



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE 1102 OF 2010**  
**IN THE ESTATE OF GEORGE NGONGA NJIHIA**

**LUCY WANJIRU MWANGI.....APPLICANT**

**VERSUS**

**DANIEL NJUGUNA NJIHIA.....1<sup>ST</sup> RESPONDENT**

**FLORENCE NJERI MWAURA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**PLEADINGS**

The deceased George Ngonga Njihia died on 24<sup>th</sup> September 2009.

By an Application of 3<sup>rd</sup> October 2014, for revocation of grant issued on 21<sup>st</sup> April 2011 and certificate of confirmation of grant issued on 11<sup>th</sup> March 2013, the Applicant sought from Court orders that; she is legal widow of the deceased and ought to be beneficiary of the deceased's estate, her child Norelle Njihia be recognized as child of the deceased and beneficiary of his estate; she should be reinstated in the matrimonial home and the properties that comprise of the deceased's estate be preserved until hearing and determination of the matter in this Court.

The Respondents filed Replying affidavit on 20<sup>th</sup> January 2015, they asserted that the Applicant was not married to the deceased and she was hired as househelp to look after the children after his wife died.

The deceased's children, Anne Nungari Ngonga and Gregory Mwaura Ngonga filed affidavits 23<sup>rd</sup> January and 5<sup>th</sup> February 2015 respectively. Anne stated the Applicant is her stepmother who came home when she was young and Gregory refused that the Applicant was his stepmother.

Written Submissions were filed by both parties through Counsel on 24<sup>th</sup> February 2016 and 9<sup>th</sup> March 2016.

The Applicant filed a further affidavit on 23<sup>rd</sup> January 2015, and annexed photographs that show her as part of the deceased's family contrary to allegations that she was employed as house help after the deceased's wife died.

## HEARING

The Applicant's case is that she was married to the deceased under Kikuyu customary law as second wife in 2002. She lived in the matrimonial home and she found him with his 2 other children, Gregory Mwaura aged 10 years and Anne Nungari aged 7 years. She continued taking care of the children. The deceased and her had a child Norelle Njihia born on 10<sup>th</sup> May 2008 as evidenced by the birth certificate attached to the application. The deceased died from illness in 2009. She was recognized as his wife and widow as shown by the Eulogy and the photographs annexed to the Application. On 28<sup>th</sup> December 2014, the Applicant was evicted from the matrimonial home by the deceased's eldest son George Mwaura Ng'ong'a who had left home to live with his uncle. The 2<sup>nd</sup> child Anne Nungari Ng'ong'a is now married and lives with her husband and they have 1 child.

The Applicant was not informed, consulted and her consent obtained by the Respondents, brother of the deceased and sister to the deceased's 1<sup>st</sup> wife respectively, when they applied for grant of letters of administration of the deceased's estate. The Applicant sought to share as beneficiary in the following properties;

- a) Kiambu/ Municipality Block 5 ( Kiamumbi)/1262
- b) Old Mutual Investment shares
- c) Kiamumbi Estate

Francis Thumbu Njihia step brother to the deceased relied on the affidavit filed on 13<sup>th</sup> April 2015 and alluded to the fact that the Applicant was wife to the deceased and the child Norelle Njihia belongs to the deceased as he is named after their father according to Kikuyu customary law. He confirmed that he accompanied the deceased to the Applicant's home; they were the deceased, the Applicant, 2 workmates and himself. They paid dowry and the deceased was to go back later. During the deceased's funeral, the Applicant was recognized as the deceased's widow and their child as his child.

Anne Nungari Mwangi daughter to the deceased confirmed to Court that the Applicant took care of her, did household chores and lived with them. After her father died she continued living with her step mother and she paid her school fees. In Form 3 she dropped out of school as she was pregnant. The Applicant stopped paying her brother's fees and he left for their Uncle's place. In 2014, her brother evicted the Applicant from the matrimonial home. Her Uncle and Auntie came to Court and obtained letters of administration for her father's estate and she does not cope with them. She would want the Court to allow the properties be shared amongst all the family members, the Applicant, her brother and younger brother and herself.

The Respondents' case is as follows; the 2<sup>nd</sup> Respondent, Florence Njeri Mwaura is sister to the deceased's wife, Teresia Wangui Ngonga who died in 1997 and left 2 children, Gregory Mwaura aged 5 years and Anne Nungari 2 years respectively. She helped the deceased to hire househelps to look after the children as his employment involved a lot of travelling and this took him away from home. She brought a househelp called Consolata, when she was leaving the home; she brought Lucy Wanjiru Mwangi, the Applicant who was to help care for the children.

She was concerned after the deceased's death that the children did not go to school due to lack of school fees. The Applicant mistreated the daughter of the deceased and at one point she had her arrested and detained at the Police Station. She consulted with the family and they authorized her to pursue the Old Mutual Funds benefits, She was paid Ksh 300,000/= which she paid Gregory Mwaura's school fees and school expenses upto Form Four and then to St Kizito for his diploma in electronics. She kept receipts.

As for Anne Nungari, she dropped from school as she became pregnant. She was not in good terms with the Applicant and she moved to her Auntie in Kibichoi. Later she moved to her home after she was married.

The 2<sup>nd</sup> Respondent is not aware of any marriage between the Applicant and deceased and therefore did not consult her to obtain the letters of administration to the deceased's estate.

The 1<sup>st</sup> Respondent Daniel Njuguna Njihia, younger brother to the deceased informed Court that they lived on the same ancestral land with the deceased but each on his portion. When the Applicant came to the deceased's home, she was as househelp to take care of the children after their mother died.

There are rental houses which the deceased collected rent, after his death, his son collected rent for 3 months and the Applicant reported the matter to the Chief. They were summoned to the Chief and he ordered that the Applicant was to collect rent as she was wife of the deceased. They then filed for letters of administration in Court on behalf of the children of the deceased.

He did not know of the deceased's visit to the Applicant's home, he has never seen her relatives at all. He objects the child is the deceased's as he was sick for a while before his death. He stated that the birth certificate cannot be conclusive on the paternity of the child; DNA would resolve the issue finally.

Gregory Mwaura son to the deceased stated his mother died in 1997. His late father worked with Telkom and he travelled a lot and left him and his sister at their home. In 2001, the Applicant came in as househelp and she lived in the small room of the house. After his father's demise, the Applicant refused him food and only took care of her child Norelle Njihia. He could not go to school due to lack of school fees. He called his Auntie Florence Njeri who took up the matter. She paid his school fees and he completed Form 4. She paid for him to undergo an electrical certificate and diploma course in St Kizito to completion.

Meanwhile, he moved out of the home to his Uncle's home Daniel Njuguna Njihia, next to their home. His sister dropped from school and relocated to the Auntie's place.

The Applicant collects rent from 5 single room houses at ksh 3,000/- each and 1 double room house at ksh 4,500/= all on the deceased's land next to their home. This is a total of ksh 19,500/=. There is a ¼ acre plot for cultivation. These are properties for distribution. He proposes if DNA proves the child is his brother then he will share the properties.

## **ISSUES**

From the evidence on record the issues for determination are;

1. Is the Applicant Lucy Wanjiru Mwangi legal wife now widow of the deceased?
2. Is the child Norelle Njihia a child of the deceased?
3. Should the grant issued on 21<sup>st</sup> April 2011 and confirmed on 11<sup>th</sup> March 2013 be revoked and annulled?

## **DETERMINATION**

This Court has considered the evidence on record and that contained in the documents furnished to this Court and written submissions by respective Counsel for the parties in determination of the legal questions and shall rely on the same.

With regard to the first issue, the Applicant states she is the widow of the deceased by virtue of the fact of marriage conducted under Kikuyu customary law, participation of the deceased's funeral as shown by the eulogy and photographs attached to the application and the fact that she resides on the deceased's property and has a child with him.

The law of Kikuyu customary marriage is documented in **Restatement of African Law of Marriage and Divorce by Eugene Cotran** which outlines essentials of marriage as capacity to marry, consents of both

parties, conduct of *ruracio* and *ngurario* ceremonies with elders and family members and commencement of cohabitation.

I have carefully examined the evidence adduced by the Applicant and step brother in law and there is no cogent evidence to support the claim of a Kikuyu customary marriage between the deceased and Applicant. If there was a ceremony to pay dowry *ruracio* as claimed, from the evidence, it is strange the deceased was accompanied by a stepbrother yet, his own brother living in the same parcel of land was not informed or asked to accompany the deceased to the family ceremony at the Applicant's home. It is curious to note from the evidence that such a ceremony had friends who were workmates and only the step brother as the family member who accompanied the deceased to the Applicant's home. No other family members were present at the ceremony.

The deceased's step brother's evidence is scanty and not detailed on such a crucial ceremony; there is hardly any information of when this ceremony was conducted, where they went to; the Applicant's home area, who they found at the Applicant's home; parents, elders other family members and friends; the ceremony itself who are the elders who held negotiations on behalf of both families? What was agreed what was paid and in what form?

The evidence on record is not sufficient in this Court's view to confirm a ceremony to celebrate a Kikuyu customary marriage between the deceased and the Applicant.

In the case of **PRISCILLA WARUGURU GATHIGO vs VIRGINIA KANUGU GATHIGO IN THE ESTATE OF JOSEPH GATHIGO (deceased) (2004) eKLR H. Okwengu JJA** stated as follows;

***“I find the evidence adduced by the Protestor on proof of alleged marriage to the deceased fell short of proving the alleged marriage....there was no independent witness to customary formalities. There was no evidence that there were elders from the deceased relatives who participated in the said marriage. There was no evidence that there was a ngurario ram slaughtered. The Court finds there was no marriage between the deceased and the Respondent.***  
“

There were no elders named as being present during the *ruracio* ceremony, no family members except the deceased step brother and the Applicant did not have the *ngurario* ceremony. This Court adopts the same position as the above cited case due to insufficient evidence to confirm a Kikuyu customary marriage.

There is evidence on record that the Applicant was recognized as the deceased's wife as shown from the deceased's eulogy and photographs all annexed to the Applicant's application. The evidence from the deceased's brother is that the Eulogy that was prepared was changed to include the Applicant and her child and printed at the last minute. He saw this anomaly on the day of the funeral of the deceased and so he let it go. This Court's view is that there must be something more to prove a marriage than being in a funeral participating with the family and taking photographs. There are many people who attend funerals, weddings and other social functions; their presence without introduction, explanation or other cogent evidence to explain the photographs is necessary to prove marriage or any other relationship. The Eulogy and photographs by and of themselves without further evidence cannot be deemed to be proof of marriage.

The second part to this issue is, Can this Court presume marriage between the Applicant and the deceased? The law on presumption of marriage is settled by the case of **HORTENSIA WANJIKU YAWE VS PUBLIC TRUSTEE COURT OF APPEAL CIVIL APPEAL NUMBER 13 OF 1976** Mustafa JJA stated;

***“By general repute and in fact the parties had cohabited as man and wife for 9 years Before the deceased died.....and during that time, the Appellant bore him 4 children...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.”***

The evidence on record in the instant case is that the Applicant came to the deceased's home in 2001 after the death of his wife in 1997. She found 2 children Gregory Mwaura and Anne Nungare who were young and she took care of them. However, there are allegations that she mistreated them and they eventually left home after their father's death. The evidence on record is in sharp contrast of how and why she came to the deceased's residence. On the one hand, the Applicant and step brother to the deceased and daughter of the deceased claim she came as wife to the deceased and she took care of the children of the deceased and they then got their own child. On the other hand, the deceased's brother, sister in law and son claimed that the Applicant was a house help employed to look after the deceased's children as he travelled on duty a lot and was away from home. They denied that the child was the deceased's child.

These are both contradictory statements, one group's word against the other group and this Court cannot determine in the absence of cogent evidence the true version. The inconsistent narrative cannot persuade this Court to infer presumption of marriage between the Applicant and the deceased. Therefore the presumption of marriage is not applicable in this case.

With regard to the second issue is whether the child Norell Njihia a child of the deceased?

The child was born during the lifetime of the deceased on 15<sup>th</sup> May 2008 and the birth certificate is produced as annexure to the Applicant's application. The brother to the deceased and son to the deceased contest paternity of the child and claim the deceased was sick for a while before his death in 2009.

**Section 3(2) and 3 (3) of the law of Succession Act Cap 160** provide;

***“Reference in this Act to ‘child’ or ‘children’ shall include a child conceived but not yet born (as long as the child is subsequently born alive) and in relation to a female person, a child born to her out of wedlock, and in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”***

The evidence on record is that the child was born during the deceased's lifetime, lived and continues to live in the deceased's land and house to date, is known to all family members, therefore this Court will infer that for all intents and purposes, since the deceased during his life he did not contest paternity of the child, or send the child away from his home; such conduct is deemed to be that the deceased is the father of the child and or he voluntarily assumed permanent responsibility. Therefore, the deceased's brother and son cannot contest paternity of the child on the deceased's behalf. There is a birth certificate issued during the deceased's lifetime, on 26<sup>th</sup> May 2008 and unless evidence to the contrary is produced it shall suffice. The deceased is for all intent and purposes the father of the child, the birth certificate was obtained in his lifetime. Since the deceased accepted the child and lived with him in his home before his death, the child is a beneficiary of the estate of the deceased under **Section 38 of the Law of Succession Act Cap 160** and/or a dependent under **Section 29 (a) of Law of Succession act Cap 160**.

The 3<sup>rd</sup> Issue is whether the grant should be revoked and annulled under **Section 76 of the Law of Succession Act Cap 160**.

The Court has come to the conclusion based on evidence on record that the deceased's estate shall be distributed amongst the beneficiaries; children of the deceased, namely Gregory Mwaura, Anne Nungari and Norelle Njihia.

Secondly the grant issued on 21<sup>st</sup> April 2011 and confirmed on 11<sup>th</sup> March 2013 was issued to the deceased's brother and sister in law as the children were not adults and now they are adults and should take charge of their father's estate.

The new facts have included another beneficiary who was excluded Norelle Njihia and therefore the grant ought to be revoked and a new grant issued.

## **COURT ORDERS**

The Court orders are as follows;

1. The Applicant did not prove on a balance of probability that she was married under Kikuyu Customary Law to the deceased.
2. The grant issued on 21<sup>st</sup> April 2011 and confirmed on 11<sup>th</sup> March 2013 is revoked and new grant to issue to Gregory Mwaura and Anne Nungari jointly and to hold in trust the share for Norelle Njihia and pay to his mother Lucy Wanjiru Mwangi.
3. The rent from the 5 single rooms and 1 double room shall be collected by Gregory Mwaura and divided equally into 3 parts and Norelle Njihia's share shall be paid to his mother Lucy Wanjiru Mwangi.
4. The Matrimonial home shall be for the 3 children of the deceased jointly and equally. The Applicant shall continue to reside in her son's share of the home.
5. The Old Mutual Investment funds shall not form part of the estate available for distribution as the same was utilized for Gregory's school fees and school expenses.
6. All other properties of the deceased's estate shall be held jointly and equally between the 3 children of the deceased.
7. The administrators shall apply for confirmation of grant within 90 days
8. Any aggrieved party is at liberty to file application in Court for determination
9. Each party shall bear its own costs.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI ON THIS 16<sup>th</sup> DAY OF AUGUST, 2016**

**M.W.MUIGAI**

**JUDGE**

***In the presence of:***

**Ms. Marai holding brief Mrs. Morara for the Applicant/Objector**