



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kirimi v Gakii (Civil Appeal 97 of 2021) [2024] KECA 1061 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 1061 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NYERI**  
**CIVIL APPEAL 97 OF 2021**  
**W KARANJA, J MOHAMMED & LK KIMARU, JJA**  
**MAY 24, 2024**

**BETWEEN**

**WINFRED NKUENE KIRIMI ..... APPELLANT**

**AND**

**JACINTA GAKII ..... RESPONDENT**

*(Being an appeal from the ruling and order of the High Court of Kenya at Meru (Ong'injo, J.) dated 24th January, 2019 in Succession Cause No. 522 of 2012)*

**JUDGMENT**

1. This is a first appeal against the ruling of the High Court of Kenya at Meru (Ong'injo, J.), delivered on 24<sup>th</sup> January 2019, relating to the estate of Francis Guantai Mugambi (the deceased), who died on 8<sup>th</sup> November 2010. According to the pleadings filed, the deceased died intestate. He was 50 years old at the time of his death. He was survived by his widow, the appellant, and five adult children namely: Faith Gatwiri, Nicholas Koome, Samuel Kirimi, Fred Murimi and Joan Mukami.
2. The deceased's properties were listed as: LR . No. Ntima/Igoki/5968, measuring approximately 0.015 Ha; and Abogeta/Lower-Chure/1167.
3. On 24<sup>th</sup> August 2012, the appellant petitioned the High Court for a grant of letters of administration intestate, which grant was issued to her on 21<sup>st</sup> January 2013. The appellant later filed summons for confirmation of the grant on 17<sup>th</sup> October 2013.
4. Before the confirmation of the grant, the respondent filed an affidavit of protest dated 28<sup>th</sup> May 2014. The respondent and her son applied to be included as one of the beneficiaries of the estate of the deceased. It was the respondent's case that she is the first wife of the deceased, having gotten married to him in 1988, vide Ameru customary law, and that their union was blessed with one child, Samuel Kirimi Guantai. The respondent deponed that during the subsistence of their marriage, they bought several properties, including land parcels at Gaji (Igoki) and Kiriati (Igoki). She deponed that



together with the deceased, they developed the property at Makutano. The respondent averred that she was employed at the Ministry of Lands and Settlement. She had applied for a bank loan of sum Kshs.600,000 in 2007, which was utilized towards the completion of the building at Makutano. She deponed that she left the matrimonial home after the deceased had physically assaulted her.

5. The application was heard by way of viva voce evidence. After hearing the parties, Ong'injo, J., in a ruling delivered on 12<sup>th</sup> January 2019, determined that the respondent was married to the deceased, and that she resided at the matrimonial home prior to the deceased getting married to the appellant, and was therefore a beneficiary to the estate of the deceased. The learned Judge directed that rental income accruing from LR . Ntima/Igoki/5968 to be shared equally among the two widows and all children; and that LR . Abogeta/L-Chure/1167 be shared equally among the beneficiaries, save that the matrimonial house remains in occupation of the appellant.
6. Aggrieved by this decision, the appellant filed the instant appeal. She proffered four grounds of appeal. The appellant was of the view that the respondent fell short of establishing that she was married to the deceased, and faulted the learned Judge for deciding in her favour. She was aggrieved that the learned Judge failed to properly analyze the evidence before her, with respect to ownership of LR . No. Ntima/Igoki/5968, which established that the said property was registered in the name of the deceased, in trust for the appellant. Lastly, the appellant was of the view that the learned Judge's direction with respect to distribution of the deceased's estate, was against the law and weight of the evidence on record.
7. The appeal was canvassed by way of written submissions. Mr. Kariuki for the appellant submitted that Douglas Kiarie, OW2, who contended that he was sent by the deceased's father to pay dowry for the respondent was unable to tell the court how much dowry was paid, or who was the lead negotiator. Counsel submitted that proof of existence of a customary marriage is a matter of fact which must be substantiated by adduction of evidence. Counsel was of the view that if the customary marriage really occurred then the deceased's brother (PW2) and step-mother (PW3) would have been aware of the same.
8. With respect to Ntima/Igoki/5968, counsel urged that the deceased held the land in trust for the appellant. It was his submission that the said parcel of land was originally owned by the appellant's father, who gifted it to the appellant. He explained that the respondent failed to produce proof that she purchased the said parcel together with the deceased during their coverture. Learned Counsel urged the court to allow the appeal.
9. On the other hand, it was submitted on behalf of the respondent, that the respondent sufficiently proved that she was married to the deceased vide the Ameru customs, and that they lived together from 1988 to 2009. Mr. Mutunga for the respondent stated that the respondent moved out of the matrimonial home after being physically assaulted by the deceased. It was his submission that the appellant never resided in the matrimonial home during the subsistence of her marriage to the deceased, and that the appellant moved into the said house after the deceased's death. He explained that the respondent led evidence to prove that she had contributed towards the construction of the matrimonial home. With respect to LR No. Ntima/Igoki/5968, counsel for the respondent submitted that no evidence was led to establish that the deceased held the said parcel of land in trust for the appellant. In the premises, he urged the court to dismiss the appeal as, in his view, it lacks merit.
10. This being a first appeal, our duty was well stated in *Selle and Another v. Associated Motor Boat Co. Ltd* [1968] E.A. 123, where the Court observed as follows:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are



that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mbamed Sholan*, (1955) E.A.C.A. 270).”

11. Guided by the foregoing principles, the grounds of appeal, the record of appeal as well as submissions by parties to the appeal, we find that the issues arising for our determination are:
  - i. Whether the respondent was married to the deceased;
  - ii. whether LR . No. Ntima/Igoki/5968 was held by the deceased in trust for the appellant; and
  - iii. whether the distribution of the deceased's estate was fair and accorded with law.
12. On the first issue, this Court in *Kimani Gituanja v Jane Njoki Gituanja* [1983] eKLR observed that “the existence of a marriage is a matter of fact which is proved with evidence”. It was the respondent's contention that she got married to the deceased in 1988, under the Meru customary marriage. She testified that the deceased brought a sheep and heifer during his visit to the respondent's family, and further gave Kshs.30,000 during his second visit as dowry. This evidence was corroborated by her witness, Douglas Kiraithe (OW3), who stated that he was a cousin to the deceased. OW3 testified that he was part of the delegation that accompanied the deceased to pay dowry to the respondent's parents in 1988 when the deceased sought to marry the respondent. He testified that they gave the respondent's family a sheep and a heifer, and later took Kshs.30,000. It was his testimony that he lived next the deceased's homestead, and that he recalled seeing the deceased live with the respondent as husband and wife.
13. Although PW3, the deceased's step-mother, and PW2, the deceased's step-brother, denied that the deceased was married to the respondent, or that they ever acquired any property together, on re-evaluation of the evidence in this regard, we agree with the finding made by the High court that the respondent was indeed married to the deceased. Other than the evidence of OW3, the respondent availed a letter from the area Chief dated 21<sup>st</sup> May 2014, where the Chief confirmed that she was married to the deceased. The trial court heard and saw the witnesses as they testified before it and was, therefore, able to assess the respectful demeanours of the said witnesses and resolve the apparent contradictions in their testimonies. This Court sees no reason to interfere with the finding reached by the trial court in that regard.
14. Even for argument sake if the court were to agree with the appellant that no customary marriage was celebrated between the deceased and the respondent, there was evidence on record that the deceased cohabited with the respondent, in a manner that can lead a court of law to presume the existence of a marriage. This Court in *Mary Njoki v John Kinyanjui Mutheru & 3 Others* [1985] eKLR had this to say on the concept of presumption of marriage:

“...before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the



particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the *Yawe and in Mbiti (supra)*. To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”

15. In this case, the respondent stated that she lived with the deceased since their marriage in 1988 at their home in Mwichune, located in parcel No. Abogeta/Lower-Chure/1167. She stated that they were blessed with one child, Samuel Kiriimi, who was born in 1989. She further testified that the deceased had two older children from previous relationships who lived with them, and that later another child by the name Nicholas Koome, sired by the deceased, was brought to live with them. The respondent stated that she raised these children until 2009 when she left her matrimonial home due to physical abuse that she suffered at the hands of the deceased. OW3, Douglas Kiraithe, who was a neighbour and cousin to the deceased, corroborated this evidence. OW2, Charles Nturibi, told the court that in 2009, he was contracted by the deceased and the respondent to upgrade their matrimonial home, which was a bungalow, into a maisonette. He was categorical that the respondent was the one living at the matrimonial home; she used to pay him and cook for the construction workers. It was his testimony that earlier in 2005, the deceased and the respondent contracted him to partition their commercial building at Makutano.
16. The appellant claimed that the deceased had not constructed the matrimonial home when he got married to her, and that, she, together with the deceased, constructed the said home after they got married. This evidence was however contradicted by that of her witness, the deceased’s step-brother, who told the court that by the time the deceased married the appellant, he had already constructed the matrimonial home.
17. For the above reason we have no doubt in our minds that the respondent lived with the deceased as a man and wife, prior to marrying the appellant after the respondent had left the said marriage due to cruelty.
18. The second issue for determination is whether LR . No. Ntima/Igoki/5968 was held by the deceased in trust for the appellant. This Court in the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR held thus:

“It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: ‘The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.’ See *Gichuki v Gichuki* [1982] KLR 285 and *Mbothu & 8 Others v Waitimu & 11 Others* [1986] KLR 171.”
19. The appellant contends that LR . No Ntima/Igoki/5968 was gifted to her by her father, and that it was registered in the deceased’s name, to hold in trust for her. We observe that the appellant did not tell the court the nature and extent of the trust, or what kind of trust was envisaged when the said property is said to have been transferred to the deceased. The title documents and mutation form showed that the deceased was the absolute owner of the said parcel of land. No other interest was registered to encumber the deceased’s ownership of the said title. This Court in *Administrators of the Estate of*



*Maxwell Maurice Ombogo v Standard Chartered Bank Kenya Ltd & Another* [2000] eKLR expressed itself as follows with regard to what constitutes free property of a deceased person:

“Coming back to the definition of "free property": in view of what we have stated above, it is quite clear that the phrase connotes not only the personal property of a deceased person, but also, all the property which was in his possession or control or under his power, and the disposal of which, would legally have required his authority, but for his death.”

20. It is our finding that LR . No. Ntima/Igoki/5968 constituted free property of the deceased, as it was in his possession and control at the time of his death. We hold that it was the free property of the deceased, properly registered in his name, and should not be inherited by one house of the deceased on the basis of unsubstantiated claims that the appellant’s father gifted the property to the appellant, but that it was registered in the deceased name to hold in trust for her.
21. Our re-evaluation of the evidence adduced before the trial court leads us to the same conclusion as the trial court that there was no trust established to have been in existence in respect of the suit property at the time of the registration of the deceased as the owner of the same.
22. The last issue for our determination is whether the decision of the High court relating to the distribution of the deceased’s estate was fair and just in the circumstances and accorded with the law. The trial Judge’s verdict was that the rental income accruing from LR . No. Ntima/Igoki/5968 be shared equally among all the beneficiaries, being the two widows and five children of the deceased; and that LR . Abogeta/L-Chure/1167 be shared equally among the beneficiaries, save that the matrimonial house remains in occupation of the appellant.
23. Having determined that the respondent was a wife to the deceased, she is entitled to benefit from his estate. There is also evidence on record that the respondent contributed to the development of the rental property at LR . No Ntima/Igoki/5968, which was established by the evidence of the contractor, OW2. We therefore have no reason to fault the learned Judge’s finding that the rental income accruing from LR No. Ntima/Igoki/5968 be distributed equally among all beneficiaries.
24. However, from the evidence on record, the deceased constructed the matrimonial property at LR . No Abogeta/L- Chure/1167 prior to getting married to the appellant. This was during the subsistence of his marriage to the respondent. The deceased and the respondent lived in the said matrimonial home. The evidence by OW2 and OW3 established that the appellant did not reside at the matrimonial home during the deceased’s lifetime. The appellant, in her testimony, told the court that when she married the appellant in 1990, they settled in Meru town.
25. The appellant moved to the said matrimonial home after the deceased’s death. The respondent stated that she resided at the matrimonial home until 2009, when she left due to cruelty that she was subjected to by the deceased. There was ample evidence on record that the respondent contributed towards the development of the matrimonial home, and was only forced to leave it after feeling unsafe. It is our considered view that the matrimonial home, where the respondent lived with the deceased and raised her children, should be inherited.
26. From the foregoing, the appeal is dismissed, save for the order of this Court that the matrimonial home at LR . No. Abogeta/Lower Chure/1167 be retained by the respondent.
27. There shall be no orders as to costs as this was family dispute.

**DATED AND DELIVERED AT NYERI THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**W. KARANJA**



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**JUDGE OF APPEAL  
JAMILA MOHAMMED**

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**JUDGE OF APPEAL  
L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

