



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2798 OF 2015

IN THE MATTER OF THE ESTATE OF DUNCAN NJERU MUTEMA - (DECEASED)

MARY WANJIRU MUTEMA.....APPLICANT

-VERSUS-

PERIS WANJIRU MUTEMA....RESPONDENT

JUDGMENT

1. It is not in dispute that the deceased Duncan Njeru Mutema died intestate on 16th June 2015. On 12th November 2015 the respondent Peris Wanjiru Mutema petitioned the court for the grant of letters of administration intestate. She indicated in the affidavit in support of the petition that she was the deceased's widow with whom they had the following children: -

- a. John Barnabas Njeru Mutema;
- b. Halphan Wasagai Njeru;
- c. Charles Mwangi Njeru;
- d. Irene Mumbi Mbugua; and
- e. Jane Muthoni Gikundi.

She declared that the estate comprised:-

- a. Plot No. 2846 (Original No. 1058 and Title No. 15040);
- b. LR No. Ngariama/Nyangeni/171;
- c. Plot No. 4A Karia Nyangeni; and
- d. Money at the KCB Nairobi.

2. The grant was issued on 3rd April 2016. It has not been confirmed. The applicant Mary Wanjiru on 29th August 2016 applied to have the grant revoked on the basis that she was the deceased's second wife whom the respondent, the first wife, had not acknowledged, in the petition. She stated that the deceased was monogamously married to the respondent, but that he subsequently married her under Kikuyu customary law; and that she had her own two children (Elizabeth Wanjiku Njeru and Jane Kaninu Njeru) whom the deceased respectively recognised and accepted as his own and voluntarily assumed permanent responsibility. Her case was that under **section 3(5) of the Law of Succession Act (Cap. 160)**, her and her children ought to have been indicated in the petition as beneficiaries.

3. The respondent opposed the application on the basis that she and the deceased had a monogamous marriage, and that there was no way he could have legally taken another wife while the marriage subsisted. Her marriage to the deceased was in 1951 and under the **African Christian Marriage and Divorce Act**. According to her, the deceased chased her away with a panga in 1999. Before this, she said, he had begun living with the applicant whom he had earlier on employed in his bar.

4. According to evidence of the applicant, the deceased married her in 1976 under Kikuyu customary law. When he married her he had

already separated with the respondent. The deceased retired in 1983 and they continued to live together until his death at the house. He took the body of the deceased to the mortuary. She testified that the deceased paid dowry in terms of goats and clothing to her parents. She called her brother in law, the deceased's brother, Misheck Njogu Mutema to confirm the fact of marriage and the payment of dowry. He testified that he considered the applicant to be the deceased's second wife.

5. There was no dispute that the applicant annexed to her affidavit an affidavit sworn on 20th May 1998 by the deceased in which he stated that he had married the applicant on 12th August 1976 under Kikuyu customary law. Further, in **HCCC No. 1909 of 1999 (OS)** at Nairobi, the respondent filed the summons against the deceased for the declaration that LR No. Ngariama/Nyangeni/171 registered in the name of the deceased was jointly owned in equal shares. The same for LR No. NRB/37/560 in Nairobi. She was successful in the judgment delivered on 31st October 2000. What is relevant is that in the proceedings that were annexed, the respondent acknowledged that she had a co-wife; that she was willing to go back to the deceased if her co-wife was given another place to stay. A son of the applicant testified in those proceedings to say that the respondent and the deceased had lived separately on and off, but that in 1976 his mother (the respondent) had permanently left the deceased. The court found that although the respondent and the deceased had a monogamous marriage, the deceased had remarried and was staying with his new wife in the matrimonial house he had with the respondent.

6. I have gone to this great detail to show that the marriage between the deceased and the applicant begun in 1976 and went on till his death. It was known in the family, and it was something that the respondent was alive to and testified about in the originating summons. The court found the marriage to exist. Certainly, the marriage offended the **African Christiana Marriage and Divorce Act**. The deceased and the respondent had a monogamous relationship. However, **section 3(5)** of the **Act** acknowledges the applicant as a wife for the purposes of the **Act** and her children to be children within the meaning of the **Act**. It provides as follows:-

“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.”

7. I hasten to add that the uncontroverted evidence by the applicant was that the deceased took in her two children Elizabeth Wanjiku Njeru and Jane Kanini Njeru and accepted them as his own and voluntarily assumed parental responsibility over them. He lived with them, took them to school and received their dowry.

8. The result is that the deceased left two houses: - the house of the respondent with five children and the house of the applicant with two children. When the respondent petitioned for the grant she was under **section 51(2)(g)** of the **Act** obliged to include the applicant and her children in the petition. They had not renounced their claim to the estate, and therefore their consent was mandatorily required at the stage of the petition and at the stage of the grant. Now that they did not participate, I determine that the proceedings leading to the grant were defective in substance. I revoke the grant issued to the respondent. In its place, there shall be a joint grant to the respondent and the applicant. They will within 60 days, either both or any of them, apply for the confirmation of the grant. That is when the court will determine what property constitutes the estate of the deceased, the implementation of the judgment in the originating summons on the property and what each beneficiary will be entitled to from the estate.

9. This is a family dispute. Costs will abide the cause.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH NOVEMBER, 2021

A.O. MUCHELULE

JUDGE