



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.1203 OF 1999

*IN THE MATTER OF THE ESTATE OF ELIJAH WANJAU KAMAU (DECEASED)*

**RULING**

The Deceased herein, ELIJAH WANJAU KAMAU, who was a veterinary doctor, died on 29th August, aged 42 years. By Petition filed on 7th June, 1999 his mother IRENE WANJIRU KAMAU (hereinafter called IRENE) and her two other sons, ISAIAH KABURU KAMAU and NELSON MWANGI KAMAU, jointly sought a grant of letters of administration intestate to his estate. Before such a grant would be issued ELIZABETH WAITHIRA KAGOIYA (hereinafter called ELIZABETH) filed an objection, answer to Petition and petition for a similar grant by way of cross-application. In her pleadings she claimed to be the Deceased's widow with whom she had had one child called JOEL KAMAU WANJAU.

On 20.05.02 the court (Hon.Rawal, J.) recorded as follows:-

***“COURT: After discussing with the counsels it is agreed that the co -petitioner can be a co -petitioner along with IRENE WANJIRU KAMAU with spec ific understanding that she is not recognized or declared as the widow of the Deceased. That issue be determined at the time of confirmation. By consent the son, JOEL KAMAU WANJAU, be added as the dependant of the Deceased.”***

Consequent upon this a grant of letters of administration intestate dated 20th May, 2002 was issued jointly to ELIZABETH and IRENE.

On 28th February, 2003 Elizabeth applied for confirmation of that grant. In her affidavit sworn in support thereof she set out herself, her son Joel and the Deceased's mother Irene as the persons beneficiary entitled to the estate and made certain proposals for distribution. On 1st April, 2003 Irene filed an affidavit of protest in which she stated that only herself and Joel were entitled to share the estate equally.

On 7th April, 2003 it was agreed that the issue whether or not Elizabeth is the Deceased's widow be tried first on oral evidence. I heard the parties and their witnesses in this regard on 7th July 2003. The learned counsels appearing made submissions on 18th July, 2003. Hence this ruling.

I have carefully considered the testimonies of the parties and their witnesses. I closely observed their demeanors as they testified. The case of ELIZABETH is that there was a presumption that she was married to the Deceased on account of long co-habitation and repute. In the course of that co-habitation she bore the Deceased a son, JOEL. In her affidavit of protest Irene accepts this boy, who is still a minor, as the Deceased's son. But in her testimony in court she seemed to deny that he was the Deceased's son. On this as well as other issues she was less than forthright.

I accept the testimony of ELIZABETH that from 1996 she and the Deceased lived together as man and wife at Kabete from where he commuted to his station of work at Thika. He soon fell ill and was in and out of hospital until he died in 1998. Elizabeth took care of him throughout his illness. I further accept that this husband/wife relationship commenced some time in 1994 after the Deceased proposed to her. In that year he also took her to his home in Kirinyaga District where he introduced her to his mother Irene and other family members as his wife. The Deceased was then stationed at Homa Bay, and thus would go home to Elizabeth at Kabete only over the week-ends. Their son Joel was born in May, 1995. Their neighbour at Kabete, DANIEL FRANCIS OWUOR (PW 2) regarded them as man and wife. So did

Elizabeth's sister, SARA NDUTA KINYANJUI (PW 3), who visited them at Kabete on many occasions.

During the Deceased's funeral Elizabeth was recognized by the Deceased's family as the Deceased's widow. In the funeral announcements prepared by the Deceased's own brothers (including DW2, NELSON MWANGI KAMAU) and cousins she was referred to as the Deceased's widow. Her son Joel was referred to as the Deceased's son. Pictures were taken at the funeral which were consistent with her status as the Deceased's widow.

Having considered the totality of the evidence and the submissions of the learned counsels appearing, including the authorities cited, I find that a presumption of marriage between the Deceased and Elizabeth was raised. I find no cogent evidence to the contrary in rebuttal of this presumption. This marriage was not under statute nor under Kikuyu Customary Law. It was a marriage established by long cohabitation and repute and duly supported by the fact that the child of that union, a boy, was named after the Deceased's father in accordance with Kikuyu customs as pertains to the naming of the children of a married couple. I therefore find that Elizabeth is the Deceased's widow for purposes of succession under the Law of Succession Act, Cap.160. It is so ordered. She shall have the costs of these proceedings. The parties may now fix the application for confirmation of grant for hearing.

**DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2003.**

**H.P.G. WAWERU**

**JUDGE**