



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 2269 OF 1998**

**IN THE MATTER OF THE ESTATE OF JAMES MBERI MUIGAI KENYATTA**

**J U D G E M E N T**

The proceedings in this Succession Cause show that the deceased James Mberi Muigai Kenyatta son of the late Peter Muigai Kenyatta and Mary Wamuhu Muigai, died in a South African hospital on 7th June, 1998, following an aircraft crash here in Nairobi Kenya.

Thereafter his mother Mary Wamuhu Muigai petitioned this court for a Grant of Letters of Administration “ad colligenda bona”, vide her petition dated 30th July, 1998 in Succession Cause No. 1507 of 1998. It is not clear whether “A GRANT AD COLLIGENDA BONA” was issued. In the same court file also, is an application for GRANT OF LETTERS OF ADMINISTRATION, INTESTATE. For this application also, there is no evidence that a Grant was issued either.

However, there is another court file being Succession Cause No.2269 of 1998 in which one Elizabeth Wambui Mberi together with her sister in law petitioned for a Grant of Letters of Administration (intestate) in her capacity as the “widow” of the late James Mberi Muigai Kenyatta. The petition is dated 2nd November, 1998.

Filed at the same time as that petition for Grant was an application for injunction seeking restraining orders against “Mary Muigai, her sons, daughters, agents, servants etc etc from alienating, leasing or otherwise dealing with Land Reference No. 17/264 Kitisuru Nairobi”.

The petitioner also prayed in that application that she be “declared the exclusive recipient of the rents”.

The deceased’s mother, Mary Wamuhu Muigai together with her sons and daughters filed an objection to the making of a grant. This was on 6th November, 1998.

The Grounds put for the objection were as follows:-

- (i) “That the 1st petitioner Elizabeth Wambui Mberi was not a wife of the deceased at any material time as alleged in the petition”.
- (ii) “That the second petitioner (Elizabeth’s sister in law) is a complete stranger to the proceedings as she was not in anyway related to the deceased”.
- (iii) “There is already a petition by Mary Wamuhu Muigai and Hannah Wahu Muigai Unaka, the mother and the sister respectively of the deceased, being Succession Cause No.1507 of 1998, filed prior to the present one”.
- (iv) “The petitioners fraudulently intend to exclude all the beneficiaries from sharing the estate”.
- (v) “The petitioners have concealed vital and material information to this court”.

(vi) “The petitioners have misrepresented facts to this court”.

(vii) “The petitioners have not obtained the consent of the other beneficiaries to be appointed administrators”.

The deceased’s mother cross petitioned for a Grant of Letters of Administration to the deceased’s estate. The deceased’s mother also filed an answer to the petition for Grant by Elizabeth Wambui.

The advocates representing the parties filed agreed issues for determination by the court. These were:-

1. “was the petitioner (Elizabeth) the widow of the deceased?”
2. “Depending on the answer to the above, is the petitioner entitled to inherit from the deceased’s estate, if so, to what extent”.
3. “Are the two children, viz, Stephanie Wambui Muigai and Natasha Kenta Wacheke Muigai, children of the deceased”.
4. “Are the two children viz Stephanie Wambui Muigai and Natasha Kenta Wacheke Muigai entitled to inherit from the deceased’s estate, if so, to what extent?”
5. “Is the cross petitioner entitled to inherit from the deceased’s estate, if so, to what extent?”
6. “Who as between the petitioner and cross petitioner is in the circumstances entitled to obtain and be granted the Grant of Letters of Administration in respect of the deceased’s estate?”
7. Who pays for the petition or the cross petition?” The parties adduced oral evidence and called several witnesses, as the court record shows.

Elizabeth Wambui Waweru Mberi, met the deceased James Mberi Muigai in 1990, and the two became friends for about 2½ years. In 1993, Elizabeth got pregnant and because James did not want the child to be born out of the wedlock, he tried to make his family meet hers so as to formalize their living together, but this did not materialize as James’s family was reluctant to meet her family. James’ mother said that he was too young to get married. Nevertheless James went against his mother’s wishes and arranged a visit to her mother’s house.

Elizabeth recalled that James came to his mothers house off Ngong Racecourse, a place called Ngando, with 2 elders whom he got from Gatundu. He was also accompanied by two of his friends. The delegation was received by Elizabeth’s mother who was accompanied by her brothers and some of her friends.

That James had brought a goat and some drinks. He bought the goat at Kitengela. Elizabeth explained that discussions went on but she was not in the room as she had been asked to leave the room. Later she learnt that James had asked for her hand in marriage. He had asked her mother, who gave permission for marriage. Elizabeth and her friends thereafter ate some meat from the goat James brought as it was slaughtered. According to Elizabeth, James paid dowry for her of about Kshs.25,000/= or Kshs.30,000/= and promised to return to pay the balance, which he did, a further sum of Kshs.50,000/=.

Elizabeth gave birth to her 1st baby Stephanie on 16th February, 1994. She produced a copy of a birth certificate C NO. 405494, dated 6th July, 1998. The certificate did not have the father’s name, and Elizabeth explained that she delivered the baby in a Catholic hospital where they are strict and they do not allow a patient to put down the name of the father of the baby, unless a woman is married to that man.

Elizabeth had the second baby with James the deceased. She named the baby Natasha born on 30th November, 1996. Again, she produced her birth certificate No. as Ex.2. It was issued on 21st August, 1997 having been applied for the same year.

Elizabeth recalled that she started living with James when her 1st born Stephanie was about 8 months old in 1994. Their 1st place of residence was James's mother's house in Kitisuru where the mother was also living. By then, James had no job. Everything they were using was the mother's. Elizabeth was having problems with James's mother whom she said "kept on picking on her here and there". Eventually James sent Elizabeth back to her mother in 1995, but called her back to Kitisuru, the mother's house. By now James had taken possession of a part of the house which had a kitchen and had a door, separating it from the mother's part of the house. Elizabeth lived with James in that part of the house for about 3 months then she moved out and rented a house as James remained in his mother's house, but paid for Elizabeth's rented house. That this arrangement went on for about 8 months in 1996. That eventually James moved out of his mother's house and moved into a house in Ngumo Estate in May 1997 together with Elizabeth and the 2 children. In September 1997, James moved out of the Ngummo House and went back to live with his mother. Elizabeth recalled that by this time, James' mother was trying to convince him that Elizabeth was not the right woman for him. Elizabeth remained in the Ngummo House for a few days with the children then she took the children to James and she in turn went to her mother's house.

Elizabeth testified further that James eventually went to collect her from her mother's house after he had found a house in Kileleshwa. This was now in October, 1997. They moved into the house with the children. The house was too small, so they moved into a bigger house on 1st May, 1998. Elizabeth said that barely a month after moving into this house, James had a plane crash. Elizabeth broke down in court and cried at this stage. She, however, composed herself and continued with her evidence by saying that James was flown to South Africa for specialized treatment, but he died after 2 weeks.

Elizabeth attended the funeral as well as her mother. She recalled that James died on 7th June, 1998 and was buried on 16th June the same year. Elizabeth was not asked to speak during the burial, but at a meeting of James' family after the burial, she thanked everybody for their support, and according to her, she assumed she was speaking as James wife, otherwise she was not given any recognition during the whole period of mourning upto the burial, but her two children were mentioned in the funeral programme. She produced a copy of the programme as an exhibit in court.

Elizabeth said that she does not come from a well off family that is why her mother in law did not accept her, and according to what James told her. She (James' mother) did not want Elizabeth to live in the house in Kitisuru.

Elizabeth recalled that after James' death, James's mother paid rent to the Kileleshwa house for only one month, the month of July 1998. She paid Kshs.30,000/= and gave Elizabeth Kshs.10,000/= for food and that was all. This evidence denied by James's mother. Thereafter, Elizabeth had a meeting with James's mother, at Pizza Garden in Westlands. Also present in the meeting were James' friend Anthony, James' sister Wahu and James' aunt Christina Pratt. An agreement was reached and reduced into writing on how things would be done, such things as payment of bills, maintenance of the children and their school fees and medicals. Elizabeth signed the agreement, but James' mother refused to sign it. The agreement was not produced in court.

Elizabeth testified that James had a house in Kitisuru, which he built in 1995. It was very close to his mother's house, in fact, it shared the same fence with the mother's house. James had rented out that house for Kshs.105,000/= p.m. otherwise, he had no job and never worked. He used to take the rent from his house, and he even introduced Elizabeth to the tenant and told her to be collecting the rent whenever he was not around.

Elizabeth lamented that she had not got any rent from James' house, since he died. Instead James's mother collects the rent. That James used to use the rent from the Kitisuru house to pay the children's school fees, and also pay the rent of the house in which they lived in Kileleshwa.

Stephanie who is the 1st born child used to attend Cavina school where the school fees per term was Kshs.75,000/=. Elizabeth showed a demand note for school fees amounting to Kshs.168,400/=. She produced the demand letter as Ex.4.

Records from Cavina school relating to Stephanie were produced as exhibit. Elizabeth also produced medical documents and receipts issued by Dr. Kahiu, who was the children's doctor. Further documents showing insurance cover for James, Elizabeth and Stephanie were also produced as exhibits. Elizabeth said that James paid for all the insurance covers. She also produced a copy of James' passport as an exhibit, and also some photographs taken of her and her children with members of James family, i.e. his grandmother Wahu Kenyatta.

Elizabeth disclosed that her "mother-in-law" (James's mother) owns a big farm in Kitengela, over 100 acres. She also owns 3 houses in Kitisuru. She lives in one and has rented out two which fetch rent of between Kshs.70,000/= to Kshs.100,000/= a month. Elizabeth also knew that James's mother sold a property in Muthaiga and used the money to buy land in Kitisuru. This is the land she subdivided to her sons including James, to build their houses on. James later deposited the title of his house with a bank to get money to pay for his flying lessons, otherwise he never worked. Elizabeth also recalled that James had 3 cars. One small car was given to her to use. She still uses it, though the car is in James's name, but she has the log book to it.

Elizabeth lamented that she does not have access to James's house in Kitisuru because the guards who are there have been instructed not to allow her in. She went to visit her mother in law several times after the funeral but there was too much animosity. She produced several copies of title deeds of properties owned by James's mother, brothers and sisters and said that she was unable to find the file relating to James' property in Kitisuru. The file was reported "missing" at the Lands Office. Nevertheless Elizabeth discovered that the Original title deed for the Kitisuru property was subdivided into 8 different titles, and the one belonging to James was No.170264. This is the property she was interested in and which she declared in her petition seeking Letters of Administration to administer James's estate. She also put in her petition, a property known as L.R No.14906/50 situated in Nairobi West, a property James owned jointly with his brothers and sisters, but James used it as a business premises. Elizabeth has not been able to access James's bank accounts. She does not know whether there is any money in them.

Elizabeth produced several other photographs of James, members of his family and Elizabeth and her children. She also produced a receipt for payment of rent of Kshs.30,000/= made by James for the apartment in which they lived in Kileleshwa. Elizabeth remained in the flat from June to August 1998. The flat was changed into her name. James's mother paid the rent for July 1998, and no more so Elizabeth moved out of the flat at the end of August, 1998 and went to live with her aunt, Mrs. Terry Kariuki.

Elizabeth's mother lives along Ngong Road, opposite the Racecourse. She is separated from her husband. Elizabeth was born on 5th June, 1972. The names in Elizabeth's ID are Elizabeth Wambui Waweru. The last name is her grandfather's name, but her passport has the names, Elizabeth Wambui Saleka, the last name here being her father's name. She does not have official documents bearing the names Mberi or Kenyatta.

Elizabeth went to school upto 4th form, trained as a secretary and started working with NIKI Africa in 1995 earning a salary of Kshs.25,000/= p.m.

James was born on 20th April, 1972. He completed his studies locally, and eventually went to the USA for further studies and returned in 1993.

Elizabeth confirmed that upto the time of his death, James was not working but had started some business.

Elizabeth conceded that she lived with James on and off from October 1994 to June 1998 when James died (7.6.98).

Questioned about the children's names Elizabeth answered that none of the two children are named after James's parents in conformity with the Kikuyu customs Elizabeth was aware that James had several bank loans by the time of his death. She did not however, know who was servicing them, but she was aware that James's mother was being followed by creditors to pay the loans.

Concerning the ceremony in her mother's house in Ngong, Elizabeth understood it to mean that James came to ask for her hand in marriage. She confirmed that none of James's family members attended the ceremony.

One David Wachira Chuani, PW2 described Elizabeth as the wife of the late James Mberi who was his friend. He could not recall when they got married, but he remembered that James told him that he wanted to marry Elizabeth as they already had two children.

The witness did not attend the ceremony which was in Elizabeth's mother's house at Racecourse. He however, testified that James treated Elizabeth's children as his own and the way a father would. He made birthday parties for them and invited his friends. David particularly recalled a party James made at Splash in Carnivore for Wamboi, the first born child. He testified further that James drove the children to and from school, and provided for them the way a father is supposed to.

David recalled that James lived in Umoja, Ngummo estate and in some apartments in Kilimani as well as Kitisuru in his mother's house where he had to put a door to separate the part of the house where he lived with Elizabeth, from the part where his mother lived.

James also paid school fees for Wambui, the first born child. Natasha had not yet started school. James also paid rent.

Magdalena Gathoni is Elizabeth's mother. She lives in Ngando, near Racecourse. She is a businesswoman running a hotel business at Kenyatta market.

She testified that her daughter Elizabeth was married to the late James Mberi under Kikuyu customary Law and they have two children, Wambui and Natasha.

Magdaline recalled that in September, 1993 James came to her home and promised to return in November to discuss the marriage with Elizabeth. That James did return to her home in November and paid dowry in the form of money i.e. cash Kshs.25,000/= so a ngurario ceremony was performed and meat was eaten and beer served. She gave the names of the people who were present at the ceremony.

That the dowry agreed upon was Kshs.150,000/=. James returned to her home again on 20.11.93 and paid a further sum of Kshs.30,000/=.

To the best of her knowledge James and Elizabeth lived together as husband and wife, till he died. She confirmed that the ngurario ceremony was not attended by James's mother or brothers or sisters. She was surprised about this. She also confirmed that her family and James's family have never met, and also, that her daughter's children are not named in conformity with Kikuyu customs because she was told that James' mother refused to be named.

Henry Kagundu and John Njuguna Kiarie were present at the "ngurario" ceremony in Elizabeth's mother's house.

Henry Kagundu who is a farmer was invited to the function by Elizabeth's mother. He gave the number of the people who were present at about 8 in number, including James Mberi. The matter of dowry was discussed and agreed at Kshs.150,000/=. Out of that a sum of Kshs.25,000/= was paid out that day and they promised to return on 20.11.93 to make a further payment of Kshs.30,000/=.

Henry recalled that on the 1st day of the visit, James promised to slaughter a goat. He stated further that according to Kikuyu custom you must first pay dowry before you are allowed to slaughter. The witness testified that James slaughtered a goat on 6.11.93, the day of the return visit.

John Njuguna Kiarie was a childhood friend of the late James Mberi. He accompanied James to Elizabeth's home, to ask for her hand in marriage. They were a group of 8 people negotiations went on and the dowry sum was agreed at Kshs.150,000/= but they were able to pay only Kshs.25,000/= that day.

Later they returned and paid a further Kshs.30,000/=.

Elizabeth and James started living as husband and wife after that at Umoja estate. They also lived in Kitisuru at the mother's house, Ngummo estate and Kileleshwa.

The witness was aware that James and Elizabeth had 2 daughters whom James was very proud of. The witness confirmed that none of James's family members attended this function.

Mary Wamugu Muigai James's mother together with her daughter Hannah Wahu Muigai are the cross-petitioners for a grant to the estate of her late son James Mberi Muigai.

She lives in Kitisuru in Nairobi but she has other properties.

She said, ***"I am worth about Kshs.15 million in terms of property"***

. She had 7 children in all. Now she has 6 after James's death. The deceased James was born on 21.4.72 and he died on 7.6.98. She produced a copy of the death certificate. She gave a detailed account of James educational background until the year he went to Dallas in Texas USA to pursue a commercial pilots certificate.

James returned in 1993 and joined the school of flying in 1994 where he remained until 1995, then he had to leave to help her in business because she had had an accident.

Mary recalled that James had a problem with a lady called Elizabeth who kept on following him so James opted to go to the USA in 1996 to avoid her. He however returned after one year and because Mary was now financially stable she took James back to Kenya School of Flying, and in 1998 James completed his studies, but as he was doing his test, he got involved in an air crash.

Mary testified further

***"During all this period, James was never in gainful employment. During the same period, he did not acquire property of his own and I was paying for his schooling which was very expensive".***

She talked about two women who were James's girlfriends, other than Elizabeth. She denied that James was married to Elizabeth and said that first, James was living at her house in Ngummo, and later she rented a house for him in Ngummo as he wanted to start business with one Osogo. However, Elizabeth went and dropped the children in that house so James was forced to move out and go back to Kitisuru. Mary again rented an apartment for him in Kyuna. There too Elizabeth went and abandoned the children and James was evicted because of the commotion.

Mary denied that Elizabeth ever lived in her house in Kitisuru. She next saw Elizabeth at the hospital after James had been involved in the accident. She said that to her knowledge

***"Elizabeth was trying to force herself onto Mberi because Mberi complained so to her".***

Mary has organized ngurario ceremony for her children who are already married. She was not aware of the ceremony alleged to have taken place at the house of Elizabeth's mother. Mberi did not talk to her about it and none of her children or her uncles or aunties knew about it. She said that Elizabeth was never introduced to her by Mberi as a wife.

She produced copies of birth certificates of the children of Elizabeth. They did not show Mberi as the father. Elizabeth was described as "single" yet she was claiming that she was Mberi's wife.

Mary produced a letter dated 26.1.98 written to her by her late son James denying Elizabeth as his wife.

He also named the fathers of Elizabeth's two children in that letter.

Mary testified further that Mberi left the country on 10.10.96 to the USA, according to his passport which was exhibited in court. He returned on 30.3.97. In the meantime, Elizabeth delivered her second born child on 30.11.96. She denied that her son James was therefore a party to the entries on the birth register and forms.

According to James's mother, James had no income of his own and no property of his own. She was the one who obtained a loan and constructed a house. James had no income, no security so he could not be allowed to borrow money. Mary obtained a loan from East African Building Society, built the house and rented it to Barclays Bank. She uses the rent to repay the loan which she has not completed. She denied that James was using the rent for paying school fees for Elizabeth's children and said that James could not even pay his own school fees. It was Elizabeth who was working so she must have paid the school fees herself.

Mary paid heavy financial expenses incurred during James's hospitalization and subsequent death.

Mary denied the allegation that she rejected Elizabeth because she came from a poor family. She broke down in court during this part of her evidence and maintained that Elizabeth was not James's wife, and the two children were not James children. She called for a blood test, if necessary. She asked the court to allow her to administer her late son's estate, jointly with her daughter.

Answering questions about Mberi's properties. Mary said that she bought 2 properties in Juja, and registered them in Mberi's name. She also said that James had a loan with NIC which she was repaying from her own pocket as well as servicing the loan for the house. The house she built for Mberi is rented at Kshs.115,000/=, but the loan repayment is Kshs.163,000/= p.m. She had to take another loan to make up the deficit. Mrs. Muigai used to give her son between Kshs.20,000/= to 30,000/= p.m. for pocket money.

Mrs. Muigai disclosed that the property in Kitisuru No.17/265 is no longer in James' name. She got leave from court to sell it to clear outstanding debts. She did not find anybody to buy it so she formed a company, Makajawa company. James's owed Col. Kimathi Kshs.3 million used for his education. Col. Kimathi wanted his money back so the property was transferred to Cornel Kimath to hold as security. From him the property was transferred to Peter, who paid for it and the money was used to clear debts.

Mrs. Muigai stopped collecting rent from the Kitisuru property in November, 1999. To this extent she corrected her evidence to the effect that she was still collecting rent. She produced the court order which allowed her to sell the Kitisuru property to pay debts. She also produced a copy of a Notice. She gave the Barclays Bank to move out of the property in September, 1999 to enable it to be sold.

Mrs. Muigai has also sold the 2 Juja properties. She sold them for Kshs.146,000,000/= because she had a debt in James's estate of Kshs.24,000,000/= to pay. It was this debt which made her come to court under Misc. Application No.734 of 1999 and the court allowed her to sell her deceased son's properties to repay the debts. She also wanted to redeem her own property which she mortgaged in order to build a house for James. Her property was mortgaged for Kshs.7,102,101/15.

After taking the court through James's loan and debts and the efforts made to repay them, Mrs. Muigai said, "There is nothing left of James's to sell", apart from a pick up vehicle which she (Mrs. Muigai) intends to sell to pay off more debts.

An Accountant Nahashon Kinyua Murunga prepared a list of debts to the estate of the late James Mberi Muigai. He produced the list in court as an exhibit.

Peter Osogo was a friend of the late James Mberi Muigai. They did business together. The major finance was provided by James's mother about Kshs.60,000/=. It was agreed that they would repay it back once the business picked up and was doing well. However, this did not happen as the business flopped. They were conducting this business in a house in Ngummo estate where James's mother paid rent for 4 months.

One day, however, James called him and asked him to help him move his things out of the Ngummo estate house as Elizabeth had gone there and insisted on living with him in that house.

Osogo knew Elizabeth before he knew James. He recalled that Elizabeth approached him after the court case was in progress and asked him to say that he attended the Ngurario ceremony with James at her home. However, Peter refused because this was not true.

James's brother Stephen Kamau Muigai denied that Elizabeth was married to James. She also denied that the 2 children belonged to James. His further evidence was to the effect that James had no income of his own and could not have therefore paid rent or any bills at all. He did not know about any Ngurario ceremony which James performed in Elizabeth's home. None of them took part in it as a family.

Stephen recalled that several times James would be with Elizabeth and the children would be in the car. He said that the two were just friends but not husband and wife.

Mboga Njuguna Ng'ang'a was James's lawyer from the firm of Waruhiu Kowade & Nganga advocates, in Nairobi.

Ng'ang'a recalled that sometimes in 1997, James went to talk to him about a girlfriend who claimed that she had had some children with him and she demanded that she maintains the children. He explained to him the legal position, i.e that there was no affiliation law and therefore no way the girl could force him to maintain the children if they were not his or marry her. Later he advised him to go for blood test, but he warned him that he could get hurt in the whole process.

Finally was the evidence of Geoffrey Karanja Munyoroki of the Department of Civil Registration, Office of the President.

He brought records of a child named Natasha Kenta Waceke whose mother's name was recorded as Elizabeth Wambui Waweru, and the father's name was shown as James Mberi Muigai. The status of the mother was indicated as "No, mother is not married to father". This information normally comes from City Hall who in turn gets it from the hospitals.

Samuel Kiprono Ruto, an Executive Assistant from the Civil Registration was summoned to give evidence about the records of birth certificate of Stephanie Magdaline Wambui. The birth records were also brought to court, showing that Stephanie Magdalene Wambui was born on 16th February, 1994, birth entry No.2605583/94. Particulars of parents were given, i.e mother's name Elizabeth Wambui Waweru. A birth certificate was issued but he did not bring it to court. He assumed that the owner must have taken it. He was shown a copy of a birth certificate MFI a document originating from their office. The birth certificate bore the name of the father of the child as James Mberi Muigai, yet this name did not appear on the register Ex.15. The details in the birth certificate did not correspond with the details in the register as concerns the name of the father of the child.

I have considered the oral evidence adduced as well as the submissions. The proceedings which resulted in the protracted litigation were filed by Elizabeth Waweru Mberi jointly with her sister in law. As I stated at the beginning of the summary of evidence, Elizabeth petitioned for a Grant of Letters of Administration intestate, to the estate of her "late husband".

James' mother objected to the petition and subsequently cross petitioned for a Grant under the procedure in the Succession Act, the question which the court is required to answer is simply "who should be issued with the grant to the estate of the late James Mberi Muigai Kenyatta?"

To answer that question, I have to consider the evidence pertaining to the relationship between Elizabeth and James.

According to Elizabeth the evidence which symbolized her "marriage" to James was the "ngurario ceremony" performed in her home along Racecourse Road in Nairobi.

That evidence was of course disputed by James's family because none of them were present at the alleged ceremony.

Secondly, to show that she was James's wife, Elizabeth produced the birth certificates of her 2 children saying that she had the children with James.

It is on record that the evidence of the birth certificates or details in the birth Registers became quite controversial as the evidence of the 2 officers from the Department of the Civil Registration showed.

In short, the records do not tally in both cases. There was also the evidence by way of photographs where Elizabeth's children appeared with James and certain members of his family and Elizabeth herself. This evidence too was used to show parentage as well as the evidence by way of receipts of payment of hospital bills and or doctor's bills.

There were also letters of demand of school fees arrears addressed to the deceased as the "father" of the two children.

There was also the evidence by way of a text read at the burial of the deceased termed,

**"EULOGY OF THE LATE JAMES MBERI MUIGAI, DECEASED".**

The last paragraph of the eulogy read, "*Mberi was the proud and caring father of two lovely girls, Wambui and Natasha*".

To this evidence, the deceased mother and brother said that they were not responsible for the preparation of the funeral programme but the "larger" Kenyatta family was.

I want to take judicial notice of the fact that in a situation where paternity is disputed the best and most reliable evidence would be a DNA blood test or any such similar tests. In the absence of that, it is very difficult or almost impossible to say that A fathered B or C. James considered such a test but never had it done. In the circumstances, I rule that the evidence on record is not sufficient to make a conclusive finding that the deceased "fathered" Stephanie and Natasha.

I cannot therefore rely on that evidence for making a finding that Elizabeth was married to James because James "fathered" her two children.

I want to take Judicial Notice of the fact that a man and woman do not have to get married in order to have children. I do not find Elizabeth's argument convincing that she was James's wife because the two had children together.

I have to turn to other pieces of evidence in this cause to find if Elizabeth was married to James. To this extent, I turn to the evidence of the "ngurario" ceremony.

What is disturbing about this evidence was the lack of participation of James' family in order to make it a truly customary rite. Further, there was evidence from Okondo, that Elizabeth had approached him during the pendency of this cause and requested him to come and say that the ceremony did take place. If this evidence is true, then the question to ask is, why did Elizabeth do this? Does it mean that the ceremony did not take place and evidence was being adduced in court to make it appear as if the ceremony took place? What is really the truth about this "ngurario" ceremony? Does the court have the best available evidence to enable it to make a decision whether the ceremony took place or not, and if it did, whether it constituted a Kikuyu customary law marriage between Elizabeth and James Mberi Muigai Kenyatta.

When I considered the evidence on record as a whole I came to the conclusion that it **falls short** of establishing that:-

1. Elizabeth was "married" to the deceased James under Kikuyu customary law,

2. That the 2 children Stephanie and Natasha were “fathered” by the deceased James Mberi and

3. That though James mother denied any knowledge of these children apart from when she said Elizabeth abandoned them at her door in Kitisuru, there is sufficient evidence on record to show that these children were known to her. I find that she was not honest in her evidence in denying the children.

Further, from the evidence on record the presence of these children in James’s life was known to the “larger” or “bigger” Kenyatta family, that is why the family acknowledged them in the funeral or burial programme, where the family tribute was given by James’s aunt Ms. Margaret Kenyatta, the vote of thanks was given by Ngengi Muigai and the announcements were made by Uhuru Kenyatta, James’s uncle.

What about the pictures of James’s grandmother Mama Wahu Kenyatta taken with these children and indeed some of James’s brothers and sisters and their children.

There is evidence of the receipts from Cavina school where the children went to. The Doctors receipts of payment of monies were issued in James’s names. There is evidence that he was not working and was not therefore earning a living, but whatever the case is, he did at times spend money on these children. Whether it was pocket money given to him by his mother or money from the rent of his Kitisuru house or indeed money from Elizabeth that is neither here nor there. What is important to note at this point is that he incurred expenses on behalf of these children. He even paid rent of Kshs.30,000/= in Kileleshwa the last house he lived in before he died. Elizabeth lived in that house with him and only moved out after his death when she was not able to pay rent.

James’s own brother admitted in his evidence that “several times James would be with Elizabeth and the children would be in the car”. He also described Elizabeth and James as “friends”. There was also the evidence of David Wachira Chuani, a good friend of James whose evidence was that he viewed James and Elizabeth as a family and they had two children Wambui and Natasha

***“whom James took as his own. They were his main driving force in life and everything he did was towards the betterment of the children for example.....”***

I find from the totality of this evidence that these children Stephanie and Natasha were children whom James the deceased **“had taken into his family as his own”** and from the reading of Section 29 of the Succession Act, Cap 160 Laws of Kenya, these children qualify as “dependants” as far as James estate is concerned.

Otherwise I am unable to find from evidence a record that Elizabeth is entitled to apply for a Grant of Letters of Administration of James’ estate, on account of her having been James’s “wife” and therefore upon death, James widow”.

Instead, I grant leave to James mother Mary Wamuhu Muigai and her daughter Hannah Wahu Muigai Unaka, to proceed with the petition already filed, being Succession Cause No. 1507 of 1998, and obtain Letters of Administration to the estate of the late James Mberi Muigai Kenyatta.

As I have ruled that the 2 children are entitled to inherit from James’s estate, I direct that their claim for dependancy be made after the Grant applied for by James mother and sister has been issued but not yet CONFIRMED. I am giving these directions in conformity with Section 26,28 and 29 of the Succession Act, Cap 160 Laws of Kenya.

Section 27 of the same Act gives the court discretion in making order for a specific share of the estate to be given to the dependants.

However, in this case, it not clear what is left in James estate after James’s mother had obtained leave from this court (Etyang, J) to sell James house and 2 farms in Juja to pay debts owed by the estate. This

was done during the pendency of this cause. The court can only order specific shares to be given to the dependants when it is known what properties and or monies (if any) is available in the estate. This should be established before such orders are made.

**Finally, I order that each party to these proceedings pays their own expenses.**

**Dated at Nairobi this 30th day of August, 2001.**

**JOYCE ALUOCH**

**PUISNE JUDGE**