REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESION CAUSE NO.630 OF 2012

ESTATE OF MARTHA WANGARI NDERITU

MOSES NDERITU ……...…1ST OBJECTOR/APPLICANT

DORCAS NJOKI NDERITU ……..…….. 2ND OBJECTOR/APPLICANT

VERSUS

PETER IRUNGU GATHUITA ……..……...…..1ST RESPONDENT

ABIGAEL NJOKI MWINYI ……..…….. 2ND RESPONDENT

RULING

1. The application coming up for determination is the summons for revocation of grant dated 4th December 2012. The applicant seeks a revocation of the grant of letters of administration issued to Moses Nderitu Kirengenyi and Dorcas Njoki Nderitu on 6th August 2012. The application is based on grounds that the grant of letters of administration is founded on misrepresentation of fact and material non-disclosure that peter Irungu Gathuita is the widower of the deceased and he seeks leave to be allowed to file other cross petition to the respondents petition.

2. In his affidavit in support of the said application, the 1st respondent avers that he was the father of the deceased and that the said Peter Irungu Thuita was a stranger to them and never at any time married the deceased. That the said petition was filed based on misrepresentation and concealment of material facts which could lead to a fraud conclusion. That they only learnt of the said intended petition through Kenya Gazette Notice CXIV-NO-56 dated 22nd June 2012. They aver that they stand to suffer irreparable damage if the application is not granted as they will be disinherited.

3. The 1st respondent filed his replying affidavit on 23rd May 2013 opposing the said application avers that he and the deceased got married under Kikuyu customary law in 2002 but their marriage was never blessed with any issue but he took up and adopted the deceased's daughter. That on 16thDecember 2006 he and his parents including his uncle went to the applicant's home at Joska along Kangundo road and paid a dowry of Kshs. 10,000/- and a further Kshs. 4,000/- as a gift to the uncles and gave 4 crates of soda and argued that the chief of the location where he resided with the deceased confirmed that the deceased was his wife. That at the time the deceased contracted the marriage the deceased had necessary capacity to engage in marriage. That despite the said dowry the applicants did not recognise the same as they said it was not enough and insisted he

pays more. That before the deceased's burial the family pressured him to pay more dowry of Kshs. 30,000/- and later on demanded for more money and even sought orders restricting him from burying the deceased in ***HCCC No. 2 of 2012 Nairobi Moses Nderitu Kitegenyi & 2 Others –vs- Peter Irungu Gathuita*** which was later on withdrawn. He avers that the applicants are intermeddlers of the estate and were not beneficiaries of her estate and urged the court to dismiss the application.

4. Simon Irungu Kinuthia, uncle to Peter Irungu Gathuita in his affidavit dated 20th May 2013 avers that the deceased Martha Wangari Nderitu was a wife to Peter Irungu Gathuita since 2002 adding that he accompanied the 1st respondent on 16th December 2006 to the deceased's home in Joska (Ruai) with other relatives and they paid a part of the dowry of Kshs. 10,000/- and a further Kshs. 2,000/- that was to be shared by the clan elders and another 2,000/- as gifts to the women. That later on 9th August 2008 the respondent's parents went to the applicant's home at Joska to ask for their proposed formal church wedding and paid a further Kshs. 4,000/- and were to go back for further deliberations but the deceased passed on 3rd January 2012.

5. The 1st applicant avers that the 1st respondent has not adduced any documents to prove adoption. He refutes receiving any dowry from the 1st respondent or holding any discussions about marriage with the 1st respondent. That the suit filed in HCCC No. 2 of 2012 was aimed at restricting the 1st respondent from burying the deceased as he was a stranger and wanted to exclude the deceased's parents and family from their funeral arrangements. He avers that during their lifetimes the deceased used to supporting them and take care of their medical bills and their medication.

6. Parties proceeded by way of written submissions. The applicants in their submissions aver that they are the biological parents of the deceased; the 1st respondent is a stranger while the 2nd respondent is the daughter of the deceased. That the deceased was diagnosed with severe lupus when the daughter was almost 4 years, she, and her daughter started residing with them. That it was the 2nd objector who paid the 2nd respondents fees and sustenance when she sat for her class 8 examination and identified a school for her to join. They submitted that the onus of proving the marriage between the deceased and 1st respondent under Kikuyu customary law lies on the 1st respondent. They relied on the case of ***Rachel Wanjiru Karanja –vs- Nancy Wambui Kamau, HC SUCC No. 1290 of 2009, where it was held that the essentials of a valid kikuyu customary law is explained in restatement of African law; the law of marriage and divorce by Eugene Cotran, Vol1 Chapter 2 at page 10-15.***

- Capacity which includes age, physical condition and marital status
- Consents of the family of the husband and wife and first and senior wife
- Ngurario Ram slaughtered
- Ruracio part of dowry is paid
- Commencement of cohabitation

It was submitted that the deceased was at all material time sick and was under close observation of family at her house in Ruai since 1998 when she parted ways with her husband due to her illness and hence had no capacity to contract a marriage of any form and further that no marriage customary or otherwise. That the 1st respondent and his uncle only aver having gifted the uncles 14,000/- and did not indicate if at all they met the deceased's parents to seek their consent. That the daughter of the deceased was at the time of the said alleged marriage 7 years and as such her evidence is not admissible. It was submitted that they were beneficiaries of the deceased in that she provided them with assistance and subsistence in form of medical care. That the said grant of letters of administration was issued to a stranger and the same should be revoked as there is no prove of marriage between the deceased and 1st respondent under Kikuyu customary law. They relied on the case of the ***Estate of Dickson Kihika Kimani [2009] eKLR,*** where it was held that, *"there was no prove of marriage under customary law or long cohabitation between the deceased and alleged wife therefore did not warrant her to benefit from the estate of the deceased."*

7. The 1st respondent in his submissions listed the issues for determination as;

i. Whether a valid marriage existed between Peter Irungu and Martha Wangari Nderitu
ii. Essentials presumption of marriage
iii. Who is better placed and entitled to be an administrator and/or beneficiary

The respondent avers that he who alleges must prove. He relied on an affidavit of marriage dated 16/6/2002. On the issue of dowry he sought to rely on the affidavit of his uncle, Simon Irungu Kinuthia who stated that they paid Kshs. 10,000/- as dowry and a further Kshs. 4,000/-. He relied on the case of ***RE ESTATE OF WAKABA, 2004 EKLR,*** "restatement of African Law) Marriage and Divorce, to identify the essentials of Kikuyu marriage which are stated therein as;

i. Capacity of the parties
ii. Consent of parties Ngurario
iii. Ruracio
iv. Commencement of cohabitation

He also relied on the case of ***Florence Wairimu Kanyora –vs- Njoroge Kinyanjui [2005] eKLR. Civil suit No. 11 of 2002*** where it was held that *the applicant was married to the respondent despite the fact that all dowry was not paid and all the ceremonies were not performed."*

8. On essentials to qualify presumption of marriage he relied on Section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides that "***The court may presume the existence of any fact which it thinks is likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case***. It was submitted that the deceased and respondent got married in 2002 and even cohabited leading him to adopt the deceased's daughter. He relied on the case of ***Hortensiah Wanjiku Yahwe –vs- The Public Trustee, Civil Appeal*** No. 313 of 1976 where it was held that long cohabitation as a man and wife may give rise to a presumption of marriage in favour of a person asserting it. Further, it was held that, *"The presumption does not depend on the law or system of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife."*
9. He also relied on the case of ***Phyllis Njoki Karanja and Anor Civil Appeal No. 313 of 2001,*** where it was held that "***the presumption is nothing more than an assumption that parties must be married irrespective of the nature of the marriage actually contracted. 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 a woman is not a mere concubine but that long cohabitation has crystallised into a marriage and it is safe to presume the existence of marriage."*** From the foregoing, he submitted that it was clear that Peter Irungu the 1st respondent had married the deceased and that the 2nd respondent was a child. He relied on ***section 3(2) of the Law of Succession, Cap 160*** which defines a child as, *"…… a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."* Further section 29(c) *"that a dependant includes the husband of the deceased where the deceased was a woman, if he was being maintained by her immediate prior to her death."* As such, the1st respondent is considered as a dependant.

He further relied on Section 66 *which provides that,* ***"When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-***

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

He submitted that Article 27 of the Constitution on equality before the law and freedom from discrimination and he sought protection from the acts of the objector. He further reaffirmed that the he was married to the deceased and that he adopted the 2nd respondent and as such, he is a dependant as provided for under section 29 of the Law of Succession, Cap 160.

10. I have considered the parties affidavits and their written submission. The applicant claims that the 1st respondent is a stranger and should not be an administrator to the deceased's estate. The 1st respondent refutes this allegation stating that he was married to the deceased under Kikuyu customary law. In the case of ***KIMANI VS GIKANGA, (1965) EA 735***, at page 739, Duffus JA expressed himself as follows, ***"To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean*** **that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case**." **{emphasis mine}**

11. On his part the 1st respondent claims that he married the deceased under Kikuyu customary law in 2002 and though their marriage was never blessed with any issue he took up and adopted the deceased's daughter. Further that on 16th December 2006 he and his parents including his uncle went to the applicant's home at Joska along Kangundo road and paid a dowry of Kshs. 10,000/- and a further Kshs. 4,000/- as a gift to the uncles and gave 4 crates of soda. The applicants who are respondents refute this and allege that no dowry or rites were conducted as per the Kikuyu customary law demands. The 1st respondent claims though he performed part of the rites the deceased died before he could conclude the same. According to Dr. Cotran, in Restatement of African Law: Kenya Volume 1, Kikuyu customary marriages involve elaborate rites and ceremonies and concludes that, "***No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered" and that "there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid."*** At no point did the 1st respondent claim that he performed gurario.

12. In the case of ***ZIPPORAH WAIRIMU VS PAUL MUCHEMI, HCCS NO. 1880 OF 1970***, Madan, J (as he then was) considered in detail the essentials of a valid marriage under Kikuyu Customary law and in particular the essence and celebration of ngurario. He concluded as follows; ***"It is not for the girl's father to demand ngurario. Although there is no time fixed for it ngurario must be performed. Both the families of the boy and girl must be present during the performance of ngurario at the girl's home. It must be eaten at the girl's place. It is performed for proclaiming the marriage to members of both families."***

The applicants who are the deceased's parents have refuted the 1st respondent of going to their home to seek their daughter's hand in marriage or even paying any dowry to them. The 1st respondent in his evidence called his uncle who claims to have accompanied him to the decesaed's parent's home to pay dowry. No other witness was called. I find that the evidence adduced would have had more weight had the 1st respondent called more witnesses who attended the said ruracio ceremony. In the case of ***ELIUD MAINA MWANGI V MARGARET WANJIRU GACHANGI [2013] EKLR***, the court held that, "***If the***

essential customary rites and ceremonies were truly held in the presence of so many people and relatives, is it not strange that no other witness was called, save for Kamau Gitundu? True, under the Evidence Act, the matter in issue in this case could be proved even by a single witness. However, since the central dispute is whether a valid Kikuyu customary woman-to-woman marriage was contracted between the deceased and the respondent, it would have been expected that more of the alleged participants in those essential ceremonies would be called as witnesses. That it was only Kamau Gitundu who was called to testify strongly suggests that he was really the only person who accompanied the deceased, as he testified.

It was further held that,

"Even if we allow room for evolution and development of customary law, it does not appear to us that ngurario under Kikuyu customary law has today transformed into a casual ceremony performed by a delegation of just two people."

13. The 1st respondent later on seems to seek comfort in the presumption of marriage on the basis of long cohabitation. In the case of ***NJOKI VS. MUTHERU [1985] KLR 487***, Madan, JA. said the following: ***"It is a concept born from an appreciation of needs and realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the women is left stranded either by being cast away by the "husband", or because he dies, occurrences which do happen, the law subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband".***

In the same case Nyarangi JA. Further stated that, ***"In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute."*** The1st respondent however in his affidavit or submission did not come out clearly for how long he stayed with the deceased as the applicants claim that they were taking care of their daughter since 1998 when she was diagnosed with lupus and as such I find that he has not adduced sufficient evidence to prove that he was cohabited with the deceased and if so for how long.

14. In the court of appeal case of ***ANASTASIA MUMBI KIBUNJA & 4 OTHERS V NJIHIA MUCINA [2013] EKLR,*** it was held that, "***The evidence laid before the learned judge and which we have reviewed, does not prove such a marriage. No witness told the High Court that the deceased and Elizabeth lived together for so long as to gain general repute that indeed the deceased and Elizabeth Nyambura were husband and wife. Evidence has it by the appellants' witnesses that while he lived at Githunguri, she lived at Makadara, Nairobi. In addition, when she died she was buried on her own plot at Ol-jororok – not on Kibunja's land. Having children and naming them after some man's relatives is not itself proof of marriage of any sort. In this case we are unable even to verify that bit by the appellants who claimed that the deceased was their father and he provided for them when he was alive – only to disown them in his will."***

15. I find that in sum, there was no sufficient evidence placed before this court that established a Kikuyu customary marriage or marriage by cohabitation and repute between the deceased and Peter Irungu Gathuita. The two could have been having a relationship but no marriage, as such I find that it is in order to revoke the grant of letters of administration issued to Peter Irungu Gathuita and Abigael Njoki Mwinyi on 6th August 2012. I find that the applicants, the decesaed's parents have proved that the deceased was taking care of them. The applicants are dependants as the deceased's parents are dependants as provided for under Section 29 and as such they are entitled to reasonable provisions as the court may think fit out of the deceased's net estates provided for under section 26 of the Law of succession Act, Cap 160. I find that it is in order that a new grant of letters of administration to the decesaed's estate be issued to Abigael Njoki Mwinyi and the 1st applicant to assist in administration of the deceased's estate. The two administrators shall apply for the confirmation of the same before this court and the court shall apportion the provision for the dependants and what should devolve to the deceased's only beneficiary Abigael Njoki Mwinyi. Costs in the cause. It is so ordered.

Dated, signed and delivered this 2nd day of October 2015.

R. E. OUGO

JUDGE

In the presence of;

..... For the Applicants

..... For the Respondents

Ms. Charity Court Clerk