



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1892 OF 2011**

**IN THE MATTER OF THE ESTATE OF DANIEL NJOGU MACHARIA (DECEASED)**

**RULING**

1. The deceased herein died on 27<sup>th</sup> May 1992. According to a letter on record, written by the Chief of Ndithini Location, dated 9<sup>th</sup> August 2010, the deceased had married three times. He was therefore allegedly survived by two widows, for one wife had died, and eleven (11) children from two of the wives.
2. Representation to the intestate estate of the deceased was sought by the widows through a petition filed herein on 7<sup>th</sup> December 2011 dated 2<sup>nd</sup> November 2011. The survivors of the deceased were listed as the two widows and the eleven children. He was expressed to have died possessed of only one asset, a property described as Machakos/Ndithini Phase II/209. The grant was made to the petitioners on 18<sup>th</sup> April 2012. The grant was confirmed on 29<sup>th</sup> January 2013, with the property being shared equally between the two widows.
3. The application that I am called upon to determine is dated 8<sup>th</sup> August 2013. It is brought at the instance of one of the sons of the deceased, Joel Kabiu Njogu. His case is that the process of obtaining the grant was not above board as the same was defective and fraudulent. He states that Pauline Wanjiku, who was presented in the petition as widow of the deceased was never married to the deceased; she was instead a wife of the deceased's second wife, Mary Nduta Njogu, in a woman-to-woman arrangement. The alleged woman-to-woman marriage allegedly happened after the deceased had died. He avers further that the children of the said Pauline Wanjiku were not children of the deceased. He further complains that at the distribution of the estate the children of the first house, to which he belongs, were disinherited for the estate was shared out between only two of the alleged three houses of the deceased. He complains that after the grant was confirmed the second wife of the deceased began to take steps to have him evicted from the estate property. He has attached several documents to his affidavit to support his case.
4. The response to the application is by way of a replying affidavit sworn by Pauline Wanjiku Njogu on 15<sup>th</sup> October 2013. She avers to have been married under Kikuyu customary law and that dowry had been paid to her parents on 10<sup>th</sup> August 1983. At the alleged function, the deceased was said to have been accompanied by the applicant herein, Mary Nduta Njogu, who is the first respondent in these proceedings, and a Naomi Wanjiru. There were alleged subsequent visits to her parents' home on three different dates in 1986, during which occasions dowry was allegedly paid in full. The second respondent deposes that the applicant had not been disinherited for he had his own property, Machakos/Ndithini/Phase II/208, which had been bequeathed to him by the deceased and was registered in his name. She pleads that all the dependants had consented to the proposed mode of distribution. She avers that the applicant had been served with a citation prior to the cause herein being lodged in court. She contests the allegation that there was fraud and concealment of matter from the court. She states that if the applicant was unhappy with the mode of distribution proposed, he ought to have protested at the confirmation hearing. Although the affidavit by the respondent refers to several documents alleged to have been attached to it, none are in fact attached to the copy in the court file.
5. On 25<sup>th</sup> May 2016 the parties proposed to have the said application disposed of by way of written submissions. Directions were given the same day in those terms. The parties did comply with the said directions by filing their respective written submissions. I have had occasion to read through the said written submissions and to note the arguments advanced therein.

6. The applicant's case is hinged on one principal point, that Pauline Wanjiku was not a widow of the deceased as claimed, but rather she was a wife of the second wife of the deceased, in a customary arrangement loosely known as a woman to woman marriage. The said Pauline Wanjiku has sworn an affidavit to contest that allegation, asserting that she was indeed a wife of the deceased. I have noted that the woman alleged to be her 'husband' has not sworn affidavits with respect to that issue.

7. An issue as to whether there existed a marriage between the parties is a matter that ought not to be disposed of by way of affidavit evidence only, unless it is alleged that the marriage was statutory and was supported by a certificate of marriage. The alleged marriage herein is said to be a customary one. It is a matter of some notoriety, going by the law as laid down in *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* (1965) EA 725 and *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* (1988-92) 2 KAR 292, that a person who invokes existence of a customary law to establish some right must prove the same, for the existence of a customary law is a matter of fact. The fact of the customary woman to woman marriage cannot possibly be proved by affidavit evidence.

8. In view of the above, I cannot do justice in the matter before me without the parties being heard, in terms of presentation of *viva voce* evidence. Indeed, the matter ought not to have been cleared for disposal through written submissions. I shall accordingly review the earlier directions and in their place order that the revocation application dated 9<sup>th</sup> August 2010 be disposed of by way of affidavit and oral evidence.

9. I note that the property in question is a sole parcel of land known as Machakos/Ndithini Phase II/209, situated within Machakos County. Its value is said to be Kshs. 500,000.00 as at 2<sup>nd</sup> November 2011. That no doubt places it within the jurisdiction of the resident magistrate's court. However, as the estate comprises of assets falling within Machakos County, with none in Nairobi, I shall direct that the matter be transferred to the High Court of Kenya at Machakos for disposal.

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>RD</sup> DAY OF FEBRUARY, 2017 .**

**W. MUSYOKA**

**JUDGE**