



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 850 OF 2014

IN THE MATTER OF THE ESTATE OF BENSON MATHENGE MUCHEMI (DECEASED)

ANASTACIA WAMBUI MATHENGE.....PETITIONER

VERSUS

MARGINS NJERI WERU.....OBJECTOR

RULING

1. This matter commenced by way of citation dated 7th April 2014 by the Petitioner to propound an alleged will of the deceased whereby 9 Persons listed as trustees were cited. Benson Mathenge Muchemi, the deceased herein died on 21st December, 2013. The citees entered appearance and filed affidavits to the citation. However, they did not proceed to propound the alleged will of the deceased. On 12th January 2018, the widow Anastacia Wambui Mathenge filed a petition for letters of administration intestate dated 18th December 2017. It was her petition that the deceased was survived by:

- i. Anastacia Wambui Mathenge – Widow
- ii. Grace Wanjiru Mathenge – Daughter
- iii. Lucy Wanjiku Mathenge – Daughter
- iv. Joy Waceke Mathenge – Daughter
- v. Leonard Thuo – Son
- vi. Andrew Gituku – Son
- vii. Brian Muchemi –Son
- viii. Watson Weru - Son

2. On 15th February, 2018 Margins Njeri Weru the objector herein filed an objection to the Petition for letters of administration being issued to the Petitioner herein. The Objector claimed that she was the wife of the deceased with whom they had two children namely Brian Muchemi and Watson Weru. Further, that the petitioner purported to represent the interest of her children without consent.

3. On 28th May, 2019, the court gave directions and ordered that the Petition for letters of Administration intestate be set down for hearing by way of viva voce evidence. Parties filed witness statements in support of their respective cases. Consequently, the matters proceeded as an intestate succession.

4. The gist of the Objector's case is that she was married to the deceased and that they lived together as husband and wife. That she was recognized as a wife even at the time of his death. She gave sworn testimony that she met the deceased in 1989 when he worked at the defunct Kenya Telkom in Machakos. That, they started dating and the deceased visited her home in 1991 in the company of Dr. Kioko Mangeli, his cousin Musa and Gichuhi and his uncle for formal dowry negotiations although she was not a party to the negotiations.

5. It was the objector's statement that when she completed her studies, she moved to Voi where the deceased was a frequent visitor until

1996 when they started living together in Imara Daima Estate. She avers that in 1998, they conceived their first baby but lost the foetus at 5 months. She gave testimony that in 2000, they were blessed with their first child whom the deceased named after his father.

6. It is the objector's testimony that they continued living together as husband and wife during which time the deceased catered for her family needs including food, shelter and medical expenses when the need arose. She contends that during the visits to the deceased's home, the deceased introduced her to his family as his wife and that she took care of the deceased during his ailment until his demise. She asserts that they were blessed with their second child in 2010 and continued living together in South C estate.

7. The objector contends that she only came to learn of the Petitioner and her family in 2011 when the deceased introduced them. She asserts that this caused a strain in their marriage, which led her to seek legal redress for maintenance which issues were eventually resolved when the deceased continued providing for her and her children. It is her testimony that at the time of his death, she had spent 16 years with the deceased as his wife. She further avers that until his demise in 2013, she depended on the deceased for general life and upkeep.

8. The objector asserted that in excluding her from the list of beneficiaries in the Petition for letters of administration intestate, the Petitioner was attempting to disinherit her as wife and dependant to the deceased. She strongly opposed the appointment of Anastacia Wambui Mathenge as an administrator of the estate of the deceased either solely or jointly.

9. It is the Petitioner's testimony that she is the legal wife of the deceased with whom they had contracted and solemnized their union under the African Christian Marriage and Divorce Act on 2nd August 1992 at the St. Joseph Matunguru Catholic Church. She contends that they lived together as husband and wife at KPTC, South C, Rongai, Avenue Park, Kileleshwa and later in Karen at the time of his death in 2013.

10. The Petitioner further avers that in 2008, the deceased was diagnosed with cancer and went to India for treatment on several occasions until his demise in 2013. She asserts that the deceased introduced and recognized all his children including the objector's children. However she disputes claims that the objector was her co-wife, contending that she was neither married to the deceased nor was she acknowledged as such during his lifetime or at the deceased's funeral. Further, that the deceased even obtained a restraining order against her during his lifetime to keep her out of his life. She avers that she had rightly excluded the objector in the Petition for letters of administration since she was not a wife, but her children whom she had with the deceased were his dependants and were included.

11. Grace Wanjau Mathenge gave testimony in opposition to the objection filed by Margins Njeri Weru. She stated that she is a daughter of the deceased. She acknowledged that she had a cordial relationship with the deceased's other children with whom they interacted during safari rallies since her father was a rally driver. She averred that she had no objection to the Petition for Letters of Administration Intestate being allowed as the estate of her late father continued to be wasted.

12. The parties filed written submissions in support of their respective cases. The firm of Murage Juma and Company Advocates submitted for the objector that she clearly set out how she was married to the deceased under Kikuyu Customary law. Further, that the doctrine of presumption of marriage had arisen out of the long cohabitation as husband and wife and the same had crystalized into a marriage. Emphasis was laid in the case of **Mary Njoki vs Njoki Mutheru & other [2008] KLR 288**, where the court discussed this concept. Further, it was submitted that the deceased constantly maintained the objector and her children, a fact, which was not refuted by evidence produced by the petitioner.

13. It was submitted that **Section 58** of the **Succession Act** is applicable since there is a continuing trust for one of the deceased's children (Watson Weru) who is a minor and the Petitioner does not have his best interest being his stepmother. It was submitted that the Petitioner should not be appointed as the sole administrator of the estate of the deceased.

14. For the Petitioner, the firm of Mbugua, Atudo & Macharia submitted that the objector failed to prove her marriage to the deceased through cohabitation or otherwise. Reliance was placed on the cases of **Eva Naima Kaaka & Another vs Tabitha Waitheera Mararo [2018]Eklr** and **Re Estate of DA(Deceased)[2019]Eklr**.

15. I have read and carefully considered the pleadings, the testimonies and the submissions of the parties in this matter. The issue to be decided is:-

- i. whether the Objector was a wife to the deceased within the meaning of the Succession Act;

16. A ground raised by the objector is that the petitioner failed to disclose to the court that the Objector was a wife and dependant of the deceased and was entitled to be provided for under the Law. The Petitioner on the other hand alleged that the objector is not a beneficiary of the estate of the deceased as provided under the Law. The question is therefore whether the objector was a wife to the deceased and dependant within the meaning of Section 29 of the Succession Act. Under **Section 29** the meaning of dependant for the purposes of that part is given as follows:

“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."

17. Was the objector a wife to the deceased? At the hearing, the objector testified that she was married to the deceased under Kikuyu customary law. She averred that the deceased visited her home and had dowry negotiations with her father, which she was not a party to. However, she did not tender evidence on whether the traditional rights of a Kikuyu Customary marriage were fulfilled, nor did she indicate the formalities that accompany the specific type of marriage that she alleges to have contracted with the deceased. She also did not provide any independent witnesses who witnessed the ceremony attendant to their marriage if there was any.

18. The Objector was not clear whether there was a Kikuyu Customary marriage or marriage by presumption. These are two different types of marriages and evidence must be led to prove whichever one claims to have contracted. According to **Dr. Cotran**, in Restatement of African Law: Kenya Volume 1 as discussed in the Court of Appeal case of **Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR** in Kikuyu Customary Marriage there are specific rites and ceremonies which have to be performed to satisfy the essentials of a Kikuyu customary marriage. One such rite is the slaughter of a 'ngurario' ram.

19. In **the Law on Marriage and Divorce, Sweet & Maxwell, 1968**, the following procedures, rites and ceremonies are involved in a typical Kikuyu customary marriage:

A marriage proposal is conveyed to the girl. If it is favourably received the girl's parents are invited to the home of the prospective husband to partake in the "njohi ya njurio", the beer of asking the girl's hand. Thereafter the first instalment of 'ruracio'(dowry) is taken to the girl's father. Further instalments follow until a sufficient amount of the full marriage consideration, stipulated by the girl's father has been offered and accepted to seal the engagement. Next a day is fixed for the engagement ceremony (ngurario), i.e. the pouring out of the blood of unity. A ram (ngoima ya ngurario) is sent from the boy's father to the girl's home, where the ceremonial feast is prepared. The ram is slaughtered, and the girl eats the kidneys as a sign of consent to the betrothal. The betrothal is complete when this ceremony has been performed. The ngurario ceremony is followed by a further ceremonial feast (guthinja ngoima). This feast is attended by members of the parties' clans, and after the slaughter of a sheep provided by the boy's family, the families exchange presents. After the guthinja ngoima ceremony, the bride is brought to the bridegroom's home by mock capture. The author notes that this procedure of capture is now obsolete.

20. Customary law is certainly not static and is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2020 in exactly the same way that they were conducted in a long time ago. However there are essential steps and ceremonies which must be performed, irrespective of the form in which they are performed. On the essentials of a valid kikuyu marriage, **Cotran** concludes that

"No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered" and that "there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid."

21. Critical elements of a kikuyu customary marriage were not mentioned by the Objector, either in passing or corroborated by evidence produced in support of her case. If the essential customary rites and ceremonies were held then there has to be evidence to corroborate the conduct of such ceremony. Under the Evidence Act, the matter in issue in this case could be proved even by a single witness. I therefore find no basis to hold that the objector was a wife to the deceased by dint of Customary Law.

22. In the absence of such evidence, the only recourse would be to presume marriage between her and the deceased. The objector said that she had lived at Imara Daima and South C with the deceased up until his demise in 2013. She averred that the only time they did not live together was in 2011 when they had a disagreement upon her learning of the Petitioner and her children with the deceased. That was contested. She did not provide any proof of the alleged cohabitation. No witnesses were called to corroborate the evidence that they lived together as husband and wife.

23. During this period, the deceased was married to the Petitioner. Photographs of the deceased during a function were produced. Copies of air tickets to various destinations were also produced. Photographs of the deceased burial ceremony are also on record as evidence. However, this is not sufficient proof to form a basis for the presumption of marriage by cohabitation. I find that the testimony of the objector was not sufficient to prove cohabitation. I therefore find no basis to deem her as a wife of the deceased by dint of cohabitation. In any case, the deceased appears to have tried to get her out of his life when he was alive. He moved the Court to get a restraining order against the objector and she went to court to obtain an order of maintenance of the children.

24. At the hearing of this objection, the objector strongly agitated for recognition of her children as children of the deceased. The Birth certificates in evidence indicated the name of the deceased as the father of her children. The Petitioner did not object and asserted that the deceased and her Petition for letters of administration intestate had recognized all the deceased's children including those born by two other women. This not in dispute and I will therefore not belabor the subject of the recognition of the children of the deceased any further.

25. However, the Objector contended that one of the children is a minor and that the provisions of **Section 58 of the Succession Act** should apply. She averred that the Petitioner did not have the best interest of the minor child. She averred that she was the one best-placed to look after the best interest of the minor child.

26. **Section 58 of the Law of Succession Act Cap 160** requires that where a continuing trust arises the Grant of Letters of Administration shall not be made to one person alone except where that person is the Public Trustee or a Trust Corporation. The underlying objective of this provision is to safeguard the interests of minor beneficiaries of the estate. The proposal by the Petitioner in the Petition for letters of administration intestate as the sole administrator of the estate of the deceased is not in conformity within the provision of **Section 58 of the Law of Succession Act**.

27. Although the objector is the mother of the minor, it is my view that her relationship with the petitioner and the other children of the deceased is strained. Her appointment as a co-administrator may hamper the effective administration of the Estate of the deceased. Further, the chronology of events in this matter and the conduct of the Objector, shows that she does not have the best interest of the other children of

the deceased at heart.

28. In the interest of justice and proper administration of the Estate, and in balancing the interests of the minor and all the beneficiaries of the estate of the decesses, I make the following orders:

- i. Anastacia Wambui Mathenge is hereby appointed as the administrator of the estate of Benson Mathenge Muchemi (deceased)
- ii. Parties to agree on two other administrators to be appointed as required under Section 58 of the Law of Succession Act.
- iii. Each party to bear their own costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 6TH DAY OF OCTOBER, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Petitioner

In the presence ofAdvocate for the Objector