



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.3270 OF 2003

IN THE MATTER OF THE ESTATE OF NJOKA WAKIORIAH (DECEASED)

TITUS KIRAGU NJOKAH.....1ST APPLICANT

SUSAN KIRAGU.....2ND APPLICANT

CATHERINE GATHONI NJOKA.....3RD APPLICANT

KENNEDY KIORIAH NJOKA.....4TH APPLICANT

VERSUS

ESTHER WAGIKONDI NJOKA.....1ST PETITIONER/RESPONDENT

KIORIAH NJOKA2ND PETITIONER/RESPONDENT

JUDGMENT

Njoka Wakioriah, the deceased to whose estate these proceedings relate died on 11th October 2002. A dispute arose regarding the extent of the properties that comprise the estate of the deceased and the question of who are the dependants of the deceased. The 1st and 2nd Applicants, a husband and wife, petitioned the court seeking to have an agreement that they had allegedly entered with the deceased for the purchase of part of parcel of land registered as LR. No. 10317/14 (suit parcel of land) recognized by the court. Whereas the 1st and 2nd Applicant claim that the deceased sold them 100 acres out of the suit parcel of land, the Respondents insist that the only acreage that was sold by the deceased was 50 acres. That dispute is yet to be resolved. The dispute that took priority to be determined by the court was the claim that was lodged by 3rd and 4th Applicants. The 3rd and 4th Applicants claimed that they are, respectively, daughter and son of the deceased. It was their case that the deceased was married to their late mother by the name Jacinta Muthoni Njoka. The deceased sired the two of them with their late mother. Their late mother was married to the deceased as a second wife. Although their mother was separated from the deceased at the time of his death, it was the 3rd and 4th Applicants' case that they be recognized as dependants of the deceased and therefore beneficiaries of his estate. On their part, the Respondents, the wife and son respectively of the deceased, denied the claim by the 3rd and 4th Applicants to the effect that they are children of the deceased. They denied that the deceased was married to the mother of the 3rd and 4th Applicants. They further denied being aware that the deceased was married to the mother of the 3rd and 4th Applicants as a second wife.

When the matter came up for directions before the court, it was determined that the issue that would be

given priority was the identification of the dependants of the deceased. In that regard, it was agreed that parties would adduce *viva voce* evidence to establish their respective cases. Hearing commenced before Koome J (as she then was). A substantial part of the case was heard Dulu J. The parties to the case agreed that this court writes its judgment on the basis of proceedings before the two Judges. Learned counsel for the 3rd and 4th Applicants and the Respondents agreed to file written closing submission. The said submission were duly filed.

The 3rd and 4th Applicants called four (4) witnesses in a bid to prove their case. They called Winfred Muthoni Kariuki (PW1), Serah Wanjiru (PW2), Catherine Njoka (3rd Applicant - PW3) and Kennedy Kioriah Njoka (4th Applicant – PW4). It was the 3rd and 4th Applicants' case that they were the children of the deceased born of Jacinta Muthoni Njoka (Jacinta). PW2 the mother of Jacinta testified that Jacinta met with the deceased while she was undertaking a typing course in Nakuru. They started a relationship which resulted in Jacinta becoming pregnant. When she became pregnant, it was PW2's testimony that the deceased, who was known to her, went to see her and sought her daughter's hand in marriage. The deceased introduced himself to her. He gave her Kshs.10,000/- during the introductory visit. She however testified that although the deceased started living with Jacinta at his farm in Naivasha, the deceased did not perform the Kikuyu Customary marriage rites. This was despite the fact that the deceased later gave her Kshs.25,000/-. She testified that Jacinta lived with the deceased for a period of about six (6) years before she separated from him and relocated to Nakuru. She was emphatic that the 3rd and 4th Applicants were born to Jacinta in the period that she was living with the deceased. PW2's testimony was corroborated by PW1 Winfred Muthoni Kariuki. She testified that she was one of the widows of Kariuki Chotara (deceased). Kariuki Chotara was in a partnership with the deceased which bought the parcel of land which was later subdivided into various portions. She recalled that before her late husband built her a house, they used to live in a residential house that was constructed by Settlers. They lived in this house with the family of the deceased. It was her testimony that she saw the deceased live in part of the said house with his two wives namely Esther Njoka and Jacinta Njoka. In the period that they resided in the house before she relocated to her newly constructed house, she saw the deceased live in harmony with his two wives. She testified that the deceased sired two children with Jacinta. The deceased had nine children with Esther. It was her testimony that the 3rd and 4th Applicants are children of the deceased and should therefore be recognized as his dependants.

On their part, the 3rd and 4th Applicants testified that they were children of the deceased. They told the court that they were born when the deceased lived with their mother, Jacinta. In support of their case, they produced their birth certificates which indicated that their father was the deceased. Although the 3rd and 4th Applicants were born, respectively, on 21st December 1978 and 3rd April 1980, their birth certificates were secured respectively on 23rd July 1984 and 23rd May 1985. It was their testimony that the deceased paid for their education even when he was separated from their mother. Their mother died in 19th June 1998 as a result of a road traffic accident. They told the court that upon her death, their mother was buried in Nakuru North Cemetery. The deceased did not attend the funeral. Two of his children however attended the funeral. The 3rd and 4th Applicants were hard-pressed to explain why their deceased mother was not buried in the deceased's parcel of land at Naivasha. They explained that the reason why the deceased was buried in Nakuru and not at the Naivasha farm was due to the hostility of the family of the Respondents. The 3rd and 4th Applicants pleaded with the court to recognize them as dependants of the deceased by virtue of the fact that they were his children.

On their part, it was the Respondent's case that the 3rd and 4th Applicants were not the children of the deceased. Before the hearing of the case commenced, Esther Wagikondi Njoka, the 1st Petitioner/Respondent died. The only Respondent who therefore defended the case was 2nd Petitioner/Respondent. The Respondent called four (4) witnesses namely DW1 Michael Wainaina Kiraru, Jane Wangeshi Njoka (DW2), Euticus Wambugu Kiuria (DW3) and Anne Wangari Njoka (DW4). The above witnesses testified that the 3rd and 4th Respondents were unknown to the family of the deceased. DW1 the Area Chief of Naivasha East Location testified that in the period that he knew the deceased, he was unaware that the deceased was married to a second wife or that he had sired children out of wedlock.

He testified that during the funeral, no one came forward to identify himself or herself as a child of the deceased. As far as he was concerned, the deceased had children by his only wife Esther Njoka. DW3, the younger brother of the deceased testified that the deceased was married to only one wife. It was his evidence that during his lifetime, he had a close relationship with the deceased. The deceased had not intimated to him that he had married another wife. He did not attend any ceremony to celebrate the marriage of another wife other than the deceased's only wife Esther. He wondered, if indeed the 3rd and 4th Applicants were children of the deceased, why they had not introduced themselves to him as their paternal uncle. He was emphatic that the 3rd and 4th Applicants were not children of the deceased because if they were, the deceased would have informed him.

On their part, DW2 and DW4, the daughters of the deceased testified that as far as they were concerned, the 3rd and 4th Applicants were not the children of the deceased. They denied the claim by the said Applicants which was to the effect that their mother lived with the family of Esther during their infancy. They testified that the deceased was only married to one wife, their mother. At no time had any other woman lived with them in their homestead at Naivasha. DW2 testified that she knew Jacinta, the mother of 3rd and 4th Applicants, through her mother (Jacinta's) Serah Wanjiru. She knew Serah because she was her neighbour. They also attended the AIPCA Church together. It was her testimony that she attended the funeral of Jacinta when she died. She produced a copy of Jacinta's funeral programme. The eulogy did not state that Jacinta was married to the deceased. Rather, the eulogy stated that the deceased was a single parent of three (3) children. When she was asked whether she would mind the 3rd and 4th Applicants submitting themselves for DNA to determine their paternity, she was non-committal. DW2 and DW4 reiterated that the 3rd and 4th Applicants were not children of the deceased and therefore not his dependants.

The issue for determination by this court is straight forward: *are the 3rd and 4th Applicants the children of the deceased?* Conflicting evidence was adduced by the Applicants and the Respondents. It was obvious that each party adduced evidence to support their held positions. According to the 3rd and 4th Applicants, although their mother Jacinta was not formally married to the deceased, nevertheless she was the wife of the deceased during the period that they were born. It was their testimony that the deceased lived with their mother Jacinta for a period of six (6) years between 1978 and 1984. They lived at the deceased's parcel of land at Naivasha. However, in 1984 the deceased separated from their mother. Their mother relocated to Nakuru where she started a business. It was their evidence, that despite this separation, their mother told them that the deceased continued to support them by providing funds for their education. The Respondent disputed this fact. He was emphatic that the 3rd and 4th Applicants were not children of the deceased, firstly, because their mother was not formally married to the deceased, and secondly, because the deceased did not recognize the 3rd and 4th Applicants as his children during his lifetime.

Under **Section 29(a)** of the **Law of Succession Act**, a dependant is defined as:

“the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”

The position of the law is that children of a deceased, whether born in or out of wedlock, are recognized as his dependants in succession. In the present case, much energy and effort was applied by the parties in their bid to establish the question whether or not Jacinta was married to the deceased. In this court's considered view, whereas the fact of the marriage of Jacinta to the deceased would corroborate the 3rd and 4th Applicants' case that they were children of the deceased born during the subsistence of the marriage, failure to establish the existence of the marriage will not prevent this court from making further inquiry on whether the deceased sired the said Applicants in the course of having a relationship with their mother. The 3rd and 4th Applicants produced birth certificates which indicated that they were children of the deceased. The birth certificates were obtained in 1984 when it was alleged their mother had separated from the deceased. The 3rd and 4th Applicants did not produce any documentary evidence in which the deceased specifically recognized them as his children. The eulogy of their mother did not reveal who their father was. The position taken by the Respondents to the effect that the 3rd and 4th Applicants were not

the children of the deceased may well be the correct position. However, doubt was raised in this court's mind when it is considered that the 3rd and 4th Applicants share similar names with that of the Respondent and his siblings. This court took judicial notice of naming of children among the Kikuyu community: the children are named, in the first instance, after their paternal grandparents. This court is persuaded that the deceased may have had a relationship with the mother of the 3rd and 4th Applicants which resulted in their birth.

This court is mindful of the fact that the quality of evidence adduced by both parties has not shone much light regarding the paternity of the 3rd and 4th Applicants. However, with a view of resolving the case with certainty, this court hereby orders the 3rd and 4th Applicants, and the Respondent and his two sisters Jane Wangeshi Njoka and Anne Wangari Njoka shall submit their respective biological samples to the Government Chemist for the purposes of ascertaining their paternity through DNA. The purpose of the DNA test is to determine whether the father of 3rd and 4th Applicants is same as father of the Respondent, Kioriah Njoka, Jane Wangeshi Njoka and Ann Wangari Njoka. The said parties shall submit their biological samples to the Government Chemist within fourteen (14) days of the delivery of this judgment. The costs of the DNA examination shall be borne by each party. The parties shall be at liberty to mention this case before this court thirty (30) days from the date of delivery of this judgment for final orders. As regard costs, the court shall issue appropriate orders on that mention date. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2014

L. KIMARU

JUDGE