



In re Estate of Cosmas Ikunyua M'Mbwiria (Deceased) (Succession Cause E893 of 2020) [2024] KEHC 2087 (KLR) (Family) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E893 OF 2020
PM NYAUNDI, J
MARCH 1, 2024
IN THE MATTER OF THE ESTATE OF COSMAS IKUNYUA M'MBWIRIA**

BETWEEN

SELINA NJOKI NDUNGU APPLICANT

AND

AGNES NJIRU IKUNYUA 1ST RESPONDENT

MERCY GACHERI IKUNYUA 2ND RESPONDENT

EVERLYNE KATHAMBI IKUNYUA 3RD RESPONDENT

JUDGMENT

1. This matter relates to the estate of Cosmas Ikunyua M'mbwiria who died intestate on 7th April 2020. Agnes Njiru Ikunyua in her capacity as widow to the deceased petitioned for letters of administration of grant intestate. The grant was issued to her on 27th November 2020.
2. The grant was subsequently confirmed on 30th June 2021 pursuant to Summons of Confirmation dated 7th June 2021.
3. Selina Njoki Ndungu (the Applicant) then filed summons for revocation of grant. She averred that the deceased was polygamous and she was the deceased's second wife. Their marriage was blessed with two issues. She contended that the grant of letters of administration issued to Agnes Njiru Ikunyua was obtained fraudulently and through concealment of material facts as the administrator failed to include her and her children or disclose their existence to the court.
4. The matter was referred to mediation and by a consent dated 15th November 2022, the grant issued to Agnes Njiru Ikunyua was revoked and the children of the applicant (IMI and JMI) were included



as beneficiaries of the estate. The only issue that this court was tasked to determine is the status of the Applicant; whether or not she was a wife of the deceased.

5. The matter proceeded by way of *viva voce* evidence. Parties were later directed to file written submissions. Both parties complied, the Applicants submissions are dated 13th December 2023, while those of the Respondent are dated 5th January 2024.

Applicant's Evidence.

6. The Applicant testified as PW1. She relied on her affidavits dated 3/9/2021 and 1/4/2022 as her evidence in chief. Her evidence was that she met with the deceased in 2007 who was then working in Bungoma Law Courts as a prosecutor. Their union was blessed with three issues; their first child IM was born on 5/12/2008, their second child T died and their third born JM was born on 1/10/2013. She told the court that she was aware that the deceased had a wife and two children. She lived with the deceased as husband and wife in Bungoma. Together with the deceased, she visited the deceased's daughter Mercy at school in 2007.
7. The deceased visited her home and was accompanied by Hon. Sogomo and Hon Francis Kyambai who were both magistrates in Bungoma. The deceased later visited her home with his family and friends. He gave her parents a token. Agnes Njiru Ikunyua was aware that dowry was being paid and she sent her food stuff. Among those present during dowry payment were elders from Meru, the deceased's brother and an in-law.
8. She had visited the deceased's home in Meru for celebration of the birth of Everlyne Kathambi's child. The 1st Respondent and the deceased were present. They later went to the 1st Respondent's house for a cup of tea. The 1st Respondent had visited her in her home in Bungoma and even accompanied her to her local church. After she lost her second child, the 1st Respondent nursed her in Nakuru.
9. The deceased was later transferred Kang'undo, Mombasa then Nyando. He fell ill while he was in Nyando and she visited him in hospital. He was later discharged and he went to Meru. The 1st Respondent informed her that the deceased was very ill and was admitted in a hospital in Meru. She travelled to see him but she was not allowed to see him because of the covid outbreak in 2019.
10. They had a family meeting with the deceased's brother before travelling back to Bungoma. The deceased spoke to her on the phone. The deceased died two days later. She travelled back to Meru where funeral arrangements were ongoing. An obituary was published mentioning her and the 1st Respondent as the deceased's wives. Her children were also recognized as those of the deceased.
11. The deceased's employer summoned her and the 1st Respondent and informed them that there was a balance from funds collected by friends for the funeral. Mercy, the 2nd Respondent received Kshs. 200,000 for funeral expenses from the deceased's employer. She was given Kshs. 67,000. The deceased's dues in Pioneer Insurance amounting to Kshs. 4,613,400 were shared equally. Harambee Sacco paid each of them Kshs. 75,000.
12. She testified that the Respondents did not inform her that they had filed a succession suit in court. She learnt of the petition when she was called by Harambee Sacco. A letter from the chief recognized her as the deceased's second wife. At the mortuary, she and the 1st Respondent were each given a copy of the burial permit. She stated that land in Nakuru and Meru were not included in the list of assets.
13. During cross-examination, she stated that the deceased's daughter attended her father's funeral in Bungoma. She and the deceased were married under Kikuyu Customary Marriage. The deceased performed "kuhenda Githege" (introduction ceremony) in 2007 and ruracio (payment of dowry) in



2017. The deceased died before performing the final ceremony “kikenta kiande”. Elders from both sides met in 2014 and the function was financed by the deceased. She contributed food towards the funeral of the deceased.
14. She and her two sons were recognized in the eulogy. She has a child from a previous relationship who the deceased had taken him up as one of his own. The deceased was a county commander at the time of his death. She was paid Kshs. 67,000 because she was recognized as the deceased’s kin.
 15. OW2 was Joseph Muriuki M’mbwiria. He relied on his witness statement dated 1/4/2022 as his evidence in chief. He stated that he was an elder brother of the deceased. His evidence was that he recognized both Selina Njoki and Agnes Njiru as the deceased’s wives. He had a good relationship with both women but when the deceased died, there was a bit of disagreement.
 16. OW2 was Joania Kajuju Murugu. She stated that she was the deceased’s elder sister. She relied on her witness statement dated 1/4/2022 as her evidence in chief. She stated that the deceased had two wives; Selina Njoki and Agnes Njiru. The deceased asked her to accompany him to visit the Applicant’s home in Bungoma to pay dowry. They were accompanied by an elder called Stephen. They were received in the Applicant’s home and they gave out a token.
 17. Agnes was aware that Selina was the deceased’s wife. Selina visited their home when one of the deceased’s children got married. The deceased’s marriage with Agnes was customary. Agnes participated in the funeral arrangements of the deceased.
 18. During cross-examination, she stated that the deceased performed two functions; introduction and payment of ruracio. The deceased and Selina’s marriage was done according to Kikuyu and Meru Customary Law. The 1st wife was not at the rural home of the deceased at the time of the hearing.

Respondent’s Evidence.

19. The 1st Respondent testified as RW1. She testified that she was the only wife of the Deceased. It was her evidence that she and the deceased got married on 7/3/1986 and their marriage was blessed with three children. The deceased worked with the Kenya Police Service, DCI. She was recognized as the deceased’s wife in his personal file. She stated that she does not recognize the Applicant as the deceased’s wife.
20. The deceased introduced the Applicant to her as his workmate when they went to visit their daughter at school. The Applicant tried to disrupt the burial and police were called. She stated that the eulogy was prepared by her in-laws (Muriuki, Kimathi and Joan). She told the court that the Applicant’s children are entitled to a share of the deceased’s estate.
21. During cross examination, she stated that she never visited the deceased in Bungoma. She knew of the existence of the Applicant’s children during the burial of the deceased. She did not include their names in the summons for confirmation of grant because she did not have their documentation.
22. She was aware of the chief’s letter which indicated Selina as the second wife before she filed the petition for grant. She did not object to Selina getting a share from the deceased’s employer because she acknowledged that she had two children with the deceased. The deceased did not buy any property. She did not include the matrimonial home in the list of assets because she had been evicted from the home.
23. In re-examination, she stated that if the deceased had a second wife, he should have updated her details in his employment records. She doesn’t know why the Applicant received money from Pioneer Insurance.
24. Mercy Gacheri Ikunyua, the deceased’s daughter testified as RW2. She adopted her witness statement dated 26/4/2022 as her evidence in chief. She stated that she does not recognize the applicant as her



father's wife. Her mother and father lived well as husband and wife. Their marriage was a monogamous one. The Applicant was introduced as her father's workmate during her graduation in 2014. The only other time she saw the Applicant was during her late father's burial.

25. Her aunty and the Applicant disrupted the burial on allegations that she had been given her father's pension. The organizing committee insisted on recognizing the Applicant and her children in the eulogy. She financed her father's burial and she was refunded by the deceased's employer. She does not know why the Applicant received money from Harambee Sacco. They protested against the Applicant receiving money from Pioneer Insurance. She told the court that the only legitimate beneficiaries should benefit from the deceased's estate.
26. During cross-examination, she stated that she never visited her father at his place of work. When the deceased died, the Applicant travelled to their home in Meru. She lodged a complaint at Harambee Sacco and Pioneer Insurance for payments made to the Applicant.

Applicant's Submissions

27. The Applicant filed written submissions dated 13th December 2023. She submitted that even though the deceased did not have capacity to enter into a second marriage since he was married under Christian Marriage and Divorce Act (now repealed), the deceased took steps to formalize a customary marriage under the Kikuyu Custom.
28. She relied on the decision in *Esther Wanjiru Kiarie v Mary Wanjiru Gitbetu* [2008] eKLR which summarises the essentials of a Kikuyu Customary Marriage. Submitting that all steps of Kikuyu marriage are not mandatory or need to be performed, she relied on the case of *James Kangiri v Mary Wanjiru Njuguna* [2006] eKLR. It is her submission that by virtue of Section 3(5) of the *Law of Succession Act* she was a wife for purposes of *the Act*.
29. In the alternative, she stated that there existed a presumption of marriage between her and the deceased. She relied on the following authorities on presumption of marriage by the fact that she had cohabited with the deceased for a period of time; *BCC v JMG* [2018] eKLR and *NLS v BRP* [2016] eKLR. She submitted that she had established that she ought to be included as a beneficiary of the estate alongside her children.

Respondents' Submissions

30. The respondent enumerates the following as the issues for determination
 - a. Whether there exists a marriage between the late Cosmos Ikunyua M'Mbwiria and Selina Njoki Ndungu as per Kikuyu Customary law.**
31. The Respondents submit that there was no valid customary law marriage between the Applicant and the Respondent in accordance with the tenets of Kikuyu Customary law.
32. It is further submitted that the Applicant has not established sufficient basis for the Court to presume the existence of a marriage between the Applicant and the deceased. The Respondent's assert that the Applicant has not discharged the burden of proof as provided for under Section 107 of the *Evidence Act* as there was no evidence of prolonged cohabitation. It is the position that the relationship between the deceased and the Applicant can best be described as a sexual liaison.

Analysis And Determination

33. The only issue for determination is;



i. Whether the Applicant is a wife to the deceased and as such, a beneficiary of the estate of deceased.

34. Section 29 of the [Law of Succession Act](#), defines a dependant as:

- “(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) Such of the deceased’s parents, step-parents, grand- parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

35. The applicant’s case is that she was married under Kikuyu Customary Law to the deceased. The onus of proving a customary marriage rests on the party claiming it. In the case of *Njoki v Mathbara and Others* Civil Appeal No. 71 of 1989 (UR), Kneller J. A pronounced as follows: -

- “a) The onus of proving a customary marriage is on the party who claims it.
- b) The standard of proof is the usual one for civil action, balance of probabilities.
- c) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”

36. Further in the case of [Hortensiah Wanjiku Yawe vs The Public Trustee](#), Civil Appeal No. 13 of 1976, the court held: -

“The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely “on the balance of probabilities.” Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage”.

37. In [Mary Wanjiru Githatu v Esther Wanjiru Kiarie](#) (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009) the court stated:

“It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the ‘come we stay’ marriages which are neither customary nor statutory”

37. The Court of Appeal in [Gituanja vs Gituanja](#) (1983) KLR 575 and in *Kimani vs Gikanga* [1965] EA 735 held that the existence of a customary marriage is a matter of fact, to be proved through evidence.



1. Section 107 of the [Evidence Act](#) provides that: -
 - “(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 those facts exist.”
2. The cases of [In the Matter of the Estate of Karanja Kigo](#) [2015] eKLR and [Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo](#) [2004] eKLR 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 Ngunario;
 - (d) Ruracio (bride price) partly paid;
 - (e) Commencement of cohabitation.
3. However, in the [Eliud Maina Mwangi](#) Case, the Court of Appeal opined 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.”
37. The applicant appears to be advancing two positions. One, that she was married to the deceased in accordance with Kikuyu customary law, and two, that she had a prolonged co-habitation with the deceased which ought to give rise to a presumption of marriage.
38. To prove customary marriage, the applicant produced a letter from the chief dated 20th June 2020 which noted that the deceased had two wives. In that letter the protestor herein was expressly listed as a dependant and second wife of the deceased. The applicant also produced a claim discharge form from Pioneer Assurance which indicated that the applicant and the 1st Respondent were beneficiaries and were entitled to an equal share of the deceased’s benefits. She also produced a funeral programme and photos taken during the deceased’s burial. I have looked at the eulogy. The Applicant was recognised as the second wife of the deceased. Her children were also recognised as the deceased’s children. There was a tribute by the applicant.
39. The applicant testified that she met the deceased in the year 2007 in Bungoma. She lived with the deceased in Bungoma before he was transferred to other stations. The deceased and his two friends first visited her home for introduction. On the second visit, elders from Meru, the deceased’s brother and sister visited her home to pay dowry. They gave her parents a token.



40. OW2 and OW3 who are brother and sister of the deceased both testified in favour of the applicant. They acknowledged the applicant as the deceased's second wife. They all stated that they accompanied the deceased to the applicant's home and paid dowry.
41. RW1 and RW2 categorically deny that the deceased married the applicant. They testified that the applicant was introduced on several occasions as a work mate of the deceased. They did not deny that the applicant and her children were recognized in the funeral and were included in the obituary. They stated that the applicant was paid by the deceased's employer because of the fact that the applicant had children with the deceased.
42. I have reviewed this evidence. I find that the Applicant has not proved to the required standard that there was a customary law marriage between her and the deceased. The next consideration is, as held in *V R M v M R M & Another* [2006] eKLR whether or not on the evidence before it the Court should presume that there was a marriage between the Applicant and the deceased. In that matter the Court had this to say
- For it matters not whether the statutory or customary marriage are strictly proved in a marriage. The Court must go further and consider whether on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant's favour
37. The Court then cited with approval the decision in *Hortensiah Wanjiku Yaweh v Public Trustee Civil Appeal No. 13 of 1976*, where the Court stated, inter alia, Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant'.
38. I am cognizant of the Supreme Court decision in the case of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) where the Court laid out the strict parameters within which a presumption of marriage can be made and stated-
- (65) The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.
37. The Court therefore emphasized that with the progress in law, the presumption of marriage would be the exception other than the rule. With this in mind, it was the Applicant's evidence that she cohabited with the deceased as man and wife in Bungoma. This fact was passionately denied by the Respondent and her daughter, but coolly attested to by the siblings of the deceased. In addition, the family of the deceased recognized her as a wife and this is why they included her in the Obituary and eulogy notwithstanding the protestations by the Respondent.
38. These facts to be considered alongside the fact that the Applicant was paid a portion of terminal benefits by both Pioneer Assurance and Harambee Sacco. Add to this the fact that the area Chief by letter dated 2nd June 2020 recognized the Applicant as the 2nd wife of the deceased and cap it with the fact that the deceased and the Applicant were joint biological parents of two children.
39. Nothing much turns on the employer record of the deceased's family as the same was not updated to include his other children with the 1st Respondent.
40. All these factors taken in isolation indeed would not be sufficient to establish that there was a common intention to have a marriage but considered in totality one can arrive at no other conclusion, than that the two were husband and wife.



41. The Applicant is therefore a beneficiary of the estate of the deceased pursuant to Section 29 of the *Law of Succession Act* which defines dependant as follows:-

For the purposes of this Part, "dependant" means—

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

37. Accordingly, the Protestor is a dependant and is therefore entitled to a share in the estate of the deceased.

38. In view of the above, the orders below will issue;

i. That the grant issued to the 1st Respondent, Agnes Njiru Ikunyua on 27th day of November 2020 is hereby revoked alongside with all the consequential orders

ii. Fresh Grant to issue to Agnes Njiru Ikunyua and Selina Njoki Ndungu jointly

iii. The Administrators to present Summons for confirmation of grant within 30 days. In the event they are unable to agree either administrator to file summons of confirmation and the other to file affidavit of protest within 14 days of service.

iv. The matter be mentioned on 30th April 2024 before the Deputy Registrar family division to confirm compliance and take further directions

v. This matter being a succession matter, there will be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 1ST DAY OF MARCH, 2024.

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Sylvia Court Assistant

