



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1421 OF 1991**

***IN THE MATTER OF THE ESTATE OF WILFRED NGANGA***

**KARIGACA**

**(DECEASED)**

**R U L I N G**

A petition for probate of “written will” to the estate of the late Wilfred Ng’ang’a Karigaca who died on 17.9.1991 was filed by Carmella Wathugu Karigaca, the “remaining executor”, named in the will.

Subsequently, on 24.2.1992 an objection to the petition was filed by Mary Nyokabi Karigaca, R M K and J W. The grounds for objection were that the deceased did not make reasonable provision for them in his will, they being the deceased’s widow and sons respectively. However, on the 5th May, 1992, both the advocates representing the petitioner and the objector, did by consent agree to adjourn the hearing of the objection to enable, Mary Nyokabi to bring her application under Sec. 26 of the Succession Act Cap.160, Laws of Kenya, which Mary did by an application filed on 3.12.1992. In that application she prayed for “an order that no grant of representation to the estate of WILFRED NGANGA KARIGACA who died on the 17th day of September, 1991 having been confirmed, such reasonable provision be now made for her as a dependant of the deceased out of his net estate as the court thinks fit, and further, that the costs of this application be provided for.....”

The applicant’s 22 paragraphed affidavit, supported the application. It was sworn on the 2nd December, 1992.

Apart from this, the applicant gave oral evidence and was cross examined on it as well as her averments in the affidavit. She gave the date of her marriage to the deceased under Kikuyu customary law as 1937, which marriage was later solemnized in church, by a church wedding in 1943.

The applicant was not living with her late husband as at the date of death because he had sent her away in 1976, but he sent for her when he fell ill.

She testified that they had a total of 6 children, during their life together. These were

1. D K,
2. M W,
3. R M,
4. E N,
5. J and J W

The applicant had her matrimonial house in Karen

from which she was chased by the deceased in 1976 after persistent beatings.

She only came to learn after her husband's death, that the latter had left a will. She lamented that no reasonable provision was made for her in the will, that is why she came to court to pray for an order allowing her to have a half share of the property she acquired jointly with her late husband.

The applicant referred to some letters which she and her late husband wrote to their children in the 70's about their intention to buy land. The letter also showed that they got a 30.5 acre piece of land in Karen, and the money required for it was Kshs.70,000/= which they could not raise, so they wanted financial assistance from the children. One of the children was M W who gave evidence in court.

Eventually the applicant and the deceased raised enough money and bought the farm which only had 14 cows and workers temporary houses and milking sheds.

They developed the farm, borrowed money and built a big residential house, and other houses. In all they put up 3 houses, 2 for rental and the one where they lived as a family. This is the house from which she was chased.

Apart from the Karen property the two acquired a plot in Riruta, plot No.101 and built a house on it. They also bought another plot in Nyathuna in Ngecha, and another piece in Embu and Siakago. However, the deceased sold some of the properties after he had chased her away.

The applicant confirmed that about 15 acres of the Karen plot was sold by the deceased but 18 acres remained intact.

The applicant has been staying either with her brother or some of her children ever since she was sent away by the deceased. She is sickly, and requires regular treatment. She sees her Doctor monthly and spends about Kshs.3,000/= on medication, and Kshs.800/= on consultancy. The bills are paid by her children. She prayed the court to award her some money for her regular treatment and upkeep.

The applicant worked on the land during all the years she lived with the deceased. She considered that to be sufficient contribution.

The applicant's eldest daughter, M W W gave evidence in court, pertaining to the letters her mother, the applicant talked about. She produced the said letters in court as exhibits, and explained that they were letters her deceased father wrote to her on 1st July 1966 and 26th September 1966 respectively.

She was studying in California, in U.S.A. during that period. She identified her father's handwriting as she was familiar with it.

In the first letter, the deceased told her that she had identified a piece of land in Karen, measuring 35 acres, in fact, a farm which only had 14 cows and a tractor. He gave her the value of the land as Kshs.55,000/=. He ended the letter by thanking her for urging him to buy land for the family.

The issue of the same land was still the subject of the 2nd letter. As of the date the deceased was writing the letter, a loan of Kshs.25,000/= towards the purchase of the land had been approved by the Government. The deceased explained in the letter that he would utilize Kshs.27,000/= from his savings towards the purchase of the same land, but lamented that there would still be a short fall of Kshs.10,000/=. The deceased talked about his plans for this land, in the letter, and how he intended to use it. He was going to move the family to the land in December of that year.

The respondent Carmella Wathugu Karigaca, married the deceased in 1970 and they had 3 children who are all dependant on her. She stated that by the time she married the deceased, the Karen property was still on loan, so she helped to pay it off as she was employed and was earning a salary.

Carmella moved into the Karen house, when the applicant failed to return after she had left the deceased.

She claimed the property at Riruta as hers which the deceased gave her as a gift in 1977. It is registered in her name. She talked of 2 properties on plot No.1159/96 and one property on plot No. 1159/94. These are in the deceased's name, though half of plot No. 1159/96, was bequeathed to her son Richard in the will, and the other half to Mary's son also called Richard Mungai.

Carmilla denied any suggestion that the deceased made any provisions in his will, for her 2 children whom she had before her marriage to him. She also denied a suggestion that the deceased's hospital bills were shared equally between her and the applicant. She said that she paid all the bills alone. Carmella's affidavit was sworn on 29th March, 1993 and filed in court on 1st April, 1993.

She called 2 witnesses, Karugi King'ara and Walter Njau Waitete, both of Nyathuna village. Both testified to the effect that they accompanied the late Karigaca to Kanyawa village in Tigoni, as he was going to persuade his wife Mary Nyokabi to come back to him, but she refused. That this trip was taken in accordance with the Kikuyu customs of getting a wife back after she has run away. The two witnesses undertook the trip in their capacity as elders.

The 2 advocates filed written submissions which I have duly considered.

Mr. Le Pelley for the respondent proceeded on the basis that Mary Nyokabi's children are grown up and under Kikuyu customary law they are expected to be looking after her anyway. That Carmella's children need the assets of the estate to set them up in life. In his view, Mary was adequately provided for, and her claim should be dismissed with costs.

Mr. Nderitu, for Mary Nyokabi, on the other hand submitted that the court should approach this issue from the point of view of whether the will made reasonable provision for Mary, considering the value of the estate, and Mary's circumstances.

Mr. Nderitu further asked the court to ignore the evidence Carmella brought in buy way of extracts from the diary of the deceased showing the conduct of Mary that might have led the deceased not to

make reasonable provision for her in the will. He termed the contents of the extracts, "normal matrimonial disagreements, more so, when there is the other woman". Mr. Nderitu urged the court to reject the evidence of DW 2 and DW 3 which was meant to paint "black" the character of Mary towards the deceased.

The application before court is brought under Sec.26 of the Succession Act. This is the section which deals with "Provision for dependants not adequately provided for by will or on intestacy".

Mr. Nderitu urged the court to consider Sec.26 in conjunction with Sec. 29 which is headed, "Meaning of Dependant". His submission was that Mary is a dependant within the meaning of that section. This was not denied by the respondent, and there was no evidence that she was ever divorced by the deceased. She was married under Kikuyu customary law, which marriage was later solemnized in church. I understand this to mean that the customary law marriage was converted into a marriage under a statute.

Evidence was adduced by the 2 witnesses called by the respondent to the effect that they went to fetch Mary in their capacity as elders, in compliance with Kikuyu customary law pertaining to a wife who has run away, but Mary refused to come back. If this evidence was meant to show that Mary had therefore been "divorced" under Kikuyu customs, then it did not achieve that purpose because Mary's marriage to the deceased was now under a statute which must have provided the procedure for Divorce.

Mary and the deceased were not living together as at the date the deceased died. There is evidence on record in the form of extract from the deceased diary, produced by Carmella. They bear dates for the years 1973, 1974 and 1975 and 1976. They range from complaints by the deceased of Mary coming home late from business, to her selling some animals (goats) from the farm without the deceased knowledge and or authority.

The extracts certainly show that there were quarrels or disagreements between Mary and the deceased, however, those recordings alone, are not sufficient, in my view, to show that Mary was at fault or wrong, and the deceased was therefore entitled not to make reasonable provision for her, in his will.

Mary is claiming a ½ share of what was her matrimonial home, a home which Carmella has averred was left empty for 2 years further to return to and when she failed to do so, she moved into it herself. From the evidence on record, Mary does not seem to have had any other matrimonial home as she has lived with her own brother most of the time, or with her children at other times.

The history of how the 35 acre Karen plot was acquired, a plot on which Mary's matrimonial home was built was given by Waithera, through the letters written to her by her late father, the deceased. I believed this evidence, which was actually not challenged on substance. An attempt to challenge or deny the handwriting of the deceased did not succeed, in my view. I considered that evidence to have shown that the Karen property was acquired by Mary and the deceased during the subsistence of their marriage, and more particularly, before they started living apart. The claim by Carmella that she helped in paying off the loan used to purchase the plot, was not backed by any evidence.

The original WILL of the deceased was annexed to Carmella's petition. There is a supporting affidavit to the petition, and annexed to it is a schedule showing the list of assets and liabilities. The assets comprise movables, i.e. motor vehicles, and immovables are various pieces of land. There are some cash deposits in banks.

There is a list of 2 liabilities. These do not include the hospital bills which Carmella said she

paid. There is no record of such bills anywhere apart from the averment in Caremella's affidavit.

The WILL does not specifically bequeath the property known as L.R. 1159/94, Karen to anybody. Presumably it falls under "residuary estate" to be held "upon trust and to pay the income therefrom to the said CAREMELLA WATHUGU KARIGACA", who lives on the property anyway.

Mary Nyokabi claims half of this property, the same having been her matrimonial home. She claims it as a dependant since according to the Succession Act, that appears to be the only way in which a wife can make a claim upon the estate of the deceased's husband.

The respondent talked of the Riruta property as having been her "matrimonial home," – see her affidavit sworn on 1st April, 1993.

In evidence, she explained that this property was a gift to her from the deceased, and the same is registered in her name – solely.

The fact of Mary Nyokabi not having been maintained by the deceased for the past 20 years or so, was raised by Mr. Le Pelley. I have read Sec. 26 of the Succession Act and nowhere do I find in it a requirement that a deceased must have been maintaining a particular dependant, immediately prior to his death, before such a dependant can make a claim under the section. My understanding of Section 26 as read with section 29 is that once one qualifies as a dependant under section 29, then once can make an application under Sec. 26. It is for the court to determine whether such a dependant was provided for adequately or not depending on the facts of the case.

Another issue which came up from the submissions of the respondent's counsel, was the comparison between Mary Nyokabi's grown up and independent children, and Carmella's young children who are still dependant on her. Their ages were given as 20, 17 and 15 respectively.

I have considered this submission and have the following to say, that is, that the issue before this court, in my view goes beyond the matter of children born by these two women with the deceased. It is a question of a wife claiming as a dependent from her late husband's estate irrespective of whether there were any children between them or not. I do not find that her claim is tied round any other dependant, either her own children, Carmella herself or Carmella's children. The section gives her a right as a dependant to come to court, and that right is available to all the other dependants. To ask the court to consider that she has grown up children who should provide for her, is in my view, not the correct approach here. I am not sure that that is what the legislator meant by bringing in Section 26.

Given the facts and circumstances of this case, that is, the nature of the application, the provisions of the WILL left behind by the deceased read alongside the schedule of assets showing the value of the estate, I am inclined to find that the deceased did not make reasonable provision for Mary Nyokabi, a dependant, who was his wife as at the date he died.

For this reason, I order that Mary Nyokabi, a dependant of the deceased by reason of being his wife, be granted half portion of all that piece of land known as title No. L.R. 1159/84, situated in Karen in Nairobi, absolutely. Together with that, I order that she be paid, out of her late husband's estate, a one and for all lump sum of Kshs.200,000/= to cover her monthly medical expenses and upkeep. Once these orders are effected, I will consider that reasonable provision will have been made for Mary Nyokabi, the applicant.

Dated at Nairobi this 18th day of November, 1993.

**J. ALUOCH (Mrs)**

**J U D G E**



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