



REPUBLIC OF KENYA

HIGH COURT AT MACHAKOS

Probate & Admin. Cause 267 of 1995

ESTATE OF STEPHEN KIMUYU NGEKI::: DECEASED

ANDAGNES MUTHOKI STEPHEN::: 1ST PETITIONER

ALFONSEK. STEPHEN :::::::::::::::2ND PETITIONER

Coram: J.W. Mwera J.

Mr. Kakonzi Advocate for Petitioners

Mrs. Mwangangi Advocate for Objectors/Cross-Petitioners

Court Clerk Muli

RULING

From the record Agnes Muthoki Stephen and Alphonse Stephen filed this cause on 27th October 1995. Form P&A5 states that the subject matter is the estate of one Stephen Kimuyu Ngeki who died on 6th August 1995 in Machakos Town intestate. That the Applicants being wife and son respectively to the deceased Stephen, they named one Loise Mutheu as (another) wife plus a list of 15 children - 7 sons and 8 daughters. The estate was said to comprise 5 properties namely MACHAKOS/TOWN/909/655, Plot 670.63 Katelembo Market; Plot No. 1698 Katelembo; Plot no. 91 Kithayoni Market and a temporary jua kali plot Machakos.2

On 31st October 1995 the Applicants/Petitioners having acquired services of Messrs Kakonzi & Co. Advocates Machakos filed a chamber summons to restrain one Loise Mutheu Stephen, Ngeki Stephen and Martin Stephen from disposing of any assets belonging to the estate of the late Stephen aforesaid until the petition in the cause was finally determined. Loise Mutheu is the wife also named in P&A 5. So are Ngeki and Martin (sons). The second petitioner Alphonse Kioko Stephen swore an affidavit in support of this application. He said that Loise was the late Stephen's first wife, Agnes Muthoki (1st Petitioner) (he 2nd wife while one Ramla (3rd wife?) was deceased. He referred to the heirs and stated that at his time of death Stephen was not living with Agnes Muthoki, the 1st Petitioner, that she was living with her parents while Stephen gave her financial assistance there. It was added that the assets were as listed in form P&A 5 (above) and that an unnamed motor vehicle had been left at the Jua Kali plot. That the Respondents in the application had sold that motor vehicle full of scrap metal. That Ngeki and Martin, whom Alphonse described as his step-brother had refused to account for the lorry sale proceeds and were taking some household items from the MACH/TOWN/909/665 house while having taken over the business in that building also. That they were about to dispose of the deceased's assets.

Ngeki Stephen swore an affidavit on 14th November 1995 to counter that of Alphonse. He said inter

alia that the 2 petitioners had no right to involve themselves in the matters of the estate of the late Stephen because they had no relationship with him at all. That his late father had only 2 wives: Loise Muthu and Ramla with their children. That he knew of the petition for letters to administer the estate of Stephen Kimuyu when he was served with the chambers summons aforesaid (dated 31st October 1995 and filed on the same day). That this act was otherwise secretive, fraudulent and unlawful on the part of Agnes Muthoki and her son Alphonse. These two were never known to the 3 Respondents but only came up to lay claim on the assets of Stephen after he died. It was further said that in addition to having no right over the estate, the Petitioners had come to court tainted and they had even acquired another death certificate while Ngeki Stephen also called David had properly and lawfully obtained one. A consent order of this court made on 19th January 1996 restrained both parties from disposing of any property of the estate; the 2nd Petitioner, Alphonse was to vacate the MACH/TOWN/909/665 premises to leave the Respondents to run the business therein.

There was a further affidavit sworn now by Agnes Muthoki (1st Petitioner) on 21st November 1995. She insisted that she was Stephen's wife by customary law and that the other family members were endeavouring to deny her her right and share in his estate. That she had been named as a wife in the funeral arrangements, funeral programme, radio announcement etc. The 3 heirs Loise and her 2 sons in challenging the intended grant had now acquired services of Messrs Mwangangi & company Advocates Machakos.

Indeed even as at this time this succession cause remains ungazetted and so no side has even a temporary grant to the estate of the late Stephen. So the Objectors said that they sought to file formal objection under the law. This was done on 22nd May 1996. Again citing lack of locus standi or indeed any right to concern themselves with the estate of the late Stephen the Objectors David Ngeki Stephen, Martin Wambua Stephen and Monica Katingi Kimuyu added that the 2 Petitioners had misrepresented to this court the true nature of the estate and its rightful heirs. A list was added of 10 dependants besides the 3 Objectors. On 11th June 1996 a cross-petition was filed by the 3 Objectors. They prayed to be issued with a grant to administer the estate in issue. Assets were set out as in the petition but a liability was added to the effect that the deceased had sold a portion of Plot No. 1698 Katelemboto one David Nzau. The petition by Agnes Muthoki and Alphonse Kioko was to be dismissed, so said David Ngeki Stephen, because the two were never related to the deceased in any way to entitle them to his estate. Yet they had moved secretly and fraudulently to get the grant.

The matter then came up for hearing of the petition and cross-petition by way of *viva voce* evidence.

Agnes Muthoki, 1st Petitioner told this court that she married the late Stephen in 1966 under Kamba Customary Law and this was signified by Stephen who had another wife Loise Muthu before and after that Ramla, delivered 3 goats called MBUISYA NTHEO to her parents. They lived at Machakos, Nairobi and Mombasa. Stephen died in 1995 but for ten years before that Agnes had left him and was living with her parents. She had left on her own for no particular reason. That before his death Stephen used to support Agnes and her 7 children with food and money. He had not given her any land but he left properties outlined in the petition and cross petition. She said that the town property was a business place where tenants paid rents but she did not get any of it. That she was listed in the death announcement over the radio as one of the wives of Stephen. She did not know who placed this announcement. Agnes however attended the burial, laid a wreath on Stephen's grave but the family did not sit down to discuss the distribution of the estate. So she with her son Alphonse lodged the petition herein because the other family members from Loise Muthu's side appeared to want to disown them. But that the group, now the Objectors, knew of the petition for grant. She had never customarily divorced from Stephen even at the time of his death.

In cross examination Agnes told the court that she had no child when she married Stephen. That when Stephen and another man Ndivo, now deceased brought the 3 goats his parents did not accompany him. She was not shown where to build and cultivate when she married Stephen. Then as if in contradiction to initial answers here, the 1st Petitioner said that she bore the 2nd Petitioner in 1963 that is before she married Stephen in 1966. So she had a child by that time. She bore her 2nd

child Kanini in her marriage and the rest when she was back to her parents. She did not know if the deceased gave properties to Mutheu's children or even her own.

She said that she did not involve the Objectors in the petition because they denied her. But they knew of it. She did not get their consent either. She had moved quickly to obtain the death certificate necessary to petition because the Objectors were selling some of the deceased's property. It was not secretive at all.

Peter Munyao (PW2), Agnes Muthoki's elder brother told the court that the deceased married his sister and delivered the 3 traditional goats. But the 2 separated for over 10 years before Stephen died. They were never divorced. He saw the deceased, assisting Agnes Muthoki and her children e.g. paying Alphonse Kioko's fees. PW2 knew that the deceased had property at Grogan Machakos Town and Kyumbi. He knew his first wife Mutheu and brothers Philip and Mbaluka.

In cross examination PW3 denied that he knew one Athumani Kingoo, of Kiima Kimwe who once married Agnes Muthoki. He said that on the day the 3 goats are delivered to the bride's home it is such an important occasion that the groom's parents must attend. Stephen and Ndivo delivered the 3 goats but his parents did not come along although they were alive. The court then heard Patricia Mbithi (PW3) who took down and filed a radio funeral announcement presented and paid for by David Ngeki. (Exh.PI). It bears the name of Agnes as the other wife of the late Stephen.

Dominic Mukilo Mutiso (PW4) is Agnes Muthoki's uncle. He lives in Makueni. But when Stephen married Agnes under Kamba Customary Law, PW4 was sent for. He saw Stephen and Ndivo deliver the 3 Mbui Sya Ntheo to the home and parents of Agnes. Other people attended and the ceremony went on well. Unlike PW2, Dominic told the court that Stephen's rather did not attend it. He was dead. And while Peter Musyoka Munyao (PW2) saw only Stephen and Ndivo on the day of the 3 goats, Dominic added that Stephen's step-mother, Monica Kimuyu attended in place of his mother who was dead. Stephen and Agnes Muthoki never divorced.

The Objectors/Cross-Petitioners then started their case when David Ngeki Stephen (DW1) took the witness box. He denied that Agnes and Alphonse were ever related to the deceased. The former is not her step-mother and the latter not a step brother, He knew Agnes as a villager. He listed the issues of his mother Loise and only co-wife Ramla with his father the deceased. The former lived at Kyumbi while Ramla lived with Stephen at the business premises in Machakos Town. At no time did Agnes live on any of his father's land and he never paid fees for Alphonse Kioko - the 2nd Petitioner - or assist any other children. The deceased had given some properties to DW1 and his brothers before he died. He never gave any to Alphonse Kioko. All plot certificates were produced (Exh.D/A-D). That the petitioners never consulted David Ngeki and his group before filing the petition. They did not consent to such move and they could not because the Petitioners had no business to concern themselves with the estate of the late Stephen. DW1 went through the list of heirs and excluded five "strangers". He added that even one of his brothers, Kioko, had been excluded by the Petitioners. DW1 denied ever placing the radio announcement (Exh.PI) and ended by stressing that the 2 Petitioners had no right over Stephen Kimuyu Ngeki's estate. He wanted the court to dismiss the petition and allow the cross petition.

In cross examination, David Ngeki said that somebody had forced himself in his late father's premises and David had failed to evict him. That Kanini no longer runs a restaurant in one business property in town.

Pressed further about the placing of the radio announcement (Exh.PI) along a receipt David's lawyer had availed to the Petitioners' lawyer, DW1 seemed to want the court to believe that he did not have anything to do with either the announcement or the receipt issued. Monica Kimuyu (DW2) the step mother of the late Stephen testified. She denied that Agnes Muthoki, 1st Petitioner, a villager since childhood, ever married Stephen in 1966. No such thing took place and no 3 goats were paid. She flatly rejected Dominic Mutiso's evidence (PW4) that such a thing took place and that she was present. The 80 year old witness went over the steps taken in a Kamba Customary

Law and said that in 1966 her husband was still alive. Henever told her of a marriage between Stephen and Agnes. They never gave goats to Stephen to deliver to the home of Agnes with one Ndivo whom she *did* not even know. She had done all the correct things when Stephen married Loise Muthu. He then married Ramla in town. When she died he buried her on his property at Katelembo. On her part Agnes never had a home in Stephen's compound. She always lived with her parents at Manza. DW2 then spoke of the deceased's properties. She only knew Alphonse Kioko, the 2nd Petitioner as Agnes Muthoka'sson and a neighbour. Muthoki had attended Stephen's burial on reasons known by her - or probably just as a friend or neighbour,

Lydia Kaluki Nzioka (DW3) then testified. She was not related to Stephen Ngeki, the deceased but she knew Agnes Muthoki who was once married to her younger brother, Kingoo. She got a son Kioko and then separated. That recently Agnes had met Lydia and asked her to intercede for her son to be given some land from Kingoo's family. In cross examination Lydia maintained that she was married only to Nzioka Mweu with whom she lived. That she had never contracted a woman-to-woman customary marriage (KAWETO) with one Nthamba wife of Kycluska. Now we take the evidence of Peter Nzioki (DW4). He knew the Petitioners and Stephen Ngeki with his wife. They were villagers who lived in Manyata Village, Mumbuni Location Machakos. He had heard that Stephen married Agnes but he never saw her living in Stephen's home which is three quarters of kilometre from his own. He too went over the initial ceremonies of a Kamba Customary Law marriage, the delivery of the 3 traditional goats but *henever* heard that such a ceremony was conducted for Stephen Kimuyu and Agnes Muthoki. DW4 recalled that he used to see a brown girl living in Stephen's mother's home but not the children of the 1st Petitioner. She was Agnes Muthoki's child. That the deceased used to pay her school fees. Nzioki used to visit the deceased's scrap metal shop. He saw saleswomen there. The deceased's wife who used to work in that shop died.

The last witness for the cross petitioners was Philip Kimuyu (DW5) the deceased's Stephen's elder brother, He knew the deceased's 2 wives and their children, They live on his properties. He came from Manyata a neighbouring village to Manza where Alice Muthoki came from. She once married one Athman Kingoo and had a son, the 2nd Petitioner. Agnes was never the late Stephen's wife. DW5 recited the properties of the estate and said that the deceased bought and gave some parcels of land to his sons. He never maintained Agnes with her children or gave them properties. When Stephen *died* and the petition herein was filed Philip never knew of it. He only came to learn of it when he was summoned to court. The Petitioners were not entitled to bring this cause or share in the estate. DW5 told the court that when Stephen died the family sat and discussed which relatives to put in the radio announcement. Then David Ngeki was detailed to file the announcement with Kenya Broadcasting Corporation. It shall be remembered that David Ngeki (Dwl) denied such an act. The announcement was made twice in Kiswahili and it was satisfactory that is including Agnes as the wife, But he questioned David about the featuring of this name but he denied knowledge. DW5 remembered that Kanini, Muthoki's daughter was left by her with a relative then Stephen took her in saying that Muthoki had squandered his property. He educated her but did not support any other of Muthoki's children.

Both sides submitted. The 3 broad questions to be answered were;

- (1) Whether Stephen Ngeki married Agnes Muthoki.
- (2) Whether the Petitioners are entitled for a grant of letters of administration as prayed.
- (3) Whether Agnes Muthoki and her children are entitled to share in the estate.

It has taken considerable space to go over the pleadings and the evidence herein, but the answers to the 3 questions may not be that lengthy.

0.1 Whether Stephen Ngeki married Agnes Muthoki. This court does not think so. AKamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo. Agnes Muthoki with her relatives who testified claimed that indeed the deceased and one Ndivo did deliver these goats to her home. Both are since deceased. That she lived with Stephen at various places - Machakos, Mombasa and Nairobi. Then on her own she left him and went back to live with her parents - after 10 years. But this court did not believe her and particularly if the evidence of her witnesses is scrutinised in the light of the denial of such a marriage by the cross-petitioner's side. While Peter Musyoka (PW2) told the court that he was present at the ceremony and only the late Stephen and one Ndivo came from Stephen's side, Dominic Mokila (PW4) said that he too was present and Monica Kimuyu (DW2) also came with the two men. That she represented Stephen's mother who was dead. But PW2 told the court that both of Stephen's parents were alive at the time the goats were delivered except that they did not come along. Indeed PW4 added that even Stephen's father was dead also. But when Monica Kimuyu (DW2) testified, she was the late Stephen's step mother, she denied ever attending such a ceremony and added that her husband died some time in the 90s. So can it be said with this kind of evidence that surely Stephen married Agnes under Kamba Customary Law? Not at all. Not when 2 of her relatives give conflicting evidence of one occasion and who were present or dead. So this question of marriage is answered in the negative. Muthoki has always lived in her parents home at Manza and if she had any relationship with Stephen it did not amount to a marriage at all.

Q.2: Whether the Petitioners are entitled to the grant: This is the wish of Agnes Muthoki and her son Alphonse. But this court shall not grant it. It has not been shown that these 2 had the kind of relationship with the deceased to entitle them to petition for a grant to administer his estate. In her evidence Agnes at one point told the court that she had no child when she claims she married Stephen in 1966. But further on she changed this to the effect that she got Alphonse Kioko in 1963 - 3 years before her alleged marriage. Had this court found, but it did not, that Stephen and Muthoki were married under custom it could be assumed that they adopted Alphonse but there is no such basis. So because this court has found that there was no such marriage and Stephen did not adopt Alphonse, neither of them should concern him/herself with the estate of Stephen. Their petition is dismissed. The cross-petitioners in this court's view are the ones entitled to petition. They are granted leave to follow the process. The Petitioners tried to go behind their back in a rather secretive manner. Even if the Petitioners were entitled to petition or as co-petitioners one would expect them to move along with the Cross-Petitioners. They did not take this course and Agnes Muthoki told this court that it was so because the cross-petitioners' side was hostile and wanted to exclude her and her son from benefiting from the estate in issue. That conduct was found wanting in fair play and indeed suspect. The cross-petitioners on procuring the grant, it is believed and hoped will follow the Kamba Customary Law pertaining to inheritance and apportion to those entitled their respective shares.

Q.3: Whether Agnes Muthoki and her children are entitled to shares in the deceased's estate: This court was left with the impression that if Stephen and Muthoki had a relationship, and the court found that it was not matrimonial, perhaps another one did exist. But it was not shown and proved to this court. The Petitioners sought to establish and the cross-petitioners denied that the former depended on the late Stephen. That he gave them money and bought them things. That he even paid Alphonse's school fees. But there was no proof. The 1st Petitioner did not have it easy to show the court that Stephen gave her any property or that she lived on any of his lands. She appeared to have lived with her people to date. Peter Kaloki (DW4) and Philip Kimuyu (DW5) said something to the effect that Stephen took in and educated a woman called Kanini whose mother is Muthoki. If she had been party to this case probably one could see that she was a dependant of Stephen. But that is only as far as that. In sum, the Petitioners side is not entitled to shares in the deceased's estate. Before making final orders in this matter, it appears pertinent to comment on something about the radio announcement (Exh.P 1). David Ngeki (DW1) did not appear truthful on this point. He denied placing that announcement yet it bore his name. It included one Agnes, the other name was not shown, as the wife of his late father. But when Philip Kimuyu (DW5) testified he said that during the funeral arrangements, the family under his stewardship authorised the announcement, and

dispatched DWI to place it. He did and he paid. How Agnes came in does not seem easy to resolve but it was found as a fact that DWI placed that announcement. He should not have denied it. But still the appearance of Agnes in that announcement or that she attended the funeral of Stephen and placed a wreath on his grave does not make her a wife. That bit has already been determined.

The conclusion in this hearing is that:

- (1) Stephen Ngeki did not contract a customary marriage with Agnes Muthoki.**
- (2) The Petitioners are not entitled to procure the grant to the estate of Stephen Ngeki. The cross-petitioners are**
- (3) Agnes Muthoki and her children are not entitled to share in the estate of Stephen Ngeki.**

Orders accordingly.

Costs to the cross petitioners.

Delivered on 17th December 1998.

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J.W. MWERA JUDGE