



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
CIVIL APPEAL NO. 70 OF 2019

MARY WANJIKU GITAU.....APPELLANT

VERSUS

MARY WANJIKU GITAU.....1ST RESPONDENT

STEPHEN KIMWAKI.....2ND RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court

at Kiambu (Hon. B. Khaemba (Mr.) Dated 12th April 2019

in Nairobi Succession Cause 374 of 2009)

JUDGMENT

1. (Being an appeal and cross appeal have been filed herein against the Ruling of Kiambu Chief Magistrate's Court's Ruling of 12th April, 2019 in **Succession Cause No. 374 of 2009**. That succession matter is in respect to **THE ESTATE OF JACKSON GITAU KIMWAKI**, deceased. The deceased died on 16th July, 2009.)
2. Before the Kiambu Chief Magistrate's Court, **MARY WANJIKU GITAU (Mary)** jointly with **STEPHEN KIMWAKI GITAU (Stephen)** petitioned for Grant of Letters of Administration intestate in respect to the deceased's estate. **Mary** petitioned as the wife of the deceased while **Stephen** applied as the son of the deceased. The petition was filed on 23rd December, 2009. The petitioners, (**Mary and Stephen**) set out the beneficiaries who were listed as daughters and sons of the deceased and two minors whose relationship to the deceased was not disclosed.
3. By Summons for Revocation and Annulment of Grant dated 23rd January, 2017 **NANCY NYAMBURA GITAU (Nancy)** sought to revoke and annul the Grant issued to Mary and Stephen. The revocation was sought on the basis that Nancy was deceased's wife.
4. The hearing of the summons was by way of *viva voce* evidence. By the ruling dated 12th April, 2019, the subject of this appeal, the trial court made two findings. Firstly, that Nancy was a widow of the deceased and secondly that Nancy's two adult children, namely, **Zainabu Njeri Gitau** and **PGG** were neither children nor dependants of the deceased. As a consequence of the above trial court's finding that, Nancy was a widow of the deceased, and that she had an equal right to petition for Grant of Letters of Administration the trial court revoked the Grant issued jointly to Mary and Stephen. Those orders have provoked this appeal by Mary and Stephen and Nancy has filed a cross appeal.
5. The appeal by Mary and Stephen raises the following grounds of appeal:-
 - a. The learned magistrate erred in law and in fact in revoking the grant issued and confirmed on 9th December, 2010.
 - b. *The learned magistrate erred in law and in fact in holding that there was a valid marriage under Kikuyu Customary Law between NANCY NYAMBURA GITAU and the deceased, JACKSON GITAU KIMWAKI.*
 - c. The learned magistrate erred in law and fact in disregarding the evidence tendered by the appellants.
 - d. The learned magistrate erred in law and in fact in holding that the respondent, **NANCY NYAMBURA GITAU** was a widow of the deceased and is a beneficiary of the Estate of **JACKSON GITAU KIMWAKI** premised on a Funeral Program.

e. The learned magistrate erred in law and in fact in disregarding the appellants' submissions that the respondent herein had failed to prove the elements of a valid marriage under Kikuyu Customary Law.

f. On the whole, the decision of the learned magistrate in revoking the grant dated 9th December, 2010 is unreasonable, irrational and contrary to the pleadings, evidence, submission and law.

6. It was submitted that Nancy failed to prove those elements. It was further submitted that a funeral program was not proof of marriage.

7. On ground (a) and (f), it was submitted that Nancy failed to meet the requirements of **Section 76** of the Law of Succession Act, Cap 160.

8. Nancy by her cross-appeal filed the following grounds of appeal:-

a. THAT the learned Senior Resident Magistrate erred in Law and in fact in making a decision of dependency of the deceased's step children in absence of such an application as by law required.

b. THAT the learned Senior Resident Magistrate erred in Law and in fact in holding that the appellant did not give evidence prove that the step children of the deceased were maintained by him prior to his death on an application for revocation of Grant.

c. THAT the learned Senior Resident Magistrate erred in Law and in fact in introducing extraneous matters of dependency and making a decision on his own motion hence pre-empting an application for dependants.

d. THAT the learned Senior Resident Magistrate erred in Law and in fact in holding that there was no documentary evidence to show that the applicants' children were dependants of the estate ignoring the Eulogy and the Obituary of the deceased.

e. THAT the learned Senior Resident Magistrate erred in Law and in fact in making inferences not supported by evidence and arriving at an erroneous decision not based on sound principles of law or fact.

9. It was submitted, on behalf of Nancy, that the trial court erred in determining dependency of the children of Nancy in the absence of an application as required by law. Nancy submitted that dependency was not before the trial court. That in the trial court consideration of dependency of those children was an error because it pre-empted an application by those children of dependency.

ANALYSIS AND DETERMINATION

10. The two appeals before me raise two issues which are:-

a. Did Nancy prove she was the wife of the deceased? and

b. Did the trial court err in determining dependence of Nancy's children?

ISSUE (a) MARRIAGE

11. Nancy by affidavit and *viva voce* evidence stated that she was the 2nd wife of the deceased. That she got married to the deceased under Kikuyu Customary Law in the year 2007 after having cohabited with the deceased from the year 1993. That when she got married, Mary the first wife of the deceased was estranged and had lived apart from the deceased since 1993. Nancy also confirmed that her children who were 20 years and 16 years old were not children of the deceased even though their birth certificates bore the deceased's name, as their father.

12. Nancy's evidence was supported by the deceased's younger brother, namely, **Francis Ndichu Mwaniki**. He stated that he and the deceased were introduced to Nancy's parents in the year 2007 and he went to pay dowry to her parents at the end of the year of 2017, in the company of his wife, two aunts, two sisters and an age mate of the deceased. This witness also confirmed that the deceased had built a house for Nancy which house was destroyed by Mary and Stephen when they also assaulted her. That assault resulted in the criminal charges in Githunguri Criminal case No. 523 of 2010.

13. That evidence of marriage was denied by Stephen. Stephen stated that Nancy was married to his uncle but not to his deceased's father.

14. The burden of proof hereof is on a balance of probability. Nancy's proof of existence of her marriage was on that standard of proof. Although it was contended on behalf of Mary that Nancy had failed to meet all the elements of marriage, the trial court proved that Nancy was the widow of the deceased.

15. In my view, just as the trial court, I find that Nancy well met the standard of proof and proved she was one of the widows of the deceased. Although it was argued that Nancy did not prove all elements of a Kikuyu Customary Marriage, I am well persuaded by the holding of the case **P.M.K. V. G.N. & 5 OTHERS (2018)** eKLR thus:-

“36. It is important to remember the caution sounded by the Court of Appeal in the *ELIUD MAINA MWANGI CASE* that customary law evolves with time. The Court stated thus:-

“Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation

to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.”

16. A case can be made that as time has gone by not all elements of customary marriage, let alone Kikuyu Customary Marriages are observed but the parties in the ceremony can be said to be clear that a marriage contract has been performed. Nancy provided evidence, through her brother in Law, which evidence showed there was a family meeting and dowry was paid. In my view that suffices to prove marriage.

17. Over and above that, Mary and Stephen assaulted Nancy and demolished some structures. Why did they do that? Is it because she was, as she stated living on the land the subject of this succession? That I believe is the correct position. It follows that Nancy proved she had co-habited with the deceased and Mary and Stephen wanted her out of the land. Since cohabitation is also proved, I find that there is a presumption of marriage between deceased and Nancy. In this regard, I rely on the case of ***B.C.C. VS. J.M.G. (2018) eKLR*** where the court stated thus:-

“HORTENSIAH WANJIKU YAWE V PUBLIC TRUSTEE CA Civil Appeal No.13 of 1976 (UR) the Court of Appeal for East Africa held that a long period of cohabitation as man and wife may give rise to a presumption of marriage in favour of the party asserting it. Mustafa JA., held as follows:-

“I find nothing in the Restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising out of long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case, should not apply just because she was married according to Kikuyu customary law. It is a concept that is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages, however celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage ...”

ISSUE (b) DEPENDENCY

18. This issue requires me to determine whether there was an error, on the part of the trial court, in determining the dependency of the children of Nancy.

19. The standing of those children, in regard to the estate of the deceased was provoked by Nancy’s depositions in her affidavits. In her affidavit in support of the summons for revocation and annulment of the grant, affidavit dated 23rd January, 2017, Nancy stated:-

“That the petitioner (Mary and Stephen) filed this petition but failed to disclose that the deceased had a 2nd wife and children namely:-

i. Zainabu Njeri Gitau – 20 years

ii. PGG– 16 years.”

20. In further affidavit sworn by Nancy dated 25th February, 2017, Nancy deposed:-

“That paragraph 6 of the affidavit (of Stephen) contains half-truths because it omits my name as a 2nd wife of the deceased together with two children namely:-

1. Nancy Nyambura Gitau (widow) 2nd wife.

2. Zainabu Njeri Gitau – 20 years.

3. PGG– 16 years.”

21. Nancy during the hearing was cross examined and she stated:-

“I got married in 2007. I had children when I got married. One of them was 20 years and the other one was 16 years old. The birth certificates of the children to (sic) have the names of the deceased as he had (sic) changed my identity card to have his name. I had no child with the deceased.”

22. Stephen while testifying in chief stated that he did not know the children of Nancy. It is following this evidence that the trial court made a finding that Nancy’s children do not qualify as dependants of the deceased’s estate. That finding was based on the fact that there was no evidence that the deceased had taken the children as his own children, because the birth certificates bearing the deceased’s name were obtained after the death of the deceased and because there was no documentary evidence adduced showing that the deceased maintained the children. Further, the court found that those children were adults of 22 years and 23 years. The trial court concluded:-

“I therefore find the applicant failed to prove that her children were dependants of the estate.”

23. On behalf of Nancy it was submitted that the trial court erred in introducing extraneous matters, relating to dependency of those children, which was not part of the application for revocation. It further submitted that the trial court erred in finding that there was no proof of dependency of those children because they were mentioned in the deceased’s eulogy/funeral program.

24. Parties are indeed bound by their pleading. The courts are required to confine their decisions on the pleaded issues. This was clearly stated in the case **GEORGE W. OMONDI VS. GUILDERS INTERNATIONAL BANK LIMITED (2015) eKLR.**

“As a general rule therefore, it is not open to a court to base its decision on an unpleaded issue. There are however, acknowledged exceptions to this general rule. We identified such an exception in the case of ODD JOBS -V- MUBIA [1970] EA 476 namely, where it appears from the course followed at the trial that the unpleaded issue has been left to the court for decision.”

25. There is however exception to the rule that courts should determine the issues raised in the pleading. That exception was discussed in the case **C.K. VS. T.K.M. (2016) eKLR** as follows:-

“The main issue of custody was squarely before the court and in our view the question of taking the child out of jurisdiction when the respondent had custody was so intertwined with the issue of custody that it was not reasonable to expect separate and distinct pleadings on it. In addition, as the authorities consistently show, where evidence is led and it appears from the course followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. In this case, the record shows that when the informal application to take the child out of jurisdiction was made, the appellant’s counsel then on record, *Ms. Kwaya* was in court and neither objected to the application, nor sought to address the court on the issue. In the circumstances of this appeal, we do not see any basis for the contention that the High Court erred by addressing unpleaded issues.” (underlining mine)

26. In this case, Nancy specifically brought the issue of dependency of her children through her affidavit evidence. She alleged that the petitioner for Grant of Letter of Administration failed to recognize she was a widow and even though she testified that her children were not the biological children of the deceased she sought determination that they had a right to inheritance to the Estate of the deceased. It follows that the dependency of Nancy’s children was not only pleaded but also left to the court to determine. The trial court in making that determination therefore did not err.

CONCLUSION

27. Both the issues above having been determined in the negative, both appeals do fail. Both the main appeal and the cross appeal therefore are hereby dismissed with no order as to costs.

SIGNED AND DELIVERED VIRTUALLY THIS 18th DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

For the Appellant – Mr. Ogutu

For the Respondent – Mrs Muhuhu

COURT

Judgment virtually delivered in their presence.

MARY KASANGO

JUDGE