



**REPUBLIC OF KENYA**

**HIGH COURT, AT NAIROBI**

**PROBATE & ADMINISTRATION NO 112 OF 1987**

**SARAH WAIRIMU KANGI ..... APPLICANT**

**VERSUS**

**MARGARET WAGATE NYAMU ..... RESPONDENT**

**RULING**

These proceedings are in respect of the estate of one Meshack Kangi Karemi who died in Nairobi on the 25th of July, 1985 at the age of seventy years. On the 25th of July, 1987 Mrs Sarah Wairimu Kangi petitioned this Court for a grant of letters of administration intestate in her capacity as the surviving widow of the deceased.

This petition was grounded on her affidavit in which she depones that in addition to herself the deceased was also survived by their seven children, five daughters and two sons. All these children were adults and married with the exception of the sons and the last daughter as at the time of filing of this petition. She further deponed that she was related to the deceased as the only surviving widow and continues to list all the deceased property valued at about 2,430,000/-.

Subsequently on the 29<sup>th</sup> of June, 1987 one Margaret Wagate Nyamu filed an objection to the petition stating that she was a beneficiary having a life interest in the deceased's estate on the grounds that:

- (a) She is also a widow of the deceased Meshack Kangi Karemi by virtue of her marriage to the deceased in 1952.
- (b) that there are six surviving children of the said marriage.
- (c) that no decree of divorce has been made.
- (d) that the objector is entitled to inherit the estate of the deceased with her children in equal shares with the petitioner herein.
- (e) that no citation has been made by the Petitioner herein for her to refuse the Grant.
- (f) that she has not consented to the making of the grant in favour of the present petitioner.

Furthermore Margaret then cross petitioned the Court for a grant of letters of administration intestate for the same estate to be made to her and that of Sarah be dismissed. The grounds she cites are as follows:-

- “(a) I am a wife and widow of the deceased and my name has been left out of the said application.
- (b) The applicant has left out of the application all my six children.
- (c) The application has been made without my or my children’s consent and we are all beneficiaries.”

It is on this basis that Margaret prays for the grant to be made to her jointly with the petitioner so that her and her children’s interests can be looked after. The said children are all six boys. The youngest David Murage Meshack aged 23 years and the eldest 40 years as at the time of filing of the objection. She has no quarrel with the list of assets as given by Sarah.

Before the commencement of this hearing it was agreed that the proceedings were in accordance with section 70 of the Succession Act. Directions had been previously obtained that the hearing would be by way of *viva voce* evidence. The two parties were heard in evidence. Both adduced further evidence from one witness each.

The issue at this stage as understood by all of us is not who inherit what of the deceased’s estate. But whether a grant of letters of administration intestate ought to be issued to Sarah alone or Margaret alone or jointly. What then is Margaret’s case as contained in her testimony in Court?

“My husband’s name was Gilbert Nyamu. I married Gilbert. I don’t remember the day of our marriage. He was killed during emergency.”

They had four children together. One of them Gethenji died. The surviving children are Karimi, Kinyua and Kangi. The witness was not sure since when her husband died but it was agreed that he died on 9th of August, 1953. At the time of Gilbert’s death she was living with him in a shop where they both worked. She went to Kerugoya where the deceased was working and informed him of the death of the brother. She was arrested immediately after this. Upon release she went with her children back to her father’s home at Kagumo. After two months the deceased sent one Murithi PW2 to fetch her with her children and to take them to Kiangani, Meshack’s home “to stay there.” They stayed there for a few days and then went to the emergency village where she stayed with her children and the other members of their family till the emergency was over. Meshack got her out of the village by building a house for her on his own land. While at the village “Meshack came and we had a child.” He used to come and inspect the work that was going on. He was by then staying at Kerugoya with his wife. He would come and stay for about 3 days.

“When he came we spent a night with him. I considered Meshack to be the brother of Gilbert. That is why I went to bed with him. He said that I was his wife. Yes he performed the traditions to make me his wife. He told me that I was his wife and all work I would be doing with him. We would be working together as his wife. After that we took dowry together.”

I consider this part of Margaret’s testimony very important. It is the basis upon which she asserts that she is now a widow of the deceased Meshack and therefore entitled to equal treatment with Sarah in law.

This is what she had to say about the customary marriage fulfilments:

“I was there when the dowry was taken by Joel Murithi he took the goat and bull and sheep. Gilbert had taken some dowry before. The second taking of the dowry is a requirement of Kikuyu custom when I cohabited with Meshack I did so as his wife.”

As to the issue of the children, Margaret testified that she considered all her six children as belonging to Meshack and beneficiaries to this estate. The reason for saying so is twofold. Firstly because when Gilbert died and Meshack married her he took over all the upbringing and maintenance of both herself and the three children that had been sired by Gilbert. Meshack paid all the fees, built for her and the children planted coffee for them. Evidence of this is the account they had for the coffee at the factory. She produced the authority she gave for Meshack her husband to collect the money and pay the school fees.

As for the other three younger children born after Gilbert's death, these three were fathered by Meshack. They are his natural children he had acknowledged them during his lifetime and educated each of them as well as providing for them as a father does.

As for her, apart from Meshack paying the dowry, although she was working on the coffee from which she was being fully maintained by Meshack, he bought her food as well as clothing her. She lived with him as husband and wife. He never told her that she was not his wife nor the children not his children. Sarah was staying at Kerugoya as a housewife while she and Meshack were staying at Kiangai where Meshack had built a house for her on his land measuring about 9 acres. Sarah had no house but later one was built for her on a different piece of land.

As to the relationship between the two houses, according to her they were good till Meshack died. Although they did go to each other's houses if there was need otherwise they lived in their different houses. She considered Sarah her co-wife and did not want her to administer the estate by herself. Margaret was cross-examined at length about three aspects of her testimony. Firstly whether she expected any help from Meshack, a younger brother to her husband after her husband's death? Secondly, why the children were named after her husband if they were not his according to Kikuyu customary law. Thirdly whether her association with Meshack went beyond the preliminary association she had with him as a brother-in-law who had gone out of his way to help his deceased brother's wife? It is important to examine Murithi's evidence and consider the testimony of Sarah and her witness before making a finding on these issues.

Joel Murithi comes from the family. The deceased having been his uncle. He referred to Sarah and Margaret as his "mothers". According to Murithi after Gilbert's death in 1953 and the burial which he took part in, Margaret left the shop where they were staying and went to their home." She had first left for her father's home. Him and Meshack decided that he Murithi would go and fetch her from her father's home. At that time Margaret was pregnant when her husband died. There was also a child who was named after Meshack. This child became sickly and a demand was then made by Margaret's father that a sheep be taken to him. Murithi took the sheep. But the child nevertheless died. He also took a bull to Margaret's father to complete the dowry that was left over at Gilbert's death. Meshack built a house for Margaret where she stayed with her three children. The house was built on the family land at Kiangai. Later Sarah's house was also built but on another piece of land which Meshack had bought. As far as he knew Meshack lived with both the women as husband and wife. He knew all Margaret's children he had seen them educated and looked after by Meshack as his children. Margaret was a housewife, he saw Meshack pay school fees, and buy clothes for all Margaret's six children.

He also knew that at the time of death Gilbert had his own property including the family land at Kiangai which during consolidation and demarcation was also registered in Meshack's name to hold in trust for all Gilbert's children. He knows the land, it is big and is where Margaret's house is. It has coffee and she lives there with her children.

He knew Kikuyu customary law. Meshack had the right to take his brother's wife. But she became his wife. At the time of his death Meshack had two houses. He does not agree with Sarah that she is the only widow and her children are the only children of Meshack. Murithi like Margaret was cross-examined at length. The answer to this puzzle in this case comes from the cross-examination of these two witnesses.

To briefly look at Sarah's testimony her contention is that she is the only widow of the deceased and her children are the only children of the deceased and therefore the only heirs of his estate. In that capacity she is the only one entitled to letters of administration of the estate.

She was married to Meshack in a christian ceremony at Kiamwangi Church of Scotland in Nyeri District on 24/12/1942. Exhibit 1 being her marriage certificate. By then Meshack was working at Kenyatta Hospital (King George VI) as a clinical officer. He had one brother Gilbert Nyamu (deceased). At the time of her marriage Gilbert was married to his first wife Janet and they had children five of them. They are all still alive. Their mother died. She was not sure when Margaret married Gilbert because most of her life she lived with her husband wherever he was working. From Nairobi they moved to Kerugoya

Hospital where they stayed even during the emergency. During the emergency period she and her husband stayed in a government house they had no other house or home anywhere else. Gilbert and his two wives and their children were staying at Kiangai in a shop.

When Gilbert died the wives and their children shifted to Kiangai village and occupied one house. Subsequently they both moved to their piece of land but still in one house. Janet died in 1966 and left 4 children. By then she was living with her husband at Kerugoya Hospital where he was working. During this time it was emergency every now and then, they would go and visit Margaret and Janet at Kiangai. Margaret was living with her three children there while Sarah lived with Janet's three children, Zipporah, Samuel and Faith. She was looking after these children while they went to school. Meshack was the only one paying fees to all Gilbert's children. They stayed at Kerugoya from 1957 to 1963 when her husband moved to Karatina. She came to the village, stayed there for sometime in her own house, moved to her present land after a house had been built. By the time she went to the village Janet and Margaret had left. Throughout their stay at Kerugoya Margaret would visit when either she or any of the children were sick and needed treatment. She would be treated and go back home. She did not have any house at Kerugoya.

When they eventually settled here, Meshack continued to work at Karatina. She came home every now and then and she also visited him. Soon he was transferred to Nyeri. The same arrangement continued. By then she had gone back to teaching. During the whole period that Meshack was in Muranga and Nyeri she never found Margaret in her house. Upon retirement a party was made for them at Nyeri. She attended with her husband. She never saw Margaret. Meshack then started his private clinic, had bought a car and came home everyday from Karatina. All this time Margaret had her house on the land that belonged to Gilbert on which she moved when she came from the village. She moved on their *shamba* in 1969. Margaret was not her co-wife. She only would visit her home with Meshack when there was need. At no time did Meshack tell her that he had married Margaret. She did not object to him paying all Gilbert's children's school fees and looking after them generally because they were his brother's as he was expected to do. He was a good hearted man and looked after not only Margaret's children but those of Janet also.

As to the issue of dowry being paid for Margaret by her husband Sarah told the court that Meshack only told her of a sheep being taken to Margaret's father because the child who was born immediately after Gilbert's death was ailing. The sheep was taken but the child did not survive. Otherwise she never saw Margaret's father come to ask for dowry nor did she see Meshack take any.

As for special function they all came together as family. Gilbert's family and Meshack's family. Margaret did not take part in the family, weddings etc., as Meshack's wife but rather a Gilbert's wife/widow. This was the capacity in which Margaret and her children attended and took part in Meshack's funeral.

Sarah cited out three items:

- (1) The contribution to National Hospital Fund showed her as the only widow.
- (2) Announcement for the funeral indicated that Meshack's family consisted of herself and her children alone. There was no mention of Margaret and her children. Margaret's family did not complain either.

Finally:

“What I know is that all the children of Margaret and those of Janet were all assisted by Meshack who paid school fees up to the stage each went. It is true that Margaret has her own coffee on her farm.”

She had no idea when the coffee was planted.

“The land on which Margaret is home is, she is the one who knows it. The land is about 24 acres. The land is registered in the name of Meshack Kangi long time ago I used the land. That is

Kiine/Kiangai/1386.”

In cross-examination Sarah was asked about Exh I the card - Pass-Book Certificate Account which indicates that Margaret was authorizing Meshack her husband to take the money. Her reply was that she did not know about the claim by Margaret but however, this was to enable Meshack to collect money from the coffee since he was paying all the school fees. Secondly Margaret still referred to herself as Margaret Gilbert. She did not mention Margaret in her affidavit because she was not legal wife. Secondly she only came to see this document long after Meshack's death when Margaret sent somebody to come and collect the same.

Sarah had sworn an affidavit previously on 10/5/89. Par (5) of the affidavit stated that:

“That all the parcel of land known as Kiine/Kiangani/1386 is registered in the name of my late husband but I recognise an interest by the objector and her children in part of it by virtue of a portion of the said land having been granted to my late husband and his late brother Gilbert Nyamu, the husband of Margaret Wagate by the clan.”

This to my mind is the factual position in that the petitioner at no time has she denied the interest of objector and her children in this piece of land. The clan land.

Sarah was shown many photographs in which she and Margaret or their children appeared at function during the funeral of Meshack. Sarah had maintained in her evidence that Margarets children attended Meshack's funeral like any other people. Upon cross-examination and after being shown pictures where Gilbert's sons were visible in the front line carrying the coffin Sarah had this to say:

“Yes I told the Court that Margarets children attended the funeral like any other mourners but they were carrying the coffin because they were the sons of the brother of the deceased. Also because he is the one who had been educating them. It was thanksgiving for the work they had done for him. They were carrying the coffin because it was of their fathers young brother.”

Sarah maintained that she took her place in the family and did act at weddings as the mother of Margaret's children. She spoke at Kinywa's wedding as an auntie not as Margarets co-wife.

Sarah was cross-examined as to the issue of the last born of Margaret, David Murage Meshack. She only knew the David as Murage and not as Meshacks son. Secondly there was nothing wrong with him being called Meshack when he was Gilbert's son.

Isabella Wanjiro gave evidence. She comes from the same village and was known to the whole family. It was her husband that was Gilbert's Bestman, when marrying Janet. She knew alot about this family. She was active in the Church, knew that Sarah and Margaret were both members of the Women Guild. As far as they were concerned Margaret was Gilbert's wife and cannot be Meshacks wife.

“Meshack was staying at Kerugoya with Sarah and his children during emergency. After Gilbert had been killed by *Mau Mau*, Meshack came from Kerugoya, took the two wives to Kiangai village where he built them two houses in the village. By then I was in the same village. Both wives of Gilbert were staying there. After this it was Meshack who took them to their land and built houses for them.”

Margaret is a member of the Women Guild ... “In the church we refer to her as Margaret Hagate Nyamu. We have appointed her as such.

Q. Have you ever regarded her as the wife of Meshack?

A. (First of all witness sighs). “That is an impossible question to me. No woman has two husbands. After the death of one's husband the widow is regarded as the wife of the clan. The brother of the deceased is supposed to take care of the children and bring them up. We regard

Margaret as the wife of brother of Meshack. Meshack took the two wives and built houses for them. The wife belongs to the clan and can get children whenever she wants.”

Isabella was cross-examined about Meshack taking care of Margaret’s family. Her answer was that Meshack was a very generous person. He looked after his brother’s family. Also the relationship between Gilbert and Meshack was good. She had no knowledge that Meshack and Margaret had had children. Even if this had happened a widow’s children were always regarded as her deceased husband’s children. She did not expect Meshack to abandon either Margaret or Janet’s children .

In law is Margaret Meshack’s widow?

The evidence before this Court is conclusively in the negative. Sarah was married to Meshack under the Christian Marriage Act. Section 37 of the Marriage Act applies. Meshack could not have celebrated any other marriage when his marriage to Sarah was still substantive. Margaret has no legal standing under that law. On that ground Margaret’s objection would fail. However according to Mr Muthoga Margaret qualifies and has proved that she was a wife of Meshack and therefore entitled to Letters of Administration and inheritance of Meshack’s estate together with her six sons in accordance with Statute Law (Repeal and Miscellaneous) Amendment Act 1981 No 10 of 1981 which amended the Law of Succession and provides as follows:

“Notwithstanding the provision of any other written law a woman married under a system of law which permits polygamy is where, her husband has contracted a person or subsequent monogamous marriage to another woman nevertheless a wife for the purpose of this Act and particular section 29 and 40 hereof and children are accordingly children within the meaning of this Act.”

Secondly according to Mr Muthoga three of Margaret’s children are Meshack’s natural children while the other three are children he had acknowledged and maintained as his own children. They qualify for inheritance under section 3(2) of the Succession Act, where child is defined as follows:

“Reference in this Act to “child” or children shall indicate a child conceived but not yet born (as long as that child is subsequently born alive) and in relation to a female person child a child born to her out of wedlock and in relation to a male person a child who has expressly or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

I will first ascertain whether Margaret has proved that she was a wife married to Meshack Sarah’s marriage notwithstanding. Evidence on record is clear. In that Margaret was Gilbert’s wife. Meshack older brother upon Gilbert’s death Margaret said that the deceased paid dowry for her. However with due respect there was no evidence led before me to indicate that all the requirements of a Kikuyu customary law marriage were fulfilled. The ram which was sent to Margaret’s father ended up having been sent by Murithi because Gilbert’s child was sick. Margaret has throughout her case maintained that because Meshack looked after her with her children he was her husband. They lived like husband and wife and had children (3) of them together.

What is clear upon consideration of the material evidence some pleasant and others not so pleasant is this; upon Gilbert’s death, Meshack kind-hearted as described by his wife and Sarah as well as Leonida assumed the whole responsibility of his two brother’s wives and their children. Janet’s children are not before this Court demanding that they be regarded as a “house” Meshack educated all Margaret’s children, paid school fees, planted coffee, built for them on the land that was clearly their father’s land. Sarah does not deny that the piece of land that Margaret’s house now stands belonged to Gilbert and therefore Margaret’s land and her children. There is no doubt when Meshack was alive this family stuck together with Meshack undertaking everything. It is not surprising that he had to do so since the whole piece of land was still registered in his name. To my mind this is simply the reason why he had to be referred to as “husband” so that he could withdraw money coming from the coffee in order to educate Gilbert’s children. Woe be it when the African man will hesitate to look after his brother’s family simply because upon death the widow will demand to rank with the wife as a widow contrary to the customary law - see

*Cotran.* To my mind what Margaret wants to do however is to inherit both as the widow of Gilbert as well as Meshack's widow.

There is nothing in this case to persuade me that Meshack did anything that was that was not done or expected of him as Gilbert's brother. There was no marriage between Margaret and Meshak. The only relationship between these two people was clearly through Gilbert.

To my mind the amendment of law in 1981 envisaged situation where a man set off and decided to bring up another family but voluntarily. A decision taken by the two people to the exclusion of any other relationship. In this case Meshack had no choice. It cannot be said that it was his choice to look after Margaret and her children. He had to do it because it was his brother's family and that is what society and custom demands of him. He was a christian married to one wife. That is why Margaret remained as Margaret Nyamu Gilbert. All her documents are in those name including this objection/petition. Her own affidavit speaks for itself. She is Margaret Nyamu and all her children are known as Nyamu except one.

This Court sees no evidence upon which to consider otherwise. Margaret was not married to Meshack in any other way. Her interest in this proceedings can go no further than that of Gilbert's wife who has an interest in some of the property which as registered in the deceased's name and which he held in trust for her and her children.

As to the issue of children, there is no conclusive evidence before me that the younger children of Margaret are Meshack's natural children. No birth certificate or any serious attempt was made by Margaret to prove this fact. The paternity of individual is so important that no Court would be made to infer the same merely from the fact that somebody looked after children or that one person namely the objector said so. All these children are now grown-ups one would have expected passports, birth certificate, identity cards to be produced to conclusively prove the fact that they were Meshack's natural children as opposed to Margaret's children born after the death of Gilbert and in customary law regarded as so.

African Law page 17, as also explained by Isabella. There was nothing to stop Margaret having children after the death of Gilbert. The children were regarded as Gilbert's children. This is the customary law of not only Kikuyu but Luos, Luhya etc. Hence Margaret naming the children the way she did. They were *Nyamu*. The mere fact that David is called Meshack does not automatically make him Meshack's child. The bottom line in this matter is this there is no conclusive evidence that the three last children of Margaret are illegitimate children of Meshack and Margaret and so entitled to inheriting Meshack's estate.

I have already found that the care that Meshack gave to Margaret was what was expected of him the brother of Gilbert. There is no evidence that he had inherited or permanently assumed responsibility of those sic children. In law they are all Gilbert's children and do not form a 'house' for the purpose of administering Meshack's estate.

Margaret's cross-petition fails on the ground of what I have found.

Dated and Delivered at Nairobi this 4<sup>th</sup> day of August, 1993

**E. OWUOR**

.....

**JUDGE**