



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2254 OF 2012**

**IN THE MATTER OF THE ESTATE OF DUNCAN KIMANI WAINAINA (DECEASED)**

**STEPHEN NGUGI NJERI.....1<sup>ST</sup> APPLICANT**

**TERESIA EVELYN NYANJAU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**PAULINE WAMBUI KIMANI.....RESPONDENT**

**RULING**

1. The deceased Duncan Kimani Wainaina died intestate on 17<sup>th</sup> November 2021. While alive, he married the respondent Pauline Wambui Kimani in church and with her he got five children: Mary Kimani, Patrick Wainaina, Constance Jenkins, Josephine Wairimu and Margaret Wanyoike. In 1993, while the respondent was living in the USA, the deceased began living with one Jacinta Njeri Ngugi in his home at Section 9 Thika. He did not get any children with her, but she had her own children. These were the applicants Stephen Ngugi Njeri (1<sup>st</sup> applicant) and Teresia Evelyn Nyanjau (2<sup>nd</sup> applicant). She came into the life of the deceased with the children. The deceased, Jacinta Njeri Ngugi and the applicants lived together until 2011 when he died. On 3<sup>rd</sup> January 2005 the deceased had sworn an affidavit to say that Jacinta Njeri Ngugi was his wife whom he had married under Kikuyu customary law since 1993. During this relationship, the deceased transferred LR No. 1/1266 to her.

2. The respondent, on being informed of the death of the deceased, returned from the USA to come and bury him. On 20<sup>th</sup> September 2012 she petitioned for the grant of letters of administration intestate. A grant was on 4<sup>th</sup> January 2013 issued to her. The grant was confirmed on 5<sup>th</sup> November 2013, and the respondent inherited the entire estate of the deceased. There was no reference to the applicants or their mother when the petition was filed, grant issued or confirmed. It is clear that the consent of the applicants was not sought nor obtained during the proceedings. It was only through an application dated 16<sup>th</sup> May 2017 that the 1<sup>st</sup> applicant was drawn into the matter when it was sought that LR No. 1/1268 and LR No. 1/1313 (these were subdivisions by the deceased of his LR No. 1/218/7 and LR No. 1/1313) be included in the estate of the deceased. The 1<sup>st</sup> applicant was apparently in possession of the property which he claimed to have been acquired jointly between the deceased and his mother and/or gifted to her. It was in that application that he complained that the succession proceedings had been filed and concluded without reference to them and yet they constituted the second family of the deceased.

3. It was subsequent to that application that on 5<sup>th</sup> November 2018 the applicants filed the present application under **section 76 of the Law of Succession Act (Cap 160)** to have the grant issued to the respondent and subsequently confirmed revoked, and the estate restored to the deceased to allow for fresh appointment of the administrator and fresh distribution. Their case was that the respondent had obtained the grant and the confirmation of the estate of the deceased by falsely stating that the deceased had only one family and by fraudulently concealing that in fact there existed a second family, the family of Jacinta Njeri Ngugi and the applicants. The result was that the applicants had been disinherited.

4. The respondent opposed the application. Her case was that, although she was in USA she was aware that the deceased had been cohabiting with Jacinta Njeri Ngugi, but that he was not legally married to the said Jacinta. This was because the relationship between her (the respondent) and the deceased was a monogamous one that could not allow him to enter into any subsequent marriage. About the applicants, her case was that they were not the children of the deceased. She acknowledged that the deceased had transferred to Jacinta Njeri Ngugi a piece of land, but she said it was at the time when he was quite ill and that, therefore, the transfer was fraudulent.

5. The applicants were represented by Mr. Ng'ang'a and the respondent by Mrs Thongori (SC). Each counsel filed written submissions

which I have considered.

6. It is reiterated that the applicants were not the biological children of the deceased. They came with their mother into the life of the deceased with whom they lived for about 18 years between 1993 and 2011. The respondent lived in the USA during that period but was aware what was happening back at home. She did not challenge that relationship between the deceased and Jacinta Njeri Ngugi, and did not seek to bring it to an end. There is no dispute that in 2005 the deceased declared in a sworn affidavit that Jacinta Njeri Ngugi was his Kikuyu customary law wife.

7. The applicants stated that the deceased took them in as his children, maintained them and took them to his school. Their mother was a cook earning less than 10,000/= a month (they produced her payslips) who had no capacity to educate them on her own. When the 1<sup>st</sup> applicant became an adult, the court was told, the deceased entrusted him with the management of his property. Prior to the application dated 16<sup>th</sup> May 2017, it is admitted, the 1<sup>st</sup> applicant was the one managing LR No. 1/1268 and LR No. 1/1313 and collecting rent from them up to 2018. The 1<sup>st</sup> applicant stated that he had been authorized to do this by the deceased. To the respondent, the 1<sup>st</sup> applicant was intermeddling with the estate of the deceased.

8. The applicants supported their case by a letter dated 27<sup>th</sup> January 2012 from the Chief of Kagundu-ini Location in Kandara Division that showed that the deceased had two families; photographs with them and the deceased; documents to show the deceased was paying their fees; and documents to show the 1<sup>st</sup> applicant was paying rates/rent to Nairobi City County on behalf of the deceased.

9. The respondent swore that the application by the applicants was an afterthought, and asked why it had taken them all this long to challenge the grant. The applicants' case was that they first became aware of the grant in 2017 in the above application and that after it was determined they applied for revocation.

10. It does appear that Jacinta Njeri Ngugi subsequently died. The respondent questioned the capacity of the applicants to bring the application, now that they were not the administrators of her estate. Their response was that they had not come to court on behalf of their mother. They had come to benefit from the estate of the deceased on the basis they were children of the deceased who were his dependants.

11. I accept that the deceased and the respondent had a monogamous marriage. However, **section 3(5)** of the **Act** provides that:

**“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”**

The deceased and Jacinta Njeri Ngugi lived together for 18 years to the knowledge of the respondent, and to the knowledge of the local administration. They were cohabiting. The deceased declared in a sworn affidavit that she was his kikuyu customary law wife. He even transferred his land to her. I find that she was a wife for the purpose of **section 3(5)** of the **Act** who was entitled to inherit him.

12. **Section 3(5)** of the **Act** is expressly intended to cater for a woman who finds herself in a situation where the deceased had contracted a monogamous marriage which remained undissolved up to the time of his death, but subsequent to the marriage he entered a customary law marriage relationship with her (**Macharia –v- Njomo & Another [2008]IKLR (G & F) 754**). Under the marriage statute, this subsequent relationship is illegal as the deceased had no capacity to marry. However, under **section 3(5)** of the **Act**, the woman would be recognized as the widow of the deceased. If she got any children with the deceased, they would be recognized as the children of the deceased. Both the widow and the children would be entitled to inherit from the estate left by the deceased.

13. Jacinta Njeri Ngugi came into the life of the deceased while having two children, the applicants. The deceased took them in, brought them up for 18 years until he died. He took them to school. **Section 3(2)** of the **Act** defines a **“child”** or **“children”** in the following terms:

**“References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”**

On the facts of this case I accept that the deceased had in fact accepted the applicants into his family and had voluntarily assumed permanent responsibility over them.

14. Secondly, **section 29(b)** of the **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, 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.”**

15. The applicants' case was that, although not the biological children of the deceased they became entitled to his estate because the deceased treated them as his children during his life, but were also entitled to inherit as dependants upon his death. I make reference to what the Court of Appeal said in the decision of **John Ndungu Mubea –v- Milka Nyambura Mubea, Civil Appeal No. 76 of 1980** as follows:-

**“The claim by the appellant and his sisters to a share in the deceased’s estate did not depend on whether or not the marriage between their mother (Wangari) and the deceased was valid in the years of the law. Their claim as we understand it rest on the simple proposition that they are the children of the deceased who were treated by the deceased as such during his lifetime. For the purpose of their claim, it does not matter how they became children of the deceased.”**

In **Ndolo –v- Ndolo [2018]KLR (G & F) 742**, it was held that even a testator cannot be allowed to disinherit a dependant who depended on the deceased during his lifetime.

16. That being the case, I find that it was fraudulent on the part of the respondent to come to court to petition for the grant of letters of administration intestate in respect of the estate of the deceased without disclosing to the court that the deceased had a second family that included the applicants. The existence of the second family was known to the respondent and yet she concealed this from the court. This led to the second family, and in particular the applicants, being disinherited.

17. The result is that I allow the application. The grant issued to the respondent on 4<sup>th</sup> January 2013 is revoked, and the certificate of confirmation issued on 5<sup>th</sup> November 2013 (and rectified on 10<sup>th</sup> February 2016 and further rectified on 7<sup>th</sup> May 2018) is set aside. The entire estate of the deceased shall revert into the name of the deceased.

18. A fresh joint grant is issued to the respondent Pauline Wambui Kimani and the 1<sup>st</sup> applicant Stephen Ngugi Njeri. The two of them, or any of them, will be at liberty to, within 60 days from today, file and serve to all beneficiaries an application for the confirmation of the grant.

19. Costs shall be borne by the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY, 2021.**

**A.O. MUCHELULE**

**JUDGE**