



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2153 OF 2013**

**IN THE MATTER OF THE ESTATE OF JAMES NJENGA GITAU (DECEASED)**

**ROSE NYARUIRU KIARIE.....CITOR/APPLICANT**

**VERSUS**

**ZIPPORAH SENTERUA GITAU .....CITEE/RESPONDENT**

**JUDGMENT**

**PLEADINGS**

The deceased James Njenga Gitau died intestate on 15<sup>th</sup> September 2008. The Citor, Rose Nyaruiru Kiarie filed a citation notice on 27<sup>th</sup> August 2013 in her capacity as the deceased's second wife citing the Respondent Zipporah Senterua Gitau, (deceased's first wife) to accept or refuse letters of administration of all the estate which by law devolves to and vests upon the personal representative of the deceased or show cause why the same should not be granted to the said Rose Nyaruiru Kiarie. The citation was served upon the respondent, Zipporah Senterua Gitau on 10<sup>th</sup> September 2013 and she entered appearance on 26<sup>th</sup> September 2013.

The Citor filed her petition for grant of letters of administration on 21<sup>st</sup> November 2013. In the affidavit in support of the petition, the Citor stated that the deceased was survived by the following beneficiaries:

**1<sup>st</sup> house:**

- a) Zipporah Senteru Gitau – Divorced wife
- b) Elizabeth Wamaitha – daughter
- c) Edna Wambui Gitau – Daughter
- d) Edward Gitau Njenga - Son
- e) Maureen Talash – daughter

**2<sup>nd</sup> house**

- a) Rose Nyaruiru Kiarie – Widow (2<sup>nd</sup> wife)
- b) Alexander Kiarie – Son
- c) John Gitau Njenga - Son

The Citee /Respondent Zipporah Sentura Gitau filed another petition for grant on 18<sup>th</sup> December 2013 in which she listed the following as beneficiaries of the estate of the deceased:

- a) Zipporah Senteru Gitau –Wife
- b) Elizabeth Wamaitha – daughter
- c) Edna Wambui Gitau – Daughter
- d) Edward Gitau Njenga - Son
- e) Maureen Talash – daughter
- f) John Gitau Njenga - Son

There are therefore two petitions for grant pending before the court with respect to the estate of the deceased. The applicant recognizes the respondent as the 1<sup>st</sup> wife of the deceased but the respondent does not acknowledge the applicant as a wife of the deceased.

### **HEARING**

Zipporah Sentura Gitau (PW1) testified in Court that she was married by deceased on 4<sup>th</sup> September 1958 and had 4 children namely Elizabeth Wamaitha Edward Gitau, Edna Wambui Gitau and Jane Ngobia (deceased) who left her daughter Maureen Talash. They both worked for Ministry of Health and he was transferred to Mombasa and she remained in Nairobi with the children. In 2008, she was called by Rose Nyaruiru Kiarie that her husband was sick. She visited him and found him at home, he became worse and was taken to hospital. She helped pay part of the medical bill Ksh 30,000/- and was on her way back to Nairobi to get funds when she was informed that he died. They prepared to transport his body and held the funeral.

In cross examination, he stated that he lived with the deceased from 1958-1984 when he went on transfer and from then she did not visit him until towards his death in 2008. She admitted that they separated and the deceased sent her away from their home and she left him with the children and later took them and lived with them at Pumwani Maternity Hospital staff houses.

She confirmed that though Rose Nyaruiru Kiarie lived with the deceased she was not married to the deceased, as he had no capacity having contracted a monogamous marriage in church and the child Alex came with her and is not the deceased's biological child. She admitted that John Gitau Njenga was the deceased's son and a beneficiary of the deceased's estate.

Martha Wairimu Gitau (PW2) testified that the deceased is James Njenga Girau son of Johana Muchiri Gitau. The deceased married 1<sup>st</sup> wife Zipporah Sentura Gitau and he married the 2<sup>nd</sup> wife in 1981 and told his father he did not want to live with Zipporah. The deceased sold the Plot in Wanyee and moved to Mombasa. She lived in Kitengela and Zipporah had a hospital. She knew that James and Zipporah did not live together and Rose came with a son called Alex and they lived together.

During the funeral of the deceased, she referred to photographs that showed both widows participated in his funeral. In cross examination she stated that she did not know whether a customary marriage was done or dowry was paid. She said even if dowry was not paid, she was widow to the deceased as they lived together for a long time.

Rose Nyaruiru Kiarie (PW3) testified that she was married to the deceased, with Alex Kiarie her son from a previous relationship. She was married in 1981 and lived with the deceased in Nairobi/Ndegwa flats from 1981-1982 and went to Mombasa in 1983. He did not marry her in church, he told him he had another wife Wairimu. The deceased took her home to his father's home in Kitengela and found Wairimu (PW2) She stated that if she was not married, their son, John Gitau Njenga could not have been named after the deceased's father as per Kikuyu customary law. She produced list of documents to confirm that she was wife to the deceased. Exhibit 1 – 7.

When the deceased was ill, she called 1<sup>st</sup> wife and they took him to Aga Khan Hospital for treatment. Unfortunately he passed on. They cooperated and paid bills, transported his body to Kiambu where they buried him. Her son Alex Kiarie paid hospital/mortuary bill.

After the funeral, 2 weeks later, 1<sup>st</sup> wife Zipporah and 2<sup>nd</sup> wife Rose met and went to National Bank and they withdrew the pension funds of the deceased and divided in half, each took their share.

### **ISSUES**

I have duly considered each party's pleadings together with all the evidence tendered in court and the written submissions filed by each party in support of their cases.

The following are the issues for determination:

- i. Whether applicant Rose Nyaruiru Kiarie was a wife to the deceased and whether her children were children of the deceased?
- ii. Whether the applicant Rose Nyaruiru Kiarie and her children are entitled to benefit from the estate of the deceased?

## **DETERMINATION**

From the hearing, it emerged that the deceased had married the respondent, on 6<sup>th</sup> September 1958 which fact was admitted by the citor and her witnesses Maritha Wairimu Gitau under the **African Christian Marriage and Divorce Act (CAP 151 Laws of Kenya)**.

It was the submission of the respondent that the deceased having married her in 1958 under the African Christian Marriage and Divorce Act, he had no capacity to contract a second marriage to the citor. She submitted that the law applicable during 1958 when the deceased married her and in 1981 during when the deceased is alleged to have married the citor was **Section 37 and 42 of the repealed Marriage Act Cap 150** which prohibited the deceased from contracting a subsequent marriage to the citor, hence the alleged marriage was illegal.

The citor claimed to have been married under the Kikuyu Customary Law, **Eugene Cotran on African customary law and Sweet & Maxwell 1968 on Law & Marriage and Divorce; lists the processes of a valid Kikuyu Customary Marriage;**

***“njohi ya njurio, ruracio, ngurario ceremonies and mwati harika and ngoima are produced during the ceremonies.”***

In the Citor’s testimony and that of step mother of the deceased they did not state whether any ceremony of customary law was conducted. They alluded to visiting the deceased’s home and the Respondent but did not confirm visiting the Respondent’s home with both family members, friends and/or neighbor for and negotiations or ceremony or payment of dowry. In the absence of such evidence, the Respondent cannot rely on **Section 3(2) Law of Succession Act Cap 160** as she was not married in any system of law that permits polygamy as she was not married in the first place.

The Citor in submissions stated that she was a wife of the deceased through presumption of marriage; that having lived together with the deceased as husband and wife from 1981 and had two children with the deceased, one of whom she had before the marriage but whom the deceased considered his own, she had acquired the status of being a wife.

The Citee however submitted that a presumption of marriage can only be made where both parties have legal capacity to contract a valid marriage, and that the deceased having lacked capacity, the presumption of marriage could not be applicable.

Although the Citor indicated in her petition that the respondent was divorced from the deceased, there was no evidence to prove the allegation. As such, the respondent was still a wife of the deceased. It was however not disputed that the deceased lived with the Citor from 1981 when they first resided in Parklands up to 1983 when they relocated to Mombasa where the deceased died; that they had a son, John Gitau Njenga who the respondent listed as a beneficiary of the estate of the deceased. The Citor called her mother in law (the deceased’s mother) (PW1) who confirmed that the deceased was initially married to the respondent but when the marriage broke down, he stayed single for about 2 years before marrying the Citor. It is on this basis that the Citor relied on the principle of presumption of marriage.

Our courts have held that the principle of presumption of marriage after a long cohabitation between a man and a woman was applicable in Kenya (**HORTENSIA WANJIKU YAWEH –VS- PUBLIC TRUSTEES C.A. NO. 13 OF 1976**). Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and that it was safe to presume the existence of a marriage. It has been stated that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed (**GACHEGE V. WANJUGU [1991] KLR 147.**)

In **MARY WANJIRU GITHATU VS ESTHER WANJIRU KIARIE Court of Appeal Civil Case No 20 of 2009 Hon Justice Bosire J.A.** on the issue of cohabitation stated as follows;

***“In the circumstances where parties do not lack capacity to marry, a marriage may be presumed if the fact and circumstances shows the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.”***

In the present case, although the cohabitation between the deceased and the citor lasted for 30 years and a son was born in the course of the union. The deceased’s mother attested that she knew of the Citor as married to the deceased, the deceased lacked capacity to marry as he entered into a monogamous marriage and did not divorce the Citee. He had no capacity to conduct another marriage until he divorced the 1<sup>st</sup> wife. In order to benefit from **Section 3(5) Law of Succession Act Cap 160** the deceased ought to have undertaken any part of the process of customary marriage for the Citor to benefit in his estate. On the other hand, there lacks evidence on record that the deceased undertook any part of the process that constitutes a customary marriage. to the existence of the marriage. In the absence of customary marriage and the fact that the Citor cannot rely on presumption of marriage as the deceased lacked capacity, I therefore find that the Citor does not qualify to be a wife of the deceased for purposes of Succession. She is not a widow entitled to the estate of the deceased.

On whether the Citor’s sons are beneficiaries of the deceased, I note that it is not disputed that John Gitau Njenga was a son of the deceased. He therefore is a beneficiary entitled to the estate of the deceased. The second son, Alexander Kiarie was stated not to be a biological son of the deceased but the Citor’s son whom it was claimed that the deceased had taken into his family as his own. The evidence was not adduced to prove this fact. In this case, he is not a beneficiary of the deceased.

## **FINAL ORDERS**

- a) The Citor Rose Nyaruiru Kiarie is not wife/widow of the deceased;**
- b) The Citee Zipporah Senterua Gitau was wife/widow of the deceased and entitled to the estate of the deceased;**

c) John Gitau Njenga is son of the deceased and is entitled to the estate of the deceased just like the respondent's children Elizabeth Wamaitha, Edna Wambui Gitau, Edward Gitau Njenga and Maureen Talash;

d) Zipporah Senterua Gitau is appointed administrator of the estate of the deceased;

e) Any of the aggrieved party to appeal the decision of the Court;

f) Each party to bear their own costs.

g) Any aggrieved party to lodge an appeal.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 3<sup>RD</sup> DECEMBER 2018.**

**M.W.MUIGAI**

**JUDGE –FAMILY DIVISION –HIGH COURT**