



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G.B.M. KARIUKI & MWILU, J.J.A.)

CIVIL APPEAL NO.23 OF 2008

BETWEEN

MARY WANJIRU KIARIE.....APPELLANT

AND

MARY WANJIKU KIARIE.....RESPONDENT

(Being an appeal from the ruling of the Honourable Lady Justice Martha Koome dated 26th March 2004

in

H. C. SUCCESSION CAUSE NO.82 OF 2002)

JUDGMENT OF THE COURT

The appellant, **Mary Wanjiru Kiarie**, filed in this Court on 28th February 2008 an appeal against the judgment of the High Court (Martha Koome, J. as she then was) delivered on 26th March 2004 in Nbi High Court Succession Cause No.82 of 2002 seeking to have it and the order declaring the respondent, Mary Wanjiku Kiarie, the second wife of Francis Kiarie Ndirangu, deceased, set aside.

The facts reflected in the record of appeal pertaining to the background of the dispute leading to the impugned judgment are that Francis Kiarie Ndirangu, the deceased, died intestate on 7th December 2001 leaving an estate that comprised 9 parcels of land each with its own Title Deed and three motor vehicles and cash in Barclays Bank of Kenya as well as shares in a company known as Ruthigiti Gikambura Hotels & Company which is the proprietor of a property known as L.R. 209/136/74 in the City of Nairobi. The estimated value of the estate is said to be in excess of Ksh.10 million.

Following the deceased's death the appellant petitioned for a Grant of Letters of Administration. She presented in the petition the names of her five children (with the deceased) as heirs. The latter consented to their mother getting the Grant of Letters of Administration to administer the estate of the deceased.

However, **Mary Wanjiku Kiarie**, the respondent, filed objection to the petition. She also filed a **cross-petition** seeking a grant of letters of administration in the estate of the deceased and sought inclusion of her four children (with the deceased) as heirs.

It was conceded by the respondent that the appellant was a lawful wife of the deceased but the appellant on her part disputed that the respondent herself was the lawful wife of the deceased, hence the dispute resulting in the impugned High Court judgment and the appeal giving rise to this judgment.

The trial Judge (Koome, J.) who heard the case confirmed three pertinent issues for determination which the parties agreed on, namely:

1. *whether the respondent as objector was a lawful wife of the deceased*
2. *who the beneficiaries of the estate are*
3. *how the estate of the deceased should be distributed*

After hearing and analyzing the evidence adduced, the learned trial Judge came to the conclusion that the deceased was married under Kikuyu customary law to both the appellant and the respondent and further that the appellant's and the respondent's children are the heirs to the estate of the deceased and hence are entitled qua heirs to share in the distribution of the estate. Accordingly, the learned trial Judge ordered that letters of administration be issued jointly to the appellant and the respondent on the basis that both of them with their children are survivors and beneficiaries of the estate of the deceased.

The appellant was aggrieved by the findings and decision of the learned trial Judge and consequently gave notice of appeal and lodged the record of appeal on 26th February 2008 and 28th February 2008 respectively in which she proffered in the memorandum of appeal ten grounds of appeal as follows:

- 1. The learned Judge erred in finding that the respondent was a second widow of the deceased against the overwhelming weight of evidence adduced to the contrary.**
- 2. The learned Judge erred in fact by concluding that the respondent was known to the appellant contrary to the evidence on record.**
- 3. The learned Judge erred in disbelieving the evidence of appellant's witnesses Nos.5 John Wanjira Kamiri and 6 Bernard Kiongo Njau, contrary to the weight of the evidence adduced and without any valid basis grounded on any credible evidence.**
- 4. The learned Judge erred in believing and relying on the evidence of respondent's witness No. Joseph Kimani Ndirangu without taking into account the strong evidence given to the effect that the said witness had dispute over land with the deceased, which dispute continued after the deceased's death, putting the said witness against the appellant.**
- 5. The learned Judge erred in disregarding evidence tending to show that the respondent was never involved in and did not participate in any of the deceased's family functions.**
- 6. The learned Judge erred in finding that the objector's alleged children were issues of the deceased contrary to the weight of the evidence adduced.**
- 7. The learned Judge erred in failing to appreciate that the ignorance of the respondent as to the date of the deceased's death and the cause of the said death as revealed by her evidence was reliable evidence that the respondent could not have been the deceased's second widow.**
- 8. The learned Judge erred in relying on the evidence of the deceased's mother without taking into account her disability by reason of advanced age which could have adversely affected her memory.**
- 9. The learned Judge erred in preferring the evidence of respondent's witness No.3 Mr. Kimani Ndirangu, as against that of his wife, appellant's witness No.3 Mary Nduta Kimani, and without giving any reasons for such preference and further dispute what is pleaded in paragraph 5 hereinabove.**
- 10. The learned Judge erred in finding that the respondent was deceased's second widow without any or sufficient proof marriage between her and the deceased.**

The appellant contended that there was overwhelming evidence to show that the respondent was not the second wife of the deceased. Further, it was the appellant's contention that the evidence adduced in the trial Court showed that the respondent was never involved and did not participate in any of the deceased's family functions. The appellant also argued that the respondent was unaware or was ignorant of the deceased's date of death and the cause of death and that this was evidence showing that the respondent could not have been the deceased's second wife, a fact which the trial Court failed to appreciate. The mother of the deceased who gave evidence in the trial Court in favour of the respondent was said to be too old by the appellant to be reliable and while the learned trial Judge believed the evidence adduced by the respondent as objector and her witnesses, especially Joseph Kimani Ndirangu, the learned trial Judge erred in failing to believe the evidence of the appellant and her witnesses especially the evidence of John Wanjira Kamiri and Bernard Kiongo Njau.

The first issue, to wit, whether the respondent as objector was a lawful wife of the deceased was the single most important issue because on it hinged the answer to the other two issues. The burden of proving on the balance of probabilities that the respondent was the lawful wife of the deceased reposed on the respondent. Was this burden discharged on the balance of probabilities? Firstly, it was conceded that the deceased was married to the appellant under customary law of the Kikuyu. His marriage to the appellant was potentially polygamous. The deceased therefore had capacity to marry a second wife. The objector testified and called four other witnesses who included three relatives of the deceased namely, Loise Wambui Ndirangu (PW1), Ng'ang'a Ndirangu(PW2), Joseph Kimani Ndirangu(PW3) and the deceased's elder brother. The fourth witness, Joseph Mwaura Gathambo (PW4) was not as close a relative of the deceased as the other 3 witnesses. Joseph Mwaura Gathambo (PW4) , a farmer cum businessman hailed from Karai and was the deceased's brother-in-law as he had married the deceased's sister.

The appeal came up for hearing before us on 13th June 2013. Learned counsel Mr. Prestone Wawire of P. M. Wamae & Company Advocates appeared for the appellant while learned counsel Mr. George Miyare of K. Mwaura & Company advocates appeared for the respondent. This being a first appeal we hasten to point out that we are alive to the fact that we are enjoined to re-evaluate the evidence adduced in the trial Court and to draw our own inferences and conclusions and to make our own findings but bearing in mind that on matters of credibility of witnesses, the trial Court had vantage position as it saw and heard the witnesses whose demeanor it observed and assessed. However, if, with respect to conclusions on credibility of witnesses, it becomes apparent that the evidence on which findings and conclusions were drawn was inconsistent and contradictory on material and important matters in determination of issues or any issue, this Court shall not be bound by such conclusions and findings.

The hearing of the succession cause commenced on 8.7.2003 before Koome J.

The respondent as objector testified and as stated above called four other witnesses who included the deceased's mother, Loise Wambui Ndirangu (PW1) who in her evidence, told the Court that she was a widow and had no formal education. Although she could not remember the date when the deceased married the respondent, she could remember that it was at a time when the appellant had ran away from home and gone to Kisumu. She testified that the appellant had five children with the deceased at the time and that the appellant left her children behind. They were cared for by the respondent. She maintained that the respondent was married to her son, the deceased. She told the Court that she lived in Ndeiya while the deceased lived in Kinoo with the appellant and the respondent. She used to visit the deceased, she said, and stay with the two families of the respondent and the appellant. The deceased, she said, had houses in the homestead at Kinoo for each family. She told the Court that she paid dowry for the respondent. The appellant, she pointed out, hailed from Kiambu, while the respondent hailed from Waithaka. With respect to the appellant, she said, 80 goats were paid and "Ngurario" ceremony was performed in accordance with Kikuyu customary law and in respect of the respondent, she paid 80 goats also and Ngurario ceremony was performed and she attended it with her family and friends. She could remember the name of Ms Margaret Wangari as one of the persons who went with her for the Ngurario and the name of Mr. Gathambo who was the spokesman at the Ngurario of the respondent and who had also been the spokesperson at the Ngurario of the appellant. It was her evidence that she used to visit and stay with the deceased's families at Kinoo even when the appellant had ran away to Kisumu. She told the Court that the respondent is a businesswoman and that the latter stopped living in Kinoo after the death of the deceased because of the infighting with the appellant who had returned to the deceased's homestead at Kinoo after the death of the deceased. The children of the appellant, said the deceased's mother, were brought up by the respondent along with the latter's children. Loise Wambui Ndirangu was adamant that both the appellant and the respondent were the wives of her son, the deceased, and in her own words she asserted that she could not bring "*a stranger into my household to make them a wife of my son.*" She had a good relationship with the deceased to whom she was close, she said.

Mr. Nganga Ndirangu, a farmer, was the younger brother of the deceased. He told the trial Court in his testimony that his mother (PW1) was about 100 years old. He knew the appellant as the first wife of the deceased. He also knew that the deceased married the respondent in 1982 as a second wife when the appellant had ran away from home. According to Nganga Ndirangu, dowry was paid for the second wife but he conceded that he was not at the ceremony. He knew that the deceased lived with the appellant and the respondent as his two wives in the same homestead and that before he died, there was a lot of infighting between the appellant and the respondent and eventually the respondent was chased away by the appellant. The respondent now lives in Dandora, he said. In cross-examination, Nganga Ndirangu told the Court that the appellant had run away from the deceased for a period of 9 years and that it was during that period that the deceased married the respondent. He could recall that when the appellant ran away, her children were small and that it was around 1979. He participated in the ceremony of marriage of the respondent and recalled that dowry was paid in 1985. His brother-in-law, Michael Gathambo, was the spokesperson in the marriage ceremony of the respondent and was also the spokesperson in the marriage ceremony. He carried cash, he said, and gave Shs.3,000/= to him to pay towards the required goats. He contradicted himself when he said in cross-examination that the deceased was alive when the appellant chased the respondent away after stating that the respondent left after the death of the deceased due to infighting with the appellant. But this slip did not depict him as untruthful and the trial judge who observed his demeanor believed him. In cross-examination, Nganga Ndirangu was firm that when the appellant left the deceased and stayed away for 9 years, her children were small and it must therefore have been around 1985. It was during that period when the appellant was away that the deceased married the respondent. Nganga Ndirangu testified that he participated in the marriage ceremony. Goats, cash and beer were given. Although Nganga Ndirangu was the deceased's brother, the appellant failed to keep him informed of his illness and when the deceased died, the appellant did not let Nganga Ndirangu know. What was telling was that the appellant chased away the respondent when the deceased was still alive but it seems that the deceased was too sickly and the appellant failed to inform Nganga Ndirangu. The deceased's condition deteriorated and when the deceased died the witness was not informed but he later came to know that his remains were at Thogoto Hospital Mortuary. It was his evidence that even when the deceased was first hospitalized, the appellant deluded him that the deceased had gone to South Africa. The appellant did not also entertain visits from the deceased's brother, Nganga Ndirangu. He conceded that after the appellant chased the respondent away, the latter went to live in Dandora where the deceased would visit her and the respondent would in turn visit the deceased at his place of work.

It was the respondent's evidence that the deceased met the respondent in 1982 and took her to his home in Ndeiya and introduced her to his mother and his brother. He also introduced his children with the appellant to respondent. The children lived and went to school in Ndeiya then. It was the respondent's evidence that the deceased told these children that henceforth, the respondent would take care of them. It was her testimony that the deceased and the appellant were then in separation. The respondent and the deceased moved to Gikambura Hotel and then moved to her father's plot and later rented a house at Eastleigh, Nairobi and soon thereafter the deceased started building a house at Kinoo. She supervised the construction of the house and when it was completed, she moved in with the children of the appellant. She got her first baby at Kinoo residence but the child unfortunately died after several weeks and was buried there. Her other four (4) children, are Ndungu, Geoffrey Gichanga Kiarie, Stephen Chege Kiarie and Joyce Waihera Kiarie who were born between 1982 and 2002 at Kinoo. Their birth certificates show that their father was the deceased. The respondent testified that her marriage was in accordance with Kikuyu Customary law and that the ceremony of marriage was in 1985 when the appellant was estranged from the deceased. The deceased, said the respondent, visited the respondent's parents many times and the various customary rites were performed and dowry was paid and ngurario ceremony was performed and the respondent played her part. It was she who cared for the children of the appellant during the period of the latter's estrangement.

It was the respondent's evidence that the deceased suffered from diabetes and the respondent cared for him and it was not until 1995 when he started ailing that the respondent was introduced by the deceased to the appellant when the deceased was in hospital. The appellant returned home at Kinoo. When the appellant returned to Kinoo, infighting started between her and the respondent and when it became unbearable, the respondent left. When the deceased died, the appellant did not cooperate with the respondent and she tried to bar her from burial arrangements. But the burial programme produced as an exhibit in the trial shows that the respondent was acknowledged as a wife of the deceased and her children as the children of the deceased.

The appellant contended that the decision of the trial judge in holding that the respondent was married as a second wife to the deceased under the Kikuyu customary law was wrong. In her evidence, she dwelt in large part on her marriage to the deceased and how the properties in the estate were acquired which was not an issue. She alleged in her evidence that she came to know the respondent "in court" during the contest for grant of Letters of administration of the estate of the deceased. She told the trial court that she never left Kinoo home "even for one day" and that she lived with the deceased throughout and that she was never estranged from the deceased. She testified on the extent of the deceased's estate and contended that the properties were acquired by her and her husband. She admitted that Mr. Gathambo (PW4) was

attending the deceased's funeral meetings. None of her children, though adults, testified. Francis Mwaura Kinya (DW2) a farmer, and a first cousin of the appellant testified on behalf of the appellant. He referred in his evidence to the Kikuyu customary rites in respect of which he said he was familiar and he stated that he had no knowledge of the deceased marrying the respondent and that before he died, the deceased never told him that he had another wife. He was positive that dowry for the marriage of the appellant to the deceased was paid in 1984 but when in cross examination he was told that evidence received by the court from other witness suggested a different year, he admitted that he was not sure of the year. He told the trial court that he did not know all the members of the deceased's family including Mr. Gathembu and did not know many things about the deceased's family. His testimony showed that he was not close to the deceased.

Mrs. Mary Nduta who gave evidence in the trial court as DW3 on behalf of the appellant was the wife of the deceased's brother as she was married to Joseph Kimani Ndirangu (PW3) whose evidence showed that he knew the deceased was married to both the appellant and the respondent and that he participated in the respondent's dowry and *ngurario* marriage ceremonies and from the evidence he appeared to know a lot about the deceased and his families. On her part, Mary Nduta merely confirmed that the appellant was married to the deceased and denied knowledge of the deceased's marriage to the respondent. Strangely enough she told the court that her husband (PW3) had not told her that the deceased had married the respondent. Fredrick Ndungu Chege of Kinoo (DW4) who claimed to be a journalist and consultant gave testimony on the appellant's behalf in which he said that he was a neighbour of the deceased whom he mourned when he died and that he had no knowledge that the deceased was married to the respondent. In cross-examination, he admitted that his daughter was married to the appellant's son and he was consequently the appellant's in-law. The appellant also called John Wanira Kamiri (DW5) as a witness. A retired councilor cum businessman from Karai, DW5 was the deceased's junior in school as well as the deceased's social friend. He admitted that he did not know all the deceased's affairs but would be surprised if the deceased had another family besides that of the appellant. Bernard Kiongo Njau (DW6), a businessman from Kikuyu was a friend of the deceased. He conceded in cross examination that he did not know when the deceased moved to Kinoo and was a stranger to his personal affairs. He was informed of the deceased's death and did not participate in the funeral arrangements but he went to the burial ceremony.

The learned trial judge examined and analyzed all the evidence adduced by the respondent and the appellant and found the demeanor of the appellant during her testimony less than candid and her answers to questions put to her incredulous. The learned judge singled out some of the answers in which the appellant could not be telling the truth which included when she stated that she had never separated from the deceased even for one day; that she had never seen the respondent and that she saw her in court during the contest for Grant of Letters of administration; and her vehement denial that the deceased had no other family. On the other hand, the appellant's counsel suggested in cross-examination of the respondent that the latter was employed by the deceased as house help which if true, would have meant that the respondent was known by the appellant.

After a careful perusal of the entire evidence, it becomes quite clear that on the balance of probabilities, the evidence of the respondent was credible and established the fact that the deceased had married the respondent under Kikuyu customary law as a second wife. The appellant's evidence on the other hand was not credible and it focused on the properties constituting the estate which she claimed ought to be inherited by her and her children alone on the ground that the deceased had no other wife except herself. The appellant's witnesses clearly feigned lack of knowledge of the existence of the respondent as a wife of the deceased. For instance, Mary Nduta, DW3 who was the wife of Joseph Kimani Ndirangu (PW3) alleged that she did not know of the respondent or that the deceased had a second wife and that she knew the appellant as the only wife of the deceased, yet her own husband from whom she was not estranged was involved in the marriage ceremonies of both the appellant and the respondent and in addition the deceased used to have end-of-the year parties attended by his friends and relatives. The evidence of the appellant and her witnesses did nothing to dent the evidence of the respondent on the issue of the deceased's Kikuyu customary law marriage to the latter. At pages 19 and 20, the learned trial judge had this to say on the evidence:

“So what would have motivated the deceased's mother (DW4) to make up a story of how the objector was married, dowry was paid and the (ngurario) wedding ceremony conducted. How far can people go in making up stories. Can they make up a story about marriage rites? A story of a child born by the objector who died two weeks after birth and was buried at Kinoo? Could they make up a story of objector's three children (at least those who were born before the deceased passed away) could they make names of children who are named after the deceased's family and make out birth certificates. Could they make up a funeral programme mentioning the objector as second wife? Are the objector's witnesses named as beneficiaries of the deceased estate not (sic), how will they stand to benefit. The questions could go on and on but the upshot of all is that on a balance of probabilities I find that the objector was a wife of the deceased and her children are the deceased's children.”

After a careful perusal of the evidence, we are in agreement with the findings of the learned trial judge that the evidence of the appellant and her witnesses was not credible and we have come to the conclusion that the denials by the appellant about the marital relationship between the deceased and the respondent were glib and were motivated by the appellant's desire to shield the estate of the deceased from the respondent and her children. In our view, and on the balance of probabilities, the respondent discharged her burden of proof and showed on the balance of probabilities that she was married to the deceased under the Kikuyu customary law as a second wife.

We find no merit in the appeal which we hereby dismiss. As this dispute relates to members of the family of the deceased, we order that each party shall bear its own costs.

Dated and delivered at Nairobi this 30th day of May 2014.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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I certify that this is a

True copy of the original.

DEPUTY REGISTRAR