examination she agreed that he was found with a rope hanging on his neck. She denied the knowledge of his mental illness and said he was behaving normally with her. She said she was given the transfer of share with the consent of the petitioner and in her presence at D.O.'s office, Kiambu.

The Petitioner gave evidence and testified that deceased was sick since he was in standard VII and then said since he was 10 years old. She reiterated her stand that the objector was her employee and that she was never married to the deceased. She said she went once to the home of objector's mother to pick her up. She assisted her in household work and tea picking while she looked after the deceased.

She gave details of the circumstances under which deceased committed suicide and I do not think they are relevant to the present matter. She could not explain satisfactorily the pictures taken and produced in evidence. She stuck to her version that as far as she was concerned she was taking the objector as her employee.

She conceded she has transferred the estate property in her name and that she is in possession thereof.

Dr. Asania Onyango confirmed from records held at Mathare Hospital that the deceased was suffering from Schizophrenia and since it was chronic he was admitted on and off in Hospital. He described its symptoms and agreed that there could be lucid intervals, but intervals thereof cannot be quantified.

The third witness gave all the stages of Kikuyu customary marriage. He insisted that the permission to get married has to come from the bridegroom and insisted that the said ceremony of Ngurario or permission cannot be performed in his absence.

These are the facts of the case as presented before the court.

Both counsel submitted and I have considered their respective contentions. The Objector in support of her application annexed the proceedings and award in P & A Cause NO. 161 1994, presumably before D.O.'s office. Be that as it may, there is specific contention made on the part of the Objector that Kshs.1,500/= was given by the Petitioner as dowry and Kshs.500 in respect of soda to be drunk by the guests. However the said sum now has inflated to Ksh.7,000/= before this court. Mary Wangui (P.W.2) also gave evidence before the tribunal and stated the same amount of Kshs.1,500/=. She did not mention several visits as she has done before me. What she said before them was that the deceased and Objector met in her house on 1st January, 1991 and then his mother approached her by stating that she would like her son to be married to the objector.

Apart from the payment of the dowry (the sum thereof differing) there is nothing before me that the

stages in Kikuyu customary marriage was followed.

The spilling of blood ceremony was also admittedly not performed. The pictures produced before the court unfortunately cannot confirm the marriage which has lacked essential steps of a Kikuyu marriage. I shall also be hampered in presuming the marriage by long cohabitation and repute. The couple stayed together only for 34 days. There is nothing to show that the two children of the Objector were adopted by the deceased, who in any event has been sufficiently shown to have been suffering from serious and chronic mental disorder.

The absence of the deceased in any of the visits deponed by the Objector and her witnesses also lend support to my observation that no valid marriage as per Kikuyu customary law was performed. The onus of proof of marriage in this case rests on the Objector and, in my view, she has failed to discharge that burden.

She should be content with what she has been allegedly to have been given by the Petitioner but in law she has failed to prove her claim.

My findings thus on all the three issues raised are in negative.

The application to revoke grant of letters of administration issued in favour of the Petitioner stands dismissed with costs.

Dated and delivered at Nairobi this 5th day of May, 2003.

K. H. RAWAL

JUDGE.