



REPUBLIC OF KENYA



**In re Estate of Tabitha Njoki Ngigi (Deceased) (Succession Cause
552 of 2019) [2024] KEHC 580 (KLR) (Family) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 552 OF 2019
SN RIECHI, J
JANUARY 24, 2024
IN THE MATTER OF THE ESTATE OF TABITHA NJOKI NGIGI (DECEASED)**

RULING

1. The deceased Tabitha Njoki Ngigi Kibisu died on 3.11.2019. The record shows that she was survived by 3 adult children Jacqueline Wairimu, Samuel Wainaina Wanyoike and Daniel Ngigi Wanyoike. She was also survived by AHW M, a minor. On 22.8.2019, Jacqueline and Daniel, the Petitioners, filed a petition seeking to be appointed administrators of the estate of their late mother. Shortly thereafter, the Applicant filed an objection dated 11.9.2019 stating that he was the husband of the deceased. He also filed an answer to petition and a petition by way of cross application both dated 11.9.19. The following month, the Applicant filed a summons dated 24.10.19 against ITSL Company Limited and Jane Juma, seeking a monthly sum of Kshs.50,000/- as reasonable provision from the deceased's group life benefits.
2. By an order of 18.12.19, Ongeru, J. directed inter alia that "the Deputy Registrar to refer this matter to the Public Trustee to be seized of administration and to take measures to preserve the Estate until the contested issues herein are determined." The contested issues related to beneficiaries, the administrators, the properties of the estate, and distribution thereof. Notably, the grant issued on 30.1.2020, was not a limited grant ad colligenda bona for collecting and preserving the estate, but a full grant of letters of administration intestate.
3. By ruling dated 23.9.2022. Thande J. directed:

In the end and in view of the foregoing, I make the following orders which are necessary for the ends of justice:
 - a. The Summons dated 15.2.22 is hereby dismissed.



- b. The matter shall proceed to oral hearing of the summons for confirmation of grant dated 26.8.21, where all issues in dispute shall be ventilated and finally determined.
4. The Summons for Confirmation filed by Public Trustee indicated the estate of deceased was comprised of:
- i) Immovables:
1. Naivasha/Mwichiringiri Block 4/1908
 2. Malindi/Pumwani Phase 11/54
 3. Makuyu/Kimorori 1 Block 1/2487
 4. Kajiado/Kaputiei-North/69080
 5. Kajiado/Mailua/8451
 6. Juja/juja East Block 1/6005
 7. Weiteithie Block 1/680, Plot No. 10
 8. Mavoko Town Block 3/72160
 9. Karangaita Ballot No. Q2176, Parcel No. 533
 10. Samuru/Mwitingiri/Block 1/1145
 11. Farmers Choice Housing Co-op Society Ltd Plot No. 3
 12. Broad Borders Plots
 - a. Kiharu Project, plot no 23 code 1006 (Muranga Hostels)
 - b. Maragua I- High Rise Garden, Plot 88, code 1555, Nginda/ Samar/ block 1/1419 (Muranga Igikiru)
 - c. Olive Gardens 2, plot 2 code 1859 (Nyahururu Kasuku- oljororok)
 - d. Evergreen gardens, Plot No. 95, code 2514, Kiine/Thingirichi (Sagana primerose)
 13. Muroto Mwenga (Sale Transfar Agreement for Ruiru/Ruiru East Block 2/3770 Plot No 4
 14. Embakasi Ranching Plot No V14107
 15. Ekeza/Urithi- Tabitha Njoki Ngigi
- ii) Movables:
1. Bank Accounts
 2. Motor Vehicle Registration No. KBR 633D
 3. Motor Vehicle Registration No. KAM 394B
- (Share of the minor to be held by the Public Trustee until she attains the age of majority)



5. This is not disputed by the parties. The Public Trustee proposed to distribute the estate in equal shares to:
 1. Jacqueline Wairimu Daughter
 2. Samuel Wainaina Wanyoike Son
 3. Daniel Ngigi Wanyoike Son
 4. AHWM Daughter (minor)
6. Robert Tom Martin Kibisu filed objection contending that he was the husband to the deceased and therefore a beneficiary who should be included in the distribution of the estate. The issue of whether he was a husband and therefore a beneficiary was by Consent be heard by way of viva voce evidence. On 4.5.2023 Robert Tom Martin Kibisu (Robert) gave evidence. He testified that he knew the deceased and in 2004 they started staying together. By that time Tabitha had 3 biological children:
 1. Jackline Wairimu Wanyoike – 30 years
 2. Samuel Wainaina – 27 – 28 years
 3. Daniel Ngigi – 26 or 27 years
7. Tabitha was also supporting a child AHWM – 17 years
8. He adopted the content of this affidavit sworn on 11.9.2019 as his evidence in chief. In paragraph 6 deponed:
 1. That prior to the death of TABitha Njoki Ngigi we cohabited together as and wife with the deceased for over ten years preceding her death including her children it: various houses and locations that is Buru Buru phase 3 Nairobi Milimani estate Meru town Section 9 Thika town and finally Jogoo Kimakia estate near Blue Posts Hotel, Gatanga Sub County, Muranga County. We attended all functions as appropriate together as a couple or family including attending Church and Home group fellowship. This was after she separated and was brutally chased away from their matrimonial house by her former husband a Mr. Joseph Wainaina Wanyoike of Saba Saba town Muranga in 1997. Mr. Joseph Wainaina Wanyoike then formally dissolved the marriage by way of a letter dated 20th March 2003.
 2. That marriage completely irretrievably broke down with each party moving on. The former husband remarried and has three issues and currently residing at Saba Saba town one kilometer away from their ancestral home. The said Joseph Wainaina Wanyoike never participated in the affairs of the deceased nor her children from 1997 to date, even her funeral. The deceased is buried on land that was jointly acquired with the Applicant herein. At the time of the deceased death she was a known hypertensive and on medication prescribed by a doctor. The following documents are attached as proof of marriage and acts of general repute: Anglican Church of Kenya membership, Mothers Union membership, Mothers Union testimonial during funeral, Jubilee Medical Insurance, Thika Sports Club membership card, Nairobi hospital admission and discharge record, Standard Chartered (Sanlam) Loan documents, Diamond Trust Bank joint account documents, Farmers staff retirement benefits scheme nomination of beneficiary form dated 2.7.2012. KRA PIN Certificate, Kakuzi PLC receipt dated 13.10.2018, House Lease documents for Jacqueline Wairimu Wanyoike, Various Banking Slips for school/ college fees, House Rent receipts, Funeral documents for Andrew Mlamba and Dowry documents



for Rachel and event photographs marked and soft copies of memorial service for the deceased dated 7 November 2018, held at ACK Emmanuel Memorial Church Thika as RTMK 2 – 26.

10. On the basis of his long cohabitation he stated that there was a presumption of marriage and therefore he was the husband of the deceased and beneficiary of the deceased's estate, along with the children. On being cross examined by Mr. Njenga for the children he testified that he met the deceased 3 years after she had been chased away by her husband. She was then staying in Umoja and they moved together to a new house in Buruburu estate. He knows that she had been married to one Wanyoike who had written to her stating that he was no longer interested in her. He however did not know whether they divorced. He denied the assertion that he was just a boyfriend.
11. Jackline Wairimu Wanyoike, the daughter of the deceased adopted her witness statement dated 17.12.2023 as her evidence in chief. In her statement She stated:
 1. My mother, Tabitha Njoki Ngigi (deceased) died on 3rd November 2018.
 2. At the time of her death she was still married to my father Joseph Wanyoike Wainaina and the marriage had not been dissolved.
 3. My mother had borne 4 children with my father namely:-
 - a. Jaqueline Wairimu (born on 20th June 1988)
 - b. Samuel Wainaina (born on 8th December 1990)
 - c. Daniel Ngigi (born on 6th July 1995)
 4. The Objector herein Robert Tom Martins Kibisu was merely a boyfriend to our mother as such is a stranger to the proceedings herein.
 5. The Objector herein is not a widower to the deceased as alleged in his Objection as he was never married to my mother.
 6. The marriage between my mother and our father Joseph Wanyoike Wainaina was subsisting as at the time of the death of our mother.
 7. The Applicant was never married to my deceased mother and neither was he a dependant of the deceased as alleged.
 8. My mother, the deceased and my father were married under the African Christian marriage and Divorce Act Cap 151 on 4th June, 1988.
 9. The dissolution of marriage under the above mentioned Act was provided for under Section 9(3).
 10. I am aware that the marriage between my father and my deceased mother was never legally dissolved hence she lacked capacity to contract another marriage.
 11. The alleged marriage between my deceased mother and Robert Tom Martins Kibisu was illegal, null and void.
 12. The Objector herein is not a dependant in accordance with Section 26 of the [Law of Succession Act](#).
12. On being cross examined by Kibisu she stated that she is now 39 years old and the last time she shared with her biological father was when she was 7 years old and staying in Umoja. She confirmed it is her mother who paid school fees. She stated she was out of Kenya from November 2012 – April 2015 and



was not involved in the acquisition of the property. She confirmed the biological father Wanyoike has not been involved in her life nor did he attend or participate in the funeral of the deceased because they had separated. She confirmed that Robert was staying in their house since 2003 up to when the mother died in 2018. She confirmed she and her siblings had received the Insurance and Farmers choice benefits. On being asked why she had not included the biological father in the estate she responded that she did not allow him to file for Succession in this matter because he and the deceased were separated.

13. By consent both parties filed written submissions. Mr. Jengo for the Petitioners submitted that the objector was not married to the deceased and therefore is not entitled to the share in her estate. He referred this court to the decision in MNK Vs PON & KESC 2 (KLR) in support of his submissions. On the evidence adduced he submitted that Robert was just a boyfriend and not a dependant as stipulated by section 29 of the *Law of Succession Act*. He therefore urged the court to distribute the estate among the children of the deceased equally.
14. Robert Tom Martin Kibisu the objector also filed his written submissions. He submitted that he met the deceased in January 2000 when she was working at Farmers choice and he was working with the Kenya Army. She informed him that she separated from her husband Wanyoike Wainaina and had no intention of going back as the said Wanyoike had chased her. She showed him a letter by the said Wanyoike where he stated that he had released the deceased and on his part will move on to have another family.
15. He submitted that after moving in with deceased he cohabited with her in Buruburu, Milimani Estate in Meru and finally Thika town. He stayed with her until when she died. He submitted that the way they cohabited for a long time, the way they managed their affairs and the fact that the deceased included him in statutory records as a husband all lead to a presumption that they were married. He referred this Court to the persuasive decision in Jecinter Njoki Okoth (Deceased) 2020 eKLR where it was noted that there is a presumption of marriage where there is long cohabitation.
16. The role of a Probate Court is first to confirm that the deceased died, secondly, identify the beneficiaries or dependants of the deceased, thirdly ascertain the property of the estate and finally distribute the estate to the beneficiaries. In this case there is evidence that the deceased died by production of the death certificate.
17. The extent of the estate has been established at least that known to the Petitioners. The main outstanding issues for determination is the number of beneficiaries and the distribution. This court heard the evidence of Robert the applicant and Jacqueline the daughter of the deceased. In their evidence they agreed on the following:
 1. That the deceased was married to Wanyoike
 2. That the deceased at time of death had the following biological children:
 - Jacqueline Wairimu
 - Samuel Wainaina Wanyoike
 - Daniel Ngigi Wanyoike
 - AHWM – though not biological she was supported by deceased.
 3. That the known properties of the deceased are as stated in the summons.
 4. That the deceased and Wanyoike separated and Robert started staying with deceased from 2003 to the time of her death on 3.11.2019.



18. The issue which is in contention is as whether Robert the objector is a husband by virtue of presumption of marriage as he contends and therefore a beneficiary or was he a boyfriend of the deceased who should not be a dependant as the Petitioner contends. The determination of this issue brings to the fore the provision of Section 29 of the Law Succession Act.

Section 29 of *Law of Succession Act*

Meaning of dependant

For the purposes of this Part, “dependant” means—

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
19. Robert in this cause contends that he is a husband of the deceased. He readily admits that it is true deceased had a previous marriage with one Joseph Wainaina Wanyoike. He contends and the Petitioners admit that the said Wanyoike separated with the deceased many years ago. He contends and the Petitioners agree that since 2003 to the time the deceased died, Robert was staying with deceased. While Robert maintains that the long cohabitation with deceased led to a presumption of marriage, the petitioners deny the same.
20. The doctrine at presumption of marriage has received several judicial affirmation in our courts. The court of appeal of East Africa in *Hotensia Wanjiku Yaweh Vs Public Trustee*. C. A. 13 of 1976 (.....) that Musafa JA stated:
21. I agree with the trial judge that the onus of proving that she was married to the deceased was on the Appellant. But on 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 favor of the Appellant. Only cogent evidence to the contrary can rebut such a presumption, see re: *Taplin- Watson Vs Tate* [1973] EAll ER105. 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 necessary ceremonial rituals. It was 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 for all marriages however so celebrated”

In the same issue Wambuzi P. stated:

“In the first place, no authority has been 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 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.”

22. There are parameters within which a presumption of marriage can be proved by any person who desires the court to declare a presumption of marriage. These parameters include, that
1. The parties must have lived together for a long period of time.
 2. The parties must have had the legal right to or capacity to marry.
 3. The parties must have intended to marry.
 4. There must be consent by both parties
 5. The parties must have held themselves out to the outside world as being a married couple.
 6. The onus of proving the presumption is on the party who alleges it.
 7. The evidence to rebut the presumption must be strong, distinct, satisfactory and conclusive and the standard of proof is on balance of probability.
23. There is no dispute that the deceased was married to Joseph Wanyoike. It is not contested that the deceased and Joseph had disputes and they separated when the Petitioner Jacqueline who is now 34 years old was in class 7. This is confirmed by the letter from Joseph Wanyoike dated 20th March, 2003 to the deceased confirming the separation with her and the intention to start another family;

Mama Wairimu,

I hope you are all okay and doing fine. Am also alright and continuing with my normal duties. How are the young ones? Let me know.

Let's turn to the message. I am sure that you know that we have started the fifth year since our separation. It is apparent that neither of us requires the other. The marriage has now faded away and am sure you can see so. While you are happy with your kids am lonely. It is for this reason that I wish to inform you that I can't continue with this kind of life and for this reason I am forced to dissolve the marriage forthwith.

23. The Petitioner confirms both in her affidavit and evidence that the deceased started staying with Robert in 2013 or thereabout and that when she was in class 7 and had been staying with the deceased until she died in 2018. This compute to a period of 15 years. Did the deceased consider Robert a boyfriend or husband when they were staying together? The deceased during her lifetime filed statutory documents indicating and describing Robert as her husband. These documents include:



1. Jubilee Medical Insurance application form where she indicated:
Robert T.M. Kibisu - Born on 8th August 1961, ID No. (particulars withheld) Blood group O+ Beneficiary ID No. (particulars withheld) as her husband
 2. Farmers Choice Nomination of Beneficiary from where in the notes she indicated:
Robert T. M. Kibiso Tel No. (particulars withheld) , Christine Njeri – (particulars withheld) and Jacqueline W. Ngigi (Additional beneficiaries) will be guardians to both Samuel due to his Aphosia disability and Daniel (below 18 years).
 3. Power of Attorney from Diamond Trust Bank authorizing Robert to execute all documents required by the bank.
 4. The deceased taking Robert to family functions where photographs were taken and are annexed Indeed the Petitioner confirmed this in her evidence when responding to questions by counsel. She stated:

“I have seen the photographs, it is true they used to worship together. He used to come to family gatherings, traditional parties, birthday of our cousins and aunts and our birthdays”.
 5. Admission form at Nairobi Hospital where Robert is indicated as husband and next of Kin.
 6. Tenancyagreement by Musica Agencies where the tenant was Robert and next of Kin indicated as deceased.
 7. Participation in Church activities together as evidenced by photograph produced where both Robert and deceased are being blessed by pastor.
24. From all documents indicated above, there is nowhere where the deceased introduced or mentioned Robert as a boyfriend. She deliberately and willingly indicated him as a husband. The decision whether Robert was a husband or boyfriend lay with the deceased. She categorically stated that he was husband. The children have no capacity to determine for the mother who Robert was to her. It was her province and responsibility and she made it clear he was a husband. The children therefore cannot be heard to call him a boyfriend because it was their mother the deceased who knew who he was to her.
25. Great emphasis has been placed by the Petitioner that their mother the deceased had no capacity to marry because there was no divorce and was still therefore married to Wanyoike. On her own evidence Jacqueline informed court that the said Wanyoike left that home when she was in class 7. She is now 34 years old and running her own business. She confirmed that he has not been in their lives nor involved in their welfare since.
26. She informed Court that she went to look for him in 2021 and found he has another family with whom he stays in Muranga. She confirmed that even upon death of the deceased he did not participate. Indeed she confirmed that Robert is the one who was with the deceased and remained with them after the death of the deceased. He is the one who participated in the funeral arrangement. Probably she was not aware what Joseph told the deceased in letter dated 20th March 2003.
- It is for this reason that I wish to inform you that I can't continue with this kind of life and for this reason I am ready to dissolve the marriage forthwith.”
27. In these circumstances I agree with my brother Nyakundi J. in Re Estate of Jacinter Njoki (deceased) 2020 eKLR where he stated:



There is positive evidence of a marriage where both cohabited together for such a length of time so as to acquire the reputation of spouses. This begs the question whether any other previous union there was, must have been rebutted by this new arrangement. It appears that where any marriage, so called has been absconded by conduct of one party followed with another marriage, particularly on the side of a woman she may have by intention and conduct dissolved her marriage. Put another way any possibility of ties with the previous union and any formalities of dissolution of marriage aside, the presumption goes in favour of an irretrievably broken down marriage.

It is a curious feature of this case that the objector would claim validity marriage relationship with the deceased but in her death he did not advance a case for the application of having the sole custody of burying and to inter the body in accordance with two Customary Law.

27. I think the Petitioners do not believe in their contention that there was an existing marriage between deceased and Wanyoike. Had they believed how can they explain the fact that they did not include him as a beneficiary of the estate of the deceased. Indeed that action shakes the ground upon which they allege to be standing in their objection to Robert being a beneficiary.

Upon considering the same I do find that there was between Robert and deceased a long cohabitation which gives rise to presumption of marriage.

28. I therefore do find that Robert Tom Martins Kibisu was husband within the provision of Section 29 of the Law Succession Act and therefore a beneficiary.

DATED AT NAIROBI THIS 24TH DAY OF JANUARY 2024

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S. N. RIECHI

JUDGE

