



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 499 OF 2015

In the Matter of the Estate of the late JULIUS KIRAGU KIARA (DECEASED)

AGNES TIRINDI KIARA PETITIONER

VERSUS

VIOLET KAGWIRIA

PAMELA KAGWIRI PROTESTORS

PENINAH KATHURE

JUDGMENT

1. JULIUS KIRAGU KIARA (“the deceased”), was born in or about 1965 to the late Jacob M’ikiara and Agnes Tirindi (“the petitioner”). He served as a Police Officer with the Kenya Police Service working at various stations until 18th February, 2015 when he died at Kiirua Mission Hospital aged 50 years. His last work station was Naromoru Police Station of Kieni East Police Division, Nyeri County. He was not married at the time of his demise.

2. Pursuant to his death, the petitioner lodged this Succession Cause on 17th July, 2015 seeking a grant of letters of administration intestate. Accompanying the petition was a Letter of Introduction dated 29th May, 2015 by the Assistant Chief of Kithangari Sub-location which disclosed the following as his survivors:-

- (a) Agnes Tirindi - Mother
- (b) Margaret Wanja Kiara - Sister
- (c) Juster Kaburi Kiara - Sister
- (d) Jeremy Mugambi Kiara - Brother
- (e) Hydah Kagendo Kiara - Sister
- (f) Dedan Kimathi Kiara - Brother
- (g) Franklin Mbaabu Kiara - Brother

3. The following is what was listed as constituting the estate of the deceased:-

- (a) LR No. Ngobit Supako Block 5/198
- (b) LR No. Abogeta/U-Kithingari/1906
- (c) LR No. Ngusishi/Settlement Scheme/1821
- (d) LR No. Abothuguchi/U-Kithangari/1820
- (e) LR No. Ex-Lewa S. S/45- (Portion)
- (f) LR No. Mukuri Self-Help Group No. 45 –Buuri District
- (g) LR No. 18 Nkuene Mukuri II Self-Help Group
- (h) Account No. [...] – Standard Chartered Bank
- (i) Account No. [...] – Cooperative Bank
- (j) Account No. [...] – Equity Bank Limited
- (k) Account No. [...] – Harambee Sacco
- (l) Pioneer Assurance

4. The petitioner was issued with a grant on 14th October, 2015 and on 13th April, 2016, she applied for confirmation. On 13th June, 2016, Violet Kagwiria, Pamela Kagwiria and Peninah Kathure (“the protestors”) filed an application for the revocation of the grant on the grounds that the Cause was lodged in secrecy and for non-disclosure of material facts.

5. They contended that they were children of the deceased from two different mothers, Jane Maiti Kiugu being the mother of the 1st protestor and Esther Kagendo M’Mukiria being the mother of the 2nd and 3rd protestors who are twins. That the protestors had been recognized as daughters of the deceased during his funeral. That they believed that the petitioner was being manipulated by their uncles and aunts. That because the petitioner had demonstrated dishonesty, she was not the fit person to administer the estate of the deceased. They urged that the grant be revoked.

6. In response to the application, the petitioner swore that the deceased was never married and had no child; she denied that any of the protestors had been named after her or has ever been to her home; that she only heard of the protestors during the burial of the deceased. That she had never seen any woman or girlfriend visit the deceased at his home which was within her homestead. She contended that the deceased used to support her with all his money and no one else. That the protestors printed their own eulogy for the purpose of these proceedings. She concluded that the protestors sought to take advantage of her old age.

7. In rejoinder, the 1st protestor contended that she had lived with Juster Kaburi and Dedan Kimathi, the brother and sister of the deceased, respectively during the lifetime of the deceased. That she had been visiting the home of the deceased until she discovered that the sisters and brothers of the deceased were up to no good. That the petitioner’s intention was to deny the protestors their inheritance for reason of being girls.

8. The summons was ordered to be determined through viva voce evidence. The parties and their witnesses filed Affidavit evidence on which they were cross-examined.

9. **PW1 was Violet Kagwiria**, the 1st protestor. She reiterated her statements in the various Affidavits which she had filed. She told the court that she first visited the petitioner’s home in December, 2007 after

her class 8. That at that time, the petitioner had a neck problem. That the deceased used to maintain her by sending money to her Auntie Juster Kaburi for school fees and maintenance. That she took a photograph with the petitioner while these proceedings were still pending. That she used her mother's Identity Card to procure her National Identity Card. She complained that she was never notified of this Cause.

10. **PW2 Pamela Kagwiri** supported the testimony of PW1. She told the court that the very first time she visited the deceased at his home was in 2009 where she met Franklin, Dedan, Jeremy and the petitioner.

PW3 Esther Kagendo Mukira is the mother of 2nd and 3rd protestor. She told the court that although she was not married to the deceased, the deceased was the father of the 2nd and 3rd protestor. That all was well until the Officer Commanding Police Division (OCPD), Kieni East disclosed that there were benefits amounting to over KShs.5 million payable by the Government. That during his lifetime, the deceased used to visit the children at her home and the children likewise used to visit him at Kionyo. That he used to cater for their maintenance.

11. **PW4 Joseph Kimathi Alexander**, a brother to PW3 told the court that the deceased used to visit PW3 at their home. That it is the deceased who took PW3 to hospital to deliver the 2nd and 3rd protestor. That he was the Master of Ceremony (MC) at the funeral of the deceased and no photography was undertaken. **PW5 Benard Gitari Kanampiu**, a clerk from Karamugi Girls High School produced the admission details of PW1 to that school. The names of the parent and guardian were missing from the said details. That PW1 was admitted to the school by the name of Violet K. Kiragu with Admission No. 2773.

12. **PW6 Duncan Murithi Murungi**, the Principal of Menwe Mixed Secondary School produced school records for the 2nd and 3rd protestor. Only the name of the mother of the two was disclosed in the school records. **PW7 John Kithinji Manyara** was the Senior Chief of Upper Kithangari Location. He knew the deceased well since he hailed from his area of jurisdiction. He told the court that although the deceased was not married, he had children out of wedlock. That this was a matter in the public domain. That at the burial, a eulogy was read and there was no complaint about it. That he represented the administration at the funeral and the protestors were recognized as children of the deceased. He faulted the letter of introduction written by his Assistant Chief. He told the court that no dispute had arisen on the estate when he wrote various letters that were produced in evidence.

13. **PW7** denied any bad blood between him and the family of the deceased. He stated that he never adjudicated the dispute between his brother-in-law, one Kirima Kigwe, and the deceased's family as it was a succession matter. He denied having any grudge with the deceased or his family.

14. **PW8 Julius Kimathi Kiara**, the Assistant Chief of Kithangari Sub-location told the court that he knew that the deceased was not married. He never attended the burial of the deceased. He confirmed that he is the one who wrote the letter of introduction in the Cause and saw nothing in its being addressed "to whom it may concern" instead of the Deputy Registrar, High Court of Kenya.

15. **PW9 Ancent Kaloki** was formerly the OCPD, Kieni East under whom the deceased worked. He told the court that the deceased had nominated the petitioner as the next of kin. That a one Mr. Nicolas from Pioneer Assurance had informed him that, while at the Insurance Company to collect the last expense payment, Dedan Kimathi had disclosed to him that the deceased had children. That he represented the Police Service at the burial of the deceased. That the brothers of the deceased had admitted that the protestors were children of the deceased when he interviewed them at the mortuary. He denied the allegation that he tore the burial permit that had been issued by the area Chief to a brother of the deceased. He identified the photograph appearing on the copy of the eulogy as that of the deceased.

17. In cross-examination, PW9 admitted that he did not investigate whether the protestors were really the children of the deceased. That he did not include them in his letter to Pioneer Assurance because they were not in the Police records. He denied having any interest in the estate of the deceased. That the petitioner had in three occasions acknowledged the protestors as being the children of the deceased.

18. The petitioner testified as RW1 and called six witnesses. She told the court that the deceased was not married. She denied knowing the protestors. That when the deceased was at work, he used to leave the keys to his house with Dedan Kimathi. She denied taking PW3 to hospital for delivery. She stated that she did not attend the funeral of the deceased as she was unwell at the time and was resident at Juster Kaburi's (RW2) home. In cross-examination, she stated that the first time she saw the protestors was in court. She denied that she was the one in the photograph produced by PW1 as PExh. 1. She further denied sending Dedan Kimathi to pick the letter of introduction from PW8. She also denied ever going to Kieni East Police Division to pursue gratuity for the deceased.

19. **RW2 Juster Kaburi Nkonge**, was a sister to the deceased. She told the court that the first time she saw the protestors was on 21st February, 2015 when they were brought to the petitioner's homestead by PW7, the area Chief. That the OCPD for Kieni, PW9 tore the burial permit at the hospital mortuary and ordered one to be written in the names of the protestors. That no eulogy was prepared or read at the burial. The M.C. for the burial was one Muroria. RW2 denied ever having lived with PW1 or receiving money from the deceased to pay any school fees for PW1. In cross-examination, she could not tell how PW1 came to know her personal details. She stated that the photograph in the eulogy was not that of the deceased; that the contents of the eulogy were correct save for the mention of the protestors. That there was no eulogy that was prepared or read at the burial. She confirmed that the petitioner had attended the funeral of the deceased. She stated that the family had complained to the Commission for the Administration of Justice and Kiutha Arithi against PW7 and PW9.

20. **RW3 Dedan Kimathi Kiara** was a brother to the deceased. He denied that the deceased ever left him with his keys when he was away except on 10th January, 2015. That the eulogies he saw at the burial were buried with the body in the grave. That he first saw the protestors on 21st February, 2015 when they were brought by the Chief, PW7. In cross-examination, he admitted that the petitioner attended the burial arrangements as well as the funeral. **RW4 Margaret Wanja** was a sister to the deceased. She admitted that the photograph appearing in the copy of the eulogy was that of the deceased. However she did not see any copy of eulogy at the burial.

21. **RW5 Jeremy Mugambi Kiara**, a brother to the deceased denied that the deceased ever left his key with him or anybody else when he was away from home. **RW6 Charles Ndegwa Mbijiwe** was a nephew to the petitioner. He told the court that he was in charge of his uncle's (the petitioner's husband) family matters. He did not know the protestors. He stated that the protestors were brought to the petitioner's home by the Chief at the time the family was making burial arrangements. Those present at that meeting were more than 10 people. That the family did not prepare any eulogy and therefore there was none that was read at the funeral.

22. **RW7 Jackson Kanaka**, an officer from the National Registration Bureau appeared and produced the registration details of the protestors. He told the court that according to the details held by the Bureau, the fathers of the 1st and 2nd protestors are Stanley Kiugu M'Kiringia and Kennedy Murithi Mukira. In cross-examination, he admitted that it is not unusual to find young adults registering names of their uncles, grandmothers or grand fathers as their parents where they do not have fathers.

23. I have considered the evidence on record and the written submission of Learned Counsel. The issues for determination are; *were the protestors given notice of these proceedings? Were they entitled to such notice? Who are the beneficiaries of the estate of the deceased? What orders should be made?*

24. There is no dispute that the protestors were neither consulted nor their consent sought before this Cause was lodged. The petitioner and her witnesses were categorical that the protestors were strangers to the estate of the deceased and they were therefore neither entitled to be consulted nor their consent required. Under the **Law of Succession Act**, it is those who are entitled to the estate as either, spouse, parents or children of a deceased person that are entitled to be consulted and their consent sought. In this regard, it was for the protestors to prove that they were entitled to partake in the estate for them to have been entitled to be consulted or notified of these proceedings.

25. It was the protestors' case that they were children of the deceased born out of wedlock; that the 1st protestor was born to the deceased by Jane Maiti Kiugu while the 2nd and 3rd protestor were twins born to the deceased by **PW3, Esther Kagendo**. That the deceased participated in their education during his lifetime. That he used to visit them and they also visited him at his Kionyo home as well.

26. On the other hand, the petitioner and her witnesses maintained that the deceased was not married and did not have any child; that he never introduced any woman or girlfriend to them during his lifetime; that the protestors were strangers whom they first saw on 21st February, 2018 when they were brought by the area Chief while burial arrangements were going on.

27. It was submitted on behalf of the petitioner that the protestors had neither proved paternity nor dependency. That their documents did not disclose any connection with the deceased.

28. The protestors indicated that they were willing to undergo DNA profile to prove that they were children of the deceased. The petitioner indicated that she was not opposed to such profiling provided the costs be shouldered by the protestors.

29. My opinion is that, DNA profiling for purposes of proving parentage may be the best option. The court retains discretion to order such profiling in a suitable case. However, from time immemorial, it is a known fact that the place of the dead is to remain in the grave undisturbed. Once the body has been interred, in my view, a court should be slow to order disinterment of a body unless in clear and desirable circumstances.

30. *In Re Matheson (deceased) [1958] 1 ALL ER 202 at 204* the court held:-

“As I have said, the primary function of the Court is to keep faith with the dead.

When a man nears his end and contemplates Christian burial, he may reasonably hope that his remains will be undisturbed, and the court should ensure that, if reasonably possible, this assumed wish will be respected. In all these cases, the court must and will have regard to the supposed wishes of the deceased. I say supposed wishes, because it can rarely, if ever, happen that the circumstances giving rise to the application could have been contemplated still less, discussed, in the lifetime of the deceased.”

31. In this regard, it is the natural desire of man, be he Christian or an adherent of African traditions and customs, that after his death, his body should not only decently and reverently interred, but should forever remain in the grave undisturbed. This is a view, in my opinion, which should be respected by all including the courts. However, when certain circumstances arise and make it desirable and imperative that a body be disinterred, the court should not unnecessarily fetter its discretion but should order such disinterment.

32. In the present case, the remains of the deceased were interred in Kionyo on 26th February, 2015 under Christian traditions. Considering the evidence on record, I am satisfied that the circumstances of this case does not make it desirable for the court to order the disinterment of the body of the deceased for purposes of DNA profiling.

33. I saw the parties and their witnesses testify in court. Their testimony is sufficient to decide whether or not the protestors are or are not children of the deceased. It was for the protestors to advance evidence which on a preponderance of probability should prove that the deceased was their father.

34. PW1 told the court that after her class 8, her mother took her in December, 2007 to visit the petitioner. That at that time, the petitioner had a neck problem. That later, she accompanied Dedan Kimathi (RW3) to the petitioners' home and lived with that family for two weeks. She was later taken to live with Juster Kaburi (RW2) while in form 1 and Form 2. After Form 2, she went to live at the deceased's home and was staying in the house of RW3.

35. PW1 further testified that the deceased used to pay her school fees through Juster Kaburi (RW2). That the last time she met the deceased was December, 2014 at his Kionyo home. Early in that year, she had visited him at Aga Khan Nairobi and Kiirua Hospitals. His demise was communicated to her by Franklin Mbaabu, a brother to the deceased. That she and her co-protestors were recognized at the funeral of the deceased in terms of the eulogy that was prepared by the family. That after the demise of the deceased, she dropped out of college as there was no one to pay her college fees.

36. The court noted that the documents produced from the schools which the protestors attended did not disclose that the deceased was either the father or guardian of any of them. However, when being admitted to Karamugi Girls Secondary School in February, 2008, PW1 was admitted under admission number 2773 by the name of **Violet K. Kiragu** (Pexh. 5). The question that arises is, how and why would the name Kiragu, which belongs to the deceased, be used by a stranger seven (7) years before his demise? It is to be remembered that PW1's testimony was that it was Juster Kaburi (RW2) who enrolled her to that school.

37. PW1 seemed to know so much about the petitioner's family. She narrated to court minute and personal details of not only Juster Kaburi (RW2) but the deceased's family. She recalled that the petitioner had a neck problem in December, 2007 the first time she was introduced to her. She knew the mobile phone numbers of RW2 and the deceased. In addition, she told the court that the deceased used to leave the keys to his house with his brother Dedan Kimathi (RW3). Although RW3 attempted to deny that fact, the petitioner admitted that fact in her evidence. All these details were not denied or controverted save the place of residence of Juster Kaburi (RW2).

38. Further, PW2 explained in detail how the house of the petitioner looked like. She knew it was a timber house with three bedrooms and a sitting room. The question that arises is, how would strangers who are not in any way related to the petitioner's family know so much about it? While the 2nd and 3rd protestor were said to come from an adjacent location to that of the petitioner, PW1 comes from Githongo which is said to be over 20 kilometres away from the petitioner's home. How comes that she came to know so much about the petitioner's family?

39. The other issue is the eulogy of the deceased. A copy was produced in evidence. The protestors and their witnesses stated that it was read at the burial while the petitioner and her witnesses stated that none was read. That eulogy recognized the protestors as children of the deceased. It contained detailed information regarding the relations of the deceased. To my mind those details must have emanated from either the family itself or someone so connected or familiar with the deceased's family.

40. While the testimony of the protestors on the material particulars was firm and consistent, not so for the petitioner and her witnesses. They gave contradictory evidence. They came out as having rehearsed a particular pattern of evidence of denying everything that touched on the protestors even the most obvious.

41. To contradict PW1's testimony that the deceased used to leave keys to his house with Dedan Kimathi (RW3) from whom she would collect it, Dedan Kimathi (RW3) and Jeremy Mugambi (RW5) denied that fact in their Affidavits sworn on 2nd March, 2017. After the petitioner admitted this fact in court, Dedan Kimathi (RW3) attempted to explain that it was only on 10th January, 2015 that the deceased had left the keys with him.

42. On the eulogy, while the protestors and their witnesses asserted that the photograph on the copy of the eulogy was that of the deceased, the petitioner and her witnesses denied that it was his. However, Margaret Wanja (RW4), a sister to the deceased identified that photograph as that of the deceased. Despite the petitioner and her children denying that photograph as being of the deceased they never produced a different photograph to show that the one produced in the eulogy was not that of the deceased.

43. RW2 and RW3 insisted that they saw a few copies of the eulogy at the burial which were however buried in the grave. On the other hand RW4 and RW5 insisted that the family did not prepare any

eulogy because the area Chief, PW7 had allegedly insisted that the protestors be included in the programme.

44. The other puzzle is; when was the very first time the petitioner and her family saw or met the protestors. The petitioner testified that she first saw the protestors in court when the trial of this matter began on the 1st February, 2017. This explains why she denied that she was the one in the photograph produced as PExh. 1. It is the reason why she lied that she did not attend the burial of the deceased. She told the court that during the burial arrangements as well as the day of the funeral, she was at the home of Juster Kaburi RW2. That she only learnt later that her son had died and buried. Her witnesses as well as PW1, PW2, PW7 and PW9 testified that the petitioner attended the funeral. Indeed RW3 told the court that the petitioner participated in the burial arrangements at her homestead.

45. PW1 testified that she took the photograph produced as PExh. 1 days after the burial when she went visiting the petitioner. Looking at that photograph one will conclude that it is of people who are at ease with each other and not an abrupt “selfie” by a stranger. This shows that PW1 may have indeed been close to the family of the deceased even after burial. That differences only arose later.

46. As regards the allegation that the protestors first stormed into the lives of the petitioner’s family on 21st February, 2015, the same is untenable. There were different narratives by the petitioner’s witnesses on what transpired on that material day. If it be true that that day was the first time the petitioner’s family was coming in contact with the protestors, it would be difficult for the witnesses to forget who was present at the meeting that the Chief in the company of the protestors stormed into.

47. RW3 told the court that the Chief stormed the burial meeting that was going on at the petitioner’s homestead where only three people were in attendance. RW4 stated that 10 people were in attendance while Charles Ndegwa Mbijiwe (RW6) stated that the meeting was of 15 people. Juster Kaburia (RW2) stated that they had already prepared a draft eulogy when PW7 stormed the meeting with the protestors but when PW7 insisted that the protestors be included in the programme, they discarded it. The question that arise is, why would there be discrepancies in the number of people present at the alleged meeting? In any event, when PW1, PW2 and PW7 testified, this allegation was not put to them. It must have been an afterthought.

48. The court took note that while the protestors called independent witnesses, the petitioner called none. The mother of PW2 appeared and was cross-examined at length about how she begot the 2nd and 3rd protestors with the deceased. PW7 the area Chief had no interest with the estate. The allegation that he had bad blood with the deceased was not proved. The evidence on record shows that the late Kirima Kigwe who had married PW7’s sister had six wives of which PW7’s sister was one of them. The portion of land on which PW7’s sister settled did not directly touch on the boundary dispute between Kirima Kigwe and the family of the deceased. PW7’s sister was not directly affected. PW7 denied having been involved in the dispute. He attended the burial of the deceased and addressed the mourners. In this court’s view, that is not the conduct of a sworn enemy as the petitioner wanted the court to believe.

49. As for PW9, SSP Acent Kaloki, I found him to be truthful and honest. There was no evidence to show that he had any interest in the estate of the deceased. His actions were that of a superior concerned with the best interest of a deceased officer.

50. On the other hand, all those who testified for the petitioner stand to gain from their testimonies save for RW7, the Registration Clerk. The petitioner has proposed to distribute to them the estate of the deceased. After observing their demeanor in court, I found it very difficult to believe them.

51. The testimony of PW7 was formal. It is not in dispute that the protestors submitted the names of their uncles or grandfathers as their fathers to the Registrar of Persons. PW7 himself admitted that that is not unusual with youngsters born to single mothers. This court takes judicial notice that until recently, the law did not permit women to put the names of those who fathered their children in Birth Certificates without the express consent of such men. When a child is born out of wedlock, many men are not readily

eager to consent to their names being put in the birth certificates of such children.

52. The fact that the deceased had put the name of the petitioner as the next of kin in the records of his employer is not out of the ordinary. It is not in dispute that the deceased was unmarried by the time he died. In the ordinary course of events, the person naturally to be appointed the next of kin, in such circumstances, would be the mother. Such appointment however, does not mean that the deceased could not have sired children with women he was not married to.

53. Regarding dependence, the evidence on record was that the deceased used to send money through M-pesa to RW2 for the fees and other necessities of the 1st protestor. Safaricom Limited filed an Affidavit sworn by Daniel Menja Ndaba to the effect that, it could not retrieve data for the requested mobile numbers of the deceased, RW2 and PW1 because it stores logs for a maximum of 90 days only. The transactions in question were between 2008 and 2013. As for PW2 and the 3rd protestor, their mother told the court that the deceased used to give her money either directly or through her brother PW4 for the maintenance of the 2nd and 3rd protestor.

54. In the premises, I find that the protestors have proved to the satisfaction of the court that they are children of the deceased. The evidence on record point towards that inference only and nothing else. The petitioner and her children knew this fact and that is why RW3 disclosed this fact to Pioneer Assurance when he went to collect the last expense payment. Further the family of the deceased included the protestors in the eulogy, although the family sought to disclaim it in court. The family also recognized the protestors as children of the deceased during the funeral. The court is further satisfied that things went sour when PW9 disclosed to the petitioner and her children that the benefits payable by the Government to the estate of the deceased was in excess of KShs.5 million and that this will be only available to the petitioner and the three protestors as children of the deceased. This is when RW2 and RW3 moved with speed and convinced everyone to disclaim the protestors. Indeed, the petitioner admitted that it is RW2 who is behind the filing of these proceedings and that it is RW2 who sent RW3 to the Assistant Chief for the Letter of Introduction. RW2 appeared to me to be an untruthful and dishonest witness but a very shrewd person.

55. Accordingly, I find that the protestors are children of the deceased and should have been involved when lodging the Cause. Under **Section 66 and Part V of the Law of Succession Act**, it goes without say that the beneficiaries of the estate of the deceased are the petitioner and the protestors.

56. Accordingly, the order that commends itself to the court is to revoke the grant issued to the petitioner on 14th October, 2015. A fresh grant hereby issues to Agnes Tirindi Kiara, Violet Kagwiria and Pamela Kagwiria as joint administrators.

57. The administrators are to apply for confirmation of the grant jointly within 30 days of this judgment if they agree on distribution. In default of any such agreement, anyone of them is at liberty to apply and serve the others at any time after the expiry of the period specified above.

It is so decreed.

DATED and DELIVERED at MERU this 1st day of February, 2018.

A. MABEYA

JUDGE