



**IN THE COURT OF APPEAL AT NAIROBI**  
**CORAM: NAMBUYE, KARANJA & M'IN OTI, J.J.A.**  
**CIVIL APPEAL NO. 281 (A) OF 2003**

**BETWEEN**

**ELIUD MAINA MWANGI ..... APPELLANT**

**AND**

**MARGARET WANJIRU GACHANGI ..... RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Koome, J) dated 26th September, 2003 in HCSC NO. 1608 OF 1995)**

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**JUDGMENT OF THE COURT**

This appeal relates to the Estate of *KEZIAH WANJIRU KAHIGA* (deceased) of Gitugi Location, Kangema, Murang'a County, who died on 22nd September, 1993. The central question in the appeal is whether the respondent, *MARGARET WANJIRU GACHANGI*, was married to the late Keziah Wanjiru Kahiga in a woman-to-woman marriage under Kikuyu customary law to entitle her to a grant of letters of administration of the estate of the deceased and to inherit the deceased's property. The protagonists are, on the one hand the deceased's brother in law, *ELIUD MAINA MWANGI*, the appellant, who stakes his claim to the estate on account of the same being his brother's, and on the other hand, *Margaret Wanjiru Gachangi*, the respondent, who claims to have become the "wife" of the deceased after the death of their respective husbands.

Upon the death of Keziah Wanjiru Kahiga, the respondent applied jointly with her own brother, James Waweru Gachangi for grant of letters of administration. The basis of the application for grant was the respondent's status as "widow" of the deceased. The respondent listed herself and her four children, namely, *Michael Mwangi*, *James Njomo*, *Wilson Maina* and *Grace Wangui* as the beneficiaries. On 28th September, 1995, the grant of letters of administration was duly issued and confirmed on 26th April, 1996. The court ordered the respondent to hold the net estate of the deceased in trust for the children named above and the distribution of the estate to be done as equitably as possible.

On 26th November, 2001, the appellant filed in the High Court summons for revocation or annulment of the grant. He contended that the grant had been obtained fraudulently by concealment of material facts,

namely that, as the rightful heir of the deceased, he had not been issued with a citation to accept or refuse letters of administration, nor had he been asked to renounce his right. He further contended that the deceased was never married to the respondent as alleged in the application for grant and that the deceased was not survived by any children.

The dispute was heard by Koome, J (*as she then was*) who on 26th September, 2003, found that the deceased had validly “married” the respondent under a Kikuyu customary law woman-to-woman marriage, and dismissed the application for revocation of grant as an afterthought. The present appeal was provoked by that decision.

Before we consider the appellant’s grounds of appeal, there are certain facts which were established by the High Court and which are not in dispute between the parties. We would summarize those facts as follows:

The deceased, Keziah Wanjiru Kahiga, had been married to Jonathan Kahiga Mwangi, the elder brother of the appellant. Jonathan Kahiga Mwangi died on 20th June, 1979. Keziah Wanjiru Kahiga and Jonathan Kahiga Mwangi had no children.

For her part, the respondent hails originally from Nyeri. Before the present dispute, she was married to Karimi Njomo and lived with him in Kamune Village, Kamacharia Location, Muranga County. Karimi Njomo and the respondent had four children, namely Michael Mwangi, born in 1981, James Njomo, born in 1982, Wilson Maina born in 1983 and Grace Wangui, born in 1985. These are the children who were recognized as the surviving children of the deceased. When Karimi Njomo died (the year is not disclosed), the respondent went back to her father’s home in Nyeri. The respondent, with her four children, moved into the home of Keziah Wanjiru Kahiga in 1987.

Beyond the above facts, everything else is contested, in particular, the capacity in which the respondent moved into the deceased’s home, whether it was as an employee or as a “wife” and whether or not any or any valid kikuyu ceremonies were conducted to legitimize the disputed woman-to-woman marriage.

The appellant’s memorandum of appeal listed 6 grounds of appeal as follows:

- 1. The learned judge erred in law in holding that the respondent as a woman was legally married to the deceased Keziah Wanjiru Kahiga under Kikuyu customary law;*
- 2. The learned judge erred by failing to consider in totality all the evidence adduced before reaching her decision;*
- 3. The learned judge erred in law in holding that the respondent and her children were dependants of the deceased Keziah Wanjiru Kahiga prior to her death;*
- 4. The learned judge erred in law in holding that the respondent was the rightful heir and administrator of the deceased Keziah Wanjiru Kahiga;*
- 5. The learned judge erred in failing to appreciate that the estate, the subject matter of the suit was family land and that the appellant had the legal right to inherit his brother’s land in succession;*
- 6. The learned judge erred in law in not revoking or annulling the grant of representation issued to the respondent and confirmed on 26th April, 1996 in High Court Succession Cause No 1608 of 1995.*

Mr Kihara Ndiba, learned counsel appeared for the appellant whilst Mr G. Kamonde, learned counsel appeared for the respondent. It was common ground between the parties that a woman-to-woman marriage is recognised under Kikuyu customary law. The point of departure was whether there was any evidence before the High Court upon which it could find that a valid woman-to-woman marriage existed

between the deceased and the respondent. To that extent all the arguments of counsel focused on the existence or otherwise, of a woman-to-woman marriage, because all the other issues raised in this appeal are dependent upon how that central question is resolved.

Mr Ndiba started off by arguing that the essential steps and ceremonies of a valid Kikuyu customary marriage are the same, whether the marriage involved is a man-to-woman or a woman-to-woman marriage. He further submitted that there was no woman-to-woman marriage proved between the deceased and the respondent because essential steps and ceremonies of such a marriage were never carried out. He named these ceremonies and stages as *Ngurario*, *Mwati*, *Harika* and *Ngoima*. Without these essential ceremonies, he contended, there can be no valid Kikuyu customary marriage.

Mr Ndiba further argued that the ceremonies in a customary marriage and in particular payment of dowry are family and clan affairs actively involving close family and clan members. In the present case, he argued, none of the close family and clan members of the deceased participated or were involved in the alleged woman-to-woman marriage. He dismissed the contention that the reason why such family members were not involved was because there was bad blood between them and the deceased or they were otherwise based in Nairobi. As far as he was concerned, the evidence on record was more consistent with the respondent having lived with the deceased as an employee. Lastly, Mr Ndiba argued that the woman-to-woman marriage was undermined and discounted in the present case by the fact that the children involved were all the children of Karimi Njomo and none of them were born at the home of the deceased so as to qualify as children of the deceased and Jonathan Kahiga Mwangi.

Mr Kamonde opposed the appeal and vigorously supported the decision of the High Court. He contended that there was sufficient evidence to prove that ceremonies essential to the marriage were duly performed and that there was no requirement under customary law to involve family and clan members, it being left to an individual to choose who to involve. He concluded that the learned judge properly found that the respondent was not an employee of the deceased and that to be recognised as children of the deceased, those children did not have to be born in the home of the deceased.

Since this appeal revolves around a woman-to-woman marriage under

Kikuyu customary law, it is opportune to consider at this stage also the legal position pertaining to proof of customary law and practices. In *KIMANI VS GIKANGA*, (1965) EA 735, at page 739, Duffus JA expressed himself as follows on proof of customary law:

*“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”*

See also *SAKINA SOTE KAITTANY & ANOTHER VS MARY WAMAITHA*, CA NO 108 OF 1995 and *ATEMO VS IMUJARO*, (2003) KLR 435.

Specifically on proof of a customary marriage, this Court in *GITUANJA VS GITUANJA*, (1983) KLR 575, held that the existence of such a marriage is a matter of fact which is proved with evidence. In that case the court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the “*ngurario*”.

Under section 51 of the Evidence Act, Cap 80 Laws of Kenya, opinions of persons who are likely to know of the existence of any general custom or right are admissible where the court is required to form

an opinion of the existence of such custom or right. The phrase “general custom or right” is defined in section 52 (2) to include customs or rights common to any considerable class of persons.

Lastly, *Rule 64 of the Probate and Administration Rules* makes provision for the application of African Customary Law in the following terms:

*“Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination.”*

The effect of the above provisions of the *Evidence Act* and the *Probate and Administration Rules* has been to make admissible, among others, the works of Dr. Eugene Cotran pertaining to the customary laws and practices of many Kenyan communities. Dr Cotran’s treatise on African customary law has for example, been admitted and relied upon to prove Kikuyu customary law in

*KARANJA KARIUKI VS KARIUKI*, (1983) KLR 209 (distribution of the land of a deceased person during his lifetime), *GITUANJA VS GITUANJA*, (1983) KLR, 575 (life interest of a widow), *KANYI VS MUTHIORA*, (1984) KLR 712

(inheritance rights of unmarried daughters), and *NJUGUNA VS NJUGUNA*, (1984) KLR, 527 (the duties and obligations of the “*Muramati*”).

Kikuyu customary marriages involve elaborate rites and ceremonies. According to Dr. Cotran, in *Restatement of African Law: Kenya Volume 1*

*The Law on Marriage and Divorce*, Sweet & Maxwell, 1968, the following procedures, rites and ceremonies are involved in a typical Kikuyu customary marriage:

*A marriage proposal is conveyed to the girl. If it is favourably received the girl’s parents are invited to the home of the prospective husband to partake in the “njohi ya njurio”, the beer of asking the girl’s hand. (It would appear that this is significant because Cotran specifically notes that there is a variation among the Waembu where the boy’s parents take the beer to the girl’s parents). Thereafter the first instalment of rurachio is taken to the girl’s father. Further instalments follow until a sufficient amount of the full marriage consideration, stipulated by the girl’s father has been offered and accepted to seal the engagement. Next a day is fixed for the engagement ceremony (ngurario), i.e. the pouring out of the blood of unity. A ram (ngoima ya ngurario) is sent from the boy’s father to the girl’s home, where the ceremonial feast is prepared. The ram is slaughtered, and the girl eats the kidneys as a sign of consent to the betrothal. The betrothal is complete when this ceremony has been performed. The ngurario ceremony is followed by a further ceremonial feast (guthinja ngoima). This feast is attended by members of the parties’ clans, and after the slaughter of a sheep provided by the boy’s family, the families exchange presents. After the guthinja ngoima ceremony, the bride is brought to the bridegroom’s home by mock capture. The author notes that this procedure of capture is now obsolete.*

Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.

On the essentials of a valid kikuyu marriage, Cotran concludes that

*“No marriage is valid under Kikuyu law unless the ngurario ram is slaughtered” and that “there can be no valid marriage under Kikuyu law unless a part of the ruracio has been paid.”*

Specifically on the woman-to-woman marriage, Dr Cotran has rendered its rationale and essentials under Kikuyu customary law as follows:

*“Where a husband dies leaving a childless widow, who is past childbearing age, the widow may marry a wife. The widow pays ruracio to the family of the woman selected, and arranges for a man from her deceased husband’s age set to have intercourse with her. Children resulting from such intercourse are regarded as the children of the widow’s deceased husband. Modern development: This form of union is now very rare.”*

See *Restatement of African Law, supra, page 13.*

We now turn to consider the appellant’s grounds of appeal. The principles which guide this court in an appeal from a trial by the High Court are now well settled. In *SELLE AND ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS*, [1968] EA 123, Sir Clement De Lestang, Vice President of the

Court of Appeal for East Africa stated those principles 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 demeanor of a witness is inconsistent with the evidence in the case generally.”*

See also *JOHNSON NDEGWA KANYUIRA AND OTHERS V NYAMBURA MAINA AND OTHERS*, CA NO. 145 OF 2002).

The main ground of appeal and on which this appeal turns is the first ground of appeal on whether the respondent proved on a balance of probabilities, as she was duty bound to do, that a valid woman-to-woman marriage under Kikuyu customary law had been contracted between her and the deceased. The evidence of the alleged woman-to-woman marriage was given by the respondent and Kamau wa Gitundu, the only witness called by the respondent. To say the least, the evidence was scanty and mutually contradictory in material particulars.

The respondent’s evidence was that after the death of Karimi Njomo, she left his home and went back to her father in Nyeri because she had nobody to look after her. In 1987 the deceased and one Mwangi Waituiki visited her father in Nyeri and informed him they were looking for a lady with children to inherit the property of the deceased because the deceased had no children. It was then decided that the respondent would go and live with the deceased, look after her and inherit the deceased’s property. Subsequently, the deceased took to the respondent’s father a ewe, a he-goat and „njohi ya njurio?, the traditional beer. Elders visited her father three times and took to him dowry to formalize the marriage. During the last of these visits, elders took two goats for the *ngurario* ceremony.

Cross-examination elicited from the respondent the fact that the first visit was made by three people only, namely the deceased, Edward Mwangi and his wife Waruguru. During this visit, there were only discussions, “the goods” (presumably the dowry) were brought later. During the second visit, there were four people, namely, the deceased, Kamau Gitundu, Albert Githuku and Charles Maina. According to the respondent, Kamau Gitundu and Albert Githuku were members of the deceased’s clan while

Charles Maina was the brother of Jonathan Kahiga Mwangi, and thus the brother-in-law of the deceased. During this second visit, *mwati*, *harika* and traditional beer were taken to the respondent's father in addition to some money. During the last visit, two goats were taken to the respondent's father for *ngurario*. At this visit, there was a car full of visitors including members of the deceased's clan and many women from the deceased's Gitugi village.

From the evidence of Kamau Gitundu, it transpired that he was merely from the same village as the deceased, rather than a relative and a member of the deceased's clan. He informed the court that he visited the respondent's father three times and delivered the goats. He did not visit the initial time. The second visit was made by two people only, namely the deceased and himself. His actual evidence in this respect was:

*"I was there the second time. We were with Keziah (deceased), the two of us. There was nobody else. There was nobody from Keziah's family. We did not take any dowry at that time."*

According to Kamau Gitundu, it was at the third visit that they took to the respondent's father a ram, a ewe, dowry of KShs.8,000/= and KShs.2,000/= for beer. Even this third visit was made only by the deceased and himself.

So what do we make of this evidence of the customary woman-to-woman marriage? Although the respondent was firm that the initial visit to her home by the deceased was in 1987, neither her nor her witness could put a date or year to the alleged subsequent visits. Secondly, one of the strange and suspicious angles to this alleged customary marriage is the total non involvement of the relatives of the deceased or members of her "*Anjiru Mbari ya Murinda*" clan as is the norm in customary marriages.

The appellant, the younger brother of Jonathan Kahiga Mwangi, the late husband of the deceased was not aware, let alone involved in the alleged marriage of his sister-in-law. Benson Maina Mwai, the chairman of the *Anjiru Mbari ya Murinda* clan was similarly not aware or involved in the marriage. Florence Wangari Wandai is the younger sister of Jonathan Kahiga Mwangi. She testified that she was brought up by the deceased and lived with her and Jonathan Kahiga until she (the witness) got married. Like the others, she was not aware or involved in the alleged marriage.

The respondent's explanation was that the deceased was in bad terms with her relatives and therefore kept them off. It was also suggested that other relatives and clan members were based in Nairobi, and so could not be involved in the marriage. Still, the respondent, in her evidence, attempted to pass off her only witness Kamau Gitundu as a relative and a member of the clan of the deceased before he confirmed that he was only from the same village as the deceased. Lastly, the respondent testified that during the second visit to her father's house, the elders included Albert Githuku, a member of the clan of the deceased and the deceased's brother in law, Charles Maina. In his evidence on the alleged visit, Kamau Gitundu was categorical that the visit was made only by him and the deceased. In fact, from his evidence, even the third visit which the respondent claimed was made by many relatives, clansmen and women from Gitugi village was made only by the witness and the deceased.

If the essential customary rites and ceremonies were truly held in the presence of so many people and relatives, is it not strange that no other witness was called, save for Kamau Gitundu? True, under the Evidence Act, the matter in issue in this case could be proved even by a single witness. However, since the central dispute is whether a valid Kikuyu customary woman-to-woman marriage was contracted between the deceased and the respondent, it would have been expected that more of the alleged participants in those essential ceremonies would be called as witnesses. That it was only Kamau Gitundu who was called to testify strongly suggests that he was really the only person who accompanied the deceased, as he testified.

According to Dr Cotran there is no valid Kikuyu customary marriage without the slaughter of the *ngurario* ram. It is patently clear that *ngurario* is not performed by mere delivery of a ram or sheep. As described by Jomo Kenyatta's *Facing Mount Kenya*, Heinemann Books, 1988, Chapter VII, *ngoima ya*

*ngurario* is a rather elaborate ceremony involving the slaughter, roasting and sharing of particular parts of the ram between specific members of the two families. In ZIPPORAH WAIRIMU VS PAUL MUCHEMI, HCCS NO. 1880 OF 1970, Madan, J (*as he then was*) considered in great detail the essentials of a valid marriage under Kikuyu Customary law and in particular the essence and celebration of *ngurario*. He concluded:

*“It is not for the girl’s father to demand ngurario. Although there is no time fixed for it ngurario must be performed. Both the families of the boy and girl must be present during the performance of ngurario at the girl’s home. It must be eaten at the girl’s place. It is performed for proclaiming the marriage to members of both families.”*

Even if we allow room for evolution and development of customary law, it does not appear to us that *ngurario* under Kikuyu customary law has today transformed into a casual ceremony performed by a delegation of just two people.

The other troublesome aspect of this alleged wife-to-wife marriage arises when the rationale of a customary woman-to-woman marriage is borne in mind. At the core of the Kikuyu customary woman-to-woman marriage is the fact that the children born by the woman who has been “married” are fathered by an age mate of the deceased husband or a member of the clan of the childless woman, chosen by her. In the current constitutional set up, it would be expected that all these arrangements would be strictly with the consent of the “married” woman. Be that as it may, in this case there is no dispute that all the children involved are the children of Karimi Njomo, born in his home, rather than that of the deceased. The customary woman-to-woman marriage was a recognized social system to preserve and perpetuate clans and their lineages. What is presented in this appeal is not such preservation, but rather, the translocation of the entire family of Karimi Njomo into the *Anjiru Mbari ya Murinda* clan. It would be more appropriate to describe the situation here as some form of mass adoption of Karimi Njomo’s family rather than a customary woman-to-woman marriage.

In MONICA JESANG KATAM VS JACKSON CHEPKWONY & ANOTHER, Msa HCSC No. 212 of 2010, the High Court (Ojwang J, *as the then was*) found through the consistent evidence adduced in that case, a valid woman-to-woman marriage under Nandi customary law was proved and held that the petitioner was a wife of the deceased (woman) within the meaning of *section 29 of the*

*Law of Succession Act*. On the other hand, in IN THE ESTATE OF PRISCILLA NDUTA GITWANDE (DECEASED), [2006] eKLR (Rawal J, *as she then was*) and in MILLICENT NJERI MBUGUA VS ALICE WAMBUI WAINAINA, NYR CA NO 50 OF 2003 (Makhandia J, *as he then was*) the High Court declined to recognize alleged customary Kikuyu woman-to-woman marriages which did not satisfy the essentials of such marriages as identified by Dr Cotran.

In this appeal, we find likewise that the respondent did not prove that she had contracted a valid kikuyu woman-to-woman marriage with the deceased. Having so found, we do not find it necessary to consider the other grounds of appeal, save for ground number 3 which faults the learned judge for holding that the respondent and her children were dependants of the deceased prior to her death.

There is evidence that the deceased had taken the said children of Karimi Njomo into her family as her own children within the meaning of *section 29 of the Law of Succession Act* and was maintaining them immediately prior to her death. Since 1987, she was providing for those children and educating them. The deceased build the house where they live with their mother and since her death in 1993; their mother has been cultivating and utilizing the land of the deceased.

The respondent’s petition for grant of letters of administration intestate of the estate of the deceased was founded on her alleged status as the “widow” of the deceased. We have concluded that she was not a widow of the deceased. In these circumstances, the order that best commends itself to us is to allow the appeal, set aside the order of the High Court dismissing the appellant’s summons for revocation of grant and substitute therefor an order allowing the summons for revocation or annulment of the grant

filed in November, 2001. This will pave the way for the respondent and her children to file, if they so wish, an appropriate application before the High Court as dependants of the deceased. That will also provide an opportunity for the appellant's claim, if any, to be

heard since there is evidence that the property of the deceased which was given to the respondent and her children includes family land that belonged to the deceased's late husband and the appellant's brother, Jonathan Kahiga Mwangi.

Each party shall bear its own costs both in the High Court and in this Court. Those are our orders.

**Dated and delivered at Nairobi this 11th day of October, 2013.**

**R. N. NAMBUYE**

**JUDGE OF APPEAL**

**W. KARANJA**

**JUDGE OF APPEAL**

**K. M'INOTI**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**