



REPUBLIC OF KENYA



**In re Estate of Paul Kariuki Njuguna (Deceased) (Succession Cause  
2108 of 2015) [2024] KEHC 3484 (KLR) (Family) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3484 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2108 OF 2015  
MA ODERO, J  
APRIL 12, 2024  
IN THE MATTER OF THE ESTATE OF PAUL KARIUKI NJUGUNA (DECEASED)**

**JUDGMENT**

1. Before this court for determination is the objection to making a Grant dated 12<sup>th</sup> October, 2015 which objection was filed by SOPHIA WANJIRU MWENGWA (hereinafter ‘the Objector’)
2. Hearing of the said objection proceeded by way of Viva Voce evidence. The hearing commenced before Hon. Justice Onyiego on 27<sup>th</sup> March, 2017. Following the transfer of the Honourable Judge I took over the matter and heard the last witness.

**Background**

3. This succession cause relates to the estate of the late Paul Kariuki Njuguna (hereinafter ‘the Deceased’) who died intestate on 28<sup>th</sup> April, 2015. A copy of the Death certificate Serial Number 0129746 is annexed to the Petition for Grant of letters of Administration intestate dated 20<sup>th</sup> July, 2015.
4. The Deceased was said to have been survived by the following persons.
  1. Virginia Njeri Kariuki - Widow
  2. Philomena Njoki Kariuki - Daughter
  3. Pielina Waithira Kariuki - Daughter
  4. Josephine Wambui John Kariuki - Daughter
  5. Douglas Njuguna Kariuki - Son
  6. Rahab Wanjeri Kariuki - Daughter
  7. Naomi Mugure Kariuki - Daughter



8. Milkah Nduta Kariuki - Daughter
5. The estate of the Deceased comprised of the following assets;-
  - a. LOC 4/Ngararia/497
  - b. LOC 4/Ngararia/908/22
  - c. LOC 4/Ngararia/49
6. Following the demise of the Deceased his widow Virginia Njeri Kariuki and son Douglas Njuguna Kariuki filed a petition seeking Grant of letters of Administration intestate. However after gazettelement and before the issuance of the Grant to the two, the objector herein filed an objection to the making of the Grant on the basis that she too was a wife to the Deceased, and was entitled to inherit from the estate.

### **The Evidence**

7. The Objector Sophia Wanjiru Mwangwa testified that she met the Deceased in the year 2010. That the two got married under Kikuyu customary law. The objector averred that the Deceased in the company of three friends went to introduce himself to her father and paid a dowry of Kshs. 80,000. The Objector states that she and the Deceased set up their matrimonial home at LOC4/Ngararia/908/22
8. The Objector states that she was aware that the Deceased had another wife and states that the 1<sup>st</sup> wife went to visit their home in Ngararia whenever she wished to see her husband.
9. The Objector states that though she bore no children with the Deceased she came into the marriage with two children who the Deceased accepted and raised as his own.
10. The Objector went on to state that during his lifetime the Deceased transferred to her the parcel of land known as Title No. L. R. LOC4/Ngararia/908/22 (hereinafter referred to as 'Ngararia Plot 908/22' as a gift. That this is where the Objector and the Deceased had established their matrimonial home.
11. Accordingly the Objector contends that Ngararia Plot 908/22 belongs to her and is therefore not available for distribution as it does not form part of the estate of the Deceased.
12. The objector told the court that sometime in December, 2014 the first wife of Deceased came for him and that the Deceased later died in the house of the 1<sup>st</sup> wife. The Objector prays to be recognized as the second wife of the Deceased and prays to be appointed as Co-Administrator of the estate.
13. PW2 James Maina Mwaura told the court that he was a friend to the Deceased. The witness stated that in the year 2011 he accompanied the Deceased to the rural home of the Objector where the Deceased met elders and paid a sum of Kshs. 80,000 as dowry.
14. PW3 Samuel Njoroge Nyoike told the court that he and the objector are from the same village at Kibuthe. He stated that on 10<sup>th</sup> December, 2011 he went to the home of the Objector. That the Deceased came with some friends and introduced himself to the family of the objector. That the deceased paid out Kshs. 80,000/= as dowry.
15. The 1<sup>st</sup> Petitioner Virginia Njeri Kariuki testified as DW1. She insisted that she was the only wife to the Deceased having first married him under Kikuyu customary law and later solemnizing their union on 14<sup>th</sup> March 1972.
16. The 1<sup>st</sup> Petitioner stated that she does not know the Objector at all and that she only met her when the Objector summoned the family to the chief's office to stake her claim to Ngararia Plot 908/22.



17. The widow insists that the said property belonged to the Deceased and forms part of his estate. She vehemently denies the Objectors claims that she lived on the said property with the Deceased. She states that the property has always been occupied by a tenant called Joseph Kang'ethe Gathuri.
18. The 1<sup>st</sup> petitioner categorises the Objector as one who seeks to reap where she has not sown. She urges the court to dismiss this objection in its entirety.
19. DW2 - Douglas Njuguna Kariuki is the son of the Deceased.  
He stated the following the demise of the Deceased he and his mother commenced the process to obtain letters of Administration. However when they went to seek the chief's letter, the chief informed them that a lady called 'Sophia' (the objector) had gone to the office claiming ownership of Ngararia Plot 908/22.
20. DW4 categorically denies that the Deceased ever got married to the Objector or to any other woman. He denies that the Deceased ever lived with the Objector in the said plot. According to DW2 Ngararia Plot 908/22 was at all times rented out to a tenant called Joseph Kang'ethe Gathuri.
21. DW2 Joseph Kang'ethe Gathuri told the court that he knew the Deceased as his landlord. The witness confirms that he resided in the property of the Deceased at Ngararia Plot 908/22 from the year 2008 and states that he occupied the entire premises. DW2 told the court that he never at any time saw the objector in that plot.
22. DW3 Peter Kamau Wairaga told the court that he was a brother to the Deceased. He asserts that the Deceased had only one wife by name Virginia Njeri.
23. DW3 stated that he does not know the objector and that he only saw her at the chief's office when the objector went to stake a claim to Ngararia Plot 908/22. He denies that the Deceased ever lived in that plot with the objector and denies that the Deceased ever transferred the plot to the objector.
24. At the close of oral evidence the parties were invited to file their written submissions. The objector filed the written submissions dated 31<sup>st</sup> May, 2023 as well as the supplementary written submissions dated 11<sup>th</sup> July, 2023. The petitioners relied upon their written submissions dated 31<sup>st</sup> May, 2023.

### **Anaylisis And Determination**

25. I have carefully considered the evidence adduced in this matter, the relevant law as well as the written submissions filed by the parties. The questions which arise for determination are:-
  - i. Whether the Objector was a wife to the Deceased.
  - ii. Whether the Deceased transferred the property known as Title No LR LOC 4/ Ngararia/908/22 to the objector.
  - iii. Whether the Objector should be appointed as Co-Administrator of the estate of the Deceased.

#### **i. Whether the Deceased got married to the Objector.**

26. It is common ground that the Deceased in this matter the late Paul Kariuki Njuguna died intestate on 28<sup>th</sup> April, 2015. The widow and son of the Deceased filed a Petition for Grant of letters of Administration intestate but to date no grant has been issued due to the intervening objection filed in this matter.



27. The Objector claims to be the second wife of the Deceased. She asserts that the Deceased married her under Kikuyu customary law on 10<sup>th</sup> December, 2011. The Objector therefore protest her exclusion as one of the beneficiaries to the estate of the Deceased.
28. On their part the petitioners categorically deny that the Deceased got married to the objector under customary law or indeed under any other system of law.
29. It is trite law that “he who alleges must prove.” In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act Cap 80, Law of Kenya provides as follows:

“Burden of Proof

“ 107

- (1) Whoever desires any court to given judgment as to any legal 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.”
30. The Objector testified that the Deceased went to her rural home accompanied by two of his friends and that the Deceased introduced himself to the Objectors family. It is further claimed that the Deceased paid Kshs. 80,000/= as dowry.
31. PW2 James Maina Mwaura stated that he was one of the friends who accompanied the Deceased that day. PW3 Samuel Njoroge Nyoike stated that he was one of the elders who were at the objector’s home and who received the dowry of Kshs. 80,000. PW3 explained that Kshs. 30,000/= went to ‘Mwati’ and ‘harika’ (small she-goat) / or (small sheep) whilst Kshs. 50,000 represented the dowry payment.
32. It is very curious that Deceased would go to the objectors home to marry a wife and exclude all members of his family. DW4 the only son of Deceased who by then was an adult was not informed by his father that he had married another wife.
33. Even if the Deceased wanted to keep his first wife in the dark about his intentions he would at least have involved one or two of his relatives e.g. a brother a cousin or kinsmen. DW3 who was a brother to the Deceased told the court that he had no knowledge of the Deceased going to pay dowry for the objector.
34. It is important at this point to consider what elements constitute a valid Kikuyu customary marriage. In the case of *Eva Naima Kaaka & Another -vs- Tabitha Waithera Mararo* [2018] eKLR the Court of Appeal quoted Eugene Cotran’s Casebook on customary law which at Page 30 set out the essential ingredients of a Kikuyu customary marriage as follows;-
- “(i) Capacity; the parties must have capacity to marry and also the Capacity to marry each other.
  - ii. Consent;- the parties to the marriage and their respective families must consent to the union.
  - iii. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.



- iv. Ruracio; there can be no valid marriage under Kikuyu law unless part of the ruracio (dowry) has been paid.
  - v. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e under the capture procedure when marriage is consummated after the eight days seclusion, and nowadays when the bride comes to the bride grooms home.” [Own emphasis]
35. In this case although the objector and her witnesses assert that ‘ruracio’ dowry of Kshs. 80,000 was paid, none of the witnesses made any mention of the Ngunario ceremony having been conducted.
36. In the Eva Naima Kaaka case [Supra] the court of Appeal in observing that no ngurario ceremony had taken place stated as follows;-
- “From the above it 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 Ngunario ceremony it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the Deceased.” [Own emphasis]
37. In this case there is no evidence that the ngurario ceremony i.e. slaughter of a ram ever took place. This negates the existence of a valid marriage under Kikuyu customary law. Therefore I find that there did not exist a customary marriage between the Deceased and the objector.
38. It is also pertinent to note that in the chief’s letter dated 15<sup>th</sup> June, 2015 no mention is made of the objector as a wife/widow of the Deceased. It is to be presumed that the local chief knew the family well and would have been aware if the Deceased had married the objector as a second wife. The only mention made of the objector in the chief’s letter is that she went to her office claiming ownership of Ngarara Plot 908/22. The Objector’s claim to ownership of said parcel of land does not make her a wife.
39. I will now return to the question of whether the Deceased had the Legal capacity to enter into a marriage with the objector. In denying the claim that the Deceased had married a second wife, the 1<sup>st</sup> Petitioner stated that she first got married to the Deceased under customary law. That the couple later solemnized their union through a statutory marriage conducted on 14<sup>th</sup> March, 1972. The 1<sup>st</sup> Petitioner produced in evidence a copy of a marriage certificate serial number 274869 (Annexure ‘Vnk I’) as proof of the marriage.
40. The Objector on her part denied that the Deceased ever contracted a statutory marriage with his first wife. She alleged that the copy of the marriage certificate produced by the 1<sup>st</sup> Petitioner was a forgery.
41. It is not enough merely to dismiss a document as a forgery. The onus lies on the objector to prove that this document was in fact a forged marriage certificate.
42. Annexed to the objectors further Affidavit dated 8<sup>th</sup> February, 2017 is a letter dated 6<sup>th</sup> February, 2017, written by the objectors Advocate to the Registrar of Marriages enquiring if the marriage certificate produced by the 1<sup>st</sup> Petitioner was genuine (Annexure ‘SWM 2 B’). No reply that the query was received. As such there is no evidence that the said marriage certificate was indeed a forgery.
43. Having entered into a statutory union with the 1<sup>st</sup> Petitioner in the year 1972, and there being no evidence that the said statutory union was ever dissolved, I find that the Deceased did not have the legal capacity to enter into another marital union customary or otherwise with another woman.



44. In other words the Deceased lacked capacity to marry the objector whilst his statutory marriage to the 1<sup>st</sup> petitioner still subsisted.
45. The next question then which arises is whether a Presumption of marriage can be said to have existed between the Objector and the Deceased. The Objector state that she cohabited with the Deceased at the Ngarara Plot 908/22 which she terms as their matrimonial home.
46. The Petitioners however deny that the Objector ever resided on that property. They insist that the property which consisted of four (4) rooms was rented out to the same tenant since the year 2008. The Petitioners have produced as evidence, tenancy Agreements entered into with DW2. (Annexure ‘DNK 4’ and ‘VNK2’)
47. DW2 Joseph Kang’ethe Gathuri told the court that it was he who occupied the said property as a tenant. He confirms that he occupied all four (4) rooms since the year 2008.
48. DW2 states that he does not know the Objector and states that he never saw her in the property. DW2 is not related to the parties in this cause. He would have no reason and / or motive to come and lie to the court. The Petitioners have produced as evidence, tenancy Agreements entered into with DW2 (Annexure. ‘DNK 4’ and VNK2’)
49. Based on the above evidence and testimony of DW2. I am not persuaded that the Objector cohabited with the Deceased in that plot as she alleges.
50. Section 37 of Cap 150 (now repealed) which is similar to Section 9 of the Marriage Act 2014 provide as follows;-

“Any person who is married under this Act whose marriage is declared by this Act to be valid shall be incapable during the continuation of such marriage of contracting a valid marriage under any native law of customs but save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contract under or in accordance with any native law of custom, or in any manner apply to marriages so contracted.” [Own emphasis]

51. In the case of Esther Njeri Gichuru -vs- Samuel Kumuchi Gichuru [2008] eKLR the court citing the case of Machani -vs- Vernoor [1985] KLR stated as follows:-

“The presumption (of marriage) covers two aspects, that the parties had the capacity to enter into a marriage and that they did so in effect During the continuance of a previous marriage the already married party would have no capacity to enter into a new marriage and the new marriage would be null until the previous marriage had been brought to an end by final decree of divorce such as decree absolute” [Own emphasis]

52. Similarly in the case of Mary Wanjiru Githatu -vs- Esther Wanjiru Kiarie Appeal Number 20 of 2009 (Eldoret) Hon Justice Bosire JIA (as he then was) held as follows;-

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependant on any system of law except whereby reason of written law it is excluded For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute...” [Own emphasis]

53. A statutory marriage such as the one the Deceased contracted with the 1<sup>st</sup> Petitioner is deemed to be monogamous in nature. The only way the Deceased could have legally entered into a marriage



- customary or otherwise with the Objector would have been to have his marriage to the 1<sup>st</sup> Petitioner legally dissolved through a decree absolute. This did not happen.
54. Therefore notwithstanding any customary rites and / or payment of dowry, the fact of the matter is that the Deceased lacked capacity to marry the Objector. Accordingly I find that any purported marriage between the Deceased and the Objector is null and void.
55. Section 29 (a) of the *Law of Succession Act* recognizes only the legal wife or wives of a Deceased person.
56. It is also pertinent to note that despite her claim that she was a wife to the Deceased, the Objector admits that she did not attend the burial of the Deceased. This omission she claims was due to hostility from the family. If the objector truly believed she was a wife and had a right to attend the burial I have no doubt that she would have taken legal steps (moved to court) to secure her right and position. Her failure to do so indicates that the Objector did not really consider herself as a wife to the Deceased.
57. Based on the above I find that the Objector is not a wife (widow) of the Deceased and is therefore not entitled to benefit from his estate under the law of Succession.
58. The next question would be whether the objector's two children can be deemed to be beneficiaries to estate of the Deceased. The Objector readily concedes that the Deceased was not the biological father of her two children. She however claims that the Deceased took care of the two and provided for all their needs.
59. Since the two children were not fathered by the Deceased, the Objector must prove that the two were dependant, on the Deceased immediately prior to his death.
60. Section 29 of the *Law of Succession Act* defines a '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.
  - b. Such of the deceased's parents, step-parents, grand-parents, grand children, 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” [Own emphasis].
61. Firstly I find no evidence to prove that the deceased had taken the Objector's two children into his home as his own. He had not introduced the Objector or her children to his wife, children or other family members. The petitioners stated that they first met the Objector after the demise of the deceased.
62. Secondly the Objector has not adduced any evidence to show that the deceased was providing for her children in any manner whatsoever. There is no evidence of payment by the deceased of the children's accommodation costs, payment of school fees or medical expenses, provision of money for food and other needs. In short there is no evidence that the two children were dependant on the deceased “immediately prior to his death’. As such I find that the objectors two children are not beneficiaries to the estate and are not entitled to inherit therefrom.



**(ii) Whether the Deceased transferred the Property known as Title No LOC 4 /Ngararia/902/22 to Objector.**

63. The Objector maintains that Ngararia /902/22 was transferred to her by the deceased during his lifetime. That the said property does not therefore form part of the estate and is not available for distribution.

64. On their part the Petitioners insist that the said property belongs to the Deceased, as it is still registered in his name and therefore forms part of the estate. They deny that the deceased ever transferred that property to the Objector.

65. The Objector is therefore claiming that the deceased transferred to her this Ngararia/908/22 as a gift 'inter vivos' Blacks law Dictionary, 10<sup>th</sup> Edition describes a gift Inter vivos as follows:-

“Gift between the living relating to or involving property conveyed not by will or in contemplation of an imminent death, but during the conveyors lifetime”

66. A gift inter vivos requires the donor to provide means for putting the land under the effective control of the donee and such inter vivos gift of registered land becomes effective upon execution and delivery of the transfer.

67. The plot in question was not put under the effective control of the Objector because DW2 still occupied the plot as a tenant.

68. The Objector has produced in court a copy of a transfer made in her favour allegedly by the deceased. The said transfer of lease which is dated 13<sup>th</sup> February, 2015, appears as Annexure SWM1 to the objectors further Affidavit dated 8<sup>th</sup> February, 2017.

69. It is curious that this transfer bears what is alleged to be the thumb- print of the Deceased yet all parties state that the Deceased was literate and could read and write. Indeed the Objector under cross-examination says

“ Mzee knew how to write and sign. He put his thumb-print. It was put of his own choice-----“

70. If the Deceased was literate he would have been more likely to sign the transfer not to append his thumb print.

71. This court is sitting as a Probate Court with the mandate to distribute the estate of the Deceased to the genuine heirs. It is not the duty or mandate of this court to resolve disputes between parties claiming ownership of estate properties. That mandate lies solely with the Environment and Land court which was established under Article 162 (b) of *the Constitution* of Kenya 2010.

72. The certificate of lease annexed to the Petition for Grant of letters of Administration Intestate indicates that the property known as Loc 4 Ngararia/908/22 is registered in the name of Paul Kariuki Njuguna (the deceased herein). Therefore I find that this property forms part of the estate of the deceased and is available for distribution.

73. In Re Estate Of Stone Kathuko Muinde (Deceased) [2016] eKLR Hon. Justice William Musyoka held as follows:-

“ Such claims to ownership as alleged estate property as between the estate and a third party, should be resolved through the Civil Process in a Civil Suit properly brought before a civil



court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing a suit at the magistrates' courts or at the Civil or Commercial Divisions of the High Court or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that the court can give effect to it.”

74. Therefore if the Objector wishes to pursue her claim to the said property then she is at liberty to file a suit in the Environment and Land Court which by virtue of Section 13 of the ELC Act, has the exclusive jurisdiction to determine issues of use, ownership and occupation of land.

**(iii) Whether the Objector should be appointed as Co-Administrator of the estate**

75. Based on my above analysis and findings above it is clear that the objector has no locus standi in this succession cause. She was neither a wife nor a dependant of the Deceased. Her claim to estate property can only be canvassed in the ELC. In the circumstances the Objector does not merit to be appointed as a Co-Administrator in this cause.

76. Finally I find no merit in this objection. The same is dismissed in its entirety. Costs to be met by the Objector.

**DATED IN NYERI THIS 12<sup>TH</sup> DAY OF APRIL, 2024**

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**MAUREEN A. ODERO**

**JUDGE**

