



REPUBLIC OF KENYA

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

Succession Cause 2411 of 1995

IN THE MATTER OF THE ESTATE OF JOHNSON KAMAU KOMO (DECEASED)

JANE MBERE KOMU..... 1st APPLICANT

ELIJAH KARIUKI KOMU..... 2nd APPLICANT

CAROLINE WANJIKU KOMU..... 3rd APPLICANT

MARY WANJIKU KOMU..... 4th APPLICANT

VERSUS

LEAH NGENDO KOMU..... 1st RESPONDENT

OBADIA THIONGO NGWIRI..... 2nd RESPONDENT

RULING

The applicants pray for an order that reasonable provisions be made for them under S. 26 of the Law of Succession Act from the estate of the deceased. The Respondents are the executors of the will of the deceased dated 22.11.94.

The Respondents has filed a petition for Grant of probate of the will. The first Respondent is a widow of the deceased. The first applicant is the mother of the 2nd 3rd and 4th applicants. The first applicant claims that she is also a widow of the deceased and that the 2nd 3rd and 4th applicants are the children of the deceased. The first Respondent disputes this. As a result Oral evidence has been received to determine the status of the applicants in relation to the deceased.

The first applicant testified, inter alia, that:

- (a) She met deceased in 1981 who married her under Kikuyu customary law.
- (b) That in December 1981 deceased with elders visited her parents to report that he had married her and gave her parents shs 2000/= on that occasion.
- (c) That thereafter she lived with deceased as husband and wife at various construction sites and from 1984 in the deceased house at Sabugo in Nyandarua

(d) That they got three children - Caroline Wanjiku Komu born on 26.9.97 but she admits that deceased is not the biological father of the child; Elijah Kariuki Komu born on 1.8.87 and Mary Wanjeri Komu on 1.7.90 (e) That in 1986 deceased visited her mother and paid shs 4000/- as dowry and that deceased also built a semi permanent house for her mother as part of the dowry.

(f) That she was described in the eulogy at the burial of deceased as second wife of deceased and that she was received as wife of the deceased at the funeral.

(g) Deceased used to pay school fees for three children.

JANE MBERE KOMU called four witnesses viz: Joseph Karanja Kariuki (PW2) - younger brother of the deceased; Edward Chege Kariuki (PW3) - brother of deceased, John Njuku Kariuki (PW4) deceased brother and Bilha Wanjiku Kariuki (PW4) - deceased brother and Bilha Wanjiku Mungai (PW5) her mother.

Leah Ngendo Komu (DW3) called three witnesses viz Wanjeri Kariuki (DW1) - mother of the deceased; Isaac Komu (DW2) cousin of deceased and Obadiah Thiongo Ngwiri (DW4) an advocate of the High Court of Kenya and one of the executors of the will of the deceased. Deceased's will and a friend.

The case of Leah Ngendo Komu is that Jane Mbeere Komu was not a wife of the deceased but only an employee.

I have considered the evidence from both sides. Two of the brothers of the deceased, which is Joseph Karanja Kariuki (PW2) and Edward Chege (PW3) gave evidence that Jane Mbeere Komu was a wife of the deceased. But John Njuku Kariuki (PW4) - a brother of the deceased and Wanjeri Kariuki (DW) a mother of the deceased gave evidence that Jane Mbeere Komu was not a wife of the deceased. So, it is clear that the family of the deceased is split in the middle on the issue. The essentials of a valid Kikuyu customary marriage are stated in chapter 2 page 30 of *Conran's CASEBOOK ON KENYA CUSTOMARY LAW*. They are considered more comprehensively 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 "Njohi ya Njurio" followed by payment of "Mwati" and "HARIKA" Further, according to that decision "Mwati" and "Harika" and drinking of beer constitute a valid Kikuyu marriage and dowry is paid after "Mwati" and "Harika". "Ngurario" which gives final sanction of the validity of the marriage can be performed later.

I am aware that these ceremonies are not strictly observed nowadays and that money can be paid as substitute for "Njohi ya Njurio, Mwati and Harika;" dowry even "Ngurario". The relation of Jane Mbeere and the deceased has to be considered in the light of the above practices.

Now, Jane Mbeere Komu says that she met deceased in 1981 and they got married and that thereafter in December 1981 deceased with elders visited her parents to report that the two were married and deceased paid shs 2000/= There is no evidence of customary marriage or semblance of it before December 1981 .

As for payment of first dowry installment of dowry of shs 2000/= Edward Chege Kariuki (PW3) says he was present. According to PW3 deceased gave mother of Jane Mbeere shs 2000 and told her to buy sugar. In his evidence in cross examination, PW3 testified that they had not arranged to visit mother of Jane Mbeere and that they passed by on their way to Nakuru when deceased said that he would show them the home of Jane Mbeere.

Bilha Wanjiku Mungai (DW5) testified that, although she was paid shs 2000/= there has not been any ceremony to discuss dowry. The father of Jane Mbeere was not even present.

On the second occasion when shs 4000/- was paid to PW5 there were no deliberations and father of Jane was not present. This is according to the evidence of Jane Mbeere. It is only Jane Mbeere and her mother who says that shs 4000/= was paid as dowry. It is the evidence of PW5 that if dowry was to be paid deceased would have paid 80 goats. Jane Mbeere refers in her evidence in cross-examination to another occasion in 1993 when deceased, herself and her children visited her mother and a goat was slaughtered. According to her evidence, deceased was not accompanied by anybody else on that occasion.

It appears from the evidence that there was no family gathering to discuss marriage or solemnize any marriage and that the visits by the deceased to Jane Mbeere's mother were merely casual. It is improbable that dowry could be paid in the absence of Jane Mbeere's father and family elders. It appears further that if any money was given to Jane Mbeere's mother by the deceased it was merely a gift. The money was not attributed to either "Njohi ya Njurio" "Mwati" and "Harika" or to any other customary ceremony.

On the issue of cohabitation Jane Mbere testified that she lived with deceased in Thika from 1981 to 1982 and in Kangema from 1982 to 1984. Thereafter she lived with deceased in a Sabugo in house deceased had constructed in his farm from 1984 until May 1995 when deceased died.

But the evidence shows that deceased was doing road construction as well as running businesses in Nairobi and that he had construction sites in Thika and Kangema. Where Jane Mbeere and deceased employees at the construction sites were living. It is admitted by Jane Mbeere that deceased was in Nairobi most of the times running three hotels, a hardware shop and other businesses. Joseph Karanja Kariuki (PW2) confirms that deceased was spending half of his time in Nairobi and used to be in Nairobi most of the weekends. There is also the evidence of Isacks Komu (Dw2) who was employed by deceased as a supervisor. His evidence shows among other things that:-

- (i) Deceased used to put up prefabricated houses at construction sites and workers would share rooms.
- (ii) Jane Mbeere was employed by deceased and used to receive salary like other workers.
- (iii) Deceased used to visit construction sites and then return to Nairobi and that deceased never used to sleep in same place as workers.
- (iv) At the construction sites, Jane Mbeere never used to live with her children and her children were living with their grandmother in Kanyariri.

The employment records from March 1981 to May 1983 were produced in court. They show that Jane Mbeere was in the payroll for those years and that she was using the name of Jane Mungai. Leah Ngendo Komu produced a letter dated 28.11.85 written to Jane Mbeere Mungai by the deceased. I reproduce the letter here below

'Miss Jane Mbeere Mungai

C/O KGT Limited

P.O BOX 75711 1

NAIROBI

Dear Madam

It is the intention of the Company to select a few people from the existing staff and train them on various courses or own them job training on the work they do. You are requested to complete the attached form

and return to undersigned not later than 2nd December 1985. Please attach the Photostat copies of your certificate,

Yours faithfully

J.K. KOMU

managing director

The documents that she attached were also produced. Jane Mbeere admitted that she was receiving salary but stated that deceased used to pay his wives and children salaries. Three petty cash vouchers were also produced showing that even in 1986 Jane was receiving monthly salary. She admitted writing some of the petty cash vouchers.

As for the house in Sabugo Nyandarua.. Jane Mbeere testified that it was built for her and that she used to live in the house with another employee Wanja. She testified that other employees were living at the labour camp that evidence was supported by pw.3 Leah Ngendo Komu however disputes that She states that Jane Mbeere had a room in the house and that the house had a section for workers. According to her three other employees Komu Kariuki and Wanja were living in the house. There is evidence from pw2 that deceased used to spend half of his time in the farm and half of the time in Nairobi.

Deceased refers to Leah 'Ngendo Komu in his will dated 22.11.94 as his wife. In the same will he has bequeathed L.R, No. Dagoretti/Kinoo/T.31 to Jane mbeere Mungai without referring to her as his wife.

The evidence also shows that there was very little association between the family of the deceased and the family of Jane Mbeere Komu. The evidence also shows that there was no association between Jane mbeere Komu and Leah Ngendo Komu. It is clear that Jane Mbeere was living at the construction sites with other workers and that eventually she was living with other workers in Sabugo farm. Jane Mbeere was not living with her children at the construction sites or in the Sabugo farm. The evidence shows that deceased used to visit the construction sites and later Sabugo farm occasionally. It is also evident that deceased used to pay Jane Mbeere monthly salary like all other employees. Even in his solemn will he referred to her by her maiden name and never declared that she was his wife, it is improbable that deceased would sleep in the prefabricated houses at construction sites where his other employees used to sleep when he was busy in Nairobi and when construction sites were not far from Nairobi. The official letter dated 28.11.85 and failure by deceased to refer to Jane mbeere in his will as his wife is further evidence that the two did not cohabit as husband and wife.

I A Her strongest evidence is that she had two children with the deceased and that she was named in the eulogy as wife of deceased and accorded the status of a wife at the funeral.

Jane Mbeere readily accepts that deceased is not the biological father of her first child Caroline Wanjiku Komu but says that deceased was paying her School fees. She states that deceased is the father of Elijah Kariuki Komu born on 12.8.87 and Mary Wanjeri Komu born on 1.7.90 and that deceased was paying their school fees. She produced the certificates of birth of last two children show name of JOHNSON kamau komu as the father of each child. Those certificates were given on 29.11.93 long before John Kamau Komu died in May 1995 they show on the body *at the bottom* they are evidence of the dates and facts contained there in without any or other proof of the entry v Elijah Kariuki is apparently named after kariuki- the father of deceased while Mary Wanjeri Komu is named after Wanjeri the mother of the deceased. Deceased in his will has given Kiungururia farm to Jane Mbeere in trust for Elijah Kariuki which indicates that deceased recognised him as his son. Jane Mbeere testified that deceased was educating the three children. She produced a bundle of receipts in respect of each child.

Caroline Wanjiku was in form 1 in 1995, she must have by now finished form IV although Jane Mbeere on 8th May 1996 told court that she was at home for lack of school fees. Elijah kariuki was in boarding

school Nyahururu Elite Junior. The receipts show that the school fees was high.

Jane Mbeere informed court on 8th may 1996 that Elijah Kariuki had not gone to school because of lack of school fees Leah Ngendo informed court in July 1996 that Elijah Kariuki and Mary Wanjeri were in may, 1996 transferred to Akiba preparatory school where fees is lower. Petty cash Vouchers show that Jane mbeere was earning a monthly salary of shs 2,220/= in 1986. It is unlikely that she was earning much higher from 1992 to 1995 to be able to pay school fees for the three children.

As for Mary Wanjeri Komu Jane mbeere testified that it is the deceased who made an application for admission of Mary Njeri Komu to Cedar Groove Nursery school. She produce an application dated 11.5.92 signed by the deceased. The signature on that form is similar to the signature on the letter dated 28.11.85 produced by Leah. Ngendo as evidence that Jane Mbeere was an employee. Two receipts dated 14.2.95 show Johnson Komu as the person who paid school fees for Mary Wanjeri

The fact that Jane Mbeere had to transfer two of the children to a less costly school after the death of Johnson Komu supports her evidence that deceased was paying school fees for the three children. Her evidence is further supported by the evidence of Edward Chege Kariuki (PW3) that deceased was paying school fees for the three children.

The paternity of Elijah Kariuki Komu and Mary Wanjeri Komu is not seriously disputed though Leah Ngendo testified that deceased had not shown any of the three children as his own children.

The fact that deceased was paying school fees for the three children:

not also seriously disputed as all what Leah Ngendo could say is that she does not know if deceased was paying school fees for the three children

Although Most of the receipts are not in the name of the deceased. Jane Mbeere testified that deceased used to either pay the school fees directly or give her money to pay I am satisfied that Elijah Kariuki Komu and Mary Wanjeri Komu are the children of the deceased and that deceased was paying their school fees and also school fees for Caroline Wanjiku But other than paying school fees for Caroline Wanjiku Komu there is no evidence that deceased recognised her as his own child or that he voluntarily assumed permanent responsibility over her (see definition of a child in S. 3 (2) of the Law of succession Act).

The fact that deceased had two children with Jane Mbeere does not in itself prove any marriage, Further, the fact that Jane Mbeere was named in the eulogy as wife of the deceased and participated in the funeral as wife of the deceased does not also prove any marriage if there was no marriage subsisting before the death. In any case, she was omitted in the newspaper and radio Death and Funeral Announcement both of which have a wider circulation than a private eulogy. The printed eulogy is discredited by the fact that it shows year of the marriage as 1986 while Jane Mbeere says that she was married in 1981.

The inclusion of Jane Mbeere in the eulogy as wife of the deceased and the honour accorded to her at the funeral could be evidence of reputation of marriage if Jane Mbeere was asking court: to presume marriage from long cohabitation and reputation. But that is not her case and in any case I have already found that she did not cohabit with deceased as husband and wife. I conclude from the evidence that Jane Mbeere was not married to the deceased under Kikuyu customary law and that though they begot two children their relationship was that of both an employee and a mistress. She is therefore not a dependant as defined in S. 29(a) of the law of succession Act. For reasons I have already stated. Caroline Wanjiku Komu 3rd applicant is not also a dependant of the deceased as she is not a child of the deceased as defined in S. 3(2) of the law of succession Act.

But in respect of Elijah Kariuki Komu, 2nd applicant he is a son of the deceased although he was born out

of wedlock. Deceased had named him after his (deceased) father in accordance with the custom. Deceased was also educating him and made a provision for him in his will. Those circumstances show that deceased had both recognised him as his own child and also had voluntarily assumed permanent responsibilities over him. The same applies to Mary Wanjeri Komu, 4th applicant. Deceased was her father. He had named her after his mother in accordance with the custom and he was educating her. He had thus recognised her as his own child and had also voluntarily assumed permanent responsibility over her. She was not provided for in the will and she is entitled to a provision from the estate.

Deceased bequeathed Kuinguguria farm Nakuru to Jane Mbere in trust for Elijah Kariuki. Although Leah Ngendo informed the court that the land is 14 acres its value is not known. We do not know if the land exists or not as the title deed was not produced. The executors show in the petition that the estimated value of the estate is Shs. 944,892/35.

The [applicants](#) however show the estimated value of the estate as Shs. 157,000,000. The estate comprises of Lands and Commercial buildings.

There is one valuable share belonging to the estate in Kinoo General Traders Ltd. A consent order was made on 5.12.95 that Counselors agree on the value of the estate for purposes of the application and that in case of the failure to agree on the net value of the estate applicants be at liberty to engage a valuer

Again on 14.12.95, a consent order was made that the advocates do agree on the net value of the estate. The advocates did not inform the court of the result before the application was prosecuted. From the consent order recorded on 29.4.96, it is clear that what parties wanted the court to determine, first, is whether or not first applicant is a wife of the deceased and whether or not the 2nd 3rd and 4th applicants are the children of the deceased. Depending on the result, the next issue to be decided is what provision should be made.

Although the estate has not been valued, it is apparent from the nature of the assets that the estate is substantial and I am not satisfied that deceased made a reasonable provision for the assets that the estate is substantial. I am not satisfied that deceased made a reasonable provision for Elijah Kariuki Komu. I order that a reasonable provision be made for him from the estate. As no provision was made for Mary Wanjeri Komu, I order that a reasonable provision be made for her in the estate, in the circumstances I have [explained](#) above it is just to give parties a chance to discuss what reasonable provision should be made from the estate for Elijah Kariuki Komu and Mary Wanjeri Komu and see if a settlement can be reached.

It is also just that in case of disagreement the court should give the parties a further chance to be heard and bring before the court all the relevant facts. The costs of the application should be reserved until the final orders of the court, I so order,

E.M. Githinji

JUDGE

26 .2.99

Mr. Njoroge holding brief for Mr. Kiome present

Mr. Njenga for executors present

Mr. Njenga

Alter the Ruling is typed I will discuss the issue of reasonable provision with the executors to see whether

an agreement can be reached. Give me one month.

Order By Consent

1. Mention on 19.4.99

2. In case of disagreement on what reasonable provision should be made for the two children, both parties to file additional affidavits.