



REPUBLIC OF KENYA



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**In re Estate of Heinz Ostertag (Deceased) (Succession Cause 410 of 2005)
[2022] KEHC 16661 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 410 OF 2005
JN ONYIEGO, J
DECEMBER 16, 2022**

BETWEEN

VYONNE OSTERTAG PETITIONER

AND

PIA MIRIAM STEIN OSTERTAG 1ST BENEFICIARY

PATRICIA OSTERTAG 2ND BENEFICIARY

AND

TERRY NZILANI IBRAHIM 1ST OBJECTOR

GERDA OSTERTAG 2ND OBJECTOR

JUDGMENT

1. The deceased herein a Germany national died intestate on February 12, 2005, while domiciled in Kenya. On January 4, 2005, Yvonne Ostertag claiming to be the widow to the deceased petitioned for a grant of representation. She listed herself (widow), Pia Miriam Ostertag(daughter) and Patricia Ostertag(daughter) as the survivors hence beneficiaries of the estate. According to form P&A 5, the deceased lusted Plot Number XXX9 Section IMN worth 13million, house hold goods worth kshs 687,250 and motor vehicle Regn No. KAJ XXXXZ as the assets comprising the estate.
2. On May 3, 2006, Terry Nzilani Ibrahim and Gerda Ostertag claiming to be widows to the deceased filed an objection to the petition on grounds that; having been married to the deceased and therefore wives to the deceased, they were not consulted nor was their consent sought before petitioning for the grant; the second objector was married to the deceased until they divorced in 1976 and they had two children ; the objectors' names had been excluded from the list of heirs and Yvonee Ostertag wanted to disinherit them; the petitioner has been receiving the pension which is part of the deceased's estate and not accounting for it.



3. Amid several applications and counter applications, the court finally granted a grant of letters of administration intestate on February 14, 2019 and issued the same to Yvonne Ostertag on February 15, 2019. Subsequently, the petitioner applied for confirmation of the grant *vide* a chamber summons dated April 24, 2019 thus proposing the estate to be shared out between her, Pia Miriam and Patricia equally (1/3 share each). It is however not clear from the record why the objection could not be dealt with pursuant to justice Odera's directions in her ruling of August 15, 2014 directing that the objection be heard by way of *viva-voce* evidence before the grant could issue.
4. Nevertheless, before the grant could be confirmed, parties agreed to canvass the pending objection. During the hearing, the 1st objector adopted her witness statement recorded on September 21, 2021 together with a list of documents. It was her testimony therefore that she met the deceased whom she described as the love of her heart the year 1999 when he visited Kenya as a tourist. That the deceased had confided to him that around the year 1976, he divorced his first wife Gerda Ostertag (2nd objector) and got married to Yvonne Ostertag (petitioner) in 1985 but separated in 1999. That the deceased proposed to marry her which she agreed and together visited her rural home in ukambani where she introduced him to her family including her grand-mother as her intended husband. She attached and produced photographs allegedly taken between her and the deceased (see Doc.No. in the list of documents).
5. She further stated that after the deceased's proposal to marry her was accepted, they moved back to Mombasa and started cohabiting as husband and wife. That the year 2004, the deceased filed a petition for the divorce of the petitioner but died before they could divorce. She went further to state that the year 2002, the deceased took her to Germany where he introduced her as a wife to his two daughters Pia Mariam and Patricia who also recognized her as their step mother. She referred the court to Pia Mariam's affidavit sworn on May 5, 2006 where she allegedly recognized her(Terry) as a wife to her father. It was her evidence that cohabitation for over a period of 5 years was sufficient enough to infer or presume a marriage.
6. She claimed that she stayed with the deceased in his house now the disputed property until he died. That the deceased used to support her and her ailing parents. She denied being married to some other Germany man known as Frank thus dismissing some marriage certificate produced by the respondent as fake. She claimed that the house comprising the estate was acquired through her joint effort with the deceased.
7. On her part, Pia Miriam a daughter to the deceased adopted the content of her affidavit sworn on August 9, 2021 together with the documents attached thereof in opposing the objection herein. She denied the claim by the objector that she was married to the deceased. She told the court that the deceased was married to her mother the 2nd Objector with whom they divorced. She recognized the petitioner one Yvonne her step mother as the only lawful widow to the deceased and not Terry nor her mother Gerda the second objector herein. It was further her evidence that Terry was married to Frank a Germany and therefore could not be married to her father. She attached a marriage certificate between Frank and Terry (exb.5)
8. She further stated that the 1st objector was a mere friend to the deceased and not a wife. It was her contention that the deceased and Yvonne having not divorced officially, the deceased had no capacity to contract any other marriage. She produced a consent signed by her mother the second objector herein renouncing her interest in the estate thus withdrawing from the proceedings. The said consent was produced as evidence and marked as exh. number 6. According to her, the estate should be shared out equally between her, her sister Patricia and Yvonne her step mother.



9. It is worth noting that Yvonne did not testify on grounds that she could not link up with the court. Mr. Omollo opted to close the case and then file submissions. Parties agreed to file submissions which they did at various times.

Petitioner's submissions

10. The firm of Gor and Gor appearing for the petitioner filed their submissions on March 14, 2005 submitting that Yvonne was the only widow entitled to a share of the estate given that she had contracted a monogamous marriage with the deceased hence the 1st objector had no capacity to enter into another marriage. That Terry had failed to prove that she got married under Kamba customary marriage. In support of that argument, reliance was placed in the holding in the case of *Anna Munini v Margaret Nzambi* (1984)e KLR where the court held that the onus of proving customary marriage basically and generally lie with the party claiming it. Further reliance was placed in the case of *MWK vs AMN* (2017)e KLR where prof.Ngugi J as he then was held that to allege existence of customary marriage, there has to be evidence of negotiation of bride price and performance of other formalities.
11. On the claim that Yvonne had been bought out or compensated of the plot and house in question hence has no further claim from the estate, counsel submitted that the property at hand belongs to the deceased hence the issue of separation of ownership before he died is immaterial.

Beneficiaries' submissions.

12. The firm of Muniyithya , Mutugi,umara and Muzna and co. Advocates appearing for Pia and Patricia being daughters to the deceased and therefore beneficiaries to the estate filed their submissions on November 19, 2021. They submitted that Terry the 1st objector was not legally married to the deceased as the deceased was engaged in a monogamous married hence had no capacity to marry another wife. Regarding the claim that the deceased had separated with the petitioner, it was contended that the divorce case had not been concluded by the time he died.
13. It was further contended that the objector could not claim both customary marriage and marriage by long cohabitation at the same time. That there was no proof of Kamba customary law marriage having been conducted as no witness was called to witness the same. Counsel submitted that the objector having been married to another man in Germany, she cannot claim having had another marriage with the deceased.
14. On the question regarding distribution, it was submitted that the petitioner having benefitted by receiving value for her half share in the property in question from the deceased cannot claim a share out of the same property. In counsel's view, the estate should be shared out equally between the two beneficiaries.

Objector's submissions

15. The objector filed her submissions in person on November 16, 2021 thus reiterating the content in her witness statement and oral testimony in court. She maintained that she was legally married to the deceased under Kamba customary law. That even if the deceased had not divorced with the petitioner, she was deemed to be a lawful wife through long period of cohabitation a fact she claimed was acknowledged by the daughters of the deceased.

Analysis and determination.

16. I have considered the objection herein, responses thereof and submissions by both counsel. Issues that can be discerned for determination are;



- a. Whether the deceased was married to the deceased
 - b. Who are the rightful heirs to the deceased
 - c. Who is entitled a share of the estate.
17. The undisputed facts of this case are that; the deceased was a German national who died while domiciled in Kenya; the deceased was originally married to one Gerda Ostertag whom he divorced with in 1976; the deceased and Gerda were blessed with two daughters namely; Pia and Patricia; after divorcing with Gerda, the deceased under a monogamous marriage married the petitioner one Yvonne in 1985 but separated around 1999; prior to his death the deceased had petitioned for divorce against Yvonne but he died before conclusion of the case.
 18. It is worth noting that through a consent filed in court together with the affidavit in evidence filed by Pia Miriam, Gerda withdrew from the proceedings thus renouncing her claim and or right over the estate. In the circumstances, am left with Terry as the only objector. According to Terry, she was aware that the deceased had a wife married under a statutory marriage but they were separated. She claimed two types of marriage. Firstly, she claimed Kamba customary marriage. Secondly, marriage by long cohabitation.
 19. It is trite law that a person who is engaged in a monogamous marriage cannot engage in any other marriage before dissolution of the statutory marriage. In the case of *Estate of the Late Peter Kamau Ng'ang'a (Deceased)* [2018] eKLR the Court stated that the *Marriage Act* 2014 provides at Section 11 that a union is not a marriage if at the time of the making of the union either party is incompetent to marry by reason of a subsisting marriage.
 20. Similar position as above was also held in *Machani vs Vernoor*(1985)e KRL and *Victoria Mwibaki Muchira & 2 other vs Wanjiku Mwenja Mwangi & 3 others* (2016) e KLR where both courts held that a person married under a monogamous marriage lacks the capacity to contract a subsequent marriage. Technically therefore, the deceased had no capacity to marry Terry and as correctly stated by Terry, that was the reason why the deceased petitioned for divorce against the petitioner but died before they could divorce. To that extent, the petitioner was lawfully married to the deceased by the time the deceased died.
 21. The above finding notwithstanding, the issue of Kamba customary marriage is a legal question. Assuming for a moment that the deceased had capacity to marry which is not, did he contract Kamba customary law marriage with the deceased? It was incumbent upon the objector to prove the existence of Kamba customary marriage. In the instant case, the objector merely stated that she and the deceased visited her family in the rural home. She did not establish whether any bride price negotiations ever took place and the Kamba cultural rites or ritual or formalities performed. She did not tell the court how much dowry was paid and in whose presence. All she attached as exh.1 was a photo she was taken while holding the deceased. Nobody testified to confirm that some customary law ceremony was conducted as a sign of such marriage. In the absence of such evidence, it is difficult to conclude that there was such customary marriage.
 22. In the case of *Hortensiah Wanjiku Yawe vs The public Trustee* the court of appeal civil appeal 13 of 1976 the court of appeal held that the onus of proving customary law marriage is generally on the party who claims it and that the standard of proof is on a balance of probability and that the formalities required for a customary marriage must be proved to that standard. In the circumstances of this case, the objector did not submit any evidence at least on a prima facie basis that they contracted Kamba customary marriage. For those reasons that ground fails.



23. Regarding the question of long period of cohabitation, the objector stated that she met the deceased the year 1999 after he had separated with the petitioner. She stated that they stayed together with the full knowledge of her family and the children of the deceased among them Pia Miriam who allegedly admitted in her replying affidavit sworn on May 5, 2006 at paragraphs 11 and 12 that when she and her sister came to visit their father in Kenya the year 2003, they found their father staying with Terry whom their father introduced as his wife.
24. On the other hand, Pia Miriam admitted in her evidence that the deceased was a friend to Terry. In the same affidavit, she confirmed that the deceased visited Germany the year 2002 with Terry. That according to her, her father and Terry were staying together as husband and wife.
25. To serve as further proof of closeness with the deceased, Terry attached copies of cheques the deceased used to pay school fees for her son Ben whom he was supporting as a step son. She attached several photos taken between the deceased and her mother, her son and herself. From the evidence on record and more particularly the evidence of Pia on oath, the deceased had indeed cohabited and presented to the general public and right thinking men and women in society that they were living together as husband and wife.
26. In the case of *Phylis Njoki Karanja & two others v Rosemary Mueni Karanja & another* (2009) e KLR the court of appeal Madan J stated that;

“The concept of presumption of marriage is not new in Kenya. It was recognized by the former court of appeal in *Hortensiah Wanjiku v public trustee* in civil no 13 of 1976 and by this court in *Mbithi Mulu & another v Mitwa Mutunga* in Civil Application Number Nai.17 of 1983”

This presumption arises from long cohabitation and repute between the man and the woman who have capacity to marry and have consented to do so-see (*supra*). We consider that the deceased and the 1st respondent in this appeal had capacity to marry while the deceased was married to the 2nd appellant under Kikuyu customary law but this was not a bar to him marrying any other woman since customary law of marriages under kikuyu customs are potentially polygamous”

27. Having held that the deceased and Terry(objector) had presented themselves as husband and wife, Section 3(5) of the *law of succession Act* does recognise the objector as a beneficiary. For avoidance, I wish to reproduce the said section which provides as follows;

“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.”.

28. In view of the above provision, Terry is entitled to a share of the estate as a wife to the deceased. The claim that she was married to another man was not substantiated as the document produced was not authenticated as to the source and the author. Pursuant to section 3(5) above quoted, she is entitled to a share as a spouse to the deceased for purposes of succession. See *EMNM vs DNMK and 13 others* (2017) e KLR and *In re Estate of Morris Kilonzo Msyimi(deceased)*(2018) e KLR.
29. Having held as above, it is clear that the beneficiaries of the estate are Yvonne, Pia, Patricia and Terry. The next question is, who is entitled to which or what share. Having held that the deceased had more



than one wife, he is deemed to have died a polygamous man hence Section 40 of the *law of succession Act* comes to play. The said section provides as follows;

Where intestate was polygamous-

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

30. In view of the above, the two widows Yvonne and Terry are additional units hence shall equally share personal effects and the rest of the properties including the motor vehicle can be shared out amongst the four beneficiaries equally. The same can be sold upon valuation by a mutually agreed valuer and proceeds realized there from shared out as stated. Accordingly, the grant herein is confirmed and the estate distributed as stated herein above.

DATED SIGNED AND DELIVERED VIRTUALLY AT Mombasa this 16th day of December, 2022.

J.N. ONYIEGO

JUDGE

