



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal 252 of 2004**

**BETH NYAMBURA KIMANI .....APPELLANT**

**AND**

**JOYCE NYAKINYWA KIMANI & 2 OTHERS .....RESPONDENTS**

**(An appeal from the ruling of the High Court of Kenya at Nairobi (Githinji, J.)**

**dated 12<sup>th</sup> October, 1998**

**in**

**H.C.SUCC. CAUSE NO. 130 OF 1993)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This appeal arose from a Succession Cause in the estate of **Charles Kimani Chege** a.k.a **Kimani Chege** (deceased) who died on 3<sup>rd</sup> April, 1992. The sole issue before us, as it was before the superior court, is whether the appellant, **Beth Nyambura Kimani** (“Beth” or “the appellant”) was the wife of the deceased and therefore entitled to inherit the estate of the deceased. In a ruling delivered on 12<sup>th</sup> October, 1998, after hearing oral testimony from several witnesses, the superior court, Githinji, J (as he then was) found that Beth was not lawfully married to the deceased and was therefore not entitled to any grant of representation for his estate or to any inheritance therein. Aggrieved by that finding, Beth now comes before us on appeal.

The undisputed and proved facts were that the deceased died while undergoing treatment at Gaicanjiru Catholic Hospital, at the age of 53, from liver failure due to diabetes mellitus and hypertension. In his lifetime he was engaged in various businesses and had invested widely in real property as well as shares and stocks in various companies and co-operative societies. He also had a lorry, tractor, posho mill, and cash in various bank accounts. As regards his family, he was polygamous. His first wife was **Beth Wanjiru** and they had eight children between them before Wanjiru died in 1988. They had three sons and five daughters all of whom, except two, had attained the age of majority by the time their mother died. The eldest son was **John Chege Kimani** (John), who is the 3<sup>rd</sup> respondent here. The second wife was **Joyce Nyakinyua** (Joyce) who is the 1<sup>st</sup> respondent before us. She had no children of her own but has two adopted children. She met with the deceased in 1959 when they were both engaged in the business of buying and selling maize in Kandara. Four years before the deceased died, he married another wife, **Veronica Nduta** (Veronica) the 2<sup>nd</sup> respondent whom he met at Kagundu shopping centre where he ran a shop. That was in 1988. Veronica is said to have had three children - two sons and a daughter who was married.

Upon the death of the deceased, the three respondents: Joyce, Veronicah and John, petitioned for a grant of letters of administration for the estate. Before the grant of the Letters of Administration however, Beth objected and cross-petitioned for issuance of the grant to her or to the Public Trustee. She claimed that she was the lawful third wife of the deceased and ought therefore to participate in the administration of his estate. Counsel representing both sides however agreed on 4<sup>th</sup> November, 1993 that the grant may be issued jointly to the petitioners and the objector and the grant was issued accordingly on 25<sup>th</sup> January, 1994. Subsequently the parties agreed that the issue as to whether Beth was the wife of the deceased be submitted to arbitration before elders under the chairmanship of the Chief of Gaichajiru Location and the order was recorded on 27<sup>th</sup> September, 1995. The Chief and elders came to the conclusion that Beth was the deceased's wife but Joyce protested that the decision was wrongly arrived at. She sought to have it set aside but once again counsel on both sides agreed to have it set aside for the dispute to be heard and determined on evidence recorded by the court. The order was recorded on 21st March, 1996. The matter then fell before Githinji, J (as he then was) who heard Beth with her four witnesses and also heard Joyce, Veronicah and three other witnesses. John declined to testify in the matter. Another witness was also summoned to produce court records to confirm that Beth and her previous husband were lawfully divorced.

Beth's story is basically this: she was married to one **Ephraim Mwaura Mutugi** until 1970 when they parted ways. By the time she left that marriage she had two young children, one daughter, **Miriam Njeri** aged one year, and one son, **Peter Njoroge** aged five months. There are court records to show that the dowry Mutugi had paid for her was refunded when Beth's father sued him in Kandara Magistrate's court to recover customary compensation for impregnating Beth. In 1970 she met the deceased at Kabati town where the deceased had constructed a shop/bar/butchery complex and they started cohabiting in those premises. Beth was managing the shop and bar business while the butchery business was rented out. The following year, the deceased took Beth to her parents' home to inform them that he had decided to marry their daughter and was living with her. He gave out some money to her parents. The deceased went again to see the parents in Beth's absence in 1973/74. Then in 1977, the deceased, his late brother **Mburu** and late first wife, **Wanjiru**, together with an elder took some beers, sodas and cash to her parents' home. That same year 1977, Beth became pregnant with the deceased's child. She gave birth in Thika Maternity Hospital, but unfortunately the child, a son, died five days later and was buried in the hospital cemetery. He had been named after the deceased's father, **Chege**. Beth and the deceased made many other informal visits to her parents over the years. Eventually in 1982, the deceased took Beth and her two children to his home in Gitura village where she lived with Joyce, the second wife, in the same house. The first wife, Wanjiru, and her children were living in the deceased's other land in Makuyu. Wanjiru's children however moved to Gitura when their mother died in 1988. Beth says she took care of the two youngest children at Gitura. After staying with Joyce in the same home for several years, Joyce became extremely hostile to Beth as she wanted her to leave. Beth agreed with the deceased that she should leave the home for a while and she went to stay with her parents. She left her two children behind. The children had all along been maintained and educated by the deceased as his own children and they were baptized and had adopted his name as their father throughout. After one year, towards the end of 1989, the children were taken to her, but the deceased still continued to see them and gave his financial support.

In 1990 he fell sick and died two years later in 1992. Beth went to his Gitura home when he died and slept in Joyce's house but Joyce prevented her from participating in any funeral arrangements or the burial ceremony. She nevertheless attended the burial ceremony and paid her last respects. Beth exhibited various documents including photographs of herself and the children with the deceased. She also had an identity card which identified her as the wife of the deceased and said it was obtained with the deceased's consent and knowledge. In total, according to her, she had cohabited with the deceased for about 20 years as man and wife and she was properly married under Kikuyu customs.

Beth called the deceased's 60 year-old sister **Naomi Wanjiru Chege** (PW2) who testified that Beth was indeed the third wife of her brother. Two other witnesses, **Mwaura Kabuli** (PW3) and **Mwangi Nganga** (PW4) also testified to confirm that Beth was married to the deceased. Kabuli was a friend of the deceased and he helped him locate some plot in Ngei estate Nairobi for purchase. Beth then helped in the construction of some houses on the plot. He also knew about their new-born baby who died in Thika

hospital. Mwangi Nganga was an elder who witnessed various ceremonies at Beth's parents' home when the deceased visited to formalize their marriage. He witnessed the payment of cash towards dowry on two occasions and the presentation of beers and sodas. He also testified that the deceased had requested Beth's parents to perform the "Ngurario" ceremony under Kikuyu customs but the parents stopped him because there were elder sisters of Beth who were yet to perform theirs.

On the other hand the evidence led by Joyce was to the effect that Beth was merely an employee of the deceased throughout and there never was a formal marriage between them. Joyce met Beth in 1970 at Kabati where, according to Joyce, her husband had employed Beth as a bar maid. She worked in the bar business until 1982 when it went bankrupt and all employees were dismissed except Beth. Thereafter Beth was employed at the farm in Gitura where she was living in Joyce's house with other workers. She had two children with her at the time and she left with them in 1983. Joyce did not know anything about visits, made by the deceased to Beth's parents or any dowry paid for her. The deceased, she said, would have told her. She further testified that before he died, the deceased had called a surveyor to share out his Gitura farm to his three wives who did not include Beth. She admitted seeing Beth at her home when the deceased was sick. She had also visited Beth at Thika maternity hospital when she was pregnant but did not know that happened to the pregnancy. According to her, Beth was only an employee because the deceased used to tell her so, but she never saw any salary being paid to her.

Veronica (DW3) who met the deceased in 1988 and was brought to the Gitura home as a wife in 1990, denied that Beth was a wife. She had been informed by Joyce that Beth was only an employee. In 1992, however she met Beth at the funeral of the deceased's brother, **Mburu** who died that year. When the deceased died, Beth was not included in the funeral programme although she attended the burial. **Peter Mburu** (DW4) was also called to lend support to the evidence that Beth was an employee. He was the deceased's brother-in-law and was employed in the butchery at Kabati town while Beth was running the adjoining bar and lodgings where she also lived in one of the rooms. He however worked for only 3 years and left Beth there. He did not know her relationship with the deceased although he knew that Beth went to live at the deceased's home in Gitura. She was staying in the same house with Joyce. A friend of the deceased, **Ibrahim Njogu Wainaina** (DW5) testified that he was asked by the deceased in 1990 to take measurements of his Gitura farm and divide it into three. He did not know anything about Beth, and the deceased did not mention the names of the wives who would be given the land. He was not a surveyor. The last witness was a neighbour **Kariuki wa Wakoru Nyagithoga** (DW6) who said he was called by the deceased one day and was shown two children. The deceased told him they had no one to look after them and requested him to escort them to a home which the children would show him. He was given a vehicle which was driven by the deceased's son and they took the children to an old man at Kiriti and left them there. He did not know whose children they were but since they were in the deceased's home, he presumed they were his. He claimed that he never knew Beth before, although it was put to him that he had attended the marriage ceremonies at her father's home and therefore knew it. The deceased's son who accompanied him declined to testify.

We have examined the evidence on record in some detail because it is our duty as the first appellate court to re-evaluate it and to make our own conclusions, although it is a jurisdiction which should be exercised with caution. As was stated in **Peters v Sunday Post Ltd [1958] EA 424**: -

**"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses."**

We would only therefore be entitled to interfere with the findings of fact made by the superior court if they are based on no evidence, or on a misapprehension of it or the Judge demonstrably acted on wrong principles in reaching the findings.

We have neither the basis nor the intention to disturb the findings of fact made by the superior court that the first wife of the deceased died in 1988 leaving eight children; that the deceased had two other wives: Joyce and Veronica; and that Beth was lawfully divorced from her first husband. On the issue of marriage, the learned Judge found that Beth was familiar with the deceased between 1970 and 1983. He examined the evidence relating to a formal Kikuyu customary marriage and came to the conclusion that

there was no such marriage, stating: -

**“I have not found any concrete and credible evidence that dowry was discussed and paid by the deceased or that any customary marriage ceremony was performed.”**

That conclusion depended mainly on the assessment of credibility of the witnesses who appeared before the learned judge and we must give allowance for that advantage. It was on that basis that the learned Judge held in the end, thus: -

**“After considering the whole evidence, I find it more probable that Beth Nyambura was living with the deceased as his mistress and not as an employee.”**

Learned counsel for the appellant Mr. Mwangi Kigotho addressed us on the six grounds of appeal set out in the memorandum of appeal which he combined into three by arguing grounds 1 & 5, 2 & 4 and 3 & 6. The grounds were as follows: -

- “1. The learned Judge erred in law and infact by failing to find that the appellant was a wife to the deceased by virtue of cohabitation and repute, and hence entitled to inherit his estate.***
- 2. The learned Judge erred in law and infact by arriving at a decision that was manifestly at variance with the candid evidence on record, which clearly pointed out the existence of a marital relationship between the appellant and the deceased.***
- 3. The learned Judge erred in law and infact by dismissing the application for confirmation of grant with costs, and upholding the objection therein.***
- 4. The learned Judge erred in law and infact by failing to attach similar importance and weight to the evidence adduced by the appellant and her witnesses, with that adduced by the respondent and her witnesses, without valid reasons for so doing.***
- 5. The learned Judge erred in law and infact by failing to find that the appellant was a wife to the deceased, though finding that the two lived together for several years, and the deceased was helping the appellant’s children from her previous marriage.***
- 6. The learned Judge erred in law and infact by failing to consider the submissions and authorities cited by the counsel for the appellant thereof.”***

We think the most crucial of those grounds is the complaint by the appellant that the learned Judge did not consider presumption of marriage through long cohabitation.

As stated earlier, the Judge was satisfied that there was no customary marriage proved between the appellant and the deceased and decided the case on that basis. He further made a finding that the appellant had lived for 13 years as a mistress with the deceased. In point of fact the period was 18 years from 1970 to 1988. Unfortunately, the learned Judge went no further. He said nothing about presumption of marriage. It was a live issue which was raised by learned counsel for the parties who made submissions and cited relevant authorities including **Hortensiah Wanjiku Yaweh v Public Trustee Civil App. No. 13 of 1976 (ur)**. In **Veronica Rwambah Mbogoh v Margaret Rachel Muthoni & Anor Civil App. No. 311 of 2002 (ur)** this Court stated as follows: -

**“For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The court must go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant’s favour. Such was the situation facing the predecessor of this Court in Hortensiah Wanjiku Yaweh v Public Trustee, Civil Appeal No. 13 of 1976. Mustafa J.A in his leading judgment stated: -**

*“I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption, see re: Taplin – Watson v Tate (1973) 3 ALLER 105. The trial judge did not consider this factor. The trial judge was not satisfied that the appellant had established, on a balance of probabilities, that the Kikuyu customary marriage was performed in accordance with all the necessary ceremonial rituals. It is not clear whether he found that the marriage was not valid because all the rituals were not performed, or that no marriage of any kind had taken place at all. However in considering whether there was a marriage the trial judge ought to have taken account of the presumption of marriage in the appellant’s favour. Such presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance in the appellant’s favour, the scale must tilt in her direction.”*

**He continued:**

*“I can find nothing in the “Restatement of African Law” to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated.”*

**On the same issue, Wambuzi P. stated: -**

*“In the first place, no authority was cited to us that the presumption does not apply to customary law marriages and secondly, the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. It may be shown that the parties are not married after all but then the burden is on the party to assert that there was no marriage. It is at this stage that the nature of the marriage becomes relevant and the incidents thereof examined.”*

**Musoke J.A agreed with both.**

**That decision has since been faithfully applied in our courts.”**

As correctly submitted by Mr. Kigotho, several factors which militated against the finding that the appellant was a mistress and supported her marriage were not considered sufficiently or at all. They included the long period of cohabitation in Kabati town and Gitura farm for 18 years; the undisputed fact that the deceased maintained and educated the appellant’s two children from a young age of one year and less upto completion of secondary school, and that they adopted the name of the deceased as their father throughout; the undisputed evidence relating to the appellant’s identity card which identified her as the wife of the deceased, and family photographs taken with the deceased; visits to the appellant’s parents’ home and the gifts given out, even if, as found by the Judge, they did not amount to dowry or customary marriage negotiations; the evidence that the first wife, Wanjiru (deceased) and Joyce, 1<sup>st</sup> respondent, visited Beth when she was admitted at Thika maternity hospital; and the reluctance by the children of the 1<sup>st</sup> wife Wanjiru (deceased) to testify against the appellant as tacit acknowledgment that she was their father’s third wife. We think, with respect, that those were all weighty matters of fact which would have made all the difference if they were considered. The evidential burden of proof is not on the appellant, but on the respondents to show that the appellant was not the deceased’s wife or put another way, to rebut the presumption of marriage. That was stated in the Yawe Case.

Learned counsel for the respondents, Mr. Mundia, submitted that the superior court was entitled to believe the evidence of Joyce and Veronicah that the appellant was merely an employee; that if there was any intention of converting her into a wife, proper Kikuyu rites would have been performed including the construction of a house for her and allocation of land; that cohabitation could only have technically lasted between 1980 – 1988 since formal divorce from the earlier customary marriage was made in 1980; that the appellant left the deceased’s home before the death of the deceased; That she did not take part in funeral ceremonies; and that the cohabitation was secretive when it ought to have been open for presumption of marriage to apply.

Once again, in our assessment, those were factual issues which the superior court did not weigh sufficiently or at all. Other than rejecting the evidence of Joyce and Veronicah that the appellant was an employee and making a finding that she was a mistress, the court did not appreciate that it was not in the interest of the two respondents to give favourable evidence in favour of the appellant. Neither of the two was the natural mother of the deceased’s children. None of the two held any legal title to any of the deceased’s property. Veronicah in particular knew very little about the appellant as she joined the family two years before the deceased fell seriously sick and died two years later. There was evidence that Joyce was hostile to the appellant when they stayed together in the same house and that led to the appellant’s departure leaving the children with the deceased for more than one year on the ground that there was no one to look after them. Her hostility kept the appellant away from the deceased’s funeral arrangements but she still attended the burial ceremony. In all the circumstances, the evidence of the 1<sup>st</sup> and 2<sup>nd</sup> respondents ought to have been treated cautiously as it was lacking in cogency. They stood to gain by rejection of the appellant as the wife of the deceased.

On our own evaluation of the evidence on record, we think it was more probable than not that the deceased cohabited openly with the appellant as man and wife for a long period and we would on that ground alone find that she was the deceased’s wife. Being so persuaded, we allow this appeal and set aside the ruling of the superior court made on 12<sup>th</sup> October, 1998. We substitute therefor an order allowing the objection filed by the appellant and confirming the issuance of the grant of letters of administration of the estate of the late **Charles Kimani Chege** alias **Kimani Chege**, which was made with the consent of the parties on 25<sup>th</sup> January, 1994 in the joint names of the appellant and the three respondents.

As the matter involves members of the same family, there shall be no order as to costs.

*Dated and delivered at Nairobi this 8<sup>th</sup> day of December, 2006.*

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**P.N. WAKI**

.....

**JUDGE OF APPEAL**

**W.S. DEVERELL**

.....

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**