



REPUBLIC OF KENYA



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**In re Estate of Gikonyo Thumbi (Deceased) (Succession Cause 1234 of 2018)  
[2023] KEHC 27185 (KLR) (Family) (8 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27185 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1234 OF 2018  
PM NYAUNDI, J  
DECEMBER 8, 2023  
IN THE MATTER OF THE ESTATE OF GIKONYO THUMBI (DECEASED)**

**BETWEEN**

**ROSEMARY WAMBUI NYAGENYE ..... APPLICANT**

**AND**

**MERCY WANGARI KARIUKI ..... OBJECTOR**

**JUDGMENT**

**Background**

1. The Deceased, Gikonyo Thumbi, died intestate on 14th January 2018. Rosemary Wambui Nyangenyne (the Petitioner) took out a citation dated 24<sup>th</sup> September 2018 against Mercy Wangari Kariuki (the Objector). In default of Appearance and response to the Citation, the Court by order dated 13<sup>th</sup> November 2018, allowed the Petitioner to apply for letters of Administration.
2. The Petitioner filed for grant of letters of Administration on 17<sup>th</sup> December 2018 and the same was gazetted on 25<sup>th</sup> January 2019 vide Gazette Notice No. 649. In the Petition the Petitioner listed the following as the Beneficiaries of the Estate of the deceased
  - i. Rosemary Wambui Nyangenyne 1<sup>st</sup> Wife
  - ii. Mercy Wangari Kariuki 2<sup>nd</sup> Wife
  - iii. Wycliffe Thumbi Son (Minor)
  - iv. Lucy Wachinga Daughter (Minor)
  - v. Newton Maina Son (Minor)



3. The Deceased's estate was said to comprise of the following;
  - a. L.R No. 496 Makongeni Settlement Scheme
  - b. L.R No. 919 Makongeni Settlement Scheme
  - c. Plot No. Nyandarua Ndemi/3413
  - d. Plot No. K-A Kayole Riverside
  - e. Plot No. 1488 Kantafu Company Limited
4. On the 15<sup>th</sup> March 2019, the Objector lodged the Objection dated 14<sup>th</sup> March 2019. In her objection, she stated that she was the only wife to the deceased and mother to Wycliff Thumbi Gikonyo and Lucy Wachinga who are both minors.
5. She states that the Petitioner was not a wife of the Deceased and that Newton minor is not a child to the deceased and therefore not a beneficiary of the Estate.
6. In her Affidavit sworn in support she asserted that she was the sole wife of the deceased and that challenged the authenticity of birth certificate of Newton Maina presented as evidence of Paternity, contending that it was a forged birth certificate.
7. The Petitioner swore an Affidavit on 21<sup>st</sup> March 2019, in opposition. She avers that the Objector seeks to disinherit the rightful heirs and that she was married to the deceased under Kikuyu Customary law.
8. She avers that Newton Maina is a biological child of the deceased and the deceased supported his education and performed other parental responsibilities.
9. The Objection was canvassed by way of viva voce evidence. The matter was partly heard by Hon. Lady Justice Achode (as she then was) and upon her elevation to the Court of Appeal, the matter was heard by me. Parties agreed to proceed with the matter from where it had reached.

### **Summary Of Evidence**

#### **OW 1 Mercy Wangare Gikonyo**

10. She stated that she got married to the Deceased in 2001. They were blessed with two children; Wycliff Thumbi Gikonyo and Lucy Valarie Gikonyo. She produced two birth certificates marked as Exh 1 and Exh 2. Although the Deceased was unemployed, he provided for her and the children.
11. She told the court that in 2002, she and the Deceased jointly acquired a property in Kayole where they constructed rental houses. Although the property did not have a title deed, they had a certificate of allocation which showed that they were joint owners. The property has eight units but she only collects rent of Kshs. 4,000 per month from two units.
12. She administers plot no. 474 rented by a church and 919 which is her home. She stated that Plot 919 is registered in the name of Gerald Thumbi Gikonyo. The Deceased had intentions to transfer the property to her before he died. After the Deceased's death, she approached Makongeni Sector Plot Owners to help her transfer the property to her name.
13. That the Owners Association in their letter dated 5<sup>th</sup> March 2019 indicated that the Deceased intended to transfer the property to her. She produced the letter as Exh 3. She told the court that Nyandarua/Ndeni/3414 belonged to the Deceased. The Deceased also acquired a property in Kantafu.



14. She stated that her in laws took the original documents from their house while the deceased was still alive. She was also chased from the house she was living in with the Deceased while the deceased was in hospital. She and the Deceased sold a property to pay off a hospital debt. The Deceased's family tried to keep him away from her before they took him to hospital for treatment. After the deceased was discharged, he went back to live with her in their house.
15. Her evidence was that, the Deceased did not inform her that he had another wife. She told the court that Newton Maina is not a son of the Deceased. She accused the Petitioner of obtaining a birth certificate bearing the names of the Deceased after the deceased had died. She challenged this birth certificate and stated that the original birth certificate did not bear the name of the deceased.
16. She produced a letter dated 15<sup>th</sup> August 2019 written by the Ministry of Interior and Coordination of National Government and Civil Registration Services as Exh 6 which stated that the birth certificate issued in September 2002 was genuine. She stated that the petitioner was mentioned in the eulogy and she only learnt about this a day before the burial.
17. She told the court that the Petitioner and her son should not the benefit from the Deceased's estate because they are not the rightful beneficiaries. She and her children are the rightful beneficiaries.
18. During cross examination, she stated that the Chief's letter from Kayole confirmed that she was the Deceased's wife. She was invited to a meeting held in the home of the deceased's grandfather on 27<sup>th</sup> March 2017. In that meeting, she was informed that the Deceased had divorced her. Although the deceased was present in that meeting, he did not talk to her.
19. She was shown an agreement titled Gikonyo Thumbi dated 27<sup>th</sup> March 2017 and a document called Mrs. Gikonyo Thumbi which had her name. She denied signing any document. She stated that she did not contribute towards the purchase of plot 919 and 474. She receives Kshs. 4,000 per month from the church. The deceased's family recognised the Petitioner as the Deceased's wife. The Deceased paid her dowry.
20. During re-examination, she stated that dowry was not taken back from her parents. She continued living with the Deceased after the meeting of 27<sup>th</sup> March 2017. The witnesses in the two documents are different yet they were signed on the same date.

## **Petitioners Case**

### **DW 1 Gerald Gikonyo**

21. He adopted his witness statement dated 5<sup>th</sup> July 2019 as his evidence in chief. He stated that he is the grandfather of the deceased. His evidence was that both the Petitioner and the Objector were married to the Deceased. The Deceased and the Objector had marital issues and on 27<sup>th</sup> March 2017, they agreed to divorce. The Objector promised to leave and never come back.
22. During cross examination, he stated that the Deceased lived in his hotel after he was discharged from hospital. The Objector and her father sold 3 acres of the Deceased's land, the remaining 4 ½ acres were given to the Deceased's mother.
23. He stated that both the Deceased and the Objector signed the divorce agreement. The deceased died in the home of the Objector. The Objector cultivates the land in Nyandarua. He bought the property in Mowlem.



## **DW 2 Paul Ndugi Gikonyo**

24. He adopted his written statement dated 5<sup>th</sup> July 2019 as his evidence in chief. He stated that the Deceased was his nephew. His evidence was that both the Petitioner and the Objector were married to the Deceased. The Deceased and the Objector had marital issues and on 27<sup>th</sup> March 2017, they agreed to divorce. The Objector promised to leave and never come back.
25. On cross examination, he stated that he did not know how many children the Deceased had with both women. In the meeting held on 27<sup>th</sup> March 2017, the Deceased complained that the Objector was mistreating her. At the time of his death, the deceased was living in his uncle's hotel. He was not aware of any divorce between the Deceased and the Objector. He was not familiar with Kikuyu custom relating to divorce. According to him, there was no divorce because the family of the Objector was absent during that meeting.
26. In re-examination, he stated that the Objector was not at the meeting.

## **DW 3 Nancy Nyambura Gichini**

27. She adopted her witness statement dated 5<sup>th</sup> July 2019 as her evidence in chief. She stated that the deceased was her nephew. Her evidence was that both the Petitioner and the Objector were married to the Deceased. The Deceased and the Objector had marital issues and on 27<sup>th</sup> March 2017, they agreed to divorce. The Objector promised to leave and never come back.
28. During cross-examination she stated that after the deceased was discharged from hospital, he stayed with the Objector. At the time of his death, he was living with the Objector. He lived with her for a long time and even bought property together. The deceased and the Petitioner only owned the ancestral land.

## **DW4 Rosemary Wambui Nyagenye**

29. She stated that she got married to the deceased in 1999. The Objector was her co-wife. She told the court that she had a child (Newton Maina) with the Deceased. The Deceased had properties in Kayole, Makongeni Settlement (2 plots) and Kantafu and the farm in Ol kalau.
30. During cross –examination, she stated that according to Kikuyu custom, a delegation goes to a girl's house to announce that the girl is at their home. There was no ruracio in her case and dowry was not paid. According to her, in the absence of dowry, one is still recognised as a wife upon cohabitation and siring of children.
31. The deceased lived both in her house and that of the Objector. She and the Objector were present during the meeting of 27<sup>th</sup> March 2017. The deceased divorced the Objector on that day. The deceased died in the house of the Objector. The deceased's hospital bill was paid by his uncle. He went to stay in his uncle's hotel after he was discharged from hospital. She stayed with the deceased in her house before he went to the Objector's house.
32. She stated that when Newton was born, she discussed with the deceased to name him Maina. She obtained a birth certificate after the Deceased's death. The birth certificate issued earlier on 13<sup>th</sup> September 2002 did not have the Deceased's name. She stated that the Registrar stated that the second birth certificate (dated 17<sup>th</sup> September 2018) is uncertainable while the 1<sup>st</sup> birth certificate (dated 13<sup>th</sup> September 2002) is genuine and contains the correct details of birth.



33. The Deceased provided for her and her son. The Deceased's uncles gave her the burial permit to enable her file for letters of administration because she was the legal wife of the deceased. The Deceased gave his uncle title deeds to keep them. The Deceased and the Objector are not joint owners of the property in Kayole. All the properties were acquired by the Deceased.
34. She built a house with the Deceased in Ol kalau which is rented to a church. The Objector and the Deceased lived on that property as some point. The Deceased was allocated property in Kayole in 1995. The title does not indicate that he was holding the property in trust. The Objector was living on the land in Ol kalau when the Deceased died.
35. In re-examination, she stated that the Objector was aware that she was also married to the Deceased. The Deceased and the Objector lived in Kayole. The Objector lives in Mowlem and collects rent from the church and from the rentals in Kayole. The Objector's brother and his wife live in the Ol kalau house. The family of the deceased recognise her and the Objector as wives of the Deceased.
36. At the conclusion of the hearing, directions were given for parties to file written submissions. The Petitioner filed written submissions dated 12<sup>th</sup> September 2023. The Objector on the other hand did not file written submissions.

### Summary Of Petitioner' S Submissions

37. The Petitioner's submits that the Deceased was polygamous and she has proved that the Deceased had two wives. That the estate of the Deceased should therefore be distributed according to the provisions of Section 40 of the Law of Succession Act. She urged the court to appoint them both as administrators of the estate of the deceased. She further urges the Court to find that her son Newton Maina is a beneficiary of the estate and the deceased's dependant
38. Reliance is placed on the decision in Rono vs Rono (2005) EA 363.

### Analysis And Determination

39. Based on the pleadings filed, evidence tendered and submissions filed, I frame the issue for determination to be
  - a. Who is entitled to Petition for the Grant of the letters of Administration with respect to the deceased?
  - b. Who are the Beneficiaries of the Estate of the Deceased?
  - c. Who should pay costs of the suit?
40. On the 1<sup>st</sup> issue, who is entitled to Petition for the Grant of Letters of Administration, Section 66 of the Law of Succession Act provides-
 

[66] Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

  - (a) surviving spouse or spouses, with or without association of other beneficiaries;
  - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;



- (c) the Public Trustee; and
- (d) creditors: Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

41. The above provision indicates that the spouse of the deceased ranks in priority. Both the Objector and the Petitioner contend that they are wives of the deceased. The Petitioner testified that she got married to the deceased by Kikuyu customary law in 1999. While the Objector asserts that she was married in accordance with Kikuyu Customary law in 2001.
42. The Petitioner recognises that the Objector was the wife of the deceased but that at the time of his death the deceased had divorced her. The Objector on the other hand challenges the validity of the marriage of the Petitioner to the deceased and contends that she first met her after the deceased died.
43. It is the Objector's case that the Deceased never intimated to her that he had a prior marriage. She stated however that she was aware that the deceased had a 'romantic relationship' with another woman prior to marrying her and that they separated.
44. Witnesses called by the Petitioner testified that both the Petitioner and Objector were married to the deceased.
45. Witnesses called by the Petitioner testified that they recognised that the deceased was married to both the Petitioner and Objector. In the circumstances I am obligated to consider whether under the circumstances the Court can presume a marriage between the deceased and the parties herein
46. The principles that are the basis of a Presumption of Marriage were set out by the Court of Appeal for East Africa decision (Wambuzi P, Mustafa VP and Musoke JA) were outlined in *Mary Njoki v John Kinyanjui Muthuru & 3 Others, (mary Njoki)* [1985] eKLR by Kneller JA as follows:
- a. The onus of proving customary law marriage is generally on the party who claims it;
  - b. The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;
  - c. Evidence as to the formalities required for a customary law marriage must be proved to that standard; (*Mwagiru v Mumbi*, [1967] EA 639, 642)
  - d. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
  - e. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate* [1937] 3 All ER 105)
  - f. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (*Sastry Veliader Aronegary v Sembecutty Vaigalie* (1880-1) 6 AC 364; *Shepherd George v Thye*, [1904] 1 Ch 456)
47. The Supreme Court in its decision in the case of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) has pronounced itself on the doctrine of presumption of marriage post the enactment of the *Marriage Act*, 2014 as follows;
- (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.

48. Having regard to the circumstances of this case I find that this is a matter in which the Court can presume the marriage. There is cogent evidence that the deceased cohabited with both the Objector and the Petitioner and the relatives of the deceased recognised their respective marriages.
49. With regard to the meeting of 27<sup>th</sup> March 2017, I find that it was not established to the required standard that the Deceased divorced the objector. Indeed, witnesses were agreed that upon his discharge from hospital the deceased stayed with the Objector. Both the Objector and Petitioner were recognised as spouses of the deceased at his burial.
50. Based on the foregoing I find that both the Objector and Petitioner are the spouses of the deceased and in accordance with Section 66 of the Act rank equally to apply for the grant of letters of Administration. It is therefore directed that grant of Letters of Administration issue jointly to the Petitioner and the Objector.
51. The 2<sup>nd</sup> Issue for determination is who are the beneficiaries of the deceased. It is not in dispute that the deceased is the father of Lucy Valery Wachinga and Wycliff Thumbi Gikonyo, whose mother is the Objector. Birth certificates were produced in support of the same. The paternity of Newton Maina is contested.
52. The Petitioner admits that there are 2 birth certificates in relation to Newton. The first, Serial number 281147 does not identify his father. While the second one Serial Number 9052731 identifies the deceased as his father.
53. The Petitioner was at pains to explain why Newton has two birth certificates and why there is a discrepancy. She had no rejoinder to the letter from Civil Registration Services, Regional Coordinator Nairobi dated 13<sup>th</sup> March 2019 and specifically the pronouncement that the certificate of Birth Serial Number 9052731 is not the record of the Civil Registration Services and therefore unascertainable.
54. I find this contradiction to be material and has the effect in the absence of a DNA Test of negating the Petitioner's claim that the deceased was the biological father of the Newton Maina. This in effect that Newton Maina cannot be said to be a dependant as provided for under Section 29 (a) of the [Law of Succession Act](#).
55. The question is whether he can be considered to be a dependant under Section 29(b) of the [Law of Succession Act](#). Whereas dependants under Section 29 (a) are not required to demonstrate maintenance, those under are Section 29 (b) must do so.

Section 29(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; ... (Emphasis Supplied)

56. The Petitioner has not placed any evidence of maintenance by the deceased towards Newton Maina. For this reason, I find that he is not a beneficiary of the Estate.
57. The beneficiaries of the Estate are
  - i. Rosemary Wambui Nyangenye 1<sup>st</sup> Wife
  - ii. Mercy Wangari Kariuki 2<sup>nd</sup> Wife
  - iii. Wycliffe Thumbi Son (Minor)





- iv. Lucy Wachinga Daughter (Minor)
58. Accordingly, the Objection succeeds partly to the extent that Newton Maina is found not to be a beneficiary of the Estate.
59. On costs, each party will bear their own costs.
60. The final orders are therefore that
- a. Grant of Letters of Administration do issue to Rosemary Wambui Nyangenyne and Mercy Wangari Kariuki jointly
  - b. Beneficiaries of the Estate are as set out in paragraph 55 above
  - c. The Administrators to file summons for confirmation of Grant within 60 days. In the event that they are unable to file the summons jointly then either may file the summons and in the absence of consensus the other Administrator at liberty to file affidavit of protest within 14 days of service.
  - d. Mention on 23<sup>rd</sup> April 2024 to confirm summons for confirmation filed and to take directions on its hearing
  - e. Each party will bear their own costs.

It is so ordered

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**P. NYAUNDI**

**JUDGE**

In the presence of

Mr. Ayugi h/b for Mr. Ojienda for the Applicant Advocate for Petitioner/Objector

