



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 345 OF 2012

(CHIEF MAGISTRATES COURT AT KIAMBU SUCCESSION CAUSE 256 OF 2011)

IN THE MATTER OF GABRIEL KAMAU NJOROGE (DECEASED)

JACINTA WAMBUI KURIA.....OBJECTOR/APPLICANT

VERSUS

SAMUEL KAHENYA NJOROGE.....1ST RESPONDENT

NELSON NGIGI KAMAU.....2ND RESPONDENT

JUDGMENT

The deceased, Gabriel Kamau Njoroge, died on 23rd January 2011.

The sons, Samuel Kahenya Kamau and Nelson Ngigi Kamau, filed a petition for letters of administration intestate on 24th August 2011. The Petition was accompanied by an Affidavit in Support of the Petition for Letters of Administration and Consent to the making of grant of the Letters of Administration.

According to the Affidavit in Support of the Petition, the Deceased was survived by:

1. LOISE MUTHONI KAMAU- DAUGHTER
2. HARRISON NJOROGE KAMAU- SON
3. SAMUEL KAHENYA KAMAU- SON
4. NELSON NGIGI KAMAU- SON

The Consent to the making of the grant was signed by;

1. LOISE MUTHONI KAMAU
2. HARRISON NJOROGE KAMAU

The only asset listed as comprising the deceased's estate was land known as **MUGUGA/MUGUGA/2127** whose estimated value is Kshs.100,000. The deceased had no liabilities.

The Grant was issued to the Petitioners on 7th November 2011 by the Chief Magistrate's Court of Kenya at Kiambu. The same was however not confirmed.

On the 22nd of February 2012, Jacinta Wambui Kuria, widow of the late Gabriel Kamau Njoroge and the Applicant herein, under Certificate of Urgency, filed Summons for Revocation of Grant under Section 76 of the Law of Succession Act ,Cap 160 Laws of Kenya and Rules 44 of the Probate and Administration Rules seeking the following orders;

1. That the Grants of Letters of Administration Intestate made on the 26th day of October 2011 to Samuel Kahenya Njoroge

and Nelson Ngigi Kamau, the Respondents herein, be annulled or revoked;

And/or in the Alternative;

2. The Grant of Letters of Administration Intestate of the estate of the late Gabriel Kamau Njoroge made on the 26th day of October 2011 be amended to include Jacinta Wambui Kuria as an Administrator of the said estate together with Samuel Kahenya Njoroge and Nelson Ngigi Kmau

3. The costs of these proceedings be provided for.

The Application is premised on the grounds that:

1. Proceedings to procure the Grant of Letters of Administration were defective in substance

2. The Grant was obtained fraudulently in that the Petitioners deliberately made false statements and concealed material facts.

3. The Petitioners have no priority of inheritance over the present Applicant.

In the Affidavit in support of the Summons, the Applicant swore that she was the surviving widow of the deceased having undergone a Kikuyu customary marriage ceremony in 2008 and therefore ranks in priority as a beneficiary of the deceased's estate. According to the Applicant, the Respondents did not disclose that the deceased was married to her prior to his death and therefore the said Grant should be revoked or in the alternative, be rectified to include the Applicant's name as a co-administrator of the estate.

The Application was opposed through a Replying Affidavit filed by Nelson Ngigi Kamau on 14th March 2012. It was deposed *inter alia* that the grant of letters of administration issued to the Respondents was not defective. He stated that the applicant was neither married to nor cohabiting with the deceased prior to his death. He further stated that during the deceased's funeral, the applicant was not recognized as the deceased's wife and he also does not recall any event where the deceased went to the applicant's family to pay dowry or to attend any customary marriage. He submitted that the objection filed by the applicant to the making of the grant was not pursued further and therefore the children to the deceased as listed in the chief's letter are the only ones entitled to apply for the grant.

The Respondents further opposed the application vide a Supplementary Affidavit filed on 4th May 2012 sworn by Nelson Ngigi Kamau. He deposed that the deceased and their mother Lucy Wanjiru Kamau(deceased) did not separate in 2005 as the objector's mother, Ruth Wanjiru had stated in her affidavit filed on 28th March 2012. He averred that the applicant/objector had leased a house in 2010 in one of the 20 rental units the deceased owned at Muguga. The Objector/Applicant befriended the deceased and eventually moved to the deceased's residence for a few months prior to his death. The Applicant's family, except the daughter, is also not known to the deceased's extended family. The Respondent opposed the application by the Applicant as she has previously intermeddled with the deceased's estate and has not been taking care of the rental houses that are under her care.

Nelson Ngigi Wathiru filed affidavit on 28th March 2012 and deposed that the deceased and Lucy Wanjiru Kamau(deceased) had contracted their marriage under Kikuyu Customary Law sometime in the 1970s. They however separated in 2005. Later in 2008, he averred that the deceased married the Applicant and they resided on Land Parcel Title Number Muguga/Muguga/2127 up until his death. He also submitted that the Applicant was recognized as the lawful wife by the siblings of the deceased as evidenced in a copy of the Funeral Announcement made on Kameme Fm.

HEARING

The Objector testified in court that she was married to the deceased under Kikuyu Customary Law. The deceased paid dowry to her mother in Uthuru in cash and he was told to bring guests. He had come with friends. He died in 2011 and left her at home. Nelson Ngigi Wathiru, brother to the deceased said that the deceased lived with the objector for 3 years, that is, from 2008 to 2011. He did not accompany the deceased to pay dowry.

DW1 Nelson Ngigi Kamau was the son of the deceased and has 3 other siblings. He lived in Nakuru Pipeline and his father (deceased) lived in Gitaru and he did not know nor was he informed of the marriage by deceased to the objector. The rented houses were left to the grandmother to collect rent but found the objector collecting rent.

WRITTEN SUBMISSIONS

The Objector/Applicant filed written submissions on the 6th of June 2017. The Applicant submitted that she is the surviving widow of the deceased and does not dispute that the deceased had 4 children prior to his death.

The main issue for determination as raised by the Applicant is whether she is the deceased's widow. The Applicant contended that the deceased had trusted her with all his affairs such as collecting rent and further before his demise, he left her with his Identity Card which was later fraudulently obtained by the Respondents so as to file the succession proceedings. The mother to the deceased also recognized the Applicant as her daughter in law. The Applicant submits that she is a beneficiary of the estate and not a mere stranger and tenant due to the relationship she had with the deceased and his family prior to his demise.

The Applicant is therefore of the view that the Grant of Letters of Administration issued to the Respondent was fraudulently obtained as the

Respondents failed to disclose that the deceased had a surviving spouse. Additionally, the Respondents presented false information when obtaining the grant as two of the beneficiaries had similar identification card numbers.

The Respondents' case on the other hand as stated in their written submissions filed on 21st June 2017 was that the alleged cohabitation between the deceased and the Applicant was not long enough and did not create a general repute in the community that the two were husband and wife.

Further, the Respondent submitted that the proceedings for obtaining the grant were not defective as the Chief did not list the Applicant as a wife to the deceased and also the Petitioners(Respondents herein) have no duty to disclose the names of every person they thought would claim a share of the deceased's estate. It was therefore the Respondents case that the application has no merit and should be dismissed with costs or in the alternative, includes the Applicant as one of the co-administrators to jointly administer the estate with the Respondents

ISSUES FOR DETERMINATION

The issues for determination are whether the dowry ceremony constitutes a valid Kikuyu Customary Marriage and subsequently if the Objector/Applicant is entitled to the letters of administration of the deceased.

DETERMINATION

Section 66 of the Law of Succession Act gives the Court the discretion on who to appoint as an administrator of the estate of the deceased and priority is given to the spouse of the deceased. The Applicant/Objector therefore has to prove that she was a spouse to the deceased so that the grant of Letters of Administration issued to the two sons of the deceased is revoked.

The Applicant submitted in her Affidavit in Support of Summons that she had undergone a Kikuyu customary marriage ceremony to the late Gabriel Kamau Njoroge in 2008. During the hearing, she however submitted that the ceremony took place in 2010.

Despite the disparity in the year when the ceremony took place, it is important to determine whether the alleged dowry ceremony constitutes a valid Kikuyu Customary Marriage.

The Applicant did not call any witnesses or the family members or elders from either side of the family to certify as to when and how the alleged Kikuyu Customary Law marriage was conducted. The essentials of a valid customary marriage according to **Eugene Cotran's case book on Kenya Customary Law** are:-

- a) capacity to marry
- b) consent (as between the parties and their families)
- c) *Ngurario*- No marriage is valid under Kikuyu law unless the *ngurario* ram is slaughtered and that “
- d) *Ruracio*- bride price. There can be no valid marriage under Kikuyu law unless a part of the *ruracio* has been paid.
- e) Commencement of cohabitation

In **Mary Wanjiru Githatu VS Esther Wanjiru Kiarie** (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009) the learned judge stated:-

“It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the ‘come we stay’ marriages which are neither customary nor statutory”

This Court is of the view that the dowry ceremony alleged by the Objector does not conform to the essentials of a valid customary marriage as provided for in Eugene Cotran's book. From the evidence on record, some of the relatives and friends who attended the dowry ceremony have died and the Objector/Applicant did not present anyone before this court to affirm that the dowry ceremony actually took place. Ruth Gituru, the mother to the deceased also stated that the Deceased was yet to pay dowry according to Kikuyu Customary Law.

Before the whole marriage ceremony starts, a formal meeting is held between the parents of the couple at the girl's home. It is also imperative that the parents to the couple are present for the negotiations during the *ruracio*. It is therefore very strange that the alleged ceremony proceeded without the knowledge of the deceased's mother.

Section 107 of the Evidence Act Cap 80 of the Laws of Kenya provides that

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

A similar position was taken in **Hortensia Wanjiku Yawe vs. The Public Trustee** Court of Appeal Civil Appeal Number 13 of 1976 and

Njoki v/s Mathara and others civil appeal number 71 of 1989 (UR), where the learned judges held that:-

- (i) The onus of proving a customary marriage is on the party who claims it.**
- (ii) The standard of proof is the usual one for civil action, balance of probabilities.**
- (iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard**

A party who claims to be married must prove on a balance of probabilities that the ceremony actually took place. This may be done by presenting witnesses who attended the ceremony before this court or at least prove that part of the dowry was paid. Further, during the deceased's funeral, the Objector was not recognized as the deceased's wife in the funeral programme. In this instant case, the Applicant/objector has not proved that there was a valid customary marriage between her and the deceased prior to his death. Therefore, the claim that the grant was obtained by concealing material facts fails as the same was not proved to this court.

COURT ORDERS

Based on the analysis and findings above:

- 1. The Application dated 22nd February, 2012 for revocation of grant is hereby dismissed.**
- 2. Let each Party bear its own costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2018

M. MUIGAI

JUDGE

In the presence of: