



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Succession Cause 109 of 1996

KITILI NYAMU.....DECEASED

VERSUS

FLORENCE MUMO KITILI..... PETITIONER

Coram: J.W. Mwera - Judge

Alex Mutua Advocate for Petitioner Makau Advocate for Objector

RULING

The application that gave rise to *viva voce* evidence this court heard, is dated 22.8.1996. It was brought under Order 39 Rules 1, 2, 3, & 9 Civil Procedure Rules and Section 3A Civil Procedure Act. Essentially it prayed for an injunction to issue against the 2 Respondents Muloka and David Kitili from inter meddling with the assets of the estate of the late Kitili Nyamu Kikwati. There was a further and rather curious prayer for an order that this court do direct the District Officer (Central) to be furnished with all assets of the deceased. Kitili for due sharing of the same between the applicant, Mumo Kitili and the 2 respondents named. Or that this court would as well make such orders as it thought fit in regard to the estate.

The applicant Florence Mumo Kitili hereinafter called simply Mumo swore as affidavit in support to the effect that she was the widow of the late Kitili. So she had been granted a grant to administer that estate on 20.6.96. Mumo deponed, and it should be considered that she listed that the heirs to the estate of Kitili included the following:

John Kitili

Mutua Kitili

Regina Kitili

John Muloka Kitili

David Nzioka Kitili the last 2 being the respondents herein. She deponed further that the 1st respondent, Muloka had started to inter meddle on the estate by selling livestock and he was intending to sell the deceased's land. That Muloka had begun withdrawing money from a Bank account once held by the deceased without the knowledge and/or authority of the applicant and that the respondents were about to evict her from the land and demolish her houses. Mumo added that since the 2 respondents were sons of

her co-wife she was content to share the estate of the late Kitili equally with them.

Before reverting to the affidavits in reply to this application or such other that were filed, a brief look at the origin of this succession Cause is pertinent.

On 20.6.96 Mumo filed a petition in this court as the wife of the late Kitili. As noted above she listed the survivors as children of Kitili. Also listed were several plots in Lukenya Ranching & Farming Co-operative Society Limited and also at Katelembo Athiani Muputi Farming and Ranching Society. Further parcels of land were:

Mungala - 716,412,403 and 1305

Kasinga - 429, 498 and 724 (see form P&A 5) Kitili was said to have been living at Mungala at the time of his death.

Despite the deposition that a limited grant was issued to Mumo on 26.6.96, there was one annexed (and referred to as FMK-1. which is a copy of Kitili's death certificate) and nothing appears that this court ordered such a grant to issue. Indeed there is no copy of a limited grant on the file. So it can be taken that without other, material, Mumo's Petition remains thus and no legal representative of the late Kitili has been appointed by this court. At this point one could as well make short shrift of the application, throwing it out on the basis that Mumo is pretending to the estate of the late Kitili and she has no capacity so far to institute proceedings as she has done describing herself in the capacity she is not. However more is yet to unravel because the grounds to oppose the injunction application were to the effect that Mumo was not a dependant or an heir to Kitili's estate; that she was yet to be declared the administratrix to that estate and that she was a stranger who was moving to get the grant without the respondents consent or knowledge. Then a long affidavit sworn by the 1st respondent, Muloka was filed. It alluded to the grounds of opposition and particularly added that Mumo was once the wife of the 2nd respondent, Nzioka. That she divorced her and then on 16.11.95 she started cohabiting with their father, the deceased, Kitili. That she never married Kitili and so Mumo could not claim that she was his widow (more curiosity!)

Muloka added that he was shocked to learn that Mumo had acquired Kitili's death certificate on 5.6.96 when he himself had taken one earlier on 22.5.96 in order to proceed to petition for a grant. Then the affidavit delved in how Mumo had initially married Nzioka in 1970 when she had a son (now) John Kitili. That Regina and Mutua were not fathered by Nzioka or Kitili. In short the respondents deponed that Mumo and her 3 children were never near the estate of Kitili whether as heirs or dependants. She was therefore not right to move to do anything regarding the estate of Kitili. Then Mumo replied to Muloka's affidavit in reply denying its contents totally.

With this kind of setting it looked imperative that the disputants be heard orally to determine whether or not to issue the orders of injunction. As each party called evidence it transpired that the question to be decided is:-

Is Mumo the wife of the late Kitili? If she is found to be so, then the rest follows. But quite probably whichever way goes the answer one thing is clear that upto now Mumo is yet to be the legal representative of the estate of Kitili Nyamu Kikwati because a competent court has not said so either by probate or letters of administration.

Anyway Mumo called evidence to establish her marriage to Kitili. She claimed that this was a customary marriage under the Kamba law which requires first the betrothal ceremony followed by many others including payment of bride price (Ngasya). She said that the long journey to marry her started in 1958 when people sent by Kitili to her home delivered the traditional MBUI SYA NTHEO and later cash shs. 1,700/=. She denied that she was ever Nzioka's (2nd respondent's) wife in 1970. That the respondents were her co-wife's (Kalonde) sons. That she lived where Kitili put her after marriage and nobody had tried to evict her until after his death. Mumo was subjected to long cross-examination about the marriage

to Kikwati. She maintained that one was celebrated under the Kamba custom. She however acknowledged that in June 1996, the Aombe clan to which she belonged wrote her a notice to vacate the place where she lives. The court heard that Mumo's son Mutua Kikwata was fathered by Kitili in 1974 (before they married) but she had no document e.g. a birth certificate to this effect. But that her children had the name of their father Kitili.

Then Mumo called Makau Nyamu, (P.W.2) quite an old man who was assisted along in court. He testified that Kitili was his younger brother. His wives were Kalondu and the applicant. According to Makau:

"Before Kitili died, he had 2 homesteads. They are not separate. The first homestead is occupied by Muloka and the second by John, the son of the applicant. She stays there."

The import of this excerpt will manifest itself presently when the location of the house where Mumo claimed she lived is examined. Makau however told the court that Kitili who was then sickly despatched him with others to the home of Mumo to deliver "Mbui sya Ntheo." And that from that point Kitili customarily betrothed and then married Mumo. That he also took bride wealth from his younger brother to the parents of Mumo and that even up to the time of his death Kitili cohabited with Mumo. Makau denied that Nzioka, ever married Mumo. Told that Mumo had said that when the "Mbui sya ntheo" were delivered in her home her son John Kitili was among the group from Kitili's home, P.W.2 however told this court that in fact John was not in his group. P.W.2 denied giving evidence on behalf of the applicant so that his own son Elijah could benefit from the land if it goes to Mumo.

Raphael Muindi (P. W.3), the cousin of Mumo next took the witness stand. He told the court that Kitili married Mumo in 1987 and performed the betrothal rite by delivering four goats - via the hand of Makau (P.W.2). He also repeated that John Kitili went along. Muindi spoke of the second visit by Makau when he delivered shs.6, 700/= as bride wealth and he wrote it all down - in 1988. The applicant spoke of shs. 1,700/= in this regard. So Muindi produced exhibit P.2 - where he recorded the events of the day. The exercise book (exh.P.2) looked rather too new to have been used in 1988. He told the court that Nzioka (2nd respondent) never married Mumo at any time and that she has always lived in the home of Kitilil since 1987 when the two got married.

In cross examination about exhibit P.2 - the record of "Ngasya" taken to Mumo's home it transpired that the money was not described as the whole or part of "Ngasya".

Kyengo Musyimi (P.W.4) then testified. He knew the deceased Kitili and the disputants herein. Kitili once had 2 wives: Kalondu and Mumo - the applicant. Mumo was married in 1987 and she lives in the house Kyengo built for her on instructions of Kitili. He had built five houses in the second homestead of Kitili. Kyengo said that he was in the group that delivered goats to the home of Mumo. He never knew of any time when Nzioka married Mumo. She was Kitili's wife since 1987 and she has always lived at Kasinga. Unlike Makau (P.W.2) who said that he was with his wife and other female family members on the day the goats were taken to Mumo's home, P.W.4 said that they had no woman on that day in their company. Masila Muya (P.W.5) was present the day Kitili's men brought betrothal goats to their home to have Mumo for Kitili. John Kitili was in the group. Makau Nyamu (P.W.2) delivered 4 goats and the rest of the ceremony followed. Later P.W.2 delivered shs.6,700/= in 1989, then they discussed dowry. That sum was part of the dowry. Muya never saw Nzioka in their family as Mumo's suitor or husband. She married Kitili in 1987 and she lives in his home. That closed Mumo's case and the 2 objectors were ready with theirs.

So Muloka Kitili (1st respondent/objector) told the court that Mumo once lived with Nzioka (2nd respondent/objector) as husband and wife in 1967-70. The two then parted ways without even having any children. Mumo had her one child. She came back in 1988. The 2nd respondent's mother, Kalondu died in 1977 while Kitili died on 7.3.96 (exhibit D1). When Mumo returned, Nzioka was apparently not for it. So

Muloka allowed her to live on the land he bought as he with Kitili tried to reconcile Nzioka and Mumo. The plot he gave as No.429. That in 1988 a clan meeting was held to sort out this matter. Nzioka was adamant and the clan decided that Mumo was thus not to remain in the Kitili family. But she did not move out. That she even acquired an Identity card in Kitili's name. Since 1988 to 1993 Kitili and Mumo were never husband and wife and their father never settled her on any of his lands. In 1995 when Kitili moved to the house where Mumo was living on Muloka's land, it alarmed the family and the clan. There was wonderment as to why Kitili had moved to where his son's wife (Mumo) was living. On discovering that Mumo was now the wife of Kitili by her recently acquired Identity card, the clan decided that she should leave the Kitili family and vacate where she was living by June; 1996. That John Koti chaired the clan meeting.. That Mumo soon after Kitili died made moves to have part of his estate and filed the present petition without consulting the respondents. Muloka then went over the rites and ceremonies involved in a Kamba customary marriage stressing that one could not be gone into by Kitili with Mumo because it could amount to the former marrying a son's wife - an outrage in the Kamba custom and tradition. Mumo could thus not apply for the grant herein.

In cross -examination Muloka told the court that Kitili their father had only one wife: Kalondu. He married her when he had the 2 respondents and a sister. The two had no other child. They had only one homestead. That Mumo lives on Muloka's land. When the deceased came to live there with Mumo that is why the clan was called. He was sick. That all the time Nzioka did not want Mumo to return to their family but their father Kitili was for it. That building for Mumo on Muloka's land was with a view to get Nzioka eventually to accept Mumo back. So Kitili even allowed her to tend his coffee. That it was Muloka who was receiving coffee proceeds for Kitili but because he was working away from home, they allowed Mumo to do that. Muloka however told the court that Nzioka married in 1969 but no betrothal goats were delivered or other rite performed, Anyway Mumo could not with that in mind also marry Kitili.

Muloka said that on 13.1.96 the clan found that Kitili had taken Mumo as a wife and for that she should leave the clan. It must have been taken as an abomination. He concurred with the clan findings and was of the view that they should be affected. That decision was taken with Kitili's and Mumo present. He asserted again that Mumo lived on his land MUNGALA/IVETI/429.

David Nzioka Kitili (2nd respondent) also testified (DW.2). He married Mumo in 1969. She already had a son, John. They did not have any child. She left when D.W.2 was running a business at Makindu in 1970. Apparently the two lived in different towns and places until 1985 when Mumo met Nzioka and desired him to allow her son to use his name at a certain school. He agreed (exhibit D.2). Mumo lived with her parents. Then from 1987 on she began to make moves to return to Nzioka via his father Kitili and brother Muloka. Nzioka was not agreeable so she came and lived on Muloka's land. He demolished her house. It was rebuilt. He razed it to the ground again. Both these goings -on, the clan had to step in. Kitili, Mumo and Nzioka were before the clan. It decided that Mumo could go back to her home and only return to the Kitili family beginning with Nzioka's acceptance. She did not go as Muloka and their father Kitili built another house for her still on Muloka's land. The court heard that Mumo was never Kitili's wife and a marriage was never celebrated in this regard. That indeed it is taboo among the Wakamba for a father to marry a son's wife. That heavy consequences attend such an act if it happens. The man must foot the expense of cleansing and the woman is sent away. When the deceased moved to live where Mumo was living and it transpired that she had acquired an Identity card in Kitili's name, the clan got concerned. It met and directed Mumo to leave the Kitili family by the end of June 1996 at the latest. She was never the party to petition here and in any case the 2 respondents did not know of her move, Philip Kioko (D.W.3) a clansman with the respondents and the deceased Kitili knew them well. As the Aombe clan Secretary he kept records of clan meetings and other records. His assistant is, one Timothy Ngumbi. By producing (exhibit D.3) the witness said that in 1988 a clan meeting entertained a complaint by the 2 respondents about Mumo and concluded that she was Nzioka's wife. That in 1996, the clan again assembled in the home of Kitili because Kitili had gone to live in the house of Mumo. That Mumo had changed her names to include KITILI. The clan, decided that now she should move from this family of Kitili by June 1996 (exhibit D.4 A-B). She failed to do so and her claim that she was Kitili's wife was false. To such a

marriage i.e. a father marrying a wife of a son is unheard of among the Wakamba. D.W.3 a close clan member denied that Kitili ever married Mumo. She lives on Muloka's land.

Sammy Kavua (D.W.4) was the last witness. He is the Aombe clan vice-Chairman, so he knows the litigants here. Kitili had one wife only, Kalondu -. The mother of the 2 respondents. When Kalondu died he did not remarry. Nzioka once married Mumo but they separated without children. D.W.4 alluded to the meeting of 1988 and its decision as set out above. He also spoke of Nzioka demolishing Mumo's house on Muloka's land. The meeting on 13.1.96 concerned Mumo's use of the name Kitili in her Identity card and Kitili's move to live in a house she was occupying. But the two were never a husband and wife.

The litigants submitted and now may this court determine the issue before it: was Mumo Kitili's wife? The answer is very brief even after the very long evidence reviewed above. Mumo was not Kitili's wife. This decision is arrived at on a balance of probabilities. Mumo has brought witnesses to say that by due ceremonies she became Kitili's wife in 1987. Contradictions have been noted here and there e.g. whether her son John was present when Mbui sya Ntheo were delivered or not, If women were in the team led by Kitili's, elder brother Makau, or not while going to Mumo's home. The court was similarly not sure whether sums variously put at shs. 1,700/= and shs.6, 700/= were dowry for Mumo. Her witnesses were both from her side and that of Kitili.

On the other hand the respondents put in evidence denying such a marriage between Kitili and Mumo. Them and their witnesses never witnessed it. It could not even, be since Nzioka claimed that he once married Mumo, which she of course denied. The respondents and their witnesses, family members and clansmen disowned such a relationship. If it ever took place, it could be a great abomination and contrary to the Kamba custom and tradition. Meetings were called to discuss one thing or two about Mumo's presence in the Kitili family. At the latest in January 1996, the clan decided to have Mumo expelled from the clan because she had taken on Kitili's names and was as it were living in one house with him. This court was left with the impression that had Kitili married Mumo, he could have given him one of his listed parcels of land to build and live on. Yet the court heard that she lived in a house built on land registered in the name of Muloka. He bought it. One would also expect that if the respondents were truly Mumo's step sons, they are adults and she could consult them about their father's estate before petitioning. They would be considered as belonging to the first house. Anyway at the end of the day this court was left to conclude that Mumo was never Kitili's wife. The court was left inclined to believe the respondents' version more than that of the applicant.

As to the orders of injunction, they cannot issue. Mumo claimed that she had a limited grant to administer Kitili's estate. She had none. She was thus not being truthful to the court.

In short the orders prayed for are refused.

Orders accordingly delivered on 14th October, 1998.

J.W. MWERA

JUDGE