



REPUBLIC OF KENYA



**In re Estate of Peter Ndoho Kimani (Deceased) (Succession Cause
301 of 2018) [2024] KEHC 8055 (KLR) (Family) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 301 OF 2018

MA ODERO, J

JULY 4, 2024

IN THE MATTER OF THE ESTATE OF PETER NDOHO KIMANI (DECEASED)

JUDGMENT

1. Before this court for determination is the objection to issuance of grant/Cross Petition filed by the Objector Julius Kimani Ndoho on his own behalf and on behalf of his siblings.
2. The Petitioner Anjelinah Wairigo Mwangi opposed the Cross Petition. The matter proceeded by way of *vive voce* evidence.

Background

3. This succession cause relates to the estate of the late Peter Ndoho Kimani (hereinafter ‘the Deceased’) who died intestate on 26th November, 2017. A copy of the Death Certificate Serial Number 069XXXX is annexed to the Affidavit in support of the Petition for Grant of Letters of Administration Intestate dated 26th November, 2018.
4. The Deceased was survived by the following persons.
 - i. Beth Wambui Kimani - Daughter
 - ii. Patrick Irungu Ndoho - Son
 - iii. Julius Kimani Ndoho - Son
 - iv. Charity Wairimu Ndoho - Daughter
 - v. Evans Muchungu Ndoho - Son
 - vi. Judy Wangechi Ndoho - Daughter
 - vii. Joshat Mwangi Ndoho - Son



5. The Estate of the Deceased comprised the following assets:-
 - a. Plot No NRB/BLK 102/63
 - b. Plot No NRB/BLK 127/591
 - c. Plot No Jua Kali 31 (Kamarock Bridge Jua Kali)
 - d. Plot No Jua Kali 135 (Kamarock Bridge Jua Kali)
 - e. Plot No 9 Kariobangi South, Jua Kali Industires (SEC B)
 - f. Plot No LR 209/10456 Dandora
 - g. Plot No 419 Jua Kali Shed – Kariobangi South Project
 - h. Plot No 197 Kariobangi South, Jua Kali Industires (SEC B)
 - i. Shamba At Kangema-muranga County (Ard 3 Acres)
 - j. JUnk Yard Motors & Spares (Business)
 - k. 2 Bank Account With Equity Bank – Buruburu Branch
 - l. Motor Vehicle Reg KBM 447E (Toyota Premo) All valued at Kshs Twenty Million (Kshs 20,000,000/=)

Liabilities - None
6. Following the demise of the Deceased the Petitioner Angelinah Waiyigo Mwangi, who claims to have been a wife to the Deceased issued to the Objector and his siblings a citation dated 8th March, 2018 seeking to have them accept or refuse to take up letters of Administration. The citees failed to enter appearance and failed to respond to the citation.
7. The Petitioner then filed a Petition for Grant of letters of Administration Intestate dated 26th November, 2018. The Grant was issued to her on 28th February, 2019.
8. The Objectors then filed a summons for revocation of Grant dated 25th July, 2019. The Objectors claimed that the Grant had been obtained by means of an untrue allegation to wit that the Petitioner had been married to the Deceased. That the Petitioner was in fact a stranger and had no right to administer the estate of their father.
9. Vide a Ruling delivered on 8th April, 2021, Hon. Justice Aggrey Muchelule (as he then was) revoked the Grant which had been issued to the Petitioner. The Judge further directed that the Objectors file objections to the Petition as well as a cross-petition. The Objectors filed the cross-petition dated 22nd April, 2021 which was heard before this court.

The Evidence

10. The Objectors called two (2) witnesses namely Beth Wambui Kimani and Julius Kimani Ndoho who are both children of the Deceased. The two witnesses told the court that their Mother one Gladys Nyambura passed away in the year 2007. They categorically deny that the Deceased ever got married to the Petitioner Angelinah Waiyigo.
11. According to the two objectors the Petitioner was in actual fact a house help whom the Deceased had employed to assist him when he became ill. The witnesses both confirm that they are aware that the Petitioner filed a Divorce Petition against the Deceased but state that the petition was never determined



because the Deceased died before the matter was concluded. They also insist that the Deceased filed several affidavits denying that he had ever married the petitioner.

12. The Petitioner Angelinah Waiyigo Mwangi insisted that she was a wife of the Deceased. She states that she met the Deceased whilst working in a quarry. That in the year 1991 the Deceased initially moved into the Petitioners house in Kayole Estate. Later on they moved to reside in the house of the Deceased located at Saika Estate in Nairobi.
13. The Petitioner vehemently denies that she worked for the Deceased as a house help. The Petitioner avers that she and the Deceased got married to each other under Kikuyu customary law in the year 1993.
14. According to the Petitioner the Deceased visited her parents' home and paid an amount of Kshs 20,000 as 'Mwari' to introduce himself as her suitor. That the Deceased unfortunately passed away before the 'Ruracio' ceremony was conducted. The Petitioner states that she lived with the Deceased as man and wife from 1990 to 2016.
15. The Petitioner told the court that although she bore no children with the Deceased she has three (3) children borne out of her previous marriage to one Mwangi. She asserts that as a widow of the Deceased she is entitled to administer his estate.
16. The Petitioner admits that she filed Divorce Petition No 18 of 2015 against the Deceased but the Deceased passed away before the matter was finalized.
17. DW2 Njuguna Joshua Nganga is an uncle to the Petitioner. He told the court that the Deceased visited the rural home of the Petitioner in Murang'a accompanied by a friend. That on that occasion the Deceased paid Kshs 20,000 to the family of the Petitioner.
18. DW3 Charles Muciane Mwatha is the chief of Mukuru Nyayo Location. He told the court that the Petitioner often came to his office to complain about domestic problems with the Deceased. That as a chief he would call the couple and reconcile them. DW3 told the court that the Deceased told him that the Petitioner was his wife.
19. Following the conclusion of the oral evidence the parties were invited to file written submission. The objectors filed the written submissions dated 21st July, 2023, whilst the petitioner relied upon her submissions dated 27th July, 2023.

Analysis and Determination

20. I have carefully considered the facts of this case, the evidence adduced by the parties as well as the written submissions filed. The issues which arise for determination are:-
 - a. Whether the Petitioner was a wife to the Deceased.
 - b. Whether the cross-petition filed by the objectors has merits.

Whether a marriage existed between the Petitioner and the Deceased.

21. It is common ground that the Deceased in this cause passed away on 26th November, 2017. The children of the Deceased told the court that their mother one Gladys Nyambura died in the year 2007 thereby pre-deceasing her husband.
22. The Petitioner claims to have been a wife of the Deceased having gotten married to the Deceased under Kikuyu Customary law. She states that she lived with the Deceased as his wife from the year 1990 to 2016.



23. 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 give 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.”

24. The Petitioner claims that she got married to the Deceased in the year 1993 under Kikuyu customary law. It is therefore incumbent upon her to prove that such a customary union did actually take place.

25. The Petitioner testified that the Deceased visited her home accompanied by a friend and paid Kshs 20,000 to introduce himself. DW2 states that he was present when Deceased made that visit and paid the Kshs 20,000.

26. It is pertinent to note that the Deceased was only accompanied by ‘a friend’ during this alleged visit. No family member of the Deceased accompanied him to the home of the Petitioner.

27. Marriages in Africa are not secret or clandestine affairs. They are joyous occasions in which family and friends are involved. If the Deceased was going to the Petitioner's home to conduct a marriage then he likely would have been accompanied by his relatives. PW1 and PW2 who are both the children of the Deceased stated that their father never told them that he had married the Petitioner.

28. The obvious question that then arises is – what constitutes a Kikuyu customary marriage.

29. In the case of *Eva Naima Kaaka & another v Tabitha Waitthera Mararo* [2008] eKLR the court of Appeal quoted Eugene Cotrans *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]



30. In this case although the Applicant states that sum of Kshs 20,000 was paid to her mother she made no mention of the Ngurario ceremony having been conducted at all.
31. 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 courting 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” [Own emphasis]
32. The first question to be considered is whether the Deceased and the Petitioner had requisite capacity to enter into a marriage. From all accounts the Deceased had been married before under customary law but his wife Gladys Nyambura passed away in the year 2007.
33. Since the Deceased was married under customary law then his union with his first wife was potentially polygamous and as such the Deceased had the capacity to marry a second wife.
34. Regarding the Petitioner the evidence is that she was previously married to one Mwangi with whom she bore three (3) children. The Petitioner told the court that she parted ways with the said Mwangi in the year 1989 and that he subsequently passed away in the year 1996.
- However no proof of his demise e.g. a death certificate was availed to the court. Assuming however that the Petitioner was a widow then she had capacity to re-marry.
35. The next question is whether all the elements of a Kikuyu customary marriage were conducted. The answer is No The Petitioner under cross-examination admitted that no ‘Ngurario’ ceremony was conducted because the Deceased died before this could be done. In the absence of the ‘Ngurario’ ceremony no marriage under Kikuyu culture will be said to exist.
36. Similarly under cross-examination DW2 admits that “That Deceased did not complete the Kikuyu customary rites.”
37. This means that the elements of a Kikuyu customary union were not completed. Indeed the Petitioner admits that the Deceased never introduced her to his family and/or parents. How would a customary marriage be concluded without the involvement of the parents/family of the Groom.
38. DW3 who was the local chief told the court that he frequently settled domestic disputes between the Deceased and the Petitioner who lived together. The fact that a couple were cohabiting does not mean that they were married. Although DW3 claims that the Deceased informed him that the Petitioner was his wife it is very telling that in the chiefs letter dated 11th July, 2018, it is stated that the petitioner “lived with one Peter Ndoho Kimani.” The Chief is careful not to refer to the Petitioner as the wife and/or widow of the Deceased.
39. The Petitioner attempts to rely on the fact that she filed a Petition for divorce against the Deceased as proof that the two were married. This is not legally sound reasoning. By her own admissions in the divorce petition was never determined due to the death of the Deceased. Thus the court made no finding of fact that the Deceased and the Petitioner were ever married to each other.
40. Further the Petitioner under cross-examination admits that in the papers he filed in court the Deceased consistently denied having ever married her.



41. I find that the evidence on record falls short of proving the existence of a customary marriage between the Deceased and the Petitioner. Neither do I find any evidence to prove a presumption of marriage given that by her own admission the Deceased never introduced and/or represented the Petitioner to his family and friends as a wife.
42. Under cross-examination the Petitioner states that:-
- “At no time did the Deceased ever take me to the [rural] home where he lived with his first wife. The Deceased never introduced me to his father or mother.”[own emphasis]
43. The next question the court would need to consider is whether the evidence on record would lead to a “presumption of marriage” between the Deceased and the Petitioner. In the case of *MNK v POM & another* [2023] eKLR the Supreme Court of Kenya set out the parameters under which a presumption of marriage could be made as follows;-
- “64. We find it prudent at this juncture to lay out the strict parameters within made:
1. The parties must have lived together for a long period of time.
 2. The parties must have the legal right or capacity to marry.
 3. The parties must have intended to marry.
 4. There must be consent by both parties.
 5. The parties must have held themselves out to the outside world as being a married couple.
 6. The onus of proving the presumption is on the party who alleges it.
 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
 8. The standard of proof is on a balance of probabilities.
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.
44. The Petitioner claims that she cohabited with the Deceased as man and wife for several years. However the objectors deny that there was cohabitation/marriage between the two. They insist that the Deceased had merely hired the Petitioner as a house help.
45. Aside from the protagonists in this cause there is no evidence from an independent witness to support the presumption of marriage theory. There are no independent witnesses who were called to testify that the couple held themselves out to the public as man and wife. The Objectors deny that their father ever told them that he had married the Petitioner.
46. The Petitioner admits that his reply to the Divorce Cause she filed the Deceased categorically denied that she was his wife. Further in an Affidavit dated 12th February, 2016 the Deceased averred that the Petitioner was a house help, he had employed.



47. It is also noteworthy that the Petitioner did not attend the burial of the Deceased. If she was indeed a wife as she alleges then the Petitioner would have attended and played a key role in his burial. Her absence belies her claim that she was a wife to the Deceased. The Petitioner's claim that she failed to attend the burial of a man she insists was her husband due to fears for her security is not persuasive. Who threatened her – when and where. No reports of any threats were made to the authorities. The failure of the Petitioner to attend and participate in the burial of the Deceased is further proof that she was not his wife.
48. In the absence of a legally recognizable marital union, the only other way the Petitioner could claim a stake in the estate of the Deceased is if she could show that she was a dependant under Section 29 of the Law of Succession Act Cap 160 Laws of Kenya. The Petitioner has not adduced any evidence to show that she was dependant on the Deceased immediately prior to his demise. In fact the Petitioner admits that she and the Deceased parted ways in the year 2016 one year prior to the demise of the Deceased.
49. Based on the above I find that the Petitioner was not a wife of the Deceased nor was she a dependant. Accordingly I find that the Petitioner had no *locus standi* to petition for Grant of letters of Administration to the estate of the Deceased. She is not a beneficiary of that estate.
50. On the other hand the objectors are the biological children of the Deceased. They are beneficiaries to her estate and have *locus standi* to apply for letters of Administration. I therefore allow the cross-petition dated 22nd April 2021. I direct that Grants of Letters of Administration in respect of the estate of the Deceased herein issue to the cross-petitioner Peter Ndoho Kimani.

Each party will bear their own costs.

DATED IN NYERI THIS 4TH DAY OF JULY, 2024.

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MAUREEN A. ODERO

JUDGE

