



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NUMBER 836 OF 2015

IN THE MATTER OF THE ESTATE OF KARIA GETAO GICHERU (DECEASED)

MARY WANGUI MBUGUA.....APPLICANT

VERSUS

HANNAH WAMBUI MBUGUA.....RESPONDENT

RULING

1. Karia Getao Gicheru died intestate on 17th June 2009.
2. She was survived by her nine (9) children. She left land Mwea/Muthithi Scheme/1711 and two plots in Elburgon No. 8 and surveyed plot No. 29.
3. His Daughter Lydia Njeri Wang'andu, petitioned this Court for a grant of letters of Administration intestate on 30th November 2015 and the same was issued to her on 14th April 2016.
4. Vide Summons for Confirmation of Grant dated 1st October 2018 filed in court on the same date, she sought to distribute the deceased's estate to the beneficiaries of the estate and order that the grant of letters of administration intestate that was issued to her on 14th April 2016 be confirmed on grounds that no objections had been raised for more than six (6) months since the said Grant of Letters of Administration intestate were granted.
5. The Summons for Grant was opposed by Peter Wachira Gitau, one of the beneficiaries to the estate of the deceased herein who filed an Affidavit in protest against Confirmation of Grant on 18th October 2018 on the grounds that one Mary Wangui Mbugua was the 2nd wife to his late brother Joseph Mbugua Gitau and was beneficiary entitled to the estate but was left out. He also stated that some of the estate's properties were left out.
6. Parties were referred to court annexed mediation and all issues concerning distribution of estate's properties amongst beneficiaries were resolved via their consent dated 10th July 2020, except the outstanding issue of the estate of Joseph Mbugua Gitau.
7. The said consent was adopted as an order of this court on 30th July 2020. The issue between the two Mary Wangui Mbugua and Hannah Wambui Mbugua was referred to the court for hearing.

THE EVIDENCE

Mary's Case/Applicant's Case

8. Mary Wangui Mbugua testified that in 1975 she got married customarily to the deceased Joseph Mbugua and together they were blessed with seven (7) children. Her prayer was to be granted land.
9. On cross examination she testified that she lived with the deceased at Elburgon until his death however, she couldn't recall when the deceased passed on. She stated that the respondent was not living with the deceased but she was staying in a rented house at Elburgon.
10. She testified that her first born daughter Caren Waithera was born in 1971 and she could not recall the year of birth of her other five children namely; Ruth Wanjiku, Antony Mugi, Dominic Gitau, Margaret Nyambura and Zipporah Wanjiku.
11. She further testified that her dowry was partly paid to her brothers since her parents are deceased and that she was involved in funeral

arrangements since she contributed money. She couldn't recall how long her husband took before he was buried but she confirmed that he died at Molo Hospital and was taken to War Memorial Morgue thereafter buried at Elburgon. She chose not to respond to allegations that it was Peter Wachira who brought her to court so that they can share the deceased's inheritance.

12. **PW2 Peter Wachira Gitao** testified that his deceased brother married the Applicant herein as a second wife in 1975 and the first wife was married in 1965. He said that the 2nd wife's children were named after their family and stated that his late brother Joseph Mbugua lived with the 1st wife Hannah Wambui for 37 years and 27 years with the Applicant herein.

13. He asserted that his late brother never paid dowry of any of his two wives and in the year 2017 he attended dowry payment of the 1st wife and this payment was necessitated by her daughter's looming marriage since under the kikuyu custom a mother is not allowed to receive her daughter's dowry until hers was paid.

14. He stated that during his late brother's burial the Applicant and her children were not excluded from taking photographs with the rest of the family members and he produced the said photographs in his evidence in chief.

15. During cross examination he testified that he has been given his share of the estate's property and he was not interested in getting his late brother's share through the Applicant herein. He stated that his brother lived at Elburgon, he had not build a house for the Applicant there and he was buried on his child's land since their mother did not have a land at Elburgon.

16. He stated that his deceased brother had seven children with the Applicant and that the eulogy was prepared by the family.

17. The applicant's second witness, Paul Kamau testified that the deceased Joseph Mbugua was his cousin and he was aware he was married to two wives, the Applicant and the Respondent herein. He stated that during the burial of his cousin he was the Master of Ceremony (MC) and both wives were acknowledged.

18. In cross examination, he reiterated that the deceased had two wives. He said he was six (6) years old at the time the deceased married the Applicant as his second wife in 1975. He did not know the year when the respondent got married to the deceased.

19. The **applicant's 3rd witness Charles Njenga Ngugi**, testified that the deceased Joseph Mbugua was his long term friend who taught him carpentry work. That during the course of their interaction, he learnt that the deceased was married to two wives. Mary Wangui and Hannah Wambui. He said that he lived with his two wives until when he got sick and later died at Molo Hospital.

20. During cross examination he stated that he knew the deceased in the year 1972 and in that year he was married to two wives however, he did not attend dowry payment. He said he knew the family of the deceased together with his children and stated that the deceased was staying with his second wife while the 1st wife lived on another plot.

21. The **applicant's 4th witness Margaret Nyambura Mbugua**, who is her 6th born daughter who testified that late Joseph Mbugua was her father and she was named after his eldest sister. She told court that on 14th December, 2003 her father felt sick and he was taken to the hospital by her mother where he was admitted. On 18th December, 2003 she went to the hospital in company of her sister Catherine Njoki Mbugua to check on her ailing father and they had a brief talk after which the deceased advised them to stay united before he passed on.

22. She stated that she informed her step brother one Elijah Gitau Mbugua about her father's demise and he came with a Mr. Gachanja and the said Charles Njenga to the hospital and they moved their father's body to War Memorial Morgue in Nakuru. She testified that all children of both parties attended the funeral and in all occasions they were always together and they even took photographs. She testified that they were united until when they discovered their late dad had been bequeathed a land by his late parents Zipporah Karia and Elijah Gitau.

23. Under cross examination she reiterated that her mother took her late father to the hospital. She said she was born in 1981 and she did not have a birth certificate but had a hospital card which showed that the deceased was her father. She didn't have any objection to DNA being conducted to ascertain whether the deceased was her biological father.

24. The **applicant's 5th witness was Ruth Wanjiru**, who testified that she was the second born to the Applicant herein and the late Joseph Mbugua. She basically corroborated the testimony of her sister.

25. During cross examination she confirmed that a letter dated 9th February, 2021 from St. Peter's Girls boarding school which she alleged showed the deceased was her father did not have his name on it. She also did not have any document to show that deceased was her father.

26. The **applicant's 6th witness Grace Njoki Mbugua**, testified that she was the last born daughter to the Applicant herein and the deceased Joseph Mbugua. She said she had always known the respondent as her step mother and she also corroborated the testimony of her sisters.

27. Under cross examination she testified that she has a clinic card and Kenya Certificate of Primary Education (KCPE) certificate which only have the deceased's surname.

28. She said she was introduced to Respondent's family by her mother and late dad and told court that she knew her late father's relatives namely Mary Wangui and Lydia Njeri who were the deceased's sister, Peter Wachira and Daniel Thuku who were her father's brothers.

29. In re-examination she confirmed that they were photographed during the funeral of her father Joseph Mbugua.

Hannah's Case/ The Respondent's Case.

30. **Hannah Wangui Mbugua PW1** testified that Karia Getao Gicheru was her mother in law. She said the deceased Joseph Mbugua was her husband having gotten married to him in the year 1966 and they were blessed with eight (8) children who are all adults.

31. She said her first born Isaac Mwenja was born in 1963, second born Moses Gitau born in 1966, third born Teresia Wanjiku born in 1969, fourth born Grace Wanjiku born in 1971 and the 5th born Paul Kariuki was born in 1980. She did not state the year of birth of her 7th child James Muchiri and 8th child Margaret Wangui. She stated that they lived with the deceased at Elburgon and her last dowry balance was paid by the deceased's brother Wachira and sister Lydia.

32. She said her deceased husband became sick and was taken to Molo hospital where he died after a week, his body moved to War Memorial Morgue and later buried at Turi LR No. 3204 Turi Elburgon/Arimi Ndoshura Block 3/204. She said she never saw the Applicant herein during the burial and her late husband and mother in law never told her that there was a second wife.

33. She said she was issued with a Church Card by St. Peters Catholic Church on 30th March 1991 which evidenced her marriage to the deceased. She said if the applicant was also the wife she would not have been issued with the said card.

34. She stated that her first born son Isaac Mwenja was issued with the burial permit and the deceased's Death Certificate.

35. During cross examination she reiterated she has a marriage certificate to prove her marriage to the deceased. She also said that the land where the deceased was buried is hers and she has a title deed to prove the same.

36. She said when the deceased fell sick he was at home with her and was taken to Molo Hospital for treatment by Moses Gitau and Grace Wanjiru. She disputed that the Applicant herein stayed with the deceased at the hospital and that he died in the presence of her daughters Margaret Nyambura and Catherine Njoki. She told court that her son Isaac Mwenja, deceased's brother Daniel Gitau and herself moved the deceased's body to War Memorial Mortuary.

37. She said the eulogy produced by the applicant was manufactured.

38. In re-examination, she stated that it was her son and herself who took the deceased to the hospital. That at the time of his death he was alone and not in the company of the applicant.

39. **PW2 Lydia Njeri Wang'ond** testified that she has known the respondent for twelve (12) to thirteen(13) years as her late brother's wife. She said sometimes in the year 1966 the two got married and the deceased partly paid her dowry and after his demise together with her brother they cleared the outstanding dowry balance in 2019. She said in 1969 she learnt that her late brother and the Respondent had a four (4) months baby and another one who was about two (2) years old. She also stated that she later learned that the respondent had her own child called Isaac Mwenja.

40. She testified that when the deceased's first born son married, the Applicant herein did not attend his wedding. She also stated that photos produced did not prove the deceased had another wife and other children and eulogy could be manufactured by any one. She said at the time her mother died and when they were sharing the property the Applicant was not there. She said she saw the Applicant for the first time during the burial of her brother. She disputed the contention by the Applicant that deceased used to pay for her children's school fees as he was not even in a position to pay school fees for his own children with the Respondent and had to be assisted by the rest of the family.

41. Under cross examination she testified that the Applicant attended the burial as a neighbor and there were photographers present who could just take anyone's photos. She stated that the eulogy could have been manufactured and that her late brother could not educate his own children as he did not have money. She stated that together with support from her siblings they educated their brother's children.

42. **PW3 Evanson Wachira Thuku** who was an uncle to the deceased Joseph Mbugua testified that his nephew only had one wife the Respondent herein and he used to visit the deceased at Elburgon and he always found him staying with the Respondent. He stated that if at all there was another wife he would have been informed as the only remaining uncle.

SUBMISSIONS

Applicant's Submissions

43. The applicant submitted that she was the second wife to the deceased Joseph Mbugua. She asserted that the deceased did not pay dowry for any of his wives and the 1st wife (respondent) dowry was paid by deceased's sister and brother since her daughter was about to get married and under Kikuyu Customary Law a wife is not supposed to receive the dowry of her daughter until hers have been paid.

44. To buttress the above position specifically that she was the second wife and had children with the deceased she invited the court to look at the photographs taken by the family and the eulogy which expressly stated that the deceased had two wives.

45. She contended that she was married to the deceased in 1975 and together they were blessed with eight (8) children one of whom is now deceased. She submitted that her entire contention was corroborated by her witnesses who testified before this Court. She disputed the allegation by the Respondent and those of her witnesses that she attended the burial of John Mbugua as a neighbour.

46. She prayed that since she is the second wife and having cohabited with the deceased for more than twenty eight (28) years and sired

seven (7) children together, then by virtue of **Section 29 of the Law of Succession Act** together with her children they are entitled to the deceased estate's share. She also prayed for amendment of the confirmed grant.

Respondent's Submissions

47. The Respondent submitted that the issues for determination in this matter is twofold namely;

(a) Whether Mary Wangui was married by the deceased.

(b) Whether the Applicant and her children are entitled to inherit the property from the deceased.

48. On the first issue the respondent relied on the cases of;

1. **Njoki -vs- Mathara and Others Civil Appeal No. 71 of 1989 (UR), Kneller J.** A reading the judgment of the court held that:

“(i) The onus of proving a customary marriage is on the party who claims it.

(ii) The standard of proof is the usual one for civil action, balance of probabilities.

(iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”

2. **Hortensiah Wanjiku Yawe-vs-The Public Trustee, Civil Appeal No. 13 of 1976,** the court held:

“(i) The onus of proving customary law marriage is generally on the party who claims it.

(ii) The standard of proof is the one usually for a civil action namely "on the balance of probabilities.”

(iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.

(i) Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.

(ii) Only cogent evidence to the contrary can rebut the presumption.

(iii) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.”

49. Respondent submitted that she got married to the deceased and were blessed with children, her marriage was formalized and her dowry paid in full and the last remainder dowry payment was paid in the year 2019 a fact which was confirmed and corroborated by PW2 and PW3.

50. She contended that PW2 outlined the entire family setting to the point when she got married to her brother, how the dowry was paid and the children and even testified on her late brother's general life.

51. She asserted that it was PW2's testimony that she did not know the Applicant, she was never introduced to her and she had never seen her in any of the family functions.

52. The respondent also denied existence of marriage between the Applicant and her deceased husband and allegation that she lived with the deceased until his demise.

53. She submitted that she took the deceased to hospital where he died and they cleared the bills including the mortuary bill and produced in court documents proving that her son was the one who applied for the death certificate and was also issued with the death notification.

54. She submitted that church card issued by the Catholic Church on 30th March 1991 evidenced her marriage to the deceased. She submitted that the Applicant on her part failed to prove her dowry payment and her cohabitation with the deceased during his lifetime. That she did not produce any evidence to show that she had indeed cohabited with the deceased in his lifetime. These photographs at the funeral and the eulogy could not be proof of marriage.

55. It was her submissions that the Applicant also failed to prove that her children were sired by the deceased as no birth certificates were produced and the identification cards not bearing the full name of the deceased was obtained after his death yet all children were of majority age before demise of the deceased.

56. She submitted that other than the 1st objector who is part of her family none of her family members could recognize the Applicant. She argued that onus of prove lied with the Applicant to show that she was indeed the wife to the deceased which onus she did not discharge.

57. She also submitted that Applicant's testimony was not credible since she testified that she got married to the deceased in the year 1975 yet her first born child was born in the year 1971.

58. The Respondent relied on the provisions of **section 29 of the Law of Succession Act** and **section 43 (1) of the Marriage Act**, the case of **Eugene Cotran's "Casebook on Kenya Customary Law"** and the case of **Gituanja vs Gituanja [1983] KLR 575** where the Court held inter-alia that;

"The existence of a marriage is a matter of fact which is proved with evidence."

59. And she submitted that unlike her, the Applicant failed to prove *ngurario* and *ruracio* which is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage took place

60. She urged this court to find that she was the sole wife and beneficiary together with her children to the deceased and the only one entitled to inherit from the Estate of Joseph Mbugua Gitau.

ANALYSIS & DETERMINATION

61. The issues for determination in this matter are: -

a. Whether the Applicant was married to the deceased.

b. Whether the Applicant and her children are beneficially entitled to the deceased's estate?

Whether the Applicant was married to the deceased

62. The applicant testified that she was married customarily to the deceased in the year 1975. She stated that her dowry was partly paid to her brothers since her parents are deceased. **Section 43 of the Marriage Act, No.4 of 2014** provides that:

"43 (1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage."

63. It was incumbent upon the Applicant to prove, on a balance of probabilities, that she was married to the deceased. In **Gituanja vs Gituanja (1983) KLR 575**, the Court of Appeal held that the existence of a customary marriage is a matter of fact which must be proved with evidence. **Hortensia Wanjiku Yawe vs The Public Trustees, Civil Appeal 13 of August 6, 1976 (Wambuzi, P Mustafa V-P and Musoke, JA)** is to the same effect.

64. Guided by the above provisions of the law and the precedents the onus was on the applicant to establish that there was in existence a Kikuyu Customary Marriage between her and the deceased. It is clear that the applicant did not establish customary marriage between her and the deceased John Mbugua.

65. The applicant also asserted that together with the deceased they were blessed with eight (8) children one of whom is deceased. Her main witness, the 1st objector confirmed that the deceased did not pay dowry for the Applicant. It is important to note too that the Applicant in her submissions confirmed that the deceased never paid her dowry. Both the Applicant and the 1st objector stated that the deceased never paid any dowry for the respondent either and the dowry was paid by the members of the family after the demise of the deceased.

66. In an attempt to prove her marriage, the Applicant attempted to introduce evidence in the form of submissions including a bundle of photographs taken during the burial of Joseph Mbugua showing her and her children with the other family of the deceased. She also made reference to the eulogy program which stated that the deceased was married to two wives herself and the respondent herein. This eulogy was rejected by other members of the family.

67. However, it is important to note that there is no dispute that the respondent and her children were the spouse and children of the deceased, respectively. The objectors do not dispute this fact, and variously refer to her as the first wife of the deceased.

68. Can a presumption of marriage be made on the facts before me? The Applicant's proof of prolonged cohabitation is that she got married in 1975, bore children with deceased and was recognised in the funeral and the eulogy. The 1st objector simply stated that his brother came home with a woman in 1975 and said that she was his wife and since then he had known her as his brother's wife. That children were born and named after family members and that she was recognised at the funeral. That was the raft of her testimony and that of her witnesses. Twenty eight (28) years and eight (8) children is a really long time. One would have expected more than just the alleged recognition as a wife at the funeral and the eulogy. Where is the proof that the applicant spent twenty eight (28) years with the deceased? There is a yawning gap about the alleged life with the deceased between the year 1975 and 2003 when Joseph Mbugua died.

69. There was no evidence to prove that any of the children were the children of the deceased. No evidence even from the schools they went to that the deceased ever paid fees or attended school meetings, or maintained them in any manner. Neither was there proof that the deceased was involved in the lives of the children said to be his children.

70. It is noteworthy that what the applicant seeks a share of is not the property of Joseph Mbugua but his share of the estate of his mother. The cause before me is about the estate of Karia Getao, It is not about the estate of Joseph Mbugua whom she claims was her husband.

71. All these efforts came about only when the applicant and her children learnt that the family of the deceased had decided that the person they recognised as the wife of the deceased could inherit his share of his mother's estate.

72. The question then is whether the applicant can file a protest about the distribution of the estate of Karia Getao among her children yet she was not one of them?

73. **Section 38 of the Law of Succession Act** provides: *Where intestate has left a surviving child or children but no spouse*

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

74. This cause is about the estate of Karia Getao. It is the 1st objector who has a relationship with the deceased Karia Getao. He said he had no interest in the matter because he had received his share of the estate, and had only brought the protest because the applicant whom he claimed was the 2nd wife of the deceased had been left out.

75. The applicant, apart from claiming to have been married to the son of Karia Getao, she has not produced any evidence to prove that she and her children were dependants of Karia Getao to warrant a share of her estate.

76. Hence the penultimate question is whether the Applicant and her children are dependents and entitled to inherit the deceased's property. The applicant's claim is that she was the daughter in law of the deceased but provided no proof of that. Her claim that a little dowry was paid was not proved and she never called a single witness to testify to that alleged fact. The Applicant's children all adults now did not also establish any dependency upon the deceased Karia Getao, or any relationship with her through her deceased son.

77. The applicant's claim, as framed, if any would lie squarely in any cause filed with respect to the estate of the Joseph Mbugua but not in the context of the estate of Karia Getao Gicheru.

78. I find therefore that the protest is not merited and the same is dismissed.

79. This being a family matter each party to bear its own costs.

DATED AND DELIVERED VIA ZOOM THIS 10TH DAY OF JUNE, 2021.

MUMBUA T MATHEKA

JUDGE

In the presence of:

CA Edna

Applicant present

M/s Mongeri & Co. Advocates for Respondent