



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL CASE NO. 136 OF 1975**

**IN RE ESTATE OF B.M.R (DECEASED)**

**JUDGMENT**

This is an application by the Public Trustee under section 9 of the Public Trustee Act asking this Court to decide the dispute as to the succession to the estate of the deceased, B M R, and to determine who are the persons entitled thereto and in what share and/or proportions.

The deceased, a Kikuyu by tribe and domiciled in Kenya, died in Nairobi on 23rd February 1973, leaving a gross estate of about Shs 53,556/40. It is not disputed that he was married to one L M M under the African Christian Marriages Act in 1941, and that there are thirteen children of that marriage. L is being represented by Mr Daine. It is also alleged that the deceased subsequently married two other ladies, namely M W and M W, according to the Kikuyu customary law, and has had children by them. M W has appeared in person in these proceedings; but M W has not appeared at all.

Mr Kithyoma, for the Public Trustee, and Mr Daine have both very properly submitted that the first question that I must decide is whether, in view of the deceased's first marriage under the African Christian Marriage and Divorce Act in 1941, the deceased could enter into one or more other lawful marriages subsequently under the Kikuyu customary law. Only if my answer to this question is in the affirmative does it become necessary to determine whether the deceased had in fact entered into the subsequent marriages according to the requirements of his customary law; who the children of those marriages were; and what should be the shares of the wives and children in the estate of the deceased.

It is clear that a marriage under the African Christian Marriage and Divorce Act is meant to be a christian marriage (see section 3) and that parties become legally bound to each other as man and wife so long as both of them shall live, and that their marriage cannot be dissolved during their lifetime except by a valid judgment of divorce, and that if either of them (before the death of the other) should illegally contract another marriage while their marriage remained undissolved, the offender would be guilty of bigamy, and liable to punishment for that offence (see section 9(3)). Thus it is perfectly obvious that a marriage under the African Christian Marriage and Divorce Act is monogamous in nature and neither spouse can legally remarry during the lifetime of the other spouse without obtaining a decree of divorce from a Court of competent jurisdiction. It is further apparent that the deceased had not divorced L M M during his lifetime, and that, consequently, any subsequent marriage would be illegal.

Furthermore, by virtue of section 4 of the African Christian Marriage and Divorce Act the provisions of the Marriage Act, except as otherwise provided, apply to all marriages under the African Christian Marriage and Divorce Act. Provisions similar to section 9(3) of the last-mentioned Act (referred to hereinbefore) are contained in section 29 of the Marriage Act. By virtue of section 37 of the Marriage Act, a person who is married under that Act or whose marriage is declared by that Act to be valid (as is the case of marriages under the African Christian Marriage and Divorce Act) shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom. Furthermore, under section 50 of the Marriage Act, any person who, during the continuance of a marriage under that Act, contracts a marriage in accordance with native law or custom is guilty of an offence and liable to imprisonment up to five years.

A somewhat similar situation arose in *Ayoob v Ayoob* [1968] EA 72, a case of a Mohamedan marriage, in which the Court of Appeal held that a marriage under the Marriage Act is monogamous and could only be dissolved during the lifetime of the spouses by a valid judgment of divorce (at page 75). The Court further held that, although in Kenya, by a peculiar statutory provision, a marriage under customary law could be

converted into a statutory marriage under the African Christian Marriage and Divorce Act, there was, however, no provision enabling a christian or civil marriage to be converted into an islamic or customary one, or for an islamic marriage to be converted into a customary one (see pages 78 and 79).

Having carefully considered the legal position, I rule that any marriages entered into by the deceased subsequent to his marriage with L M M under the African Christian Marriage and Divorce Act are illegal and null and void. Accordingly, I hold that M W and M W are not the widows of the deceased and consequently not entitled to any inheritance from the estate of the deceased. I further hold that children of any such subsequent unions are not legitimate and consequently they are also not entitled to any inheritance from the estate of the deceased. Having answered the first question in the negative, it would be an exercise in futility for me to rule whether the subsequent illegal customary marriages had been performed in proper form and who the children of such marriages are, and I do not propose to embark upon such an exercise. I order that costs in respect of this petition of both the Public Trustee and L M M should be paid out of the estate of the deceased, B M R. The other two ladies shall bear their own costs, if any.

*Order accordingly.*

**Dated and Delivered in Nairobi this 3rd day of February 1977.**

**S.K.SACHDEVA**

**JUDGE**