



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 372 OF 2004

(IN THE MATTER OF THE ESTATE OF GEOFFREY GICHERU KAGIRI(DECEASED)

FRESHIAH WANGUI GICHERU.....PETITIONER/APPLICANT

VERSUS

LUCY WANJA KINYUA.....PROTESTOR

JUDGMENT

Geoffrey Gicheru Kagiri (deceased) died on 14 January 2004 aged 64; he was then domiciled in Kenya and his last known place of residence was Witima location in Nyeri County.

On 10 August 2004, the applicant petitioned for grant of letters of administration intestate of the deceased's estate. She presented the petition in her capacity as the deceased's wife and listed his six children as having survived him; they were named as:

- (i) Patrick Maina Gicheru
- (ii) Faith Wakarima Gicheru
- (iii) Florence Wanjiru Gicheru
- (iv) Robert Waweru Gicheru
- (v) Rewel Muturi Gicheru
- (vi) Justus Mugo Gicheru

All were indicated as adults the youngest of them being 21 years old as at the time the petition was filed. The deceased's intestate estate was indicated as comprising landed properties identified as Title Nos. Othaya/Kihugiru/1382, 863,623,845 and 860. Others were L.R. No. Mavoko Town Block 2/1198; 252 shares in Kenya Commercial Bank; 1000 shares in Kenya Airways; 96 shares in Barclays Bank of Kenya and undisclosed cash in Kenya Commercial Bank Othaya Branch. The deceased also owned a motor vehicle registered as No. KAG 695 Y Datsun pick-up.

He is indicated to have owed Family Finance bank a loan of Kshs. 40,000/=.

The record shows that on 1 December 2004 the protestor filed an objection to the making of the grant and with it she also filed a petition by way of cross-application for a grant in her capacity as the deceased's wife.

The grant of letters administration was subsequently made in the joint names of the applicant and the protestor on 20 November 2008. By a summons for confirmation of grant dated 26 March 2009, the applicant sought to have the grant confirmed and the estate distributed equally amongst the deceased's children and herself to the exclusion of the protestor.

The protestor filed an affidavit of protest which she swore on 21 May 2009 and filed it in court on the even date. She opposed the scheme of distribution of the deceased's estate as proposed by the applicant; she instead proposed that the estate should be distributed equally amongst the applicant, her children and the protestor and her two children whom she named as Paul Kagiri and Margaret Wambui.

According to the protestor, she started cohabiting with the deceased in 1994 at Othaya town and in the month of August 2000, the deceased paid dowry to her parents. She already had her child, Wambui, when she started cohabiting with the deceased; the latter, according to her, accepted the child as his own. As far as Kagiri is concerned, he was born on 2nd January 1999 and so he was the deceased's biological child.

The protestor carried forward this narrative when she testified in court; she reiterated that the deceased was her husband because he was the father of her child. During her examination-in-chief, her counsel showed her a certificate of birth of her child but she disowned it. She instead produced a birth certificate issued by the Registrar of Births and Deaths on 21 March 2013 showing that her son was born on 2 January 1999 and was given the name Paul Kinyua Kagiri. Prior to her cohabitation with the deceased, she testified that she had another child Margaret Wambui Kagiri and that the deceased maintained all of them as his family. Sometimes in 2003 the deceased visited her parent's home and left behind Kshs 10,000/=. She testified further that she knew the applicant as her co-wife and they fought over the deceased on various occasions.

Upon cross examination, she stated that the name Kinyua was her father's surname. She testified that she had taken the child's birth certificate earlier in 2004 but that she lost it; it is then that she took another certificate in the 2013. She admitted that under Kikuyu customs, if the child was the deceased's she would have named him Paul Kagiri Gacheru. She denied that she was aware the deceased married the applicant in church.

The protestor's mother Margaret Wambui testified that she knew the deceased to be a friend of her daughter and that they visited her on several occasions; on one such occasion the deceased gave her Kshs. 10,000/=. She testified further that her husband was called Paul Kinyua but that he was deceased. The protestor's brother, Joseph Wangai Kinyua also testified and said that he knew the deceased as the husband to his sister. He confirmed that he was present when the money from the deceased was handed over to his mother and, as a matter of fact, he is the one who recorded the proceedings on the material date.

The applicant testified that she married the deceased in 1965 initially under Kikuyu customs but later, in particular, on 16 September 1972 their marriage was solemnised in church. She produced a certificate of marriage to that effect. The marriage was blessed with six children. She denied knowing the protestor. It was also her evidence that she and the deceased lived together at Witima though they both worked at Othaya town where the deceased operated a bar and a restaurant while she sold clothes. She was not aware that the deceased had any other wife or child.

Euticus Tubi Muturi testified for the applicant and said that he was the head teacher for Kihugiru primary school between 2012 and 2014. It is at this school that the protestor's son was admitted in class 2(W) under the name Paul Kinyua. He retained this name until 2007 when he changed it to Paul Kagiri; he produced the school attendance registers showing that the child was all along identified as Paul Kinyua until 2007 when he changed his name.

Fredrick Ndonga Mureithi testified that he knew the deceased as early as 1953 and that they had been family friends for a long time; he witnessed the deceased's marriage to the applicant. He also knew the protestor but as a neighbour and not as the deceased's wife. According to him, the protestor worked in bars he used to patronise including the deceased's bar. Similarly, Samuel Waikwa also testified that he knew the deceased all his life and that the applicant was his only wife. He confirmed that their marriage was formalised in 1972.

Finally, Geoffrey Karanja Kamau testified that he was the deputy sub-county civil registrar of Nyeri Central. He testified that according to the entries in respect of the birth of the protestor's son, the protestor was characterised as a single mother when the child was born at Othaya hospital on 2 January, 1999; in other words, she was not married to the child's father. He testified further that the entry of the name Geoffrey Gicheru Kagiri was in the register but that the date of the entry was not given. He observed that the entry of the name Geoffrey Gicheru Kagiri was in a different handwriting from the rest of the entries in respect of the protestor's son. He noted that the first birth certificate was processed on 14 July 2004 while the second one was processed on 21 March 2013.

The Registrar testified further that when registering a birth, both the mother and the father of the child must appear before the civil registrar with either a certificate of marriage or a joint sworn affidavit. The registrar enters the name of the father after he is satisfied that the person entered is the biological father of the child. He would then make an entry in the register that the child has been registered either by recognition or by legitimisation. Recognition is where the father wants to be recognised as the father of the child although he is not a husband to the mother. Legitimation is where the parents are living together, apparently as husband and wife. As far as the registration of the protestor's son is concerned, the name of the father was not properly entered in the register; the entry, according to him was forged.

He also testified that any amendment for removal of a name of a registered child can only be done within two years of registration; however, a name can be added after two years of registration; thus, while the name Kinyua could not be removed, the name Kagiri could be added. However, although the name Kagiri was added later it was not apparent from the record when it was added. According to the registrar's records, the child was officially identified as Paul Kinyua up to 21 March 2013.

The basis of the protestor's protest and upon which she is laying a claim on the deceased's estate is that she was the deceased's wife; it follows that the immediate question which this court has to interrogate is whether, based on the evidence available, the protestor was indeed the deceased's wife.

There is no dispute, or at least it was established, that the applicant was married to the deceased; according to the certificate of marriage which the applicant produced in proof of the fact of marriage, the applicant and the deceased are said to have married on 16 July 1972 and their marriage was solemnised in the then Church Province of Kenya at Irindi. As at that time, the applicant is described as having been a spinster while the deceased was described as a bachelor. The applicant testified that they married earlier than 1972; to be specific, they married in 1965 under the Kikuyu customs and, strictly speaking, their marriage of 1972 ought to have been a conversion of their customary marriage into a statutory one in which event it should have been celebrated under the African Christian Marriage and Divorce Act, cap. 151 rather than the Marriage Act. Nonetheless, prior to their repeal, the legal consequences for celebration of a marriage under either of the two Acts was more or less the same.

According to section 37 of the then Marriage Act, one could not contract any other customary marriage while the statutory marriage subsisted; that section states:

37. Marriages under native law or custom

Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.

This provision of the law would apply in equal measure to marriages celebrated under the African Christian Marriage and Divorce Act by virtue of section 4 of this Act whose import is to incorporate and apply the provisions of the Marriage Act to marriages conducted under the African Christian Marriage and Divorce Act. That section states as follows:

4. Saving

Except as otherwise provided in this Act, the provisions of the Marriage Act

(Cap. 150) shall apply to all marriages celebrated under this Act.

Turning back to the question at hand, the protestor came into the picture several decades after the deceased had solemnised his marriage under statute and during the continuance of that marriage; the protestor herself knew that the applicant was married to the deceased except that she was not so aware that the marriage was statutory. With or without her knowledge of the legal status of the union between the deceased and the applicant, the simple and rather straight forward answer to her quest to establish a marital relationship between herself and the deceased is that the moment the latter married the applicant under the Marriage Act, he was thereby incapable of contracting a valid marriage under Kikuyu customs or under any other law or customs during the pendency of that marriage.

Despite her efforts, no satisfactory evidence was led to prove that the protestor could have been married to the deceased under Kikuyu customs or that she was presumed to be the deceased's wife by cohabitation. Considering the provisions of section 37 of the Marriage Act and, as long as the statutory marriage between the deceased and the applicant had not been dissolved, proof of either customary marriage or marriage by cohabitation would have been of little consequence in any event. Such purported marriage would be rendered void and in no wise elevated the status of the protestor.

The inevitable answer to the question of the protestor's marital status is that the protestor was not the wife of the deceased.

The next question that emerged and on which parties spent a considerable amount of time was whether the protestor's son was the deceased's child. This question was, in large measure intertwined with the previous question of whether the protestor was the deceased's wife. The protestor herself began her testimony by remarking that she was the wife of the deceased because the latter was the father to her son.

According to the registrar of births the child was born and registered as Paul Kinyua and his mother's marital status was described as 'single'. Paul Kinyua, according to the protestor's mother, was the name of their deceased father; this implies that the child was initially named after his maternal grandfather. The question that the protestor did not answer is why, if the child was the deceased's, he was not named after him immediately after birth.

It came out in evidence that the name Kagiri was added into the register of birth in respect of the protestor's child by some unknown person; what's more, it is not clear when this additional name was added. The registrar of births did not mince his words when he suggested that the purported amendment of the protestor's son's names in the register of birth was questionable. In fact, he went as far as stating that the addition of the name Kagiri was a forgery and that the child was officially Paul Kinyua up to March 2013.

His evidence was corroborated by the former head teacher of Kihugiru primary school in which the protestor's son was admitted as Paul Kinyua and which name remained his official name until it was changed in 2007.

My appreciation of the evidence with respect to the protestor's son is that it was nothing more than a belated but fruitless attempt to associate him with the deceased by adopting the latter's name as the child's name. I regard the efforts belated because the child was all along named after his maternal grandfather and it is only after the death of the deceased, more than four years later, that attempts were made to obtain a birth certificate in which the protestor's son is purported to be named after the deceased. They were fruitless efforts because according to the registrar of births and deaths, the attempts to amend the names were clandestine.

For our purposes, I would conclude that no evidence was provided that the Paul Kinyua or Paul Kinyua Kagiri was the deceased's son.

As far as the issue of dependency is concerned, all I can say is that it is possible, though no evidence was provided, that the deceased may have provided for the protestor and her children; if he did, then he could not have been doing so as the husband of the protestor or as the father of her children or any of them because there is simply no evidence of such relationships. Be that as it may, if the protestor or any or both of her children are of the firm conviction that they are the deceased's dependants, then the appropriate application they ought to have made is that for a reasonable provision under section 26 of the Law of Succession Act and not to file an affidavit of protest without any foundation.

That section provides as follows:

26. Provisions for dependants not adequately provided for by will or on

intestacy

Where a person dies after the commencement of this Act, and so far as

succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.

If that application was before court then I would obviously have been called upon to interrogate whether the protestor or her children fit the description of a dependant as defined under section 29 of the Act and therefore whether they are entitled to a reasonable provision of the deceased's estate. But that is not the application before the court and I would do well if I restrained myself from delving into this issue any further.

All in all, for the reasons I have given, I hold that there is no merit in the protestor's protest and it is hereby dismissed. Having found that the protestor has no stake in the deceased's estate, and for completeness of record, I hereby revoke the grant made in the joint names of the applicant and the protestor and instead order that a fresh grant be made in the name of the applicant alone. I further order that the fresh grant be and is hereby confirmed notwithstanding that six months have not lapsed from the date it has been made. Finally, the deceased's estate shall be distributed as proposed by the applicant in her affidavit in support of summons for confirmation of grant dated 26 March 2009. It is so ordered.

Dated, signed, read and delivered in open court this 20th day of September, 2019

Ngaah Jairus

JUDGE