



REPUBLIC OF KENYA



In re Estate of Mbuthi Mungushi Igiria (Deceased) (Succession Cause E875 of 2022) [2024] KEHC 5216 (KLR) (Family) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE E875 OF 2022

PM NYAUNDI, J

APRIL 26, 2024

IN THE MATTER OF THE ESTATE OF MBUTHI MUNGUSHI IGIRIA (DECEASED)

BETWEEN

NYOKABI MBUTHI 1ST OBJECTOR

ROSE WAMBUI MBUTHI 2ND OBJECTOR

MARY NGINA MBUTHI 3RD OBJECTOR

AND

SUSAN WANJIKU 1ST PETITIONER

KARIUKI MUIRA 2ND PETITIONER

JUDGMENT

1. Following the Petition by the 1st and 2nd Respondent for Grant of Letters of Administration intestate in respect of the Estate of Mbuthi Mungushi Igiria (Deceased), the 1st, 2nd and 3rd Objectors filed an Objection to the making of a grant and Cross Petition both dated 13th June 2022.
2. The Grounds of the objection were that
 - a. the deceased was the husband to the 3 Objectors.
 - b. the Petitioners did not consult the objectors/ applicants, survivors, dependants and beneficiaries of the deceased before petitioning for grant of letters of Administration intestate
 - c. the Petitioners fraudulently concealed vital information from the Court while petitioning for grant of letters of Administration intestate



- d. the Grant of Letters of Administration intestate are being obtained secretly by the Petitioners herein and without the objectors/ Applicant consent or knowledge.
 - e. The objectors / Applicants wish to cross petition for the Grant of letters of Administration intestate as they are the immediate next of kin.
3. The Parties were referred to Court Annexed Mediation and when the mediation failed the matter proceeded by way of viva voce evidence.
 4. The 2nd Objector testified on behalf of all 3 Objectors. She testified that she alongside the 1st and 3rd Objector are the wives of the deceased and she would like to be a co-administrator alongside the other wives and the children of the deceased. The Court adopted her witness statement dated 5th of May 2023 as her evidence in Chief and admitted as evidence letter from the Chief, Kawangware Location dated 17th February 2022 as well as death certificate serial no 125899 in respect of the deceased person.
 5. In cross examination she reiterated that she was the 3 Objectors are wives of the deceased having formalised the marriages under Kikuyu Customary law. She stated that she was married in March 2012 and the deceased went to her home in the company of some elders including Kariuki Igiria.
 6. She testified that the 1st Objector is the 1st wife while she is the 2nd. That she did not meet the mothers of the 1st and 2nd Petitioners. She denied that she and the other Objectors were members of the deceased's church. She testified that the 1st objector was married in 1985. She was present at the Ceremony of the 3rd Objector's marriage.
 7. She contended that she had 5 children with the deceased. She could not remember the years of birth for the 3 eldest, but the youngest were born in 1998 and 2000 respectively.
 8. She testified that neither of the 2 Petitioners reside at Kawangware and she is the one who resides there. She recalled that the deceased had suffered a bout of ill health prior to his death.
 9. She is aware that the sister of the deceased continues to collect rental income from the property of the deceased ostensibly to repay herself for costs of construction she had undertaken on behalf of the deceased.
 10. On re-examination, she reiterated that she and her co wives would like the Public Trustee to administer the Estate in the interim and that the sister to the deceased Annah Njoki had reneged on her promise to remit a monthly sum of Kshs 150000 to them.
 11. At the close of the Objector's case the Petitioners presented 3 witness.
 12. PWI is the 1st Petitioner. She contends that she is the daughter of the deceased. Her witness statement dated 17th July 2023 was admitted as her evidence in Chief. It is her evidence that she and the 2nd Petitioner are the only children of the deceased.
 13. She confirmed that she did not have a birth certificate but she was the child of the deceased. She also confirmed that she lodged the letter from the chief Dagoretti Location dated 17th February 2022 in support of her Petition for Grant of Letters of Administration Intestate. The Assistant Chief issued her with a letter dated 16th December 2021, which had a different list of beneficiaries.
 14. She stated that the Akorino Church has a plot neighbouring her fathers and on occasion when she would visit she found church members staying with her father. He never introduced those members to her as his wives.



15. She does not know how her parents formalised the union. She left Dagoretti at the age of 8. She visited her father frequently from the age of 15 years. He father was a Pastor at the Akorino Church.
16. The 2nd Petitioner is her step brother and like her, his mother left the home after the collapse of her marriage to the deceased. She confirmed that the sister to the deceased has developed the property. Her Auntie collects rent and gives her Kshs 30000 per month.
17. In re-examination she restated that she had identified the Objectors as congregants when she would visit her father at his home in Kawangware. She reiterated that the interested parties are not children of the deceased.
18. PW2 is Anna Njoki Nganga she is sister to the deceased; the Court adopted her witness statement dated 17th July 2023 as her evidence in Chief. On cross examination, she reiterated that she is a sister to the deceased. That she is married and her home is approximately 300m from that of the deceased.
19. She stated that the deceased had two wives whom he married under Kikuyu Customary law. Wangui Mbuthi and Njambi. She recalls that they undertook the customary rites to formalise the marriage to Wangui and Njambi and she recalls visiting the homes on 3 occasions. Her father was present on those occasions.
20. The 2nd Wife Wanjiru died, she could not recall the year. At the time the deceased was married to the two wives he was taking large amounts of alcohol. He later separated with both wives and they returned to their respective homes with the Children.
21. According to her the 1st Petitioner resurfaced in 2010 when the deceased fell ill. She entered into an agreement with the deceased for construction of some rental units on LR No. Dagoretti/ Riruta/5498. She averred that the Kshs 150000 was payable to the deceased and his family and not the Objectors. She admitted to managing the 64 rooms from which she collected rent of Kshs 400000 per month since 2015.
22. She does not know how the Akorinos came to live on the land. She helped her brother collect the rent, including from the Akorinos who were staying on the property. It was her evidence that the Objectors and their Children falsified their Identity Cards to bear the name of the deceased.
23. In re-examination she reiterated that the deceased had 2 lawful wives and two surviving children. She does not recognise the 3 objectors as the wives of the deceased. The total rental income from the units is Kshs 300000 and the objectors are collecting it.
24. PW3 Kariuki Muira Mbuthi is a son to the deceased. His witness statement dated 17th July 2023 was adapted as his evidence in Chief. In cross examination he stated that his mother is now deceased her name was Wangui Mbuthi. She separated from the deceased.
25. His mother left with him and they settled in Nakuru. He reconnected with his father when he got married. He knows that the objectors are members of the Akorino Church and they lived in the compound. His position is that it was the DNA test that would confirm paternity of the children of the objectors. He confirmed that the letter from the Chief dated 17th February 2022 included the 3 objectors and their children as beneficiaries of the deceased.
26. It is the 3 objectors who chased him from Nairobi and he returned to live in Nakuru. Prior to that he was living with the deceased and he had 3 children. His evidence is that the 3 Objectors were living on the deceased's property as tenants and that they lived there with their husbands.



27. He stated further that his Aunt gives him Kshs 30000 per month for his maintenance. The objectors also collect rent but he does not know the amount.
28. At the close of the hearing parties filed written submissions. The Submissions of the Objectors are dated 23rd November 2023, while those of the Petitioner are undated but loaded onto the portal on 5th March 2024.
29. The Objectors identify the following as the issues for determination
 - a. Whether the Objectors/ Applicants and the interested parties are the spouses and children of the deceased respectively
 - b. Who should be appointed as Administrators?
30. On the 1st issue it is submitted that all 3 Objectors were wives of the deceased and not Church members as is alleged. It is submitted that as proof of being married and paternity, the Applicants and interested parties had presented their Identity Cards. The proof of familial relationship it is further submitted rests on the fact that the Chief's letter in support of the Petition identified them as such. Finally, it is contended their marriage to the deceased is the explanation as to how they are in possession of the title documents of the deceased's properties.
31. On the 2nd Issue it is submitted that having established that the objectors are the wives of the deceased it follows that in accordance with Section 66 of the [Law of Succession Act](#) they rank in priority when it comes to whom the Court may Grant letters of Administration. Reliance is placed on the decision on Re Estate of Dorcas Omena Binayo (Deceased) [2021] eKLR
32. In the submissions by the Petitioners the following are the issues identified for determination
 - a. Whether the Objectors have established that they are dependants/ beneficiaries of the estate of the deceased
 - b. Whether in the order of consanguinity the objectors have priority to Petition for a grant of letters of administration to the estate of the deceased.
33. It is submitted that the Objectors did not meet the threshold as provided for under Sections 107, 108 and 109 of the [Evidence Act](#). In particular it is submitted that the Objectors did not prove that they were married to the deceased under Customary law, that the interested parties were children of the deceased, that the objectors were dependants of the deceased and therefore beneficiaries and that in the order of consanguinity, they have priority to petition for a grant of letters of Administration to the estate of the deceased.
34. On whether or not the Objectors had proved that they were wives of the deceased, reliance is placed on the decision in Gituanja vs Gituanja [1983] KLR 575 and it is submitted that the Objectors did not prove that their marriages were formalised in accordance with Kikuyu Customary law, the essentials of which were laid out in the Court of Appeal decision in Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR.
35. In the same vein it is submitted that the Objectors did not establish that the interested parties are children of the deceased as provided for under Section 3(2) of the [Law of Succession Act](#).
36. On the 2nd Issue, it is submitted that pursuant to Section 66 of the [Law of Succession Act](#), in the absence of a spouse to the deceased it is the children of the deceased who should be issued with a grant of letters of administration.



Analysis and Determination

37. Having reviewed the evidence in Court, the pleadings herein, submissions filed authorities cited and relevant law I discern the following as the issues for determination
- a. Does the Objection as presented have merit;
 - b. Who should pay costs

38. For the Objection to succeed the Objectors must satisfy the Court that they are wives and children of the deceased and therefore dependants of the Deceased.

Section 29 of the *Law of Succession Act* provides:-

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, grandparents, 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.
40. Section 3(2) provides that
- References in this Act to 'child' or ' children' shall include a child conceived but not yet born (as long as that child is subsequently born alive) and in relation to a female person, any child born to her out of wedlock, and , in relation to a male person, any child whom he has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed parental responsibility”

41. The Objectors submit that they are the wives of the deceased having formalised their respective unions under Kikuyu Customary law. The evidence submitted in support of this averment is the fact that their Identity Cards bear the name of the Deceased, the Chief's letter dated 17th February 2022 and they are in possession of the deceased's personal effects including his title deeds.

42. The deceased died on 4th September 2021. Section 3 of the *Law of Succession Act*, provides that “Spouse” means a husband or a wife or wives recognised under the *Marriage Act*. Part IX of the *Marriage Act*, 2014, requires that all Marriages be registered.

43. Section 6 of the *Marriage Act*, recognises the following kinds of marriages

1. A marriage may be registered under this Act if it is celebrated-
 - a. In accordance with the rites of a Christian denomination
 - b. As a civil marriage
 - c. In accordance with the customary rites relating to any of the communities in Kenya
 - d. In accordance with the Hindu Rites and ceremonies; and



- e. In accordance with Islamic law.
44. Section 59 of the Act, then sets out how a marriage may be proven in Kenya as hereunder
 - a. A certificate of marriage issued under this Act or any other written law;
 - b. A certified copy of a certificate of marriage issued under this Act or any other written law;
 - c. An entry in a register of marriages maintained under this Act or any other written law;
 - d. A certified copy of an entry in a register of marriages maintained under this Act or any other written law;
 - e. An entry in a register of marriages maintained by the proper authority of the khoja Shia, ith' nasheru, shia imam, Ismaili or Bohra communities, or a certified copy of such an entry
 2. Despite subsection (1), marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry.
45. From the foregoing it is evident that one cannot prove a marriage by relying on the Identity Card or chief's letter as assumed by the Objectors. They have not adduced evidence of their alleged marriages as is required under Section 59 of the *Marriage Act*.
 46. The Objectors contend that they formalised their respective marriages with the Deceased in accordance with Kikuyu Customary law. In this regard I find that the Objectors did not discharge the burden of proof that rests upon them. The essentials of a marriage under Kikuyu Customary law are now well established by judicial precedent.
 47. As stated by the Court in *Gituanja v Gituanja* [1983] KLR 575 it was upon the Objectors to establish the custom under which they anchor their case. The essentials of such marriage have been discussed in a number of cases as cited by Musyoka J in *Re Estate of Joseph Mwaura Nderi (Deceased)* [2022] KEHC 598 (KLR) (Family), including; *Edith Wagithi Chiira vs. Rebecca Wangui Gichuhi* [1998] eKLR (Akiwumi, Shah & Lakha JJA), *Jane Mbere Komu & 3 others vs. Leah Ngendo Komu & another* [1999] eKLR (Githinji J), *In Re The Matter of the Estate of Samuel Kiarie Kirimire (Deceased)* [1999] eKLR (Githinji), *Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi* [2013] eKLR (Nambuye, Karanja and M'Inoti JJA), *In re Estate of Johnson Githaiga Joshua Ng'ang'a (Deceased)* [2019] eKLR (Kimondo J), *In re Estate of Kihara Thatu Gatui (Deceased)* [2019] eKLR (Ndung'u J), *In re Estate of Boniface Njenga Mweru (Deceased)* [2020] eKLR (Ougo J).
 48. These include the offering of njohi ya njurio by the man to the women's parents, payment of mwati na harika on the day following the ceremony of njohi ya njurio. Other ceremonies include ngurario, guthinja ngoima and ruracio. Whilst acknowledging that culture is not static and is in fact dynamic, elastic and fluid it is necessary for the party claiming the existence of a marriage and customary law to demonstrate that, rites and ceremonies were conducted that satisfy the communities definition of what constitutes a valid marriage.
 49. On this front I find that the Objectors did not take even the first step in the direction of establishing what constituted the ingredients of a valid marriage under Kikuyu Custom at the time they purport to have entered into their respective marriages with the deceased and the extent to which they fulfilled these requirements.
 50. I therefore find that there was no evidence of a marriage formalised under Kikuyu Custom in respect of the 3 objectors to the deceased. The final issue is whether in the circumstances of this case the court



can presume that there was a marriage between any of the 3 Objectors and the deceased. On this I am guided by the decision of the Supreme Court in *MNK V POM; Initiative for Strategic Litigation in Africa Petition No. 9 of 2021* in which laid out what it referred to as the ‘strict parameters’ within which a presumption of marriage can be made and these include

(64)

1. The parties must have lived together for a long period of time
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both the 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 has to be strong, distinct, satisfactory and conclusive
8. The standard of proof is on a balance of probabilities

(65) The above notwithstanding, we are of the view that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.

51. Apart from evidence that the 3 Objectors reside on the deceased’s property there was no evidence to the effect that the deceased cohabited as man and wife with any of the Objectors. It would appear that the Objectors invite the Court to deduce this fact. When it comes to presumption of Marriage, the Court cannot proceed by way of joining dots. The party desiring that the Court presume the marriage must present a complete picture that points to the unavoidable conclusion that the parties were undoubtedly a married couple.
52. In view of the foregoing it is my finding that the none of the Objectors was the wife of the deceased and it follows therefore that they were not beneficiaries.
53. With regard to the interested parties, it is contended that they are children of the deceased and the evidence in support of that assertion is that they bear the name of the deceased on their respective Identity Cards. In dismissing this claim of the interested parties, I note that apart from the acknowledgment by a parent, the only other way once can prove who their parents are, is a birth certificate or DNA results. An Identity Card cannot be evidence of the paternity of an individual as on its own it does not identify who the parents are.
54. The Objectors in their submissions contested whether the Petitioners are the Children of the deceased. I have had opportunity to peruse the Affidavit in Support of the Objection and Cross Petition and the Objectors admit that the Petitioners are the Children of the deceased. A party does not need to prove an admitted fact. In any event apart from the Objectors, even the sister to the deceased recognises the Petitioners as the Children of the deceased. And ultimately a party is bound by their pleadings.



55. Accordingly, I find that the Petitioners are the only 2 surviving children of the deceased and find that under Section 66 of the [Law of Succession Act](#) it is the Petitioners who rank in Priority to apply for the letters of Administration of intestate.
56. In dismissing the Objection and Cross Petition I find that under Rule 7(7) and rule 26 of the Probate and Administration rules, the Petitioners were under no obligation to notify or obtain the consent of the Objectors or the interested parties.
57. On costs, I find that costs will follow the event and therefore the Objectors will pay costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

P M NYAUNDI

JUDGE

In the presence of:

Kimuthai Kubui Advocate h/b for Ambani Advocate for the Petitioners

Erickson Nani for Objector/ Applicants

Sylvia Court Assistant

