



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1355 OF 2003

IN THE MATTER OF THE ESTATE OF SHADRACK KAMANGA NGARUIYA (DECEASED)

JUDGMENT

1. The deceased herein died on 25th February 2002. Representation to his estate was sought in the cause by Nancy Wambui Kamanga and Harun Ngaruiya Kamanga, in their purported capacities as widow and son, respectively, of the deceased, in a petition filed herein on 28th April 2004. He was expressed to have been survived by two (2) widows – Nancy Wambui Kamanga and Beth Wanyiri Kamanga, and seven (7) children, being Harun Ngaruiya, Edward Thiong’o, Phyllis Wairimu, Peris Wairimu, Rose Nyambura, Winnie Njoki and Caroline Wairimu. A grant was according made to Nancy Wambui Kamanga and Harun Ngaruiya Kamanga on 24th March 2005.

2. A summons for revocation of the said grant, dated 14th June 2005, was lodged at the registry by Beth Wanyiri Kamanga on even date. The gist of the application was that the first administrator, Nancy Wambui Kamanga, was not a widow of the deceased, eventhough the two had had a number of children together. The said application was disposed of by consent of the parties on 19th May 2009, when it was ordered that a grant of representation be issued in the names of Beth Wanyiri Kamanga and Nancy Wambui Kamanga. The new administrators were directed to file for confirmation of their grant within thirty (30) days. The said consent did not, however, dispose of the critical issue as to the status of Nancy Wambui Kamanga. The administrators complied with the direction as to the filing for confirmation of the grant made to them and filed separate applications for confirmation of the grant.

3. The first application in time was filed by Beth Wanyiri Kamanga. It is dated 29th September 2009. The applicant proposes to share out the estate between herself and her children, on one side, and the children of Nancy Wambui, on the other, excluding Nancy Wambui herself. She allocates to herself and her children, the bulk of the estate, save for the pension funds and the Chai Sacco shares which she allocates to the children of Nancy Wambui. She justifies this on the argument that Nancy Wambui was never married to the deceased, and that her children, although sired by the deceased, were not dependent on him, and they were therefore only entitled to a token from the estate. To that application, Nancy Wambui swore and filed a replying affidavit. She asserts that she had married the deceased under customary law and that they had children, whose certificates of birth she has displayed. She avers that she had wrangles with the deceased, but their marriage was not dissolved. She then proceeds to propose her own mode of the distribution of the estate of the deceased. Nancy Wambui simultaneously filed an application for confirmation of grant dated 16th December 2009, making proposals on distribution similar to those made in her reply to the co-administrator’s application. The two confirmation applications were disposed of simultaneously by way of *viva voce* evidence.

4. The hearing commenced on 29th January 2013. The first on the stand was Nancy Wambui Kamanga. She stated that the deceased was her husband having married him in 1976. She said that they did not marry under statute or traditionally. They cohabited at a place called Kerwa, Kikuyu and had three (3)

children. The deceased was said to have been working with the Kenya Tea Development Authority at the time, and as at the date of his death he was stationed at Makomboki. She testified that in 1984 she went back to her parents, but returned to the deceased in 1986. The deceased married a second wife in 1988. She stated that she was unaware that the deceased had divorced her in 1986. She also stated that she was unaware of a meeting on 23rd November 1985 which allegedly led to the dissolution of their marriage. She averred that the deceased used to care for her and her children, including paying school fees for them. When the deceased died she allegedly attended the burial and she posed for a photograph at the event.

5. On cross-examination, she stated that she was born at Wangige and moved to Kerwa in 1963. She met the deceased in 1972, and they got married under Kikuyu customary law in 1976. She then again said theirs was a 'come we stay' marriage. She said that she moved back with her mother in 1984, but then she returned to the deceased in 1986, and then moved back to her mother. At the time of her testimony she was still living with her mother. Her children were also with her at Kerwa. She asserted that her marriage to the deceased was not dissolved and she was unaware that pregnancy compensation was paid to her parents. She stated that at the time of the deceased's death, he was living with Beth Wanyiri at Kagwe, Makomboki.

6. The next on the stand was Harun Ngaruiya Kamanga. He testified that the deceased was his father, and that he was born in 1978. He said that in 1985 he was just a toddler and he could not tell where the family was living then. He said he had his primary education at Kerwa, but before then he lived at Uplands with his parents. He generally grew up at his maternal grandparents home until he joined high school. He stated that his father did not live at Kerwa, but used to visit. He denied that his parents were not married, explaining that it was work related commitments that kept the deceased away. He said that the deceased paid his school fees and also gave money to his mother for upkeep. During trial he referred to correspondence between him and the deceased over his education.

7. The next witness on the side of Nancy Wambui was Edward Thiong'o Kamanga. He said he was a son of the deceased with Nancy Wambui, born sometime in 1979. He went to school at Kerwa, but after primary school he was sponsored by the deceased to a training at the Christian Industrial Training Centre (CITC) at Thika. He said the deceased had showed him a *shamba* where he was to build a house. A week to the deceased's death, the witness took *fundis* to the shamba to dig holes on it. He said that he was enrolled at CITC as Edward Thiong'o Kamau. He stated that the deceased lived at Makomboki, Kagwi and Kanyenyaini with Beth Wanyiri. According to him, the deceased had two wives, but he could not explain why he had separated from his mother. He said that the parcel of land given to him was number 561, but there was no written document conveying the property to him. He said the deceased had a farm at Kagwe as that is where he was buried. The land was said to be five (5) acres. He said that although they attempted to get involved in the deceased's funeral, they were excluded.

8. The last witness on the part of Nancy Wambui was Phyllis Wairimu Kamau. She said that the deceased was her father, and that she was born in 1981. She stated that she had interacted with the deceased and that they, as Nancy Wambui's children, were dependent on him. She alleged that the deceased used to visit them at home, and they, in turn, used to visit him at his place of work. She also alleged that she used to communicate with him in writing. She described Beth Wanyiri as her stepmother, adding that she would spent time with her family as the secondary school that she attended, Kambaa Girls Secondary School, was next door to Beth's home. She said she was unable to go to college as the deceased died shortly after she finished secondary school. At the trial she referred to notes that she had allegedly exchanged with the deceased at the time when she was in secondary school.

9. The case for Beth Wanyiri opened on 23rd May 2016. The first on the stand was Stephen Wainaina Kamanga. He said that he was a cousin to the deceased, their fathers were brothers. He stated that the deceased at one time worked for his father at a shop at Kerwa, Limuru. He entered into a relationship with Nancy Wambui, which did not culminate into marriage. Sometime in 1985, Nancy Wambui was said to have left the deceased's home, carting away with her all his belongings while the latter was at work. The deceased then went to her parents' home, with elders, in an attempt to get back Nancy and the goods that she had taken with her. She refused, saying that she did not want anything to do with him. Elders consulted, after which they decided to accept her repudiation of the marriage, but decided that the

deceased pay pregnancy compensation so as to be freed of the marriage. The deceased was forced to pay for Nancy's four pregnancies. The proceedings relating to that were allegedly reduced into writing and the witness referred to minutes thereon attached to his affidavit. Thereafter, Nancy Wambui and the deceased never got together, and the deceased then proceeded to marry Beth Wanyiri. The witness stated that according to Kikuyu customs once pregnancy compensation is paid there cannot be a marriage, and once the deceased paid pregnancy compensation to Nancy's parents she could no longer be regarded as his wife.

10. On cross-examination, the witness stated that he was twenty-six (26) years of age in 1985 and was not yet married. He stated that the deceased and Nancy Wambui had been off and on for a period of about eight (8) years. He said that the deceased had on an occasion visited Nancy's parents as a sign that he was interested in taking her in marriage, but the witness himself was not at the meeting. He said that before the events of 1985, there was no marriage between the parties, but an intention to marry. He said that what the elders did was to terminate the negotiations that would have led to the marriage. He explained that Nancy and the deceased stayed at Nairobi, and later at Limuru and at a house at the deceased's father's home. At the burial of the deceased, the family of Nancy Wambui was said to have come in at the tail end of the proceedings. He added that the deceased had told him that he had been assisting the children of Nancy Wambui.

11. Beth Wanyiri was the last witness for her side. She said that she married the deceased in 1988 under Kikuyu customary law, and that the two had four (4) children between them. She stated that the deceased had told her that he had had a relationship with Nancy Wambui, which terminated in 1983. She said that according to the deceased the two separated in accord with customs, and that they thereafter signed a letter to that effect. It was her evidence that the deceased had given her the repudiation document which she had attached to one of her affidavits. The same was in the hand of her witness, Stephen Wainaina. She said that during the deceased's lifetime, there was little contact between him and the children of Nancy Wambui. They would come asking for assistance with school fees, and he would assist them, although he never provided them with shelter. She had proposed that the pension dues from KTDA be shared so that Nancy's children got a portion, but taking into account the fact that they were older and had benefited from the deceased's support during lifetime, and that her own children were younger. She asserted that Nancy was never a wife of the deceased and should not therefore be involved in the estate of the deceased. She proposed that the estate be distributed as per her proposals. She said the deceased had said that Nancy's sons be shown a piece of land to put up a home as they had been chased away by their maternal uncles. They had come to see the deceased over that and he had told them to put up temporary structures, that was a year before he died. After his death, they did not develop the property. She said that the deceased had named her as the next of kin with respect to the Chai Sacco shares, and explained that that was why Juja/Kiauya/2/136 was registered in her name. The rental property was said to be at Kagwe market, where the rental income was Kshs. 3,000.00 per month. She stated that regarding the provident funds, she had been asked to obtain a grant of letters of administration.

12. On cross-examination, she stated that she met Nancy Wambui for the first time at the funeral of the deceased, and that she knew the children prior to that. She stated that the deceased supported his children with Nancy Wambui despite the 1985 document. She said that Phyllis used to pass by her home on her way from school and the deceased had no problem with that. The sons, however, never visited. She stated that they lived at a land where the deceased had constructed a home for them. The deceased had allegedly said the farm known as Mutonyora/564 be given to the children of Nancy Wambui. She averred that the Chai House plot was in her name. She said her children were still in school and colleges, and were still dependent. She supported them from a property that generated income.

13. At the close of the oral hearing, the parties hereto were directed to file and exchange written submissions. There has been compliance with the said directions for the parties hereto have filed their respective written submissions, complete with authorities. I have had occasion to peruse through the written submissions and the authorities.

14. I am tasked with determining two applications for confirmation of the grant of letters of administration intestate herein. Both applications are founded on section 71 of the Law of Succession Act,

Cap 160, Laws of Kenya, which provides for confirmation of grants. Under that provision the court is enjoined to be satisfied of three (3) matters before confirming the grant-

- (a) That the grant was rightly made to the applicant;
- (b) That the applicant is administering and will administer the estate according to law; and
- (c) That all the persons beneficially entitled have been properly identified and their shares spelt out.

15. The evidence that was laid out before the court in the affidavits and the oral testimony would form the basis for determining whether the court is satisfied of the matters set out hereabove.

16. It is common ground that the deceased had the two women protagonists in his life at one time or other. It is also not disputed that the two women had children with him, and the issue of the paternity of these children has not been raised. The primary contest revolves around the status of Nancy Wambui, who has projected herself as the first widow of the deceased, a claim which is hotly contested by Beth Wanyiri. The answer to the question whether Nancy Wambui was a wife of the deceased as at the date of his death would provide answers to whether she was rightly appointed administrator of the estate of the deceased, and also whether she is one of the persons beneficially entitled to a share in the estate of the deceased. The secondary question relates to whether the children of Nancy Wambui were dependants of the deceased.

17. Was Nancy Wambui a wife of the deceased? She fleetingly mentioned that she had been married by the deceased traditionally. She talked of the deceased having visited her parents on the matter of their marriage. If Nancy's case is that she was married under customary law, she was obliged to lead evidence to prove that fact. A person who relies on a custom is obliged by sections 13 and 51 of the Evidence Act, Cap 80, Laws of Kenya, to establish that fact. Put differently, the burden of providing existence of a particular custom and its application to a certain set of facts rests with the person who seeks to rely on that fact. It was held in *Ernest Kinyanjui Kimani vs. Muiro Gikanga and another* (1965) EA 735, that a party relying on a local custom must prove that local custom by adducing relevant evidence. It was stated, in *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* (1988-92) 2 KAR 292, that African customary law was neither notorious nor documented hence the requirement that it must be established for the court's guidance by the party relying on it. With regard to marriage, it was held in *Gituanja vs. Gituanja* (1983) KLR 575, that the existence of a customary marriage was a matter of fact to be proved with evidence. Nancy was therefore obliged to lead evidence to prove that there was a customary law marriage between her and the deceased. The parties are Kikuyu by ethnicity; consequently, a valid customary marriage between them ought to comply with the dictates of Kikuyu customary law. That law as it relates to marriage is notorious. It involves certain procedures which have to be undertaken, involving certain rites and ceremonies. All these are detailed in *Cotran's Restatement of African Law: Kenya Volume 1-The Law of Marriage and Divorce*, Sweet & Maxwell, 1968. The *Restatement* has been cited as a useful guide by the courts in Kenya on the matter, in such cases *Kanyi vs. Muthiora* (1984) KLR 712, *Wambugi w/o Gatimu vs. Stephen Nyaga Kimani* (1988-92) 2 KAR 292 and *Gituanja vs. Gituanja* (1983) KLR 575.

18. It would appear from the record that Nancy Wambui and the deceased never went through any formal ceremony of marriage, be it under customary law or statute. Nancy gave conflicting information on her status. On the one hand she appeared to say that what she had with the deceased was a 'come we stay' marriage, and on the other said that she had been married traditionally. However, from the totality of the evidence it is clear in my mind that she never went through any form of ceremony of marriage and therefore she was neither a statutory wife nor a wife married under customary law. However, case law has established that a prolonged cohabitation between a man and a woman can give rise to a presumption that the two are married. That principle was stated in *Hortensiah Wanjiku Yawe vs. Public Trustee Court of Appeal for East Africa* civil appeal number 13 of 1976 (unreported), which decision is treated as the case classicus on the subject in East Africa, and which has been cited in several other cases thereafter with approval.

19. There is some evidence that Nancy Wambui did cohabit for some time with the deceased, which

cohabitation produced three (3) children. The paternity of these children is not disputed. The deceased provided for them during lifetime. So should I presume marriage between Nancy Wambui and the deceased? I am persuaded that the two did cohabit and the cohabitation did produce the three children. However, the said cohabitation did not last until the deceased's death. The alleged cohabitation allegedly started in 1976 and appears to have terminated in 1983 or 1984 or 1985 or 1986. Thereafter the two did not live together. Indeed, the children of Nancy talked of having been raised at their maternal grandparents' home. The deceased died in 2002.

20. Presumption of marriage is dependent on cohabitation. It is the crux of the matter. Without it the presumption cannot arise. It would appear that when the cohabitation terminates, the foundation for a presumption of marriage is then lost. To my mind Nancy Wambui could only raise the issue of presumption during the period of the cohabitation, or upon the death of the death should the death have occurred during the cohabitation. Where the death occurs nearly ten years after the termination of cohabitation, I believe it would amount to abuse of the principle to argue that a presumption could be made in the circumstances. I am reluctant to make such a presumption in the circumstances of this case, and I will no doubt not make it.

21. The deceased's cousin did talk of a custom where the relationship was traditionally terminated after Nancy denounced the deceased. He said the deceased was forced to pay pregnancy compensation to the parents of Nancy Wambui so as to set the deceased free to move on with his life. I reiterate the position stated in the cases that I have cited above with respect to existence of a custom and its application. It was not established that the said witness was an expert in Kikuyu customs, and no other evidence was led to support his claim on the existence of the alleged custom. In any event, the matter is not of much importance in view of what I have stated above.

22. Having concluded that Nancy was not a wife of the deceased as at the date of his death, it follows that she ought to have no stake in his estate. She is therefore not entitled to a right to administer the estate, and ought not have been made an administrator of the estate. Section 66 of the Law of Succession Act is fairly explicit on persons who qualify for appointment as administrators by order of priority; Nancy Wambui does not fit at all in the hierarchy set out therein.

23. Regarding the persons beneficially entitled, it follows, by dint of the finding that Nancy Wambui was not a widow of the deceased, that she was not one of the persons beneficially entitled to a share in the estate. There is no dispute concerning his children with her, as no one has raised questions on their paternity. Indeed, there is overwhelming evidence that the deceased regarded them as his and provided for them, and the extended family regarded them similarly.

24. The issue of dependency was raised by one of the parties, that the children of Nancy were dependent on the deceased and that they ought to be catered for in that behalf. With respect, the issue of dependency does not arise. There is no application before me brought under section 26 of the Act. The provisions in Part III of the Law of Succession Act apply only in circumstances where there is an application under section 26. Section 29, which defines dependants, is wholly irrelevant unless it is cited in the context of an application under section 26. In any event, the children of Nancy Wambui are listed in the petition and application for confirmation as survivors of the deceased. The question of dependency therefore is a non-issue in the circumstances.

25. So how is the estate to be distributed? A court faced with the task of distributing an estate ought to identify the persons who are entitled to a share in the estate, the assets available for distribution and the manner in which the said assets are to be distributed. From the material before me, the persons who are beneficially entitled to a share in the estate are Beth Wanyiri Kamanga, Harun Ngaruiya Kamanga, Edward Thiong'o Kamanga, Phyllis Wairimu Kamanga, Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga. The assets available for distribution include Nyandarua/Mutonyora/487, Nyandarua/Mutonyora/488, Nyandarua/Mutonyora/561 and Nyandarua/Mutonyora/564, Kagwe/Gatamaiyu/208, Kagwe/Gatamaiyu/T42, Kagwe/Gatamaiyu/T52 entitlement from the KTDA Staff Provident Fund, Chai Sacco shares, Utheri wa Lari shares, Njoki Nyakinyua shares, Kenya Breweries shares, the deceased's entitlement from NSSF, the monies in

National Bank Account No. 2017207309 and Subukia Land Scheme shares.

26. I have considered the proposals made in both applications. I have noted that the proposals by Beth Wanyiri are skewed against the children of Nancy Wambui.

27. The deceased died intestate after the Law of Succession Act had come into force. Part V of the said law, which governs intestacy, applies to the estate herein. The deceased was survived by a widow and children. Ideally, section 35 of the Act should apply. He had two households, that of Nancy Wambui and that of Beth Wanyiri, although at the time of his death he had only one wife. Technically, section 40 should guide the distribution of the estate herein. I note that the deceased was said to have had shown pieces of land to his sons with Nancy Wambui to build homes on, however the said children did not coherently identify the property. The widow mentioned Mutonyora/564 as the property the deceased intended to give them while Edward Thiong'o Ngaruiya mentioned No. 561. Curiously the widow does not even allot it to them. In his final years the deceased lived in Kagwe, Makomboki and Kanyenya-ini area with the widow. I shall bear these in mind in the distribution of the assets. The principle that applies overall should be equality in distribution.

28. I am cognizant of the fact that investments held by pension schemes, provident funds and cooperative societies are not directly subject to succession, but are to be handled according to the rules governing those schemes. It is possible that the said funds are subject to nominations made by the deceased. The persons entitled to those funds ought to be the persons named in such nominations. In the absence of nomination, the said funds become estate property to be distributed under the law of succession.

29. In the end, I shall resolve the applications dated 29th September 2009 and 16th December 2009 in the following terms:

(a) That I declare that Nancy Wambui Kamanga is not a widow of the deceased, consequently she is not entitled to a share in the estate nor to its administration;

(b) That the grant made herein on 19th May 2009 shall be amended so as to remove the name of Nancy Wambui Kamanga as administrator and to have her replaced as such by her son, Harun Ngaruiya Kamanga;

(c) That the persons who survived the deceased, and who are entitled to a share in his estate, are Beth Wanyiri Kamanga, Harun Ngaruiya Kamanga, Edward Thiong'o Kamanga, Phyllis Wairimu Kamanga, Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(d) That the assets that make up the estate of the deceased are Nyandarua/Mutonyora/487, Nyandarua/Mutonyora/488, Nyandarua/Mutonyora/561 and Nyandarua/Mutonyora/564, Kagwe/Gatamaiyu/208, Kagwe/Gatamaiyu/T42, Kagwe/Gatamaiyu/T52, entitlement from the KTDA Staff Provident Fund, Chai Sacco shares, Utheri wa Lari shares, Njoki Nyakinyua shares, Kenya Breweries shares, the deceased's entitlement from NSSF, the monies in National Bank Account No. 2017207309 and Subukia Land Scheme shares;

(e) That the said assets shall be distributed as follows:

(i) Nyandarua/Mutonyora/487 – to Harun Ngaruiya Kamanga;

(ii) Nyandarua/Mutonyora/564 – to Phyllis Wairimu Kamanga;

(iii) Nyandarua/Mutonyora/561 – to Edward Thiong'o Kamanga;

(iv) Nyandarua/Mutonyora/488 – to Wanyiri Kamanga for herself and in trust for Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(v) Kagwe/Gatamaiyu/208 – to Wanyiri Kamanga for herself and in trust for Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(vi) Kagwe/Gatamaiyu/T42 - to Beth Wanyiri Kamanga for herself and in trust for Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(vii) Kagwe/Gatamaiyu/T52 - to Beth Wanyiri Kamanga for herself and in trust for Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(viii) Shares in Njoki Nyakinyua – to Beth Wanyiri Kamanga for herself and in trust for Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(ix) Shares in Subukia Land Scheme - to Beth Wanyiri Kamanga for herself and in trust for Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(x) Shares in Utheri wa Lari – to Beth Wanyiri Kamanga for herself and in trust for Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(xi) Investments or funds in KTDA Staff Provident Fund, Chai Sacco, terminal dues and deposits with NSSF – to be given to the persons nominated by the deceased under the relevant schemes, and in default of nomination to be shared equally between Beth Wanyiri Kamanga, Harun Ngaruiya Kamanga, Edward Thiong’o Kamanga, Phyllis Wairimu Kamanga, Peris Wairimu Kamanga, Rose Nyambura Kamanga, Winnie Njoki Kamanga and Caroline Wairimu Kamanga;

(xii) Shares in Kenya Breweries – to Beth Wanyiri Kamanga; and

(xiii) Money in National Bank Account No. 2017207309 – to Beth Wanyiri Kamanga.

(f) That the grant herein, as amended per paragraph (b) here-above, is hereby confirmed in the terms hereabove and a certificate of confirmation of grant shall issue accordingly; and

(g) That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY OF MARCH, 2017.

W. MUSYOKA

JUDGE