



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.59 OF 2017**

**IN THE MATTER OF THE ESTATE OF ABRAHAM MWANGI MUGANE (DECEASED)**

**A N D –**

**MARY WANJIRU MUNYORI**

**HARRISON WAWERU MUNYORI.....OBJECTORS/APPLICANTS**

**- V E R S U S -**

**BETH MUTHONI MWANGI.....PETITIONERS/RESPONDENTS**

**JUDGMENT**

This matter relates to the estate of Abraham Mwangi Mugane alias Mwangi Mugane, (the deceased) who died intestate on 13/8/1991.

Beth Muthoni Mwangi, the widow of the deceased applied to the High Court Nakuru for letters of administration. Grant of letters of administration was issued to the said Beth Muthoni on 25/5/1992 and were confirmed on 8/3/1993 with the whole estate devolving to the petitioner.

On 9/11/2012, the objectors/applicants filed a summons for revocation/annulment of grant dated 31/10/2011 intimating that the grant was obtained fraudulently by the making of false statements and concealment from this Hon. Court of relevant material facts; that the proceedings leading to the making of the grant were initiated without the consent of the objectors and their siblings with the intention of disinheriting the objectors. The application was supported by the affidavit of the objectors sworn on 7/11/2011 and a further affidavit dated 21/2/2012 and another sworn by Ng'ang'a Thurumbi Kaguongo dated 3/5/2013.

The petitioner, Beth Muthoni filed a reply to the application vide affidavit dated 24/11/2011.

On 2/3/2012, directions were taken before J. Emukule that the matter do proceed by way of viva voce evidence by the objectors starting to present their case.

PW1 Mary Wanjiru Munyori testified that she is the daughter of the deceased; that her father had two wives, her mother Maria Wanjiku Munyori and Beth Muthoni; that her father left her mother when she fell ill; that her mother had 5 children when they separated and that she was 20 years old by then; that her mother went to live with her parents after she fell ill; that the mother had five children; her, Harrison Waweru; Lucia Kapira, Naomi Wambui and Michael Wanyeki with the father but they left after 5 years when their father got married to petitioner Beth Muthoni who had been employed in their neighborhood by one Kanyai; that Beth had 4 children when she got married to the deceased and she got 9 children with the father; that she left home because Beth Muthoni was her age mate and kept picking quarrels with her. When she heard that the father had died, she went to attend the burial; she went to the chief seeking to be given some land when she learnt that the petitioner had taken out letters of administration; that the chief summoned Beth Muthoni but she refused to give her any land. She said that three of them Michael Wanyeki and Lucia Kapira are alive but Harrison Waweru and Emily Njambi are deceased but left children. PW1 said that she is known as Mary Wanjiku Munyori because she used her maternal grandfather's identity card to obtain the identity card. She said that the deceased was known by both names of Ndungu and Kungu; that they used to cultivate the deceased's land for some years before he married Beth. PW1 also stated that the deceased bought the land Settlement Fund Trustee for which they paid using proceeds from sale of pyrethrum and that the deceased had all the receipts.

**PW2 Nganga Timothy Kaguongo** relied on the statement filed with the court and dated 3/5/2013 in which he stated that in 1963, he settled on his land in Nyandarua/Murwaki/515 which is next to the deceased's land; that the deceased was his mother's age mate having been initiated in 1928; that the deceased had a wife by name Mary Wanjiku Mwangi; that Mary Wanjiru left her home due to poor health and went back to her parent's home; that Mary and the deceased had 5 children; that about that time, Beth Muthoni was employed by a neighbor Joseph Mwangi Kanyoi and had 4 children; that thereafter the deceased employed the petitioner and they started cohabiting as husband and wife and they got another 5 children.

PW2 also stated that the children of Maria remained with the deceased till the deceased got married to Beth that they left and that the children used to return to cultivate the land.

PW3 Grace Njeri testified that the deceased was her uncle and that he had a wife called Maria Wanjiku who had 5 children including the objector (PW1); that Beth got married to the deceased when Maria died.

PW4 Dorcas Wanjiru also testified that the deceased was her uncle and that he had a wife by name Maria who was the mother of PW1 Mary Wanjiku, Wanyeki, Kabira, Waweru; that Maria got sick and went to live elsewhere and died. PW3 confirmed that the objector should have been known by the father's name Mwangi because she never got married.

In her response, the petitioner (DW1) stated that she got married to the deceased in 1964; that he was alone and they tilled the land and planted pyrethrum which enabled them pay for the land. She denied having found any wife or child with the deceased and none ever claimed to be the deceased's wife or child; that she had 2 children when she got married and got 6 others with the deceased. That the deceased adopted her 2 children as his; that at his death, nobody claimed to be a wife or that there were other children; that the objector did not come to the funeral; that PW1 reported to the chief but DW1 denied knowing PW1; that PW1's identity card did not have the deceased's name. DW1 denied knowing any of the deceased's family members. DW1 denied having lived with PW1 and her siblings before they disagreed.

DW2 Joseph Mwangi Kamau said that he knew the deceased as a neighbor; that he was born in 1959 and was 6 years in 1964; that he used to accompany his father to the deceased's home and they would talk of the land; that the deceased married Beth Muthoni later and never heard that deceased had another wife or children; that Beth came with 2 children, she got 6 others; that his identity card shows that he was born in 1962 instead of 1959; that the deceased never told him about other children.

Both counsel filed submissions in support of their client's cases. The issues for determination are:

- 1. Whether the deceased was ever married to one Maria Wanjiku;**
- 2. Whether the protestors and their siblings are children of the deceased;**
- 3. Whether the grant should be revoked;**
- 4. Whether protestors should benefit from the deceased's estate.**

I will consider the first two issues together. PW2, 3 & 4 supported PW1's testimony that indeed the deceased had a wife by the name Maria Wanjiku Munyori with whom they sired 5 children who included PW1. The petitioner (DW1) and her witness (DW2) deny the said allegation. PW3 and 4 claimed to be nieces to the deceased. However, they did not explain clearly what their relationship with the deceased was. DW1 denied knowing any relative of the deceased which I find to be strange, having lived with the deceased for so many years.

Further to the above, PW1 on learning of the deceased's death went to the area chief to seek help. PW1 said that the chief called for a meeting of elders to deliberate on the issues between her and DW1. The chief of the area and the elders would have been some of the best placed persons to tell the court what they knew about this family, whether indeed Maria Wanjiku was ever married to the deceased and had children with him. Those elders and the chief would also have shed light on what transpired at the meetings they held. However, none of them was called as a witness.

PW1 did not tell the court under which law Maria was married to the deceased, customary or statutory law. Since no documents were availed to the court, this court will presume that it may have been under Kikuyu Customary Law. But even under Kikuyu customary law, there should have been evidence of some rites that were performed and so far no evidence was adduced.

The petitioner took issue with the names of the objector whose surname is Munyori, which according to the petitioner, does not accord with Kikuyu customary law on naming of children. The petitioner invited the court to take judicial notice of the fact that a child born during a marriage to Kikuyu parents will use the father's surname but if the parents are separated or the mother is a single parent, then the child adopts the mother's surname.

In *Joseph Gitau Githongo v Victoria Muihaki C.A.227/2005*, the Court of Appeal observed that it is common ground that under Kikuyu Customary Law, children born to a married couple are named in a particular consistent sequence i.e. 1<sup>st</sup> born son is named after the man's father and the first born daughter is named after the man's mother. The 2<sup>nd</sup> of either is named after the woman's parents.

In *HNN v MN & another, 2009 eKLR*, the court considered the naming of children under Kikuyu customary law to be a factor in proving of a marriage. The same issue of naming of children was considered in *HCA.76/2004 Bilher Wahito Muturi v Miriam Njoki*. In this case, since the objectors do not have birth certificates, their surnames should have provided some evidence that the objector was indeed the deceased's child but adopting their maternal grandfather's surname is questionable.

PW1 said that she has other surviving siblings Emily, Wanyeki and Kabura. The other siblings were not called to testify. The court has no idea how they were named. Their names would have provided some lead on whether they are the deceased's children.

During cross examination of PW1, she admitted to the mode of naming children under Kikuyu Customary Law, that children are named after their parents. PW1 has never been married. She has 4 children but none was named after the deceased. The first born is Harrison Ndungu and PW1 was at pains to prove that the deceased's other name was 'Ndungu' or 'Kungu' but no evidence was called to support that assertion. PW1's other children are Maria Wanjiku, Sabina Njeri and Harrison Waweru. She did not clarify who they were named after.

It is settled law that he who alleges a fact must prove. This being a Civil matter, the standard of proof is on a balance of probability. In this case, I find that the objector has not adduced sufficient evidence to prove on a balance of probability that the deceased was married to Maria Wanjiku Munyori or that she is the child of the deceased and the said Maria Wanjiku together with others and therefore a beneficiary of the deceased's estate.

In the end, I find that the objector has not satisfied this court that there is good ground to revoke the grant confirmed to the petitioner on 25/5/1992. I decline to grant the orders sought and dismiss the summons with the objector bearing the costs.

**Dated, Signed and Delivered at NYAHURURU this 8<sup>th</sup> day of November, 2018.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Nderitu for respondent

Mr. Waichungo holding brief for Mr. Kamanga for objector

Mwaura - Court Assistant