



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE MATTER OF THE ESTATE OF GIBSON GITHINJI GITONGA (DECEASED)

SUCCESSION CAUSE 820 OF 2009

JUDGMENT

This Court delivered judgment on 15th February 2016 on the application for revocation of grant filed on 29th October 2009. Thereafter, the parties filed the following applications;

- a) Notice of Motion application filed on 25th May 2016; the Applicant sought reconstruction of the Court file as it disappeared after the judgment.
- b) Notice of Motion of 22nd June 2016; the Applicant sought the Court to review, vacate, and/or vary the orders of 15th February 2016, in light of new evidence and an error on the face of the record;
- c) Summons filed on 30th June 2016, the Applicant sought that the Respondent Lucia Muthoni be restrained from intermeddling with the estate of the deceased and sold **Athena/18/22 Thika**.

The Court was addressed on the application of 22nd June 2016 vide the Court's Ruling of 22nd February 2017.

PW1 Lucia Wanjiku Githinji stated that the deceased kept a diary that he wrote all matters which she produced in Court the Note book as exhibit and outlined as follows;

- a) He was born in 1936 and obtained ID card in 196. During emergency he moved from Subukia to Kikuyu in February 1952. He came to his brother at Mangu. He worked in Karuma and went to Gakoe in 1956 and completed Std 6 in 1961 and then went to Eldoret to Mahindi.
- b) He wrote he married his wife PW1 in 2nd September, 1962 Wangare was born in 1964 and Gitonga in 1965, Murimi in 1967, Waithera 1968, Mumbi 1970, and twins Kabera and Muthoni in 1974. These are children of the deceased. He did not write about Muthoni and her children as part of his family.
- c) He wrote of their customary marriage; the dowry was 179 goats, 5 ngoima, 2 debes honey I sack of sugar I suit for her father and I suit for her mother. The ngurario ceremony was done and witnesses were; Thuge Muigai, Stephen Waweru (father of the Objector herein) Mwago Wanjoire and Bernard Keiga.

In cross examination, PW1 admitted she testified in Court before and she did not produce the Note book as the advocate at the time did not produce the same although she had given him the Note book. The Notebook was written in 1976 but the deceased started writing in 1962.

Hannah Muthoni Githinji the objector came to the shop as an employee in 1995 and she was not married by the deceased and she helped with work at the shop.

DW1 Hannah Muthoni Githinji stated that she is 2nd wife/widow of the deceased. She lived with the deceased and they started the business and he lived with her.

The deceased could not write and he wrote for him his documents and for 15 years they lived together, he did not have a Note book. The deceased bought her many things and did not write them down. The Note book produced in Court is new and the deceased did not write it.

SUBMISSIONS:

APPLICANTS:

The Applicant submitted as follows;

At Pg 4 of the Ruling/Judgment of this Court indicated that as per the case of **Gachigi vs Kamau 2003 1 EA69** that a person alleging customary law marriage must establish the fact through concrete evidence. The Objector testified that dowry of Ksh 10,000/= was paid and did not prove the Kikuyu customary marriage rites.

Citing **Cotran on African Customary Law** and **Sweet & Maxwell 1968 on Law & Marriage and Divorce on the processes of a valid Kikuyu; Customary Marriage; includes, njohi ya njurio, ruracio, ngurario ceremonies and mwati, harika and ngoima**. These in the instant case were not proved to have been produced by the deceased's family to the Objector's family.

These processes were not proved in evidence by the Objector during the proceedings.

The Applicant relied **Section 51 of Evidence Act Cap 80 and Rule 64 of Probate & Administration Rules** on evidence to be provided on the existence of any general custom or application or effect of African Customary law. Legal provisions and case-law are cited to require evidence on customary marriage rites to be provided for the valid customary marriage to be confirmed by the court.

Cotran on Essentials of a Valid Kikuyu marriage Cotran states; no marriage is valid under Kikuyu customary law unless the *ngurario ram is slaughtered and that there can be no valid marriage under Kikuyu customary law unless a part of the ruracio has been paid*.

The Objector admitted that the 2 children were not the deceased's biological children but that he adopted them yet no evidence of this fact was adduced. The process of legal adoption was not undertaken nor proof that they are dependents under **Section 29 of Law of Succession Act** was tendered in court.

The Applicants relied on the following authorities to buttress their position;

1) **Eliud Maina Mwangi vs Margaret Wanjiru Gachangi [2013] eKLR Civil Appeal 281(A) of 2003** on the question whether the Respondent was married to the deceased or not.

2) **Wanjiru Gikonyo & 2 Others vs National Assembly, Senate, CS Treasury, AG & Affirmative Action Social Development Fund Constitutional & Human Rights Division Petition 453 of 2015** on the issue of review and vacation of Court orders.

3) **In Re Estate of Dickson Kihika Kimani (deceased) 2009 eKLR Succession Cause 158 of 2005**

The Respondent filed objection to making of grant as she and her child were excluded as beneficiaries of deceased's estate.

RESPONDENTS

The submissions are as follows;

1. That the applicant claims there is an error on the face of the record that the Court found that the Objector was wife of the deceased
2. The Applicant sought to call new evidence, obtained 2 months of the Ruling which evidence that could have been obtained 6 years ago- the Diary.
3. The Applicants attempt to poke holes in the Court's judgment in the name of a review instead of filing an appeal.
4. The application is grossly incompetent as a review to set aside, vary a revocation or rectification of grant cannot be upheld.
5. The net estate of the deceased is yet to be distributed and therefore the allegation that the judgment will spark a myriad of false and unsubstantiated claims on inheritance of property is unfounded.

The Respondent through Counsel cited and relied on Mulla- The order of Civil Procedure Act 1908 16th Ed Vol. Pg 1190 – 1194 and states;

An application for review can succeed only if the Applicant proves an error or mistake apparent on the face of the record; discovery of new evidence or other sufficient reason... for an application for review to succeed the evidence must only be not new but the Applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence.

The Respondent relied on **Shah vs Dharamshi Msa High Ct Kneller J & National Bank of Kenya vs Ndungu Njau** Ca No 211 of 1996 & **Draft & Develop Engineers Ltd vs National Water Conservation & Pipeline Corporation –Civil** Case No 11 of 2011 alluding to the grounds for review.

ANALYSIS

As at the time of hearing the instant application, the Court proceedings were/are missing from the Ct file save for copy of the judgment retrieved from the Court and bundle of documents annexed to application for reconstruction of the Court file of 25th May 2016.

The Applicant/Petitioner filed application for review of the Judgment of 15th February 2016 on 2 grounds, the first, an apparent error or mistake on the face of the record and secondly, the discovery of new evidence relevant to determination of this matter that was not available at the time of the hearing.

From the submissions of Counsel for parties and evidence on record, the application for review is aptly made in these proceedings because; the new evidence is a diary alleged to have been written on by the deceased of the important events in his life.

The Petitioner/Applicant stated that the new evidence comprised of the deceased's Note book/Diary which she disclosed to the former advocate on record but who did not produce it during the Trial. Thereafter she decided that such crucial evidence ought to have been brought to the attention of the Court for it to arrive at an informed decision.

Secondly, the finding by this Court on reliance of **Section 3(5) of Law of Succession Act** that the Objector was married under Kikuyu customary law that permits polygamy, that the Objector was a wife of the deceased for purposes of Succession notwithstanding that the deceased had previously contracted a monogamous marriage between himself and the Petitioner was not based on the legal principles of a valid Kikuyu customary marriage.

Thirdly, that the Objector did not adduce evidence that the 2 children who were not biological children of the deceased, were expressly recognized or infact accepted as the deceased's own children for whom he voluntarily assumed permanent responsibility as espoused under **Section 3(2) Law of Succession Act**.

To the 1st issue, this Court finds the grounds alluded to by the Applicant that there was discovery of new evidence which was not available at the time of Trial is valid. The Applicant cannot be held liable for actions or omissions of her former advocate who did not by design or default produce the Diary. The Petitioner testified that although she disclosed the Note book / Diary of the deceased to the Advocate, the same was not presented in Court. During the Further hearing of the same matter under review of the judgment application, the Objector contested the production of the Note-Book /Diary and stated that the deceased was illiterate could not read or write and she read/ wrote documents for him. She reiterated that the Notebook/Diary was relatively new considering the events that were allegedly recorded by the deceased. I have seen the Note-Book / Diary Exhibit 1 which detailed the Petitioner's and deceased's customary marriage held in 1962 and subsequent births of their children and business ventures. I am satisfied that it is a recent creation and certainly was not kept for all those years as alleged. This Court though granting production of Note-book/Diary finds the evidence therein unreliable.

To the 2nd limb there is an error or mistake on the face of the record that this Court in its judgment of 15th February 2016 did not confirm from evidence on record that a valid Kikuyu customary law marriage was conducted between the deceased and the Objector.

In the absence of Court proceedings this Court cannot deny or confirm this fact. Suffice is to state that in the judgment; evidence adduced was by PW1, Jackson Mahinda Gitonga, that the deceased had 2 wives, PW2, Stephen Murachuri Waweru, the Objector's father testified that the deceased (whom as shown in the Diary as a witness to the deceased's and Petitioner's customary marriage) paid Ksh 10,000/- as dowry on 15th September 1998 for the Objector.

The petitioner through submissions to the application for review informed this Court that part payment of dowry alone did not constitute a valid Kikuyu customary law marriage as espoused by Cotran:

Essentials of valid Kikuyu marriage; *njohi ya njurio, ruracio, ngurario* ceremonies must be conducted and *mwati, harika and ngoima* must be produced by the deceased's family to the Objector's family.

From the record and evidence; no such ceremonies; except for *ruracio* was held with regard to the alleged marriage between the deceased and objector. Therefore on review the Objector was not legally and/or validly married under Kikuyu customary Law as the remaining ceremonies were not conducted and/or such evidence was not adduced in Court by elders and/or family members who witnessed the ceremonies.

The reliance of **Section 3(5) Law of Succession Act** cannot be relied on as was in the judgment because, now in light of the essentials of a valid Kikuyu customary marriage, the Objector is not a woman married under a system that permits polygamy, where her husband had contracted a previous marriage to be deemed a wife for purposes of succession.

This Court also noticed with concern that there were material disclosures with regard to status of marriage;

a) The Ruling of 17th March 2009, in HCCC 68 of 2009 was not disclosed during the proceedings. Now annexed to the bundle of documents for application filed on 25th May 2016 for reconstruction 2009 and a burial dispute where the Objector refused the of the Court file; it confirms that the deceased died on 10th February Petitioner to bury the deceased hence the matter in the above suit.

b) The Court in the said matter stated as follows;

On the other hand, the Defendant started cohabiting with the deceased about 1995. She already had children from another relationship or relationships. She did not have any children with the deceased. The Objector could not have any children with the deceased. The cohabitation could not have amounted to marriage, customary or otherwise as the deceased lacked the legal capacity to contract another marriage. Thus there is considerable weight in the plaintiff's plea that the defendant was merely a mistress of the deceased.

c) During the Court proceedings, the burial dispute and Ruling of the Court were not disclosed to the Court during Trial. More importantly, that the question of marriage and children of the deceased arose in another Court of equal competent and concurrent

jurisdiction. Further, no appeal was preferred against the ruling.

d) The Ruling fortifies the issue that a valid Kikuyu marriage was not proved and the Objector cannot successfully rely on Section 3(5) Law of Succession Act Cap 160.

e) The Petitioner's affidavits filed on 27th Jan 2010 and 21st April 2010 disclose that the Petitioner was married to the Deceased under Kikuyu customary law in 1962 and they had 6 children. Their marriage was solemnized on 8th January 1972 as per the marriage certificate attached. The Objector was employed by the deceased and Petitioner at their bicycle spare shop at Thika as salesperson in 1995 and at the time she had 2 children. At the time pleadings (shortly after the deceased died) were filed she did not produce birth certificates and even during the burial dispute the Court found the children not the deceased's; yet in the proceedings that culminated to the Judgment of 15th February 2016, the Objector produced birth certificates of the 2 sons as children of the deceased. It is not clear where the birth certificates were attained from and produced long after the deceased's death.

f) The Funeral Program /Eulogy annexed to the documents of the application for reconstruction of the Court file did not mention the Objector and children as part of family of the deceased; yet these documents were not produced during the Trial and therefore his Court considered only what was presented at the time.

g) With regard to Section 3(2) of Law of Succession Act that a child/children is/are considered beneficiaries/dependents of the deceased a child/children whom he has expressly recognized or in fact accepted as his own or for whom he has voluntarily assumed permanent responsibility.

In the instant case, now with additional evidence and evidence that was not disclosed during Trial, the Objector produced birth certificates after 5 years after deceased's death that they are children of the deceased, yet in HCCC 68 of 2009 shortly after the deceased's death, the Court found these children born out of wedlock, the Objector already had the children on meeting the deceased. It is debatable whether, the 2 sons are biological children of the deceased in the absence of DNA Sibling Testing. There also no cogent and tangible evidence that the deceased expressly recognized them or in fact accepted them and voluntarily assumed permanent responsibility. The annexed Nairobi Aviation College Statement of Account dated 22/7/2009 marked AMG VIIa shows fees for Githinji Alex Waweru son of the Objector but it does not show who paid the fees. The Electricity bills in the name of the deceased cannot be proof of maintaining the 2 children.

The Respondent relied on **National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR** that;

A review may be granted whenever, the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case a review was sought to introduce the Diary /Notebook written by deceased which the former advocate refused/declined to produce in Court during Trial. It was new evidence that could not be discovered then because it was in the custody of the former advocate and could not be retrieved as the Petitioner thought that it would be disclosed and waited until Trial ended and the Notebook / Diary was not produced.

Secondly, there was an error on the record, the Court did not consider that the omitted facts on record and law did not confirm a valid kikuyu customary law marriage between the deceased and Objector. The exposition of law was/is the same only that pertinent evidence was omitted/not disclosed during Trial i.e. Ruling of burial Dispute of the deceased of 17th March 2009. Now that it is filed in Court by the Objector in the application to reconstruct the Court file as proceedings were removed/lost and not found to date and annexed various relevant documents; the said Ruling was apt as to evidence adduced then and now and casts doubt on Objector's valid marriage to the deceased and the Children being biological children of the deceased.

The sum total of the application for review is that the Judgment of 15th February 2016 is reviewed and the grant of 21st September 2009 revoked in this judgment is hereby reinstated, the Petitioner, Lucy Wanjiku Githinji widow of deceased and their children are the beneficiaries of the deceased's estate.

DELIVERED DATED SIGNED IN OPEN COURT ON 17TH SEPTEMBER, 2018.

M.W.MUIGAI

JUDGE