



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 15 OF 2007

In The Matter of the Estate of Justus M'Murithi M'Bagiri (Deceased)

JEMA KARIMI OBJECTOR/APPLICANT

VERSUS

MWAKITHI M'MURITHI PETITIONER

JAMES KUBAI 2ND RESPONDENT

ISAAC NTONGAI SAMWEL 3RD RESPONDENT

JUDGMENT

[1] **JUSTUS M'MURITHI M'BAGIRI** ("the deceased") to whom this succession cause relates died on 25th May 2003. According to the Chief's letter of introduction dated 25th September 2006, the deceased was survived by: Jenadis Nkatha M'Murithi (**Daughter**), Faith Wanja M'Murithi (**Daughter**), Joyce Kanana (**Daughter**), Mwakithi M'Murithi (**Wife**), Stephen Mukaria (**Son**), Donald Karani (**Grandson**) and Victor Mwenda (**Grandson**). His assets were listed as LR NYAKI/MULANTHANKARI/1274, LR NTIMA/IGOKI/1227 and LR NYAKI/MULANTHANKARI/589.

[2] The petitioner petitioned for grant of letters of administration which were issued to her on 12th April 2007. Summons for revocation and annulment of the grant dated 3rd October 2007 were filed by the objector. She sought the following orders:

a) That this Honorable Court be pleased to revoke and/or annul the grant of letters of administration issued to the 1st respondent on 12th April 2007

b) That this Honorable Court do invoke the provisions of Section 45 of the Succession Act and proceed to punish the 1st, 2nd and 3rd respondent s for stupendous intermeddling with the deceased's free properties especially the commercial shops erected on LR NTIMA/IGOKI/1227

c) That costs of this application be borne by the respondents.

[3] The grounds upon which the application is founded are set out in the application and supporting affidavit of

Jema Karimi sworn on 3rd October 2007. It is contended: -

a. that the petitioner filed for the letters of administration secretly without her knowledge and grant was obtained fraudulently as the Petitioner is not a widow of the deceased. The petitioner's name is Teresia Mwakithi M'Thuranira and sometimes she is also known as Teresia Mwakithi M'Rukunga. But at no one time has her name been Mwakithi M'Murithi.

b. The 2nd respondent who is a cousin to the petitioner has claimed publicly that he would fund her to make sure the deceased's estate is administered by her.

c. The 3rd respondent is a relative to the petitioner and has been included in the application for the grant as a purchaser. He is operating a shop on LR Ntima/Igoki/1227 without paying any rent.

d. The 1st and 2nd respondents have colluded to fraudulently lease and collect rent from three (3) commercial shops which form part of the estate since May 2003 without accounting to the true beneficiaries.

e. The petitioner has 12 grown up children from various men and she came to the deceased's estate as a tenant.

[4] This matter was canvassed through vide viva voce evidence. **OB1 Jema Karimi** tendered in evidence her statement filed on 10th September 2015 together with her documents. She stated that the deceased is her husband for they solemnized their marriage in 1988 in a wedding that took place at St. Joseph's Cathedral – Meru. They were blessed with three children Jenadis Nkatha Murithi, Faith Wanja Murithi and Joyce Kanana Murithi. The deceased had another child out of wedlock called Jane Nthiori (deceased). The latter had two children Donald Karani and Betty Kananu who is deceased but had a son, Victor Mwenda. In 1993 they had a disagreement with the deceased and she went to stay at St. Joseph's Cathedral where she had been employed by Catholic Church at St. Dominic School. But she would visit the deceased regularly to clean the clothes, house and cook for him. The deceased never married any other woman. She filed divorce proceedings but they resolved their issues and reconciled.

[5] That the petitioner was and has been a tenant in one of their houses that she and the deceased constructed. She was married to a person known to her as Baba Joshua. Stephen Mukaria M'Murithi is not a son of the deceased as he is the son of the petitioner who has seven (7) other children. James Kubai is not a son of the deceased but a tenant in one of the rooms neither did he buy any land from the deceased. But there was an agreement between him and the deceased that he would put up a shop on the deceased's land and then recover the cost of the construction from monthly rent payable in respect of the building. The deceased had a similar arrangement with Geoffrey Mangu and Mungania.

[6] **OB2 Washington Kiremana** adopted his statement filed on 10th September 2015 as his evidence. He was the secretary to Abonyanga clan which the deceased was part of and was also his cousin. He stated that it is not true that the deceased came from Mulathankari clan. He stated that the deceased was married to the objector of which he attended the wedding in 1988. He was aware that they separated in 1993 following a disagreement. He does not know the petitioner as the deceased's wife but as a tenant who lived in the deceased's rental houses.

[7] **OW3 Ann Wanjiru** adopted her statement dated 17th March 2016 as her evidence.

She stated that between the year 1993 and 1995 she was a tenant at the deceased's premises where the petitioner was also a tenant. The petitioner was living with Samuel M'Murithi whom she knew as her husband whom she knew very well as he was the chairman of their church. The petitioner and her husband had six (6) boys and two (2) girls. James Kubai was also a tenant who was running a bar in the plot. Samuel Mungania was also a tenant as well. The deceased was married to the objector who lived in their matrimonial house behind the rental houses together

with their children.

[8] **OB4 Isabella Karimi Mungania** stated that in 1999 the deceased entered into an agreement with her late husband Samuel M. Joshua Mungania for construction of business premises on the deceased's land parcel No. Ntima/Igoki/1227. Her husband was to construct the business premises and recover the cost of construction through monthly rent. Upon full recovery of the construction cost the premises would revert to the deceased. That her husband constructed the premises and they have been running the shop thereon. They have been paying their monthly rent to the objector upon demise of the deceased. Apart from her husband, Geoffrey Manga and James Kubai had a similar arrangement. She affirmed that the petitioner is not a wife of the deceased as she was living in the rented premises whilst the deceased had his own home where he lived with the objector. She is aware that they had disagreed but they later reconciled.

[9] At the close of the objector's case the petitioner gave a sworn testimony and called two witnesses. **PW1 Teresia Mwakithi M'Murithi** adopted her statement dated 13th October 2015 as her evidence. She stated that her name is Teresia Mwakithi M'Murithi but her ID card has the name of her father M'Thuranira. She stated that the deceased is her husband whom she married in 1994 under Kimeru Customary Law who paid dowry to her parents. She affirmed that she was not a tenant in the plot of the deceased. That the objector married the deceased long before her but she deserted her matrimonial home when she was discovered to have attempted to poison him. She left behind her three issues whom she lived with on Ntima/Ihgoki/1227. She and the deceased had a son, Stephen Mukaria, but her other son Douglas Karithi is not fathered by the deceased. She does not have eight children. When she married the deceased she found ready constructed house in which he allowed her to live in and no one chased her away. She lives in the house the deceased was living in and not the rental houses. She did not include the objector as she had not seen or known her as she never saw her at the home or even hospital. That she only came to know her in court but she does not mind including her. As for James Kubai he found the deceased living with him but cannot tell the nature of the help he offered. He should not be included as a beneficiary of the estate as he is not a family member.

[10] **PW2 Josephat Kamundi**, elder step- brother of the deceased, admitted his statement dated 29th October 2011 as his evidence in chief. He stated that the petitioner is the 2nd wife of the deceased who married in 1994. The objector was the deceased's wife but they separated in 1992 after she tried to poison him. She left her children with the deceased who were taken care of by the petitioner. That after the deceased's death the objector came back and started harassing the petitioner.

[11] **PW3 Donald Karanti**, grandson of the deceased born of his daughter Jane Nthiori, adopted his statement dated 13th October 2015 as his evidence. He stated that the objector deserted her matrimonial home in 1992 and left her children under the care of his mother Jane Nthiori. In 1994 the deceased and petitioner got married who then took care of the objector's children. After the death of their mother the petitioner took care of them. The objector only came home after the death of the deceased.

[12] **PW4 Eunice waRufus** adopted her statement dated 31st March 2016 as her evidence. She stated that her husband grew up with the deceased and was also a village elder. The deceased was married to the objector but their marriage did not work. They separated and the deceased was left with the deceased. The deceased then got married to the petitioner in 1994 through Kimeru Customary marriage. The objector only resurfaced after the deceased's death.

ANALYSIS AND DETERMINATION

[13] This matter was canvassed by way of written submissions. Both parties filed their submissions which I have perused and considered.

Issues

[14] The issues for determination are: **who are the beneficiaries of the deceased and how should the estate of the deceased be distributed"**

[15]

Beneficiaries

[16] It is not disputed that Jenadis Nkatha, Faith Wanja and Joyce Kanana, Donald Karani and Victor Mwenda are beneficiaries of the deceased. The issue in controversy is whether the objector and petitioner are wives of the deceased and Stephen Mukaria is a son of the deceased.

[17] The objector stated that she and the deceased got married at St. Joseph's Cathedral in 1988. She stated that after the deceased's death the petitioner and 2nd respondent entered her home and took all her documents including her marriage certificate. She produced a letter from the Parish Priest – Cathedral Meru who confirmed her assertions. The petitioner and her witnesses do not dispute the fact of marriage between the Objector and the deceased, except, however, they stated that the two separated. According to the objector, in 1993 they had a disagreement with the deceased and she moved to her place of work together with her children. She then filed divorce proceedings but in the process they reconciled with the deceased whom she was taking care of. This is disputed by the petitioner who alleges that she never came back to live with the deceased and that she only resurfaced when the deceased died.

[18] The Objector claims they had contracted a Christian marriage with the deceased. Christian marriage is dissolved by a valid decree of divorce between the parties. See the case of **In re Estate of Wilfred Kihara Kariuki (deceased) [2018] eKLR** where it was held:

“Under section 6(2) of the Marriage Act, a Christian, Hindu or civil marriage is monogamous. Section 6(3) of the Act provides that a marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous. A marriage under CAP. 151 is a Christian marriage by virtue of its section 3(1) which states that the Act applies to marriages of Africans, one or both of whom profess the Christian religion. Section 9(3) stipulates that such a marriage can only be dissolved by a valid judgment of divorce and if one illegally contracts another marriage while it remains undissolved, they shall be guilty of bigamy.”

[19] From the evidence, the divorce did not conclude and the court was never shown any divorce decree. Therefore, the Objector was married to and was the wife of the deceased during his lifetime. She is therefore a dependant of the deceased.

[20] In such circumstances, what does the law say about a woman who marries a man already in a monogamous marriage"

[21] **Section 3(5) of the Succession Act** stipulates that:

“(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

[22] On this very point, I am content to cite what Musyoka J stated in **In re Estate of Lihasi Bidali (Deceased)**

[2019] eKLR:

“Under the marriage statutes a man who had contracted a previous statutory monogamous marriage, such as a Christian marriage, has no capacity to contract another marriage, under any system of marriage, during the pendency of the previous statutory monogamous marriage. If he does contract any other marriage despite pendency of the statutory monogamous marriage, that other marriage would not be valid or recognized in law so long as the man is alive. However, upon his death, and by virtue of section 3(5) of the Law of Succession Act, such subsequent marriages would be recognized for the purposes of succession under the Law of Succession Act, to the extent that they were contracted under systems of law that permit polygamy.”

[23] Therefore, despite the law on bigamy, for purposes of the Law of Succession Act, a woman who marries a man already in a monogamous marriage is considered to be *a wife for the purposes of the Law of Succession Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.*

[24] Is the Petitioner such wife" The objector refuted claims that the Petitioner was a wife of the deceased. She stated that the petitioner was and is a tenant in their rental houses which she built together with the deceased. Her evidence was supported by a cousin of the deceased together with two of her tenants who confirmed this. **OW3** stated that the Petitioner was married to one Samuel M'Murithi with whom she had eight (8) children. On the other hand, the petitioner stated that she married the deceased in 1994 through Meru customary law and remain so married until 2003 when he passed on. She stated that the deceased came to her home in two separate occasions where he paid dowry.

[25] The Petitioner has claimed customary marriage. Section 43 of the Marriage Act provides as follows: -

43. Governing law for Customary marriage

(1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.

[26] According to **Eugene Contran in *Restatement of African Law Kenya Volume 1 The Law of Marriage and Divorce*** at page 38:

“Marriage consideration may be paid all at once, but more usually, it is paid by installments. In Meru law, it is not essential to pay an installment before cohabitation begins. However, before cohabitation starts there must be an agreement to pay. The marriage is valid so long as there is an agreement to pay.”

[27] Since the petitioner alleges that she was married to the deceased through customary law she ought to prove it, for whoever alleges must prove. She called **PW2** step brother of the deceased who stated that he was present during the customary ceremony together with the *wazees* in 1984. This contradicts the assertions of the petitioner who stated that she married the deceased in 1994. Notably, **PW2** confirmed that he was jailed over a land dispute with the deceased's brothers for there was a quarrel between their house and the house of the deceased. Moreover, contrary to his evidence, the house constructed by the deceased was the matrimonial home where the deceased was living with Jena and her children. The petitioner even confirmed that she found the house already constructed by the deceased. In passing let me state that it is time that, upon dissolution of marriage by death, where there are more than one wife, division of matrimonial property should be undertaken first so as to determine the estate of a

deceased polygamous husband. Having said that, the testimony of PW2 is contradictory and very wanting as it tends to raise more questions than provide answers. These matters taint his evidence and if it should carry any weight, it is little or no weight at all.

[28] **PW3** grandson to the deceased stated that he accompanied the *wazees* in taking dowry. During cross-examination he confirmed that at that time he was not involved in the ceremony as he was a young man and was at his place of work in Nairobi. **PW4** could not confirm whether dowry payment was made to the petitioner's family. The Meru customary law is explicit on the ceremony as well as the specific items to be given or paid to the parents of the woman. A properly argued case would elaborately set out the manner the ceremony was conducted, the specific items or dowry paid and the persons present. I say so because anything paid or given in a marriage ceremony has its distinct name and meaning. I need not state that such customary marriage ceremonies involve distinct and un-mistakable procedures and terms of art which create a picturesque that leaves vivid impression in the minds of those present. The evidence adduced did not give any impression or semblance of a customary marriage or ceremony. In fact, there is absolutely no evidence of even an agreement to pay dowry leave alone payment of dowry. In sum, I find that the petitioner has failed to prove that payment of dowry was made under Meru Customary Law marriage, hence, she did not prove customary marriage to the deceased.

[29] But could there be any other form of marriage between the deceased and the petitioner" The petitioner claimed that she lived with the deceased and had a child out of the said cohabitation. I am aware that a person may proof marriage through presumption. In re Estate of Mbiyu Koinange (Deceased) [2015] eKLR it was explained:

“The concept of presumption of marriage has its origins in the English law. It is a common law construct, and it finds its application in Kenya through the Judicature Act, Cap. 8 Laws of Kenya. It holds that where a man and a woman have cohabitated for such a length of time and in such circumstances as to have acquired the reputation of being a man and a wife, a lawful marriage between them will generally be presumed though there may be no positive evidence of any marriage having taken place. The presumption can only be rebutted by strong and weighty evidence to the contrary. The presumption is made both where there is some evidence of a marriage ceremony of some sort having been performed followed by cohabitation as husband and wife and also where there is no evidence of any sort of marriage ceremony but there is evidence of cohabitation by and acceptance of the parties by the community as such. In both cases a very heavy burden of proof is imposed on the one who wishes to rebut the presumption.”

[30] The evidence by the petitioner and her witnesses did not show that the petitioner and the deceased lived together as husband and wife or that they were regarded as such by the community. The Objector's evidence is more credible that the petitioner was a tenant in the premises. Tenants in the premises also confirmed this fact. No one regarded the petitioner as the wife of the deceased. I should think from the record there is some form of stealth designs by the petitioner and her witnesses to defraud the beneficiaries of the estate of the estate. Therefore, there is no evidence of any cohabitation or for such considerable period as to presume a marriage in favour of the petitioner. At this point, I am properly grounded to and I declare that the petitioner is not a wife of the deceased and therefore not a dependant of the estate of the deceased. I will tackle the issue of the alleged son of the deceased separately.

Death certificates

[31] The petitioner in her submissions dated 3rd July 2019 and filed on 4th July 2019 stated that when the objector filed for limited grant of letters of administration in Senior Resident Magistrate's court at Nkubu on 20th October 2003 she presented to the court death certificate No. 816164 knowing that the petitioner had been issued with death certificate No. 815313. According to the objector, when the deceased passed on at Kenyatta National Hospital the petitioner and James Kubai objected to the deceased's body being released to her. The hospital vide its letter dated 11th August 2003 released the body to the objector for she managed to produce a copy of the High Court order

dated 31st July 2003 authorizing her to collect and bury the body. She buried the deceased without the help of the respondents. That being the case, how then did the petitioner obtain a death certificate considering the necessary documentation to get it was given to the objector after the hospital gave authorization to her to take the body" There is a whole procedure of obtaining a death certificate and pertinent documents such as burial permit and original identity card of the deceased should be submitted to the registrar's office. In fact, the ID must be surrendered. I smell forgery herein. But this aspect should be pursued through other investigative mechanisms. Nonetheless, being in possession of a death certificate does not in itself make you a dependant of the deceased.

Claim petitioner's son is deceased's

[32] The petitioner stated that in their union they had a son by the name of Stephen Mukaria. According to the certificate of birth, he was born on 7th December 1996, father is named as the deceased and mother as the petitioner. Nevertheless, the certificate was issued on 25th June 2003 after the death of the deceased. Faced with similar scenario, the court in the case of **In Re Estate of Fredrick Clavence Kittany [2002] eKLR** stated the following:

“9. That as regards the children of Sally claimed to be the children of the deceased by the first objector this was not proved as no baptismal cards or birth notification cards were produced to show that the deceased was their father. The birth certificate produced in court were obtained after the death of the deceased and so the deceased did not consent to be registered as the father of the children and it is their submissions that the certificates were not obtained in good faith. They were obtained long after the deceased's death and no explanation was given for the long delay and this can be clearly concluded that the move was taken to enable the objector snatch that which was not hers.”

[33] It bears repeating that the certificate of birth was obtained after the death of the deceased. There was no explanation by the petitioner as to the delay despite the date of registration being indicated as 31st December 1996. The basic documents for registration and notification of birth were not produced. Those are the ones which record the basic information on the paternity of the child and it is recorded immediately upon birth of a child.

[34] Be that as it may, her name when she initiated these proceedings was stated to be Teresia Mwakithi M'Murithi. According to her ID her name is indicated as Teresia Mwakithili M'Thuranira. Hence, why then is the name of the petitioner indicated as Teresia Mwakithi M'Rukunga on the birth certificate. From the foregoing and the conduct of the petitioner it shows that the certificate was not obtained in good faith. Again, from the evidence available, there is a possibility that she wanted to steal a match from the Objector by making her claim appear formidable through such government documents.

[35] The objector from the beginning has denied adamantly that the Stephen Mukaria is not a son of the deceased. In her submissions she had included him as part of the beneficiaries of the estate. I should think that evidence by her does not support the inclusion of Stephen as a beneficiary. Perhaps, and this is not uncommon, a party may think that it is good to lose part rather than the entire estate. Court decisions are, however made on the facts of the case and the law applicable. The court will not allow a stranger to partake of the estate of the deceased even if all the parties consent to such person taking a share in the estate. Needless to state that only rightful beneficiaries which have been ascertained by the court receive a share in the estate. Similarly, it is the statutory duty of the court to protect the estate of the deceased from those who intermeddles with it. The Constitution which is the supreme law of the land has emphasized on this protection of estate property and the dependant's right of inheritance. See article 68(c) (vi) which commanded Parliament to enact legislation: -

(vi) to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land;

[36] In upholding the principle of justice, I make these findings: That the petitioner is not a wife of the deceased through customary law or through presumption of marriage. That her son one Stephen Mukaria is not a son of the deceased. As for James Kobia it is abundantly clear that he is a dependant or beneficiary of the deceased, thus, he will not to get a share of the deceased.

[37] Therefore, the application is allowed in the following terms and orders:

a) That the grant of letters of administration intestate issued to Mwakithi M'Murithi on 12th April 2007 is hereby revoked.

b) That fresh grant of letters of administration intestate shall be issued to Jema Karimi.

c) That the grant of letters of administration intestate issued to Jema Karimi is confirmed and the estate shall be distributed as follows:

I. NYAKI/MULATHANKARI/589

To be shared equally between:

1. Donald Karani
2. Victor Mwenda

II. MTIMA/IGOKI/1227

To be shared equally among:

1. Jema Karimi
2. Jenadis Nkatha
3. Faith Wanja
4. Joyce Kanana

III. NYAKI/MULATHANKARI/1274

To be shared equally among:

1. Jema Karimi
2. Jenadis Nkatha
3. Faith Wanja
4. Joyce Kanana

Dated signed and delivered at Meru in open court this 18th day of December 2019

F. GIKONYO

JUDGE

In presence of

M/S Rimita for petitioner

M/s Mbijiwe for Objector

Petitioner and objector – present

F. GIKONYO

JUDGE

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