



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1394 OF 2018**

**IN THE MATTER OF THE ESTATE OF ROSEMARY WAMBUKAMUYU (DECEASED)**

JAMES MWANGI GITONGA.....PROTESTOR/ APPLICANT

VERSUS

ROBERT NDIBA.....1<sup>ST</sup>PETITIONER/ RESPONDENT

VICTORIA NJOKIKAMUYU.....2<sup>ND</sup>PETITIONER/ RESPONDENT

MARGARET WANJIKUKAMUYU.....3<sup>RD</sup> PETITIONER/ RESPONDENT

**RULING**

1. The Application coming for consideration in this Ruling is the one dated 7.5.2019 filed under certificate of urgency seeking the following orders:

i. **THAT** this application be certified as urgent and the same be heard *ex-parte* in the first instance.(spent)

ii. **THAT** this Honourable Court be pleased to issue a Conservatory Order in respect of the income generating assets forming part of the estate of the deceased being the rental properties erected on DAGORETTI/KANGEMI/1036 and the dairy cows and poultry pending hearing and determination of this Application.

iii. **THAT** arising from the order above, this Honourable Court be pleased to issue an order restraining the Petitioners/Respondents either jointly or severally by themselves, their representatives and/or anyone claiming under them howsoever from collecting rent and selling off the dairy and poultry business of the deceased and applying the proceeds to the exclusion of the beneficiary of the estate of the deceased and in prejudice of the interests of the Applicant herein and in place thereof an estate account be opened for the deposit of the income from the estate of the deceased pending hearing and determination of this Application.

iv. **THAT** this Honourable Court be pleased to issue an order restraining the Respondents from engaging in any acts that amount to intermeddling with the estate of the deceased pending hearing and determination of this Application *inter-parties*;

v. **THAT** the Honourable Court be pleased to grant an early hearing date for the hearing of this application *inter-parties*.

vi. **THAT** this Honourable Court be pleased to issue a Conservatory Order in respect of the income generating assets forming part of the estate of the deceased being the rental properties erected on DAGORETTI/KANGEMI/1036 and the dairy cows and poultry pending hearing and determination of the substantive cause.

vii. **THAT** this Honourable Court be pleased to issue an Order restraining the Petitioners/Respondents either jointly or severally by themselves, their representatives and/or anyone claiming under them howsoever from collecting rent and selling off the dairy and poultry business of the deceased and applying the proceeds to the exclusion of the beneficiary of the estate of the deceased and in prejudice of the interests of the Applicant herein and in place thereof an estate account be opened for the deposit of the income from the estate of the deceased pending hearing and determination of the substantive cause.

viii. **THAT** this Honourable Court be pleased to grant Orders of Revocation or Annulment of the Grant of Letters of Administration intestate issued to the Respondents on 18<sup>th</sup> March 2019.

ix. **THAT** this Honourable Court be pleased to order that an inhibition and or restriction be registered on LR NO DAGORETTI/KANGEMI/1036 to preserve the property pending hearing and determination of the succession cause herein.

x. **THAT** this court be pleased to grant any other orders it deems just in the circumstances.

xi. **THAT** the costs of this application be borne by the Respondents.

2. The Application is based on the grounds on the face of it and supported by the Affidavit of JAMES MWANGI GITONGA (hereafter referred to as the Applicant) sworn on 7.5.2019 in which he has deposed as follows:

(i) **THAT** the deceased was his wife having married her under Kikuyu Customary law in the year 1995 with the full knowledge of the Respondents until her demise on 12.4.2018.

(ii) **THAT** during the Subsistence of their marriage, they were not blessed with any children.

(iii) **THAT** in the year 2003, the deceased and the Applicant invested in Land Title DAGORETTI/KANGEMI/1036 (hereafter referred to as the Suit Property) and developed it and it became the Matrimonial Property and they undertook dairy farming, poultry farming and grew crops for the subsistence of the family.

(iv) **THAT** the deceased and the Applicant applied for a loan from Co-operative Bank of Kenya and Jamii Bora Bank and SACCOS in which they were members and they were using proceeds from the Family Business to repay the loans.

(v) **THAT** the deceased and the Applicant charged the suit property to secure the loan from Co-operative Bank of Kenya and further, that the Applicant signed the Spousal Consent as evidence of their relationship.

(vi) **THAT** the Respondents withheld the Death Certificate and the Applicant could not Petition for Letters of Administration and further that they concealed material facts that deceased had a surviving spouse when they were issued with the letters of administration.

(vii) **THAT** the applicant is now apprehensive that the Suit Property as well as the cows and poultry are exposed to possible auction by the Co-operative Bank for non-payment of the Loans.

3. The Respondents filed a Replying Affidavit sworn by the 1<sup>st</sup> Respondent dated 31<sup>st</sup> May 2019 in which he deposed as follows:

(i) **THAT** he was appointed administrator of the Deceased's Estate together with his two sisters VICTORIA NJOKI KAMUNYU and MARGARET WANJIKUKAMUYU (2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively)

(ii) **THAT** the Deceased who was their sister died unmarried and childless and on 18.3.2019 upon Petitioning were issued with Letters of Administration in respect of her Estate.

(iii) **THAT** the Applicant was a casual laborer of their mother who used to look after her cattle and do chores in the compound.

(iv) **THAT** the suit property was given to the deceased by their mother when she sub-divided the family land and gave each child a plot and the deceased being unmarried lived with their mother since she was born until she died on 12.4.2018.

(v) **THAT** the Applicant got married to one KEZIAH WAMBUI in 1997 in a church situated on their family compound donated by their mother and after the marriage he moved away from their compound where their mother had given him a single room while working for her.

(vi) **THAT** the deceased never married and there is no joint account in the name of the deceased and the Applicant.

(vii) **THAT** signing a Spousal Consent is not evidence that the deceased and the Applicant were married and further that the developments on the Suit Property were done by their mother and not the deceased.

(viii) **THAT** it is not true that the Applicant was ejected from the Suit property and further that the proceeds from the rental units do not form part of the estate.

(ix) **THAT** the Applicant has no proof that he had a joint Business venture with the deceased and his application dated 7.5.2019 should be dismissed with costs.

4. The parties filed written submissions in the Application dated 7.5.2019 which I have duly considered. The Submissions are a retaliation of the Averments in the Affidavits. The parties also relied on various sections of the **Law of Succession Act** and also on the **Matrimonial Property Act 2013**.

5. The issues for determination in the Application dated 7.5.2019 are as follows:

- (i) **Whether the Applicant was married to the Deceased and consequently,**
- (ii) **Whether the Applicant is a beneficiary of the Estate of the deceased.**
- (iii) **Whether the grant of Letters of Administration issued to the Respondent should be revoked.**
- (iv) **Whether the Applicant has established a prima facie case for issue of an injunction.**
- (v) **Who pays for the costs of this Application?.**

6. On the issue as to whether the Applicant and the deceased were married, I find that there is no iota of evidence that the two ever cohabited as husband and wife or that the Applicant married the deceased under any system of law.

7. The Applicant is relying on a Spousal consent annexed to his Application to show that the deceased was his wife. The said Spousal consent was not signed by the deceased and it does not mention which property it relates to.

8. The Applicant does not even feature in the Eulogy of the deceased which the Respondents attached to their Affidavit.

9. The Respondents said that the Applicant was a casual laborer who used to work for the deceased's mother. The mother of the deceased had given him a room where her tenants were staying.

10. I find that there is no evidence that he did any traditional ceremonies such as "**Ngurario**" or "**ruracio**" to signify a Kikuyu Traditional Marriage.

11. In the text by EUGENE COTRAN "**LAW OF MARRIAGE AND DIVORCE**", the author states:

***"Ruracio is the payment of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father or the other guardian of the bride which is necessary for the validity of the marriage and to establish an affiliate or the legal control of the issue of the union and which may be repayable in whole or in part on the dissolution of the marriage. Ruracio must be distinguished from collateral payments and other gifts made at the time of the marriage which are not returnable on dissolution of the marriage."***

12. The applicant filed a Supplementary Affidavit dated 5.8.2019 in which he introduced another wife and said his two wives lived amicably. However, there is no evidence that he ever married the deceased as alleged or that he cohabited with her as husband and wife.

13. I believe the averments by the Respondents that the Applicant was a casual worker of their mother and that he had a Church Wedding to one KEZIAH WAMBUI in 1997.

14. In the Supplementary Affidavit, the applicant has deposed that he married the deceased in 1995 and that they hosted her mother and that she allowed him to marry KEZIAH WAMBUI since they did not have children.

15. The Applicant would not have had capacity to enter into a monogamous marriage if he was already married under customary Law.

16. Eugene Cotran's "**Casebook on Kenya Customary Law**" at page 30 sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;

- 1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.**
- 2. Consent; the parties to the marriage and their respective families must consent to the union**
- 3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.**
- 4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.**
- 5. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home".**

17. In the case of **Gituanja vs Gituanja**[1983] KLR 575 the Court held inter-alia that;

***"The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario."***

18. I find that there is no evidence that the deceased did any of the above stated requirements of a kikuyu customary marriage. The Applicant was a worker to the deceased's mother and his allegations are outrageous, unfounded, and baseless.

19. I find that **section 3(5)** of the Law of Succession Act does not apply to this case as it relates to a situation where a woman who was married under a system that permits Polygamy and her husband had contracted a Monogamous marriage previously or subsequently and the said woman is nonetheless considered a wife for purposes of inheritance after the death of her husband.

20. **Section 3 (5)** of the Law of Succession Act provides as follows:

*(5)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 thereof, and her children are accordingly children within the meaning of this Act*

21. This section does not apply to men and again in the Current case, there is no evidence that the Applicant ever contracted a customary marriage with the deceased.

22. This Court holds that there was no marriage between the deceased and the applicant. He is not a widower to the deceased. The deceased did not sign the Spousal consent he is relying on to prove marriage and there is no mention of the property to which it relates.

23. It follows that the Applicant is not a beneficiary of the Estate of the deceased but a mere busy body and an intermeddler.

24. The grant of letters of administration to the Respondents was properly issued as the Applicant is not entitled to Petition for Letters in the deceased's estate.

25. On the issue as to whether the Applicant is entitled to an injunction against the Respondents, the answer is NO. He has not established that he has a prima facie case with chances of succeeding.

26. I accordingly find that the Application dated 7.5.2019 lacks in merit and I accordingly dismiss it with costs to the Respondents.

27. The Respondents are at liberty to apply for confirmation of the grant issued on 18.3.2019. The same to be done within 30 days.

28. Mention on 4.11.2019 for compliance.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 4<sup>TH</sup> DAY OF OCTOBER, 2019**

**ASENATHONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**