



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 375 of 1994

IN THE MATTER OF THE ESTATE OF SAMUEL KIARIE KIRIMIRE (DECEASED)

RULING

Monicah Njoki claims that she is the third widow of the deceased the other widows being Mary Njeri Kiarie (first wife) and Perpetua Wairimu (second wife). Perpetua Wairimu denies that Monica Njoki is a wife of the deceased. She however recognizes Mary Njeri as the first wife of the deceased though she was estranged from deceased. Monica Njeri testified that:

1. She got married to the deceased under Kikuyu Customary Law in 1994 and were living in a two roomed rented house at Limuru. That they got four children

- (a) Naomi Mumbi
- (b) Hannah Wambui
- (c) James Kariuki
- (d) Joseph Lenana Kiarie

3. Dowry was paid to her mother in 1983

4. Deceased built a house in his farm at Njabini South Kinangop in August 1992 and took her and Perpetua Wairimu to live in Njabini

5. She was named in the death announcement and in the funeral programmes as wife of deceased and was photographed with Perpetua Wairimu laying a wreath on the grave

6. Deceased was educating his four children she did not call any witnesses

Perpetua Wairimu (DW1) testified that she got married to deceased under customary law in 1966 and that she has eight children and was living with deceased in deceased's house in Banana. It is her evidence that she started seeing Monica Njoki about three months before death of her husband and learnt that she was deceased's friend. Her other evidence is, inter alia as follows:

- (a) That she is not aware that her husband paid any dowry for Monica Njoki
- (b) That deceased had not built for Monica and her children in any of his properties and that Monica has never lived in Njabini

- (c) That none of Monica's children are named according to the customs after the parents or relatives of the deceased.
- (d) Deceased was admitted in Nairobi hospital for 9 months and was in the ICU for 4 months and she is the one who was sleeping at the Hospital whenever dialyses was being done.
- (e) Monicah Njoke used to visit deceased at hospital while in company of many other people.
- (f) She is the one who paid heavy hospital bill and arranged anharambee to raise money to pay hospital bills without anyhelp from Monicah Njoki
- (f) She was not in control of the funeral programs and was not aware when Monicah Njoki was included as a wife and photographed during the funeral.

Perpetua Wairimu called three witnesses - Peter Mwaura (DW2); John Wadiniba Kimani (DW3) and Edward Njuguna Wairunge (DW4). DW2 testified, inter alia, that he was a partner in Alaska Bar in Limuru with deceased and another person; that he was working at YOUNG BAR LIMURU as cashier and Monica Njoki was employed as a bar maid in the same bar; that they worked in the same bar for 4-5 years; that Monicah Njoki was a close friend of Ngige Mani though they never married and were living together in Kamirithu in the same house she lives today; that Monicah Njoki was not married to the deceased and was not staying in her home at Kamiritha; that Monicah Njoki had two children when she came to Kamirithu and got two more children at Kamirithu.

DW3 says that deceased was his uncle and has never known Monica Njoki as wife of the deceased. DW4 is *the* younger brother of the deceased. He testified, inter alia, that he was very close to the deceased; that deceased was living at Njiku with Perpetua in a big house built on the land of deceased; that he was also living in the same land; that he saw Monica Njoki for the first time in court; that is Perpetua Wairimu and him who were looking after deceased when deceased was hospitalised for 5 months and when he was at home for 3 months on dialysis that at the time of death deceased was living at his farm in Jabini with Perpetua Wairimu where she lives even to day.

The essentials of a valid Kikuyu marriage are stated in chapter 2 page 3 of Contrans CASE BOOK ON KENYA CUSTOMARY LAW. They have been considered in detail in the case of ZEPORAH WAIRIMU VERSUS PAUL MUCHEMI NAIROBI HCC NO. 1280 OF 1970 reported at page 52 of the same casebook. According to that decision the first step after the woman has agreed to marry the man is the ceremony of 'NJOHI YA

NJURIO" Followed by payment of "MWATI NA HARIKA" The payment of "Mwati na "HARIKA" and the drinking of beer constitute a valid Kikuyu marriage and the dowry is paid after payment of "Mwati na Harika" "NGURARIO" which gives final sanction of the validity of the marriage can be performed later. There are of course modern variations of those customary ceremonies including the payment of money as substitute to any of the customary ceremonies or payment.

Now Monica Njoki gave very brief evidence of the customary marriage and did not call any witnesses. She did not say that "Njohi ya Njurio;" Mwati na Harika" ceremonies were held or any money paid as substitute. She merely said that dowry was paid in 1983.

She does not say in what form it was paid or how much. She does not say who accompanied deceased when dowry was being paid. In brief, there is no evidence that customary prerequisites were followed.

Although Monica Njoki at first said that she and deceased had four children, she accepted that deceased is not the biological father of her two sons and that she meet him when she already had the two sons. She however says that deceased adopted them as his children. She claimed that she had birth certificates for the children and that she would produce them but later failed to produce them. There is no material evidence that deceased used to educate or support the children. Moreover, even the last two children are not named in under Kikuyu custom. None of the two girls bears the name of deceased's mother.

There is no concrete evidence that deceased substantially cohabited with Monica Njoki as husband and wife., It is evident that she has through out been living in a two roomed house at Kamirithu and that deceased.

Was living with Perpetua Wairimu in his big house at Banana. Monica Njoki does not say what work she was doing in Limuru as a wife of the deceased. Her evidence that she was living with deceased in the two - roomed house has been discredited by the evidence of Peter Mwaura (DW2) who testified among other things that he worked in the same bar with Monica Njoki for 4 -5 years and that she was living with another man. That evidence has not been rebutted.

It is evident that deceased was a wealthy man and could have built a house for her if he wanted. Monica Njoki stated that deceased wanted to build a house for her at Jabini farm but later stated that deceased wanted to buy a farm at Gilgil and build a house for her there but he died before he purchased the land. She, at first, testified that she was living with deceased and Perpetua Wairimu in Jabini Farm from August 1992 but later testified that he has been living in Limuru and was only going to Jabini to cultivate.

It is apparent from the evidence of DW2 DW3 and DW4 that Monica Njoki was not known as wife of the deceased by deceased's associates and relatives.

It is true that she bears the name of the deceased in her I.D card but that I.D card was issued in 1994 after the death of the deceased in 1993. It is also true that the name Kiarie appears in the I.D Cards of Naomi Mumbi obtained in 1992 and in the ID cards of James Kariuki and Jospheh Lenana. But their certificates of birth were not produced. We do not therefore know whether the names, in the respective I.D cards corresponds with the names in the respective certificates of birth. Even if the certificates of birth were stolen she could have easily obtained certified copies from the registrar of persons. Monica's strongest evidence is the fact that she was named as wife of the deceased in the Eulogy and that she was accorded the honour of a wife of deceased during the funeral by being photographed with Perpetua Wairimu and lying a wreath in the company of Perpetua Wairimu. But the fact that she was the wife of the deceased has to be supported by other evidence of marriage prior to the death of the deceased. She did not call the people who included her as wife of the deceased in the Eulogy to testify that she was infact a wife of the deceased and the grounds on which they included her as a wife of the deceased. It is evident that the Eulogy was made by the funeral committee and not by Perpetua Wairimu. Similarly, she did not call any of the persons involved in the funeral programme to say why they accorded her the honour of a widow. In any case, the inclusion in the Eulogy as a wife and the honour accorded at the funeral can only be evidence of the reputation the honour accorded at the funeral can only be evidence of the reputation that she was a wife of the deceased. Such evidence of reputation is essential when court is being asked to presume a marriage from long cohabitation and repute, Monica's case is different. She claims to have been married by deceased under Kikuyu customary law. She is not asking the court to presume a marriage from long cohabitation and reputation. Even if that was the case, there is no sufficient evidence of long cohabitation. The fact that she was included as wife of the deceased in the Eulogy and the fact that she laid a wreath as wife of the deceased or was photographed with the family of the deceased, do not, on their own prove a customary marriage.

I am not satisfied that Monicah Njoki has proved that she was married by deceased under Kikuyu customary law.

Consequently, I find that she and her children are not heirs of the estate of the deceased. I order that the Grant be amended to remove her name as administratrix of the estate of the deceased.

After consulting, Perpetua Wairimu on the issue of costs she says she has forgiven Monica for costs and so, I make no orders as to costs.

E.M. Githinji

JUDGE

25.2.99 Monica present Perpetua present Mr. Kany present Mr. Wadugi absent Mr. Kanyi

I apply for leave to appeal 1 also apply for proceedings and ruling

E.M. Githinji

JUDGE

Order: Ruling and proceedings to be typed and copies supplied leave to appeal granted

E.M. Githinji

JUDGE