REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1669 OF 1974

HENRY KARANJA MWANGI

NJOROGE MWANGI

JOHN WAMBUGU MWANGI

MBURU MWANGI

DAVID KAMAU MWANGI

EUSEBIUS MWANGI MURAGE …………………. PLAINTIFFS

VERSUS

PAULINE NJERI WEST …………………………… DEFENDANT

JUDGMENT

The defendant and Alan Muchiri Mwangi were married on the 2nd November 1963 under the African Christian Marriage Act. There are two issues of the marriage, namely Ng'endo Muchiri, a daughter, and Mwangi Muchiri, a son. On 17th May 1967 Alan Muchiri Mwangi, "the deceased", died intestate. He is survived by the defendant and the two children. On 15th August 1967 the defendant, then known as Pauline Njeri Mwangi, was granted letters of administration intestate in probate and administration cause 199 of 1967. The deceased was a member of the Kikuyu tribe. At the time of his death the deceased and his family were living at Riara Ridge on plot land reference No 4892/9 which the deceased had purchased with the assistance of a loan from the Agricultural Finance Corporation. The deceased also had three plot at Mutomo, that is Ngenda/Mutomo T 126, 127 and 128, which were sold to the deceased by the defendant's father. After the death of her husband the defendant did not return to her father's home, but went to live on her own in Nairobi.

On 19th January 1974, the defendant went through a ceremony of marriage with Ronald Arthur West. On 10th October 1974, the first five plaintiffs filed in this Court an application by way of originating summons under order XXXVI, rule 7, and rule 3B of the Civil Procedure (Rev) Rules 1948 and Civil Procedure (Amendment) Rules 1973 respectively, asking that the defendant should abstain from transferring or otherwise dealing with the parcel of land (land reference No 4892/9); the heirs of the deceased's estate should be ascertained; an order should be issued to extend the caveat registered against the property on 20th September 1974; the defendant should abstain from making further applications to remove the caveat; and for the costs of the applications. The first five plaintiffs are brothers of the deceased. On 13th November 1974, an application was made to the Court for the deceased's father to be

added as the sixth plaintiff. Liberty was granted by the Court on 19th December 1974 for the plaintiff's to so add the name of the sixth plaintiff.

When the application came for hearing on 7th July 1976, on the plaintiffs' advocate's application, I gave leave for the three plots at Mutomo to be included in the application and Mr Le Pelley for the defendant had no objection.

The plaintiffs' case is that immediately after her husband's death the defendant left the matrimonial home at Riara Ridge and went to live in Nairobi on her own, taking with her the children of the first marriage; she later solemnised another marriage. They contended that, as the deceased was a member of the kikuyu tribe, he was subject to the Kikuyu customary law regarding the distribution of his property intestate and, under the Kikuyu customary law, when a married woman leaves the family and relatives of the deceased husband and takes the children she had by the deceased to her second husband she leaves behind every property that belonged to her deceased husband and the second husband becomes the father of the children the woman had by the deceased. In such a case, the father of the deceased husband inherits the deceased's property. The deceased's children who have gone with the mother do not inherit the deceased's property but they inherit from their mother. Thus Mr Wamae for the plaintiffs argued that the first marriage between the deceased and the defendant had been completely wiped out by the remarriage and the taking of the children with her to the second home made those children members of the second home and the deceased's son cannot inherit from the deceased as he has ceased to be a member of the deceased's family.

The defendant's case is that the deceased and the defendant were not married under customary law, but according to Christian rites. No customary stages were gone through to divorce the defendant from the deceased's family and, when the deceased died, the defendant went to live in Nairobi, the place (although not the exact place) where the deceased first took her after marriage. Mr Le Pelley for the defendant further submitted that remarriage (or no remarriage) of the widow has no effect on the position the children, and if dowry is not returned they are still members of the deceased's family. He contended that the determining factor, therefore, is not remarriage or cohabitation, but the return by the woman to her father and return of the *ruracio* (ie the customary brideprice payment of cattle or other livestock made to the bride's father).

That is what wipes out a Kikuyu customary marriage completely; and that there is nothing of the sort in this case. Mr Le Pelley further submitted that, even if there had been a church marriage with customary payments, any attempt to wipe it out would have been ineffective in law for the marriage (being under the African Christian Marriage Act) was governed by the Matrimonial Causes Act. Therefore section 3 of the latter Act applied; and the marriage could be dissolved or wiped out only in accordance with the provisions of the Matrimonial Causes Act, that is by a divorce or decree of nullity. Divorce has no effect on the legitimacy of the children. Only in case of a void marriage do the children cease to be the legitimate children of their parents. Thus, as the marriage between the deceased and the defendant was not void, the children of that marriage are legitimate children of the deceased and there is no way in which that status can be taken away from them. He concluded that that being the case the deceased's two children were entitled to inherit from the deceased.

It is not in dispute that the marriage between the deceased and defendant was not customary and no customary law payments were made. Eusebius Mwangi Murage, the deceased's father, told the Court that no *ruracio* was paid and James Muigai, the defendant's father, confirmed this and added that the deceased paid only Shs 1000 for wedding expenses, but apart from that there were no customary payments of any kind whatsoever. It is also not in dispute that that marriage was valid. It has not been challenged that the two children of that marriage are legitimate children of the deceased. The plaintiffs however allege that that first marriage has been wiped out by the defendant's remarriage and the two children have, it would appear, ceased to be legitimate by the act of their being taken away by their mother to the home of her second husband. The method the plaintiffs wish to wipe out the marriage between the deceased and the defendant is the method used for wiping out a Kikuyu customary law marriage. Whether a marriage is wiped out or not is a question of fact and the party alleging it must prove it. The main question is, therefore, who inherits the deceased's estate? The answer to this question depends on the answer to the

question whether or not the marriage between the defendant and the deceased has completely wiped out.

In the case of a marriage contracted under the Kikuyu customary law when the husband dies leaving a wife and children and the wife returns to her parents taking the children of the marriage with her and the whole of *ruracio* is returned to the deceased's father and the customary ceremony for wiping out the marriage (*ngoima ya gutharia nyumba*) is performed, the customary law marriage between the deceased and the widow is completely wiped out. In such a case, the position is as if there had never been a marriage between the widow and the deceased and the children of the wiped-out marriage are presumed to be illegitimate, and in some cases pregnancy compensation is payable to the widow's father. This is treated as a divorce and the rules for the return of the *ruracio* apply. If all the formalities of a customary divorce are thereafter followed, then, if the widow had children by her deceased husband and she took them with her, those children do not inherit their deceased father's property; but if the children remain with their father's family then they inherit his property (Eugene Cotran: *Restatement of African Customary Law-Succession*, volume 2, pages 17, 18). A wiped-out marriage may be likened to a union which is not really a marriage at all and which is void, *ab initio*, for all intents and purposes. For a marriage to be wiped out, all the customary formalities of a customary law divorce must be observed.

A marriage solemnized according to the rites and ceremonies of Christian Africans is a marriage under the African Christian Marriage and Divorce Act. The provisions of the Marriage Act apply to all marriages celebrated under the African Christian Marriage and Divorce Act except as otherwise provided by the latter Act (section 4 of the African Christian Marriage and Divorce Act). Thus, a marriage under the African Christian Marriage and Divorce Act can be dissolved only under the provisions of that Act and the Matrimonial Causes Act and not otherwise. Such a marriage may be terminated by a divorce or declaration of nullity. Section 8(1) of the Matrimonial Causes Act provides the grounds on which a petition for divorce may be presented; whereas a petition for a decree of nullity may be presented on any of the grounds listed under section 14(1) of the same Act.

Under the Kikuyu customary law when, on the death of her husband, the widow elects to sever her relations with her deceased husband's family and returns to her father's home, the case is treated in exactly the same way as a divorce and the *ruracio* is returnable unless the children of the marriage remain in the deceased husband's home. This practice applies only to marriages contracted and celebrated under customary law. An African woman, and this includes a Kikuyu woman, who is married under the African Christian Marriage and Divorce Act is, on the death of her husband, not bound to cohabit with the brother or any other relative of her deceased husband or any other person; nor is she to be at the disposal of the deceased's brother or other relative or other person (section 13(1) of the African Christian Marriage and Divorce Act). In my opinion, such a widow may sever her relations with her deceased husband's family without suffering any of the repercussions a widow married under customary law would suffer through severance of her relations with the deceased husband's family.

In the instant case the deceased's and the defendant's marriage was solemnised in accordance with rites and ceremonies of African Christians. There was no *ruracio* paid as the defendant's father who is a Christian refused all customary payments. In fact, no single formality appertaining to a Kikuyu customary law marriage was performed and both parties agree that this was not a customary law marriage. In my opinion, since a marriage under the African Christian Marriage and Divorce Act can be terminated or dissolved only in accordance with the provisions of that Act and the Matrimonial Causes Act, the methods used to erase or wipe out a Kikuyu customary law marriage upon death of a married Kikuyu man do not apply to a marriage under the African Christian Marriage and Divorce Act. In other words, even if a widow who had been married under the African Christian Marriage and Divorce Act severed relations with her deceased husband's family and returned to her father and any customary payments made are returned to the deceased's family, her marriage to the deceased would not be erased or wiped out in the same manner a customary law marriage would, and the children of the marriage would not cease to be the deceased's legitimate children. Even in the case of a Kikuyu customary law marriage, for it to be completely wiped out there must be evidence that the widow on the death of her husband returned to her father's home taking the children of the marriage with her; severed her relations with the deceased's family and the marriage consideration (the *ruracio*) was returned or would be returned (see *Kamau v Wanja* [1974] EA 348, 350). The evidence in this case, although it is not a customary law marriage, is to

the contrary. The defendant did not, on death of the deceased, return to her father's home. There is no evidence that she severed her relations with the deceased's family, except a mere allegation that she did not visit her father-in-law; but the deceased's family, too never visited her or cared to find out how she and the children were. There was no marriage consideration returned or to be returned, as none had been paid. So, even if the marriage between the defendant and the deceased had been according to the Kikuyu customary law, which it was not, none of the steps for wiping out a Kikuyu customary law marriage had been taken by the defendant and/or the family of her deceased husband, and, in the result the marriage would not have been held to have been wiped out. In my opinion, a subsequent remarriage by a widow whose first marriage was under the African Christian Marriage and Divorce Act does not wipe out the first marriage and the children of the first marriage do not belong to the widow's second husband, but they remain the children of her first deceased husband. The children of parties married under the African Christian Marriage and Divorce Act are by law legitimate children of the marriage and no act of customary law can change their status and turn them into illegitimate children. If there be such customary law which ostracises legitimate children of a valid marriage under written law I would not hesitate to hold it to be repugnant to justice and morality.

Mr Wamae referred to *Benjawa Jembe v Priscilla Nyondo* (1912) 4 K L R 160. The respondent, a *M'Giriama*, and her deceased husband, a *M'Duruma*, were married according to the rites of the Anglican Church. The Magistrate's Court held that the law applicable to distribution of the estate of the husband was English law. On appeal, Bath J held, allowing the appeal, that succession to a deceased native Christian's estate follows the law of the tribe to which such Christian native belongs. In *Miney Frances v Samuel Bartholomew Kuri* (1951) 24 (2) KLR 1, a preliminary argument was raised as to whether the Indian Succession Act 1865 governed the distribution of the property of native Christians and the Court held that the East African Order in Council 1897, did not apply the Indian Succession Act to natives. As Mr Le Pelley correctly pointed out, those cases dealt with the question whether English law or the Indian succession Act applied to African Christians. In other words, they dealt with the question of what law applies to succession to the estate of a deceased African Christian, and not with the question of who inherits the estate of an African Christian. The two cases are distinguishable from this case. It is undisputed that the law applicable to the distribution of the property of a deceased African Christian is the deceased's tribal law. Mr Wamae referred to section 120(2) of the Registered Land Act and emphasized that it is customary law, that is personal law of the deceased, that applies in matters of succession; but, as I have already said, this is not in dispute and is not the point for determination in this case.

From the evidence before me, I am satisfied and I find that the first marriage between the defendant and the deceased, being a marriage under the African Christian Marriage and Divorce Act, cannot be wiped out by customary law methods used to wipe out a Kikuyu customary law marriage. The second marriage between the defendant and Ronald Arthur West did not wipe out the first marriage either. The two children of the first marriage are legitimate children of the deceased and they are entitled to inherit the deceased's estate. As the defendant has remarried, she does not benefit from the deceased's estate. In the result, prayer 1 of the originating summons fails. The heirs of the estate of the deceased are his two children, Mwangi Muchiri, a son, who shall inherit all immoveable property that is land reference No 4892/9 and Ngenda Mutomo 126, 127 and 128 of the deceased, and Ng'endo Muchiri, a daughter, who shall share with Mwangi Muchiri the deceased's moveable property in equal shares. Prayer 3 of the originating summons fails and the caveat registered against land reference No 4892/9 shall be removed forthwith. Prayer 4 of the originating summons also fails. I direct that the income from all the immoveable property mentioned herein be utilized for the education and maintenance of both children of the deceased until Ng'endo Muchiri marries or completes her formal education, whichever is the later.

Order accordingly.

Costs to the defendant

Dated at Nairobi this 28th day of July 1976.

Z.R. CHESONI

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JUDGE