



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Succession Cause 2163 of 2011

### IN THE MATTER OF THE ESTATE OF GEOFFREY GITHU KAHORO -(DECEASED)

#### RULING

The applicants' summons for revocation is dated 7th March 2012. It is premised on **Sections 76** and **83** of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules. It seeks revocation or annulment of the grant made on 13th February 2012 to Hellen Wanjiku Githu Kahiro and Everynne Wanjiru Githu Kahiro.

The application is supported by the joint affidavit of Ruth Nyambura Waburi and Peter Kahiro Ngugi, sworn on 7th March 2012. Both applicants have also filed separate affidavits sworn on 26th September 2012. The application is opposed by the respondents, who are also the administrators of the estate. The respondents have sworn a joint affidavit on 24th April 2012, misleadingly headed “**supporting affidavit**”. The 1st respondent has also sworn a replying affidavit to the further affidavits of the applicants, on 12th October 2012 and filed in court on 12th October 2012. There is also a reply by a James Maina, a church minister, in response to allegations made in the further affidavits of the applicants. Mr. Maina's affidavit was sworn on 12th October 2012.

The directions given by court, on the disposal of the application, were that the matter would be determined on the basis of affidavit evidence and written submissions. Both sides have filed lengthy written submissions supported by several authorities.

The applicants' case is that the grant was obtained by fraud and misrepresentation, as the 1st applicant and her daughter have been omitted from the list of beneficiaries and are likely to be disinherited. The 1st applicant alleges to be the second wife of the deceased. The 2nd applicant is the father of the deceased and father-in-law of the 1st administrator/respondent. The applicants allege that the 1st applicant was the wife of the deceased. The two had a relationship dating from 2003 and they had cohabited at the Ongata Rongai police lines. The deceased recognized his two wives and provided for both of them. She was recognised by the extended family as a wife deceased of the and was involved in the funeral arrangements. She asserts that she was married to the deceased under Kikuyu customary law. The 1st applicant also alleges that her daughter was a biological child of the deceased and that the deceased used to support her financially. During the life time of the deceased, the 1st administrator/respondent is alleged to have had recognised the 1st applicant as a life. The 1st applicant also alleges that she holds some original documents of ownership of some of the deceased's property.

On their party, the respondents aver that they are the legal wife and biological daughter of the deceased. The 1st respondent asserts to be the statutory wife of the deceased, and there is a certificate of marriage to support this allegation, attached to the respondents affidavit. The respondents allege that the deceased lived with them at Kahawa West until he met his death on 29th June 2011. The couple was blessed with two children, that is the 2nd respondent and another. They assert that the 2nd respondent is a

biological child of the deceased contrary to the allegations of the applicants. The 1st respondent asserts that she was the only wife recognised by the authorities, as after the deceased's demise his personal and household effects were released to her. She also says that the official condolences from the Commission of Police were directed to her and in the said condolence message only the 1st respondent and her two children were recognised. She was similarly acknowledged by the Department of the Administrator General/Public Trustee as the next of kin, and she is the one to whom the body of the deceased was released by the Kenyatta University Funeral Home. She asserts that the 1st applicant was never married by the deceased as she was never acknowledged in any official document. She says that having been married under statute any other alleged union was a nullity. She further says that the daughter of the 1st applicant was not a biological child of the deceased. Finally she asserts that the fact of having photographs taken together with the deceased was not sufficient evidence of a marriage between the deceased and the 1st applicant.

In their further affidavits, the applicants claim that the 1st respondent was never married to the deceased in church but under Kikuyu customary law. The 2nd applicant challenges the validity of the certificate of marriage exhibited by the 1st respondent saying that there was no church wedding ceremony, for if there were such an event he would have been aware of it as the father of the groom. He asserts that both women were widows of the deceased, married to him under Kikuyu customary law. On her part, the 1st applicant has exhibited documents to prove that her daughter was the biological child of the deceased. In her further reply, the 1st respondent asserts that she contracted a marriage with the deceased in church. She concedes that she had previously married the deceased under customary law. She asserts that daughter of the 1st applicant is not a biological child of the deceased, and if she was in fact his child, the 1st applicant ought to have had a DNA test done before the burial. Her story is supported by James Maina, the bishop of the church where the alleged wedding ceremony was conducted.

The issues raised in this matter are weighty. It is unfortunate that the case was not heard orally, where some of the assertions made in the affidavits on record could have been tested by way of cross-examination. Issues such as the validity of the 1st respondent's marriage certificate, the paternity of the 1st applicant's daughter and the validity of the 1st applicant's alleged customary law marriage could only be effectively dealt with by way of *viva voce* evidence. Affidavit evidence alone is inadequate to deal with such issues.

There is only one critical issue for determination – whether the 1st applicant was a lawful wife of the deceased to warrant her being provided for from the estate of the deceased. All the other issues would naturally be answered once this critical issue is determined.

The 1st applicant appears to be advancing two positions. One, that she was married to the deceased in accordance with Kikuyu customary law, and two, that she had a prolonged co-habitation with the deceased which ought to give rise to a presumption of marriage.

On the customary law marriage between the deceased and the 1st applicant, very little light has been shed on the matter. In their main affidavit sworn on 7th March 2012, the applicants assert, in paragraph 10, that both wives were married under customary law. No details are given at all as to when this happened and the specific customary law rites that were performed. Three photographs have been annexed to this affidavit said to be of a function when the deceased paid dowry for the 1st applicant. There is nothing in these photographs to show that the function was in connection with payment of dowry. Photographs do not talk, life should have been breathed into them by the parties giving oral evidence.

The further affidavits of the applicants do not help either. The 2nd applicant, the father of the deceased, in his affidavit sworn on 26th September 2012 merely repeats, at paragraph 11, the assertion made in paragraph 10 of the affidavit of 7th March 2012. The 1st applicant, the person who was allegedly married under customary law, merely says, at paragraph 5 of her affidavit sworn on 26th September 2012, that the deceased married her customarily.

The requirements of a Kikuyu customary law marriage are very well documented in such texts as the **Cotran's Restatements** and Jomo Kenyatta's **Facing Mount Kenya**. The requirements are also stated in

several cases such as **Gituanja -vs- Gituanja (1983) KLR 575**, **Case -vs- Ruguru (1970) EA 55**, **Muigai -vs- Muigai (1995-1998) EA 207**, **Peter Hinga -vs- Mary Wanjiku Nairobi HCCA No. 94 of 1977** and **Zipporah Wairimu Muchemi -vs- Paul Muchemi Nairobi HCCC No. 1280 of 1970**, among others. The critical ceremonies are the performance of *ngurario and ruracio*. The evidence placed before me does not establish that these all important ceremonies were performed. I am not convinced that the 1st applicant was a customary law wife of the deceased.

Could marriage be presumed from prolonged co-habitation between the deceased and the 1st applicant? The Kenyan law on this was authoritatively stated in **Hortensia Wanjiku Yawe -vs- The Public Trustee Court of Appeal Civil Appeal Number 13 of 1976**, where it has held that the fact of a long co-habitation between a man and a woman can give rise to a presumption of a marriage in favour of the woman, which presumption can only be rebutted or displaced by cogent evidence to the contrary.

This position has been followed in a long line of decisions. **In In Re the Estate of Gerald Kiragu (Deceased) (2006) eKLR** and **In the Matter of the Estate of John G. Kinyanjui Nairobi HCP&A No. 317 of 1984** it was held that cohabitation can be evidence from which it can be presumed that the parties to the cohabitation are married. The cohabitation itself is not tantamount to marriage as marriage entails clear legal obligations and cohabitation does not entail such obligations, hence the need to presume marriage from the cohabitation. **In in the Matter of the Estate of Evanson Kungu Mureithi Nakuru HCP&A No. 163 of 1995**, it was held that the birth of children who are named after the husband's parents is a factor to be taken into account. **Sylvester Kongo Mukono and another -vs- Geoffrey Ndungu Muigai & another Nairobi HCP&A No. 2398 of 2002** held that where a man and a woman live together, had a child, constructed a house and both their families recognised their relationship as husband and wife gave rise to a presumption of marriage. **In Christopher Nderi Githambo -vs- Samuel Muthui Munene Nairobi HCCC No. 1372 of 2001**, in defining cohabitation the court took into account the cohabitant's financial arrangements and adoption of the same second name.

In the main affidavit, sworn on 7th March 2012, the applicants aver that the deceased cohabited with the 1st applicant at the police lines at Ongata Rongai. The deceased was apparently based in Ongata Rongai area station before he was transferred to Tana River. There is support for this position in the letter of condolence dated 6th July 2011 sent to the 1st respondent by the Commissioner of Police and which is exhibited to the respondents affidavit sworn on 24th April 2012, where it is marked **HWEW -6**. It is indicated that he was serving in the Nairobi area before he was transferred to Tana River. Indeed, on the day he died it is alleged that he had spent the day with the 1st applicant at Ongata Rongai before he went to the home of the 1st respondent at Kahawa West where he was killed at the gate. The applicants have annexed copies of media reports following the deceased's killing where the 1st applicant is identified as a second wife of the deceased. The applicants have also exhibited material at the time of the burial showing that the 1st applicant was recognised as a wife. There is the obituary appearing at page 58 by the ***Daily Nation*** of 5th July 2011 and the funeral programme dated 7th July 2011. There are also family photographs involving individuals from both sides of the family. Letters from the provincial administration, dated 7th March and 16th December 2011, also identify the 1st applicant as a wife. The 2nd applicant, the father of the deceased, asserts in the affidavit of 24th March 2012 that the 1st applicant was a wife of the deceased. In her further affidavit of 26th September 2012, the 1st applicant says that she has in her possession original documents of ownership of some of the assets of the deceased.

To this story, the respondents reply that the 1st applicant was never the wife of the deceased. They say that she was not recognised by the police authorities as the condolences were not addressed to her neither was any reference made of her. They also assert that the deceased's personal and household goods, as well as benefits were given to them and not the 1st applicant. They state that the fact that the 1st applicant appeared in some photographs with the deceased and other family members is not indication of the existence of a marriage. It is instructive that the respondent have not addressed the issue of the alleged cohabitation between the deceased and the 1st applicant nor of the involvement and recognition of the 1st applicant as a wife during the funeral preparations.

I have reviewed this evidence. The cohabitation between the deceased and the 1st applicant at the Ongata Rongai police line has not been denied by the respondents. The fact that she was also recognised as a wife

is the obituary and the funeral programme has not been controverted by the respondent. The respondents also appear to acknowledge that the 1st applicant appeared in the photographs with the deceased and other family members. The respondents have also not responded to the claim by the 1st applicant that she holds certain original documents. No report appears to have been made to the police of the loss of these documents, and it would appear that they have come to the 1st applicant's possession lawfully. Then there is the issue of the child, Lakeisha Wairimu. There is a certificate of birth exhibited to the second affidavit of the 1st applicant, although the respondents assert that she is not the biological child of the deceased. I am convinced that there was cohabitation between the deceased and the 1st applicant and that there is evidence that they regarded each other as husband and wife, and indeed were treated as such by those that they interacted with. I feel justified to presume marriage between the deceased and the 1st applicant, and I hold that she was indeed his wife and ought to be treated as a widow for the purposes of these succession proceedings.

What is the position of her daughter? The respondents say that she is not the biological child of the deceased; and assert that a DNA test ought to have been done. There is a certificate of birth showing the deceased as the father of the child and so does the child health card. There is no evidence that she is not the biological of the deceased. Even if she were not, it would appear that she was recognised by the deceased as his child. There are photographs of the child with the deceased and the 1st applicant, and also evidence that she was recognised as his child in the obituary and the funeral programme. I hold that she is a child for purposes of succession.

There were secondary issues raised as to whether the 1st respondent and the deceased contracted a statutory marriage. The deceased's father in his affidavit asserts that there was no wedding as alleged. The 1st respondent attached a copy of a certificate of marriage and even got the church minister who officiated at the wedding to swear an affidavit. It is not in dispute that the 1st respondent was a customary law wife prior to her going through the disputed ceremony of marriage. The evidence relating to the statutory marriage has not, in my view, been effectively controverted. I am convinced that church wedding was conducted and a proper certificate of marriage issued.

As to whether her daughter, the 2nd respondent, is not the biological child of the deceased, I take the view that there is no evidence to support that assertion. There is a supporting certificate of birth, which shows the deceased as the father of the child. No evidence has been presented to challenge the authenticity of the certificate. The child was also accepted by the deceased and raised as his own child. I believe that it would not matter whether she is his biological child or not.

This is an application for revocation of grant. The law on revocation of grants is Section 76 of the Law of Succession Act. The court may revoke or annul a grant where:-

**(a) the proceedings to obtain the grant were defective in substance,**

**(b) the grant was obtained fraudulently by the making of a false statement or concealment from court of something material.**

**(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law.**

The question is whether this application comes within the ambit of **Section 76** of the Law of Succession Act.

From the evidence on record, it is clear that the respondents knew of the 1st applicant as the wife of the deceased. She was referred to as such in the media reports following the killing of the deceased. The obituary and the funeral programme recognised her as such. The letters issued by the chief of Bibirioni Location and District Officer of Limuru, to support the petition for the grant, all identify her as such. It is instructive that the respondents relied on a letter of the chief of Kahawa Location where the deceased and the respondents resided as opposed to where the deceased hailed from and was buried. There was concealment or suppression of material information. The statement that the deceased had only one wife and two children was false, and this made the process of obtaining the grant fraudulent. **In In the Matter**

**of the Estate of David Kamethu alias David Maina Kinyanjui (Deceased) Nairobi High Court P&A No. 130 of 2002**, it was held that a grant is liable for revocation for failure to disclose in the petition some of the survivors of the deceased. The respondents are clearly guilty of the wrongs listed in **Section 76** of the Law of succession Act and the grant made to them on 13th February 2012 should be revoked.

Owing the above, I revoke the grant made to the respondents. However, instead of letting the parties start the process of petitioning for a fresh grant, I direct:-

- (1) That a fresh grant be made jointly to Hellen Wanjiku Githu Kahiro and Ruth Nyambura Waburi.
- (2) That Plot No. **3233/Business – Namanga T. Centre and Plot No. 166/Residential \_ Masimba T. Centre** be entered into the list of assets.
- (3) That Ruth Nyambura Waburi and Lakeisha Wairimu Githu be entered into the list of the persons who survived the deceased.
- (4) That there will be no order on costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 7<sup>th</sup> DAY OF MARCH, 2013.**

**W. M. MUSYOKA**

**JUDGE**