



**In re Estate of Gicheha Gichuhi (Deceased) (Succession Cause  
196 of 2006) [2024] KEHC 1679 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1679 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 196 OF 2006  
SM MOHOCHI, J  
FEBRUARY 6, 2024**

**BETWEEN**

**RACHEL WANJIKU GICHEHA ..... APPLICANT**

**AND**

**WANJIRU GICHEHA ..... RESPONDENT**

**AND**

**AUTHUR KIIRU ..... INTERESTED PARTY**

**RULING**

**Background**

1. The Late Gicheha Gichuhi passed away on the 3<sup>rd</sup> February 2003 the Grant of letters Administration Intestate was issued on 21<sup>st</sup> December 2007, to Wanjiru Gicheha and the same was later confirmed on 21<sup>st</sup> July 2008.
2. The estate of the deceased was distributed as follows: -
  - a. Wanjiru Gicheha -Title No. Dundori / Muguathi Block 1/768 - whole share.
  - b. Arthur Kiiru -Title No. Ngeria/Megum Block 3(Kimuri) 30 – whole share
  - c. Arthur Kiiru -Title No. Ngeria / Megum Block 3 (Kimuri) 31 – whole share.
3. The interested party Authur Kiiru was not only a guarantor to the Respondent/Administrator by executing a guarantee by personal surety (P&A 57) dated 18<sup>th</sup> April 2006, the official search records for parcels L.R No. Ngeria/Megun Block 3 (Kimuri) 30 & 31 dated 4<sup>th</sup> April 2006 filed in support of the Petition for issue of grant was made by the Interested Party. His interest is premised on the fact that, he is the current registered owner with title to L.R No. Ngeria/Megun Block 3 (Kimuri) 30 & 31



having commenced a purchase from the deceased that was concluded upon confirmation of grant. If the motion herein is allowed then the interested party stands to lose the two properties.

4. The Objector/Applicant-Rachel Wanjiku Gicheha, had filed a summons for revocation of grant dated 24<sup>th</sup> September 2010 and W. Ouko J (as he then was) Issued a restraining order against the Respondent/Administrator in relation to LR No. Dundori/Mugwathi Block 1/768 pending hearing and determination of the Application and directed the summons to be heard by way of viva voce evidence with hearing scheduled for the 21<sup>st</sup> October 2010. The Application and Orders were never served upon the Respondent and the original filing and orders issued are missing from the Court file.
5. Subsequently the Objector/Applicant, moved Court by a Summons for revocation and /or annulment of grant dated 14<sup>th</sup> December 2010 filed pursuant to Section 47 and 76 of the Laws of Succession Act and Rules 44(1) and 73 of the Probate and Administration Rules and W. Ouko J. (As he then was) on the 17<sup>th</sup> December 2010 considered the certificate of urgency and issued a restraining order against the Respondent/Administrator in relation to LR No. Dundori/Mugwathi Block 1/768 pending hearing and determination of the Application and directed the summons to be heard by way of viva voce evidence with the hearing commencing on 16<sup>th</sup> February 2011.
6. On the 16<sup>th</sup> February 2011 the Court Struck-out the Application dated 15<sup>th</sup> December 2010 and directed that the earlier Application shall be heard.
7. The viva voce hearing lasted from 16<sup>th</sup> February 2011 to the 6<sup>th</sup> June 2022 with the Objector Applicant Calling five (5) witnesses while the Respondent called five (5) witnesses including the Interested Party.
8. The Objector/Applicant seeks:
  - i. Spent
  - ii. That, the Grant of letters of Administration intestate issued on the 21<sup>st</sup> December, 2007 and confirmed on the 21<sup>st</sup> July, 2008 be revoked and /or annulled.
  - iii. That, the Applicant herein be and is hereby made a Co-Administratrix and Beneficiary of the Estate of the late Gicheha Gichuhi
  - iv. Spent.
  - v. That, the title deeds for land Reg. Nos. L.R. No. Dundori/Mugwathi Block1/768 And L.r. Nos Ngeriamegum Block 3 (Kimuri) 30 and 31 fraudulently obtained by the Petitioner be cancelled and /or nullified.
  - vi. That, cost of this application be provided for.

### **Applicant/Objector's Case**

9. Rachel Wanjiku Gicheha, relies on her Sworn Affidavit dated 24<sup>th</sup> September 2010. Her oral testimony on the 16<sup>th</sup> February 2011, 26<sup>th</sup> March 2012 and written submissions dated 13<sup>th</sup> February 2023. She maintains that, she is a surviving widow of the deceased and that the Respondent/Administrator failed to disclose this when petitioning and that, the Grant of Letters Administration Intestate and summons for confirmation or grant be revoked and/or annulled.
10. The Applicant/Objector alleges she was a wife to the Deceased having been married to him in November, 1965 under Kikuyu Customary Law wherein during the said traditional ceremony, all rites were performed during the payment of the dowry save for one rite; the slaughtering of the sheep and which rite has not been completed to date.



11. PW1's evidence that the Petitioner/Respondent herein was equally a wife to the Deceased and they used to live together in the same house in Nairobi, Kariobangi and later relocated to Eldoret in the year 1966 together with the Applicant's/Objector's children.
12. PW2a - (Regina Wanja Gichuhi) was the Deceased mother, a 100-year-old matriarch, she adopted affidavit dated 14<sup>th</sup> January 2011 she denied that Rachel Wanjiku Gicheha, was ever a wife to the deceased, she stated that, she only came to know of her when she was summoned to the Lands Office in 2008. She took the view that her son had only one wife and admitted that she was aware the deceased had sold to the Interested Party, L.R No. Ngeria/Megun Block 3 (Kimuri) 30 & 31 while ailing.
13. PW2 (Mathew Kibet Arusei) testified that he is the area chief of Ngeria Location and the Applicant/Objector is known to her. It was his evidence that he knew the Gicheha's family and more so that they lived in Kimuri and has lived on parcel L.R No. Ngeria/Megun Block 3 (Kimuri) 30 & 31 for over 20 years without any interruptions even when the area was affected by the 1992 and 2007 clashes and its where the Deceased, Applicant/Objector and his children lived.
14. In Cross examination the Witness admitted of not knowing the deceased and his entire testimony does not indicate ever having met the deceased. He did not know Rachel's Brother and father and if they had land in the same settlement scheme.
15. PW 3 (Paul Lagat Kiplagat) testified he only issued the chiefs letter based on the information that was given to him by the Petitioner/Respondent. He claims that the Applicant/Objector is a stranger and is not familiar to him.
16. PW3 evidence that, at the time of his demise the deceased was only married to one wife the Petitioner/Respondent and that the Applicant/Objector was not a wife to the Deceased is contradicted with that of PW4 who testified that the Deceased was his uncle and at the time of his demise was only married to two wives the Petitioner/Respondent and the Applicant/Objector had five (5) Issues.
17. It was his evidence that during burial arrangements, the Applicant/Objector was not present and neither were her children and he arguably affirmed the same by dint of fact that he was the master of ceremony during the said burial of the Deceased.
18. It was PW4 (Mambo Kinuthia) evidence that the Deceased was well known to him by virtue that they were cousins; the Deceased's mother and PW 4's mother are sisters.
19. During trial, he stated that the Deceased had two wives, and the Petitioner/Respondent herein was the elder wife. He further gave evidence that the Petitioner/Respondent got married around 1959 whereas the Applicant/Objector got married in 1964.
20. PW4 gave evidence that the Deceased married the Applicant/Objector under Kikuyu Customary Law and that he witnessed Gicheha marrying Rachael. He stated that there were men who were present when the ceremony was conducted although they are currently deceased, but they gave the Applicant's Objector's father sum of Kshs. 3,000/= and muratina (alcohol).
21. PW4 also affirmed that the Applicant/Objector and the Deceased were blessed with five issues of marriage namely; Anthony Gichia Gicheha, Jeremia Nuguna Gicheha (Deceased), John Gichuhi Gicheha, Irene Wairimu Gicheha and Cecilia Wanjiru whereas the Petitioner/ Respondent did not have any children with the Deceased and that they lived with the Applicant/Objector in Kimuri and Nairobi where the Deceased used to work.
22. PW4 also stated that during the Deceased's burial, both the Petitioner/Respondent and the Applicant/Objector were present including the Deceased's children.



23. The Applicant/Objector submit that, he has been able to prove that she was married to the Deceased and a witness PW4 corroborated her evidence.

As to Whether the Applicant/Objector was a wife of the Deceased and dependant of the Deceased estate?

24. Reliance is placed on Section 107 of the *Evidence Act* clearly provides;

“S.107. Burden of proof

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. *In re Estate of Joseph Irungu Gichiri (Deceased)* [2020] eKLR the Court held that for a party to prove the existence of a valid Kikuyu marriage one had to establish the following;

The essentials of a Kikuyu customary marriage are described in Eugene Cotran's "*Case Book on Kenya Customary Law*" at page 30 to be:

- “ 1) Capacity: The parties must have capacity to marry and also to marry each other.
- 2) Consent: The parties to the marriage and their respective families must consent.
- 3) Ngunario: No marriage is valid under Kikuyu customary law unless the Ngunario ram is slaughtered.
- 4) Ruracio: There can be no valid marriage under Kikuyu customary law unless a part of the ruracio (dowry) has been paid.
- 5) Commencement of cohabitation.

26. That the moment at which man and woman legally became husband and wife is when the man and woman commence cohabitation.

27. That in the present case, the Applicant/Objector asserts that, she got married under the said Kikuyu Customary which evidence was duly corroborated save that the only rite which was not performed was the ngurario and is the most vital rite in a Kikuyu Customary Law.

28. That the absence of “ngurario” does not negate the fact that the Applicant/Objector was married to the Deceased taking into consideration that all other rites were conducted. In the absence of the same, then the only alternative would be presumption of marriage between the Applicant/Objector as it was held in the case of *in re Estate Benson Mathenge Muchemi (Deceased)* (2020) eKLR held:

“ Customary law is certainly not static and is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2020 in exactly the same way that they were conducted in a long time ago”.



The Court went further to state. Critical elements of a kikuyu customary marriage were not mentioned by the Objector, either in passing or corroborated by evidence produced in support of her case. If the essential customary rites and ceremonies were held then there has to be evidence to corroborate the conduct of such ceremony.”

29. That, under the *Evidence Act*, the matter in issue in this case could be proved even by a single witness. In the absence of such evidence, the only recourse would be to presume marriage between her and the deceased.
30. The Applicant/Objector submit that, PW3 claims that the Applicant/Objector is a stranger and is not familiar to him are baseless as at the time the Applicant/Objector was getting married to the Deceased in the year 1965, PW3 was 7 years old. He was too young to comprehend marriage affairs and as such he cannot have a proper input on them at that age. He testified that, he schooled with the Applicant's/ Objector's children, Irene and Cecilia and as such the Court should not place much weight on his evidence.
31. That it is clear and evident that, the Petitioner/Respondent wanted to solely benefit from the Deceased's estate, for her own selfish gain. Her intentions were to deprive the Applicant/Objector and her children from benefiting from the Deceased's estate even though she was aware that the Deceased had married a second wife.
32. In Eugene Contran book in "*Reinstatement of customary law*".

“No marriage is valid under Kikuyu customary law unless ngurario ram is slaughtered” and that “there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid”,
33. That there is no doubt on the manner in which the marriage ceremony was conducted, both PW1 and PW4 (Mambo Kinuthia) stated that the ceremony took place and there were elders who were present even though they have since passed on. Some of the essential customary rites were carried out, and even though the ngurario was not carried out, the Applicant/Objector invokes the doctrine of presumption of marriage which is evident from the long cohabitation the Deceased had with the Applicant/Objector which the area chief, and Deceased's cousin can attest to.

As to whether the should issue an order allowing the Applicant/Objector to take out letters of administration for the Deceased Estate;
34. Applicant/Objector maintains she proved on a balance of probabilities that she is a dependant of the Deceased by virtue that she is a wife and it is only fair and just that the Honorable Court does issue an order allowing her to jointly take out Letters of administration intestate as it was held in the case of In re Estate of Eliud Kiarie Mutembei (Deceased) [2022] eKLR.
35. That, there was an interested party (Arthur Kiiru) who was enjoined in the suit claiming Ownership of parcels Title No. LR No. Ngeria/Megun Block 3 (Kimuri) 30 & 31 having allegedly purchased the same from the Deceased prior to his death. It was his evidence that they were god friends with the Deceased having known each other for close to 10 (ten) years.
36. The Court is invited to note that, the interested party (Arthur Kiiru) did not produce any evidence to prove purchase of the said parcels of land. It was his evidence that the Deceased was too sick to do an agreement and as such he directed his wife to take charge of the transaction.



37. The said Interested party (Arthur Kiiru), equally testified that he did not participate in the Deceased's burial and funeral arrangements yet it was PW1's evidence that Arthur Kiiru the interested party herein preached at the said funeral.
38. There is no proof of how the interested party came to acquire parcels Title No. L.R No. Ngeria/Megun Block 3 (Kimuri) 30 & 31. There was no spousal consent that was produced to show that Wanjiru Gicheha, the first wife had consented to the sale of the said property.
39. No transfer forms, application for land control board forms and/or valuation were produced.
40. The Applicant/Objector submits that, it was PW 2, the area chief, Ngeria Location testimony that, she has been residing on the parcels Title No. L.R No. Ngeria/Megun Block 3 (Kimuri) 30 & 31 and have lived on the said parcels for close to 20 years which evidence was corroborated by PW3, the retired area chief of Ngeria Location.
41. It is their evidence that the Applicant/Objector has lived on the said parcels of land without any interruptions thereon. Thus, it begs the question, if in deed the Interested Party purchased the subject parcels of land, why didn't he issue a demand notice or an eviction order requiring the Applicant/Objector to vacate the said parcels of land?
42. That Similarly, the Petitioner/Respondent acknowledges to have sold parcel Title No. Dundori/Muguathi Block 1/768 which titles were in the names of the Deceased and which proceeds the Petitioner/Respondent claimed that she used to pursue the present case despite there being a restraining order restraining her from interfering with said parcel of land.

#### **Respondent/Administrator's Case**

43. The Summons for Revocation of Grant is opposed by the following pleadings;
 

Affidavit of Regina Wanja Gichuhi dated 14<sup>th</sup> January 2011, Affidavit of Wanjiru Gicheha Dated 14<sup>th</sup> January 2011, Written Submissions of the Respondent/Administrator dated 22<sup>nd</sup> December 2023; Affidavit of Authur Kiiru Dated 25<sup>th</sup> October 2011 and Written Submissions of Authur Kiiru dated 28<sup>th</sup> February 2024
44. The Respondent/Administrator filed an affidavit sworn on 14<sup>th</sup> January, 2011 and relied on it as her evidence in opposition to the application for revocation of grant. She denied knowing the objector and stated that she was not her co-wife. She said that she saw the objector for the first time in Eldoret when she was summoned by the District Land Registrar.
45. The Respondent/Administrator denied that the Objector is known as Racheal Wanjiku Gicheha but Rachel Wanjiku Gichia. That was on 14<sup>th</sup> January, 2011.
46. That the Court on 21<sup>st</sup> October 2010 ordered that the application for revocation be heard by viva voce evidence and hearing of this cause started on 16<sup>th</sup> February, 2011. PW1 - Rachael Wanjiku Gicheha the Objector gave her evidence. She testified as follows:-

“Gicheha Gichuhi was my husband. We married in November, 1965. We married under Customary Law. My husband used to live in a farm called Katani in Machakos. I used to live at Dundori with my parents. He took me to live at Katani. It is before we went to my parents.

That was in December, 1965. I was with my husband and other old men who are now deceased. Ngugi Gichia, Ngende a brother to my father, Mkiria Kabogo since clashes I do not know where he is. Another was a Kamba old man. I can't recall his name were my



father Joseph Gichia, mother Cecilia Wanjiru. They are deceased. My husband's parents were there. Regina Wanja Gichuhi, Gichuhi Gicheha is my father in law. He died. It is my mother in law who is alive. Dowry was paid but the ceremony was not done. A sheep was supposed to be slaughtered at the last ceremony. It was not done to date. After dowry we travelled back to Ukambani, stayed for 9 years. I know Wanjiru. We used to live in the same house. She was wife to deceased."

47. On cross-examination, PW1 said: -

"I have an ID card but it was stolen on my way to Nakuru earlier on. I reported to police. I have an abstract form for police. My ID card has the name Rachael Wanjiku Gicheha. I do vote. I used the names. My name is Rachael Wanjiku Gicheha. I am sure of that. I was given abstract on 26/6/2010. I have gone to check and had told to wait. I am not known Rachael Wanjiku Gichia. Gichia is my father son of sons is called that. We married in 1965 when we married in 1965 I had a child Antony Gichia Gicheha. I had not got the child with the deceased. My second born is John Gichuhi. He was born in 1971. In 1971 I was living Kimuri.....

I have witnesses in Mukuna Kabogo, Geoffrey Mambo and Regina Wanja was present and she told my husband that if she does not marry me, she would not marry. Dowry was paid in December, 1965. I found Wanjiru in the ir home. She did not come to my home when dowry was paid. She was left in Katani. I do not know how long Gicheha had lived with Wanjiru when I got married."

48. PW2 Regina Wanja, the Respondent/Administrator's witness but she was allowed to testify before the Objector could finish her case, due to her advanced age of over 100 years old testified on 16<sup>th</sup> February, 2011.

49. She said that Gicheha Gichuhi was her son. He was married to Anne Wanjiru the Respondent/Administrator who had no children. She was not aware if her son had another wife. She did not know Rachael Wanjiku Gicheha. She said that no children visited her claiming to be children of Gicheha Gichuhi. She confirmed that District Land Registrar, Eldoret called her.

50. On Cross-examination, PW2 said: -

"where I live the land belong to Ann Wanjiru. The land was left by her husband 1965 in December I went to Rachael 's home. There is nothing like that. Gicheha had no wife from whom I paid dowry. I do not know if Gicheha had 2 wives and I was not told. It is not true my son had 2 wives. I only know one. It is not true that I resided with Rachael at Kimuri. I Could not quarrel with Rachael since I have never met her."

51. In Re-examination - she said: -

"I have told Court the truth I can Swear. I go to church. The wife of deceased is Anne Wanjiru Gicheha."

52. PW4 was Mambo Kinuthia. He stated as follows: -

"Wanjiru is the elder wife. She was married in 1954. Rachael was married in 1964. No wedding was done. I did not witness Wanjiru been married. I witnessed Rachael been married. Gicheha had come to see her mother. He met Rachael. I was close to Rachael's



father. We were neighbour. We bought alcohol for Rachael 's father and gave 3,000/= - Muratina. It was done in Dundori in Stanley Ngugi. Rachael 's father was a neighbor. No other ceremony. Wanjiku and Gicheha left. All the elders are dead."

53. On Cross-examination by counsel for the interested party, PW4 said:

"We were in the house of Stanley Ngugi. He was step father of Rachael. Gichuhi Gicheha was in Thika. He did not come. We were many men. They are dead. Deceased was not there when we took the pombe. Myself my mother and Gicheha's mother. The 1st visit the youngman is not required there. Gichuhi was away. He was far".

54. That, Section 107 - of the *Evidence Act* provides as follows:-

- "(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

55. Section - 108 - of the *Evidence Act* it provides as follows: -

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side"

56. The Respondent/Administrator submit that, at the close of the Applicant/Objector's case, she did not satisfy the Court that a marriage under Kikuyu Customary Law existed as claimed by her. For such marriage to exist the following requirements must be proved: -

- i. Capacity which includes age, physical and mental conditions and marital status;
- ii. Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;
- iii. The ceremonial slaughtering of a ram in a rite called Ngurario;
- iv. Ruracio (bride price) partly paid;
- v. Commencement of cohabitation.

57. Reliance is placed on the case of Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR where the Court observed: -

"According to Dr. Cotran, in Restatement of African Law: Kenya Volume 1 "The Law on Marriage and Divorce, Sweet & Maxwell, 1968, the following procedures, rites and ceremonies are involved in a typical Kikuyu customary marriage:

A marriage proposal is conveyed to the girl. If it is favourably received the girl's parents are invited to the home of the prospective husband to partake in the "njohi ya njurio", the beer of asking the girl's hand. (It would appear that this is significant because Cotran specifically notes that there is a variation among the Waembu where the boy's parents take the beer to the girl's parents). Thereafter the first instalment of rurachio is taken to the girl's father. Further instalments follow until a sufficient amount of the full marriage consideration, stipulated by the girl's father has been offered and accepted to seal the engagement. Next



a day is fixed for the engagement ceremony (ngurario), i.e. the pouring out of the blood of unity. A ram (ngoima ya ngurario) is sent from the boy's father to the girl's home, where the ceremonial feast is prepared. The ram is slaughtered, and the girl eats the kidneys as a sign of consent to the betrothal. The betrothal is complete when this ceremony has been performed. The ngurario ceremony is followed by a further ceremonial feast (guthinja ngoima). This feast is attended by members of the parties' clans, and after the slaughter of a sheep provided by the boy's family, the families exchange presents. After the guthinja ngoima ceremony, the bride is brought to the bridegroom's home by mock capture. The author notes that this procedure of capture is now obsolete.

Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of deliver to the prospective in-laws every item in kind, such as beer, honey, live goats and cow's. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.

On the essentials of a valid kikuyu marriage, Cotran concludes that: -

"No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered" and that "there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid".

Specifically on the woman-to-woman marriage, Dr Cotran has rendered its rationale and essentials under Kikuyu customary law as follows:-

"Where a husband dies leaving a childless widow, who is past childbearing age, the widow may marry a wife. The widow pays ruracio to the family of the woman selected, and arranges for a man from her deceased husband's age set to have intercourse with her. Children resulting from such intercourse are regarded the children of widow's deceased husband.the Modern development: This form of union is now very rare."

58. Reference is made to Nakuru H.C. Succ. Cause No. 164 of 2010 in the matter of the estate of BMK the Court observed as follows: -

"32. Our case law and various writings evidencing Kikuyu customary law have established some of the elements necessary to prove a valid marriage under Kikuyu Customary Law".

59. Some of the cases that have established the essentials of a Kikuyu Customary Law include: Eliud Maina Mwangi Vs Margaret Wanjiru Gachangi (2013) eKLR- a decision by the Court of Appeal- as well as the following decisions of the High Court: In the Matter of the Estate of Karanja Kigo [2015] eKLR and Priscilla Waruguru Gathigo Vs Virginia Kanugu Gathigo (2004] eKLR These cases mention at least five elements:

- a. Capacity which includes age, physical and mental conditions and marital status;
- b. Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;
- c. The ceremonial slaughtering of a ram in a rite called Ngurario;



- d. Ruracio (bride price) partly paid:
  - e. Commencement of cohabitation.
60. The Respondent/Administrator submit that, the call needs to recall the caution sounded by the Court of Appeal in the Eliud Maina Mwangi Case that customary law evolves with time. The Court stated thus:

“Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.

34. In *MWK v AMW* [2017] eKLR, I interpreted this caution thus:

The progressive tone by the Court of Appeal is well taken. As customs are surely organic, the exact procedures for a valid customary marriage cannot be said to be codified. Even then, there is no denying that certain pre-requisites must be present.

However, the failure of certain formalities does not per se invalidate a customary marriage if there is enough evidence to show that a customary marriage was intended and certain substantive pre-requisites performed.

35. In the present case, By C's own admission, no substantive formalities for Kikuyu Customary marriage were undertaken. C testified that only the Deceased and one other person went to see her grandparents. While there, they did not pay any mahari or engage in any dowry negotiations. C's witness confirmed as much: no dowry negotiations were ever held and no dowry was ever paid for C. Indeed, the witness, S, claimed that only he and the Deceased went to the home of the grandparents. A Kikuyu Customary Marriage can never be negotiated and contracted by the groom and his friend alone.

Whatever happened in this case cannot, by any stretch of imagination, amount to a Kikuyu Customary Marriage.

The Court further considered if the doctrine of marriage by presumption could be applied and found as follows: -36. Would the doctrine of marriage by presumption rescue the situation for C? The Court of Appeal in *Phylis Njoki Karania & 2 others Vs Rosemary Mueni Karanja & another* [2009] eKLR held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows : -

before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute: that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and



it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.

37. A party establishes a presumption of marriage when the party proves two factual predicates:
  - a. Quantitative element - namely the length of time the two people have cohabited with each other; and
  - b. Qualitative element namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative elements include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account - and so forth.
38. What evidence did the Appellant present to enable the Court to make the presumption?

C claimed that she lived with the Deceased for five years then divorced. She probably meant separated but the effect is the same. In my view, that ends the inquiry. A marriage by presumption is a judicial doctrine used to facilitate equitable outcomes in certain extant situations. It does not relate back. One cannot say, as C attempts to say here, that she is a former wife by virtue of marriage by presumption. One cannot be a former wife of a presumed marriage. A former wife must be a wife in a marriage contracted in one of the established systems for contracting marriage.
39. In any event, based on the evidence on record, I would have concluded that there is little qualitative and quantitative evidence to warrant a presumption of marriage in this case.
40. The conclusion, then, is that C was not a wife of the Deceased for purposes of the *Law of Succession Act* and cannot be a beneficiary to his estate.

61. That, PW1 and PW4 evidence is not consistent and cannot be relied upon to prove kikuyu customary law marriage. PW1 claimed that dowry was paid in December, 1965 at her father's house. She claimed that she and the deceased were present. She did not state whether there was dowry negotiation and what was eventually paid as dowry.

62. On the other hand, PW4 who is alleged to have attended the event, said that the event was in the house of Stanley Ngugi who was a step father of the Applicant/Objector. Beer was bought for the said step-father and Kshs. 3,000/= paid. Both the Applicant/Objector and the deceased were not present.

63. That, the two however, confirmed that there was no other ceremony that was conducted in the presence of the parties to the said marriage. This evidence even if is true cannot amount to a marriage under Kikuyu Customary Law.

64. There is no evidence to prove that the Applicant/Objector sired any children with the deceased. No documentary evidence in the form of birth certificates and or academic documents linking the deceased with the said children. No evidence was received from any such children considering that there was



admission that the Respondent/Administrator had no children. It would have been necessary to call evidence to show that the alleged children knew the deceased as their father. The Applicant/Objector knows why she did not consider it necessary to call such evidence.

65. The chief's letter dated 22<sup>nd</sup> July, 2010 annexed in the supporting affidavit sworn on 24<sup>th</sup> September, 2010 in support of the application for revocation of the grant listed the children's names as follows: -
- a) Antony Gichia
  - b) John Gichia.
  - c) Irine Wairimu Gichia
  - d) Sicilia Wanjiru Gichia
66. The letter states that one boy died in 1985 and is headed- Rachael W. Gicheha 33XXXXXX(D NO).
67. The Applicant/Objector testified on 16<sup>th</sup> February, 2011. She was cross-examined by the Respondent/Administrator's counsel on the details of her name. She said on oath that her ID Card had the name Rachael Wanjiku Gicheha. She said she was sure about it. She said her ID card was stolen. She denied that she was known as Rachael Wanjiku Gichia.
68. On 25<sup>th</sup> April, 2022, the Respondent/Administrator's counsel further cross-examined the Objector on her proper names. She confirmed that her father was known as Joseph Gichia. She denied that she ever had an identity card in her father's name. When challenged that there was evidence to show that she was known as Rachael Wanjiku Gichia, she said that she was ready to receive such evidence.
69. On 6<sup>th</sup> June, 2022 Paul Ouko Abuto appeared in Court and testified. He works in the National Registration Bureau as Assistant Director Registrar. He produced details of registration for the Objector herein as contained in Reg. 136.
70. The Applicant/Objector first applied for registration on 20<sup>th</sup> March, 1979. In the name of Rachael Wanjiku Gichia. A correction was done in June, 2011. The officer also produced identification report for Rachael Wanjiku Gicheha dated 28<sup>th</sup> June, 2011. It is the date of the correction.
71. The Applicant/Objector claimed that she got married to the deceased in 1965. Why did she not use his name to register herself in 1979? Why did she wait until the deceased died?
72. The officer confirmed that the Objector had an identity card in the name of Rachael Wanjiku Gichia. It is that identity card that was charged in June, 2011 to read Rachael Wanjiku Gicheha, it follows that the Applicant/Objector lied to Court on 16<sup>th</sup> February, 2011 about her name. She thereafter set in motion a process of changing her name to read Rachael Wanjiku Gicheha. This was close to 7 years after the death of Gicheha Gichuhi on 3<sup>rd</sup> February, 2003. If the Applicant/Objector can lie about her name, what else can't she lie about?
73. That, the details provided by the registrar of persons shows that she was born in 1948 – On 16<sup>th</sup> February, 2011 the Applicant/Objector told the Court that she was married in December, 1965, On 25<sup>th</sup> April, 2022 the Applicant/Objector said that she got married in 1960. When did she get married to the deceased? If she was married in 1960 as claimed, then she was a minor aged 12 years and no such marriage would have been lawful
74. That, there is evidence that the deceased lived in Nairobi and Wanyororo "A" Dundori where he died. There is no evidence that the deceased lived with the Applicant/Objector in Kimuri. There is evidence that the deceased did not build the houses in Kimuri where the Applicant/Objector lives.



75. That, there is no evidence before the Court to suggest that the deceased cohabited with the Applicant/Objector at any time in either Kimuri or Wanyororo or Nairobi. There is also no evidence to prove that before her alleged marriage to the deceased as a second wife, the consent of the 1<sup>st</sup> wife was obtained as per Kikuyu Customary Law.
76. Further, there is evidence that the deceased was a traditionalist and belonged to Ngonya wa Gakonya religious sect that allowed men to practice polygamy. The question that needed to be answered by the Applicant/Objector is - why would her relationship if any be kept a secret to the deceased immediate family and yet the Petitioner had no children of her own? The deceased had capacity to marry several wives. Furthermore, why would the deceased's mother disown the Applicant/Objector who according to her had her son's children? Women love children. It would be expected that the deceased's mother would love her grandchildren regardless of who the mother was. This remains a mystery.
77. That, PW 3 - John Gichuhi Waruinge testified on 18<sup>th</sup> February, 2020. He confirmed that he knew Gicheha Gichuhi the deceased who was brother to his mother. He also confirmed that he knew the Applicant/Objector. He said that they lived together in Kimuri Farm. The Applicant/Objector worked for East African Tanning as a cook.
- This evidence confirms that PW3 knew what he was talking about in Court.
78. John Gichuhi Waruinge told the Court that he attended Kimuri Primary School with the Objector's children. He did not know the said children as his cousins and or relatives. He further testified that when the Applicant/Objector lost her son Jeremiah Njuguna, he was buried in Kambi Nandi Farm belonging to his uncle and he attended the burial. That was in 1986 / 85.
79. That Cecilia Wanjiru also lost a child called Anthony Gichia. He was buried in the uncle's land at Kambi Nandi. There is no evidence that Cecilia Wanjiru had a child called Gicheha, her alleged father.
80. That this evidence was not challenged in cross-examination. In fact, the Applicant/Objector's witness Mambo Kinuthia PW 4 confirmed that Njuguna died and was buried at George Karanja's land. Gicheha was not at the burial. No explanation was given why Njuguna (deceased) son of the Applicant/Objector would be buried on his uncle's land in 1985 if indeed the mother got married to the deceased in 1965 as claimed. There was need for an explanation. Why would the deceased also not attend the burial of his wife's son?
81. That, Records were availed from Kimuri Primary School which showed that Cecilia Wanjiru attended the said school and was registered as Cecilia Wanjiru Karanja.
82. The Applicant/Objector was given a chance to rebut the evidence. She did not produce evidence to show what her daughter's name was in the said school. Except saying that she was not in that school the year shown on the documents she did not produce evidence to show the year she left the said school and who was indicated as her parent and or guardian. She did not even produce a copy of her identity card or even avail the said Cecilia Wanjiru to rebut the evidence adduced in Court.
83. The Respondent/Administrator urge the Court to rely on the records availed by Kimuri Primary School and find that Cecilia Wanjiru the daughter to the Applicant/Objector had no relationship with the deceased herein.
84. Reference is made on the case Nakuru H.C.C. Cause No. 205 of 2011 in the matter of the estate of Godfrey Njoroge Kagechu in which the Court held as follows:-



Section 3(5) of the *law of Succession Act* state as follows:-

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 229 and 40 thereof, and her children are accordingly children within the meaning of this Art”

The Court perused the evidence on record and what is critical is for the parties to prove that there was a marriage between the deceased and the protestors. In my view I do not find that there was such sufficient evidence on the part of the 1<sup>st</sup> Objector for the following reasons.

That, in the case at hand there was no evidence of the consent from the family, no ceremonial details especially ngurario, payment of dowry ruracio among others. Further there was no evidence of cohabitation on the part of the deceased and the Objector. The children so far mentioned did not have any connection with the deceased or at all. As a matter of fact, she did not include her children Patrick and indeed the deceased supported them as it was later claimed.

That this position is buttressed by the letters from the chief Lanet location which she submitted to this Court as well as the certificates of birth for the said children which do not bear the deceased names. In any case there was no evidence that they were supported by the deceased in any manner.

66. PWI in any case was oblivious of Joyce 's children and all that she seemed to be asking during cross-examination was the interest of her grandchildren so to speak
67. The same position obtains for the second objector. There was no convincing evidence that she underwent any known marriage under kikuyu customs. The amount of Kshs. 10,000/- so far paid was merely for shopping as per Flomena's evidence.
68. Further Kimani Kagechu was not sure when he went with the deceased to her home although later he contradicted the objector when he stated that the same was "mwati". I must add however that the Court found his evidence full of contradictions and not entirely believable.
69. The requirements of customary marriage and kikuyu customary law were outlined in the book restated by the Court of Appeal (Nambuye, Kiage & Murgor, JJ A) in the case of *Eva Naima Kaaka & Another vs Tabitha Waithera Mararo* (2018) eKLR.

The appellant Court further observed that:

When the particulars of the alleged ceremony are compared with the essentials of a Kikuyu customary marriage' as described by Eugene Cotran, and *Gituanja vs Gituanja* [1983] KLR 575 it is plain to see that certain basic elements necessary for a Kikuyu customary marriage were absent.

For instance, the ngurario is an integral part of the ceremony that signifies the existence of a kikuyu customary marriage. But our re-evaluation of the evidence does not point to a ngurario having taken place. This is because a fundamental component of ngurario is the slaughtering of a ram or goat.



During the visit to Nyeri in 2011, no slaughter of ngurario ram was evident... from the above becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid kikuyu customary marriage came into existence between Waithera and the deceased.

It is also worth noting that Waithera did not provide any description or particulars of the alleged ceremony; her evidence is clear,

"... there was no marriage..." essentially, her testimony was limited to 2008 when the deceased, together with one Joseph and Karanja, who are elders and his friends, visited her parents to introduce the deceased as the person who intended to marry her. It would seem that it remained just that: an intention to marry, The learned judge erroneously concluded that Waithera was married to the deceased under the Kikuyu - Maasai Customary Law, despite the cogent evidence that the essentials of such a marriage were not satisfied. In our view, this omission negated the existence of a Kikuyu customary marriage, and we so find"

70. Taking the totality of the evidence presented before this Court, there is no evidence that any of the above processes and rituals were ever undertaken by the deceased to qualify the objectors to conclude that they were indeed married under the kikuyu customary law. Their witnesses did not help the matter either.
  71. concerning their participation in the funeral exercise none of the objectors appeared in the preparations including the eulogy and the advertisements. Their children never as well appeared anywhere. If indeed they had any connections with the deceased I doubt whether there would have any reason to lock them out considering the period, they had stayed with the deceased.
  72. Kimani Kagechu, the deceased brother was involved in the funeral preparations so far and there was therefore no reason why he could not prevail upon the committee to include the objector 's least of all their said children.
  73. The second objector at any rate did not produce any evidence that the sons she had belonged to the deceased or at all. No birth certificates or evidence of schooling of the said children were produced before this Court.
  62. In view of the foregoing this Court finds that the protestors herein cannot benefit from the provisions of sections 3(5) of the *Law of Succession Act* since they did not contract a marriage with the deceased under kikuyu customary law. Further, by failing to satisfy the requirements needed to be recognized as wives for the purposes of succession they are therefore not entitled to inherit from the deceased's estate as wives and same applied to their children whom no evidence was adduced to show that they were sired or maintained by the deceased.
85. That, on the issue of sale of title No. Ngeria/ Megum Block 3 (Kimuri) 30 and 31, the Court record shows that on 21<sup>st</sup> July, 2008 the Applicant/Objector sought permission of the Court to allow her



transfer two plots to Arthur Kiiru. The grant was confirmed and transfer effected thereafter. The Respondent/Administrator maintained that the properties were sold to Arthur Kiiru by the deceased to enable him meet his medical costs.

86. Section 76 of the law of the *law of Succession Act* provides as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case;;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in law to justify the grant notwithstanding that the allegation was made in ignorance inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - i. to apply for confirmation of the grant within one year from the date thereof, or longer period as the Court order or allow; or
  - ii. to proceed diligently with the administration of the estate; or
  - iii. to produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) section 83 or has produced any such inventory or account which is false in a material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

87. That the Objector/Applicant failed to prove any of the grounds set out in Section 76 of *law of Succession Act* as set out hereinabove and Respondent/Administrator urge the Court to dismiss the application dated 24<sup>th</sup> September, 2010 for revocation of grant with costs.

### **Analysis and Determination**

88. This Court has refined the solo Issue for consideration as follows Whether the Applicant/Objector has made a case for the revocation of the confirmed grant?

89. The Applicant/Objector expected to demonstrate and prove that she was wife to the deceased and that they had been blessed with five (5) of four (4) issues who should be deemed as dependants?

90. The Applicant/Objector alleged that she was married to the deceased under customary law. The Respondent/Administrator and her witnesses denied this allegation. It was the duty of the person who alleges the existence of any set of facts to prove that such facts exist.

91. Section.107 of the *Evidence Act* on Burden of proof provides;

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
92. In this instance and by the concession of Rachel Wanjiku Gicheha that her customary marriage had not crystallised as the “Ngurario” ceremony was never undertaken, she urges the Court to invoke the doctrine of presumption of marriage and find that she was married to the deceased.
93. No Evidence was led or presented by the Applicant objector on long cohabitation with the deceased or any acts of general repute other than Rachels testimony that she lived with the Respondent/ Administrator and the deceased in in the same house in Kariobangi Nairobi before relocating to Eldoret in 1966. This is approximately one year after the alleged marriage. While PW2 Arusei testified that the Objector had been residing in Kimura for 20 years, he appeared unaware that the Objector’s Brother and father owned properties and lived in the same area, this witness conceded of not knowing the deceased thereby further negating any notion of cohabitation between the deceased and Rachel.
94. The Court of Appeal in the case of Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another [2009] eKLR in holding that the presumption of marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute. It stated that;
- “ Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.” (emphasis ours)
95. In the case of Mary Njoki vs John Kinyanjui Mutheru [1985] eKLR, Njarangi JA underscored factors that would rebut a presumption of marriage when he stated that;
- “...The fact that the appellant and the deceased together visited the deceased father’s home or that she attended the funeral of the deceased’s father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity. That is how friends treat one another. And on account of the cohabitation the appellant could not help meeting and knowing and even assisting the relatives of the deceased including the respondents. The appellant’s own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant’s father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu Marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage”.
96. The Customary Marriage as alleged by Rachel Wanjiku Gicheha has not been proven and the Court cannot invoke and utilise the doctrine of, presumption of marriage, as the petitioner’s evidence failed both conjoined factors of long cohabitation and acts of general repute, in fact Rachel Wanjiku Gicheha was bound by her pleadings and the attempt at invoking the doctrine at the submission stage is akin to stealing a match.
97. No evidence was led or presented by the Applicant/Objector as to why she should be appointed a Co-administratrix
98. Accordingly, the Court finds the Summons for revocation of confirmed grant dated 24<sup>th</sup> September 2010, to be without merit and the same is accordingly dismissed.



99. The restraining order against the Respondent/Administrator in relation to LR No. Dundori/Mugwathi Block 1/768 is hereby vacated.
100. Any Party aggrieved by the judgment has forty-five (45) day leave to Appeal. The leave so granted, shall operate as a stay.
101. The Administrator shall file a return confirming distribution within ninety (90) from the date hereof to mask the conclusion of this succession.
102. This being a family matter, parties shall bear their respective costs.

It is so Ordered

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 6<sup>TH</sup> DAY OF FEBRUARY, 2024.**

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**S. MOHOCHI**

**JUDGE**

