



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 164 OF 2010

IN THE MATTER OF THE ESTATE OF BMK – DECEASED

CWI.....1ST PETITIONER

MJM.....2ND PETITIONER

VERSUS

LWM.....OBJECTOR

RULING

1. The Deceased herein died intestate on 10/10/2008. CWI and MJM (Petitioners) petitioned for Letters of Administration intestate to the Deceased's estate on 31/03/2010. They described themselves respectively as widow and son to the Deceased.

2. In the Affidavit in Support of Petition for Letters of Administration Intestate, the Petitioners listed eight other beneficiaries to the estate as follows:

- a. MWM– Adult daughter
- b. WKM – Adult son
- c. DIM – Adult son
- d. PNM – Adult son
- e. LWM – widow
- f. PM– Adult daughter
- g. WK. M – Adult son
- h. MWM – Minor daughter

3. In filing the Petition, the Petitioners attached as a supporting document, a letter by the Area Chief, Elburgon location naming the Petitioners plus the above named as the beneficiaries.

4. LWM, the Objector, responded by filing an Objection to Making a Grant dated 23/09/2010. She also filed an Answer to Petition for a Grant dated 01/10/2010 and a Petition by Way of Cross-Application for a Grant of even date. In all these documents, the Objector describes herself as the sole widow of the Deceased. She names herself and her three children as the only rightful beneficiaries of the Deceased's estate. The three children are:

- a. PM – Adult daughter
- b. WK. M– Adult son

c. MWM – Minor daughter

5. Anyara-Emukule J. gave directions that the case be heard by viva voce evidence in order to determine the contested issues of who the rightful heirs and who should, therefore, be granted letters of administration.
6. Hearing began before Ouko J. (as he then was). He heard the testimonies of the Objectors: LWM (the Objector); MW (the Deceased's mother); and John Mungai, a neighbour and friend to the Deceased. Ouko J. was transferred out of the station. Ndungu J. picked up the case and re-heard the testimony of the Objector who was recalled, with the leave of the Court, to give further evidence and produce some documents. By the time it was time to hear the evidence of the Petitioners, however, the Learned Judge had been transferred out of the station and it fell upon me to conclude the hearing.
7. I took in the evidence of the Petitioners and their witness. The Petitioners, then, closed their case. The parties filed their written submissions which I have considered keenly.
8. The cause raises two questions for resolution at this stage:
 - a. Whether the 1st Petitioner (CWI) is a wife to the Deceased.
 - b. Whether the 1st Petitioner's five children are the Deceased's children and therefore entitled to benefit from his estate as such.
9. The Objector's position is that she was the only wife of the Deceased and her three children are the only bona fide children of the Deceased. The Petitioners, on the other hand, insist that the Deceased had two wives – C and L – and eight children – C's and L's.
10. L (the Objector) testified that that she is a teacher at [Particulars Withheld] Boys School and that the Deceased was her husband. They got married in 1986, she said, although they solemnized the marriage on 10th March 1991. She produced the Marriage Certificate as Exhibit 1 for the Objector.
11. L told the Court that she and her husband lived in Molo in a farm given to them by the Deceased's parents but after land clashes of 1992, they moved to a plot they had bought in Elburgon. She said that they bought two plots – Plots No. xxxx and xxxx in Elburgon. She produced a payslip for 2012 showing that she used to earn Kshs. 36,000/- per month and said that both she and the Deceased contributed to the purchase of the two plots – and that she, in fact, used to earn more than the Deceased. They decided, however, that the plots would be in the Deceased's name. She produced the Sale Agreements which are in the name of the Deceased.
12. The marriage produced three issues: PMM, WK and MWM. P was born in 1987, W 1990 and M in 1991.
13. L testified that she does not know C (the 1st Petitioner) nor her children. She insisted that the Deceased had never told her that he had another wife or having children outside her marriage. She further said that all the time while the Deceased was in hospital at PGH Nakuru and later at St. Mary's Hospital where he died, she never saw C. Neither did she see her at the burial or during the preparations for the burial. She produced the burial permit in her sole name. Neither did she, she added, see any of C's five children.
14. L testified that the first time she saw C was in 2008 after the death of the Deceased. She was summoned by the Area Chief and was told that C had claimed to be a wife to the Deceased.
15. In cross-examination, L denied that the Deceased had any case whereby he had been summoned by the Children's department about child support for his children with C.
16. MW, the Deceased's mother, testified as the Objector's second witness. She was 84 years old at the time she gave her testimony. She recalled that the Objector was the Deceased's wife; and that they got married in church.
17. M conceded that she knew C but said that she only went to their home many years ago claiming to be pregnant with the Deceased's child. This was, she said, soon after the Deceased's had completed secondary school and that she stayed with him for 6 months. She claimed that when C gave birth, the Deceased sent her away because the child was not his. She conceded, however, that the child was named after her – MW – as per Kikuyu customs; and that her daughter-in-law took care of C when the child was born.
18. M testified that C left and went back to her parents home after about 6 months; and that the Deceased lived with another woman for 5 months before she got married to L (the Objector). She said that she did not know about any other children the Deceased allegedly had with C. She also claimed that C was not involved at all when the Deceased was unwell; and during burial preparations and burial itself. She denied that C was a wife to the Deceased.
19. John Mungai testified as the third witness for the Objector. He told the Court that he was a neighbour of the Deceased and that he was sent by the Deceased to go negotiate for dowry with L's parents. He went with a gentleman by the name Muchiri (who is now deceased). They paid dowry of Kshs. 20,000/- for L. He said he does not know C and never attended any dowry negotiations for her.
20. When placed on the witness stand, C, testified that the Deceased was her husband; and that they got married in 1983. She said that they had five children together. The five are:
 - a. MWM – Adult daughter

- b. WKM – Adult son
- c. DIM – Adult son
- d. PNM – Adult son
- e. JMM

21. She said that she had Birth Certificates for three of the children – JM; PNM; and DI. She produced them as evidence in Court. She said that the birth certificates for the other two got burnt during land clashes in Molo.

22. C testified that at first the Deceased used to take care of their children but that at some point he stopped. This forced her, she said, to take the case to the Children’s department, and later to Court. She says she got a favourable ruling in Court compelling the Deceased to support the children. She attempted to produce copies of the proceedings but an objection barring their production for being uncertified copies was sustained. As a result, although the proceedings are in the Petitioners’ bundle of documents, they did not enter into evidence. However, there is a letter dated 19/11/1996 from the Children’s Office, Nakuru summoning the Deceased to report to the Children’s Office on 28/11/1996 to “sort out a case... registered in the office by your wife C that you have neglected your children....” The letter was copied to the 1st Petitioner.

23. C told the Court that at first she did not know that the Deceased had been admitted to the hospital but the Deceased called C’s son and asked why she (C) had not gone to visit him. By the time she went, however, it was too late. She also said that she attended the burial but was advised not to raise attention to herself. She said that the Deceased’s family would not let her or her children participate in the burial.

24. In cross-examination, C stated that she and the Deceased got married customarily but that no dowry was paid because dowry for her elder sister. However, she conceded that she lived with the Deceased for only five (5) years then they divorced. By that time, she said, she was 7-months pregnant with the last child.

25. JMM, the 2nd Petitioner, testified that he is the son of the Deceased. He said he has four siblings: 3 brothers and a sister. He said that the Deceased used to pay school fees for him at [Particulars Withheld] Secondary School but that he died when he (the 2nd Petitioner) was 17 years old and in Form Four.

26. The final witness was SKK. He testified that the Deceased was a cousin to his wife and that he knew him well. He said that the Deceased married C in 1983 in a customary marriage but that no mahari was paid. He insisted that he accompanied the Deceased to C’s grandparents’ home to ask for her hand in marriage. They went to the grandparents’ because C’s parents were deceased.

27. It was S’s testimony that C and the Deceased lived together until they got the first two children. Thereafter, he said, they started quarreling a lot and C would often leave the home. She remained married to him though on and off until they had five children.

28. In his written submissions, counsel for the 1st Petitioner submits that from the evidence adduced, the Court should draw a presumption of marriage. He relied on *Hortensiah Wanjiku Yawe v Public Trustee EACA*. He said that there was evidence of cohabitation given by the witnesses including the Deceased’s mother.

29. Counsel for the Petitioners also submitted that under section 29 of the Law of Succession Act, the children of the Deceased were beneficiaries since they qualify as dependants. He said this was shown by the fact that the Deceased used to maintain them.

30. Counsel for the Objector, on the other hand, submitted that the 1st Petitioner had failed to discharge her burden to show that there was a marriage between her and the Deceased. Counsel submitted that the 1st Petitioner had failed to show all the elements of Kikuyu Customary Law had been complied with. Counsel similarly submitted that there was no sufficient evidence to show that the children of the 1st Petitioner belonged to the Deceased.

31. Did C table sufficient evidence to warrant a conclusion that she was a wife of the Deceased? C, it would appear, oscillated between making a claim that she was married under Kikuyu Customary Law and a claim that she cohabited with the Deceased sufficiently to warrant the presumption of marriage.

32. Our case law and various writings evidencing Kikuyu customary law have established some of the elements necessary to prove a valid marriage under Kikuyu Customary Law. Some of the cases that have established the essentials of a Kikuyu Customary Law include: ***Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR*** – a decision by the Court of Appeal – as well as the following decisions of the High Court: ***In the Matter of the Estate of Karanja Kigo [2015] eKLR*** and ***Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo [2004] eKLR***. These cases mention at least five elements:

- a. Capacity which includes age, physical and mental conditions and marital status;
- b. Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;
- c. The ceremonial slaughtering of a ram in a rite called *Ngurario*;
- d. *Ruracio* (bride price) partly paid;

e. Commencement of cohabitation.

33. 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.

34. In *MWK v AMW [2017] eKLR*, I interpreted this caution thus:

The progressive tone by the Court of Appeal is well taken. As customs are surely organic, the exact procedures for a valid customary marriage cannot be said to be codified. Even then, there is no denying that certain pre-requisites must be present. However, the failure of certain formalities does not per se invalidate a customary marriage if there is enough evidence to show that a customary marriage was intended and certain substantive pre-requisites performed.

35. In the present case, By C's own admission, no substantive formalities for Kikuyu Customary marriage were undertaken. C testified that only the Deceased and one other person went to see her grandparents. While there, they did not pay any mahari or engage in any dowry negotiations. C's witness confirmed as much: no dowry negotiations were ever held and no dowry was ever paid for C. Indeed, the witness, S, claimed that only he and the Deceased went to the home of the grandparents. A Kikuyu customary marriage can never be negotiated and contracted by the groom and his friend alone.

Whatever happened in this case cannot, by any stretch of imagination, amount to a Kikuyu customary marriage.

36. Would the doctrine of marriage by presumption rescue the situation for C? The Court of Appeal in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR* held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows: -

Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.

37. A party establishes a presumption of marriage when the party proves two factual predicates:

- a. Quantitative element – namely the length of time the two people have cohabited with each other; and
- b. Qualitative element – namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative element include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account – and so forth.

38. What evidence did the Appellant present to enable the Court to make the presumption? C claimed that she lived with the Deceased for five years then divorced. She probably meant separated but the effect is the same. In my view, that ends the inquiry. A marriage by presumption is a judicial doctrine used to facilitate equitable outcomes in certain extant situations. It does not relate back. One cannot say, as C attempts to say here, that she is a former wife by virtue of marriage by presumption. One cannot be a former wife of a presumed marriage. A former wife must be a wife in a marriage contracted in one of the established systems for contracting marriage.

39. In any event, based on the evidence on record, I would have concluded that there is little qualitative and quantitative evidence to warrant a presumption of marriage in this case.

40. The conclusion, then, is that C was **not** a wife of the Deceased for purposes of the Law of Succession Act and cannot be a beneficiary to his estate.

41. I will now turn to the question whether C's five children are children of the Deceased for purposes of the Law of Succession Act.

42. C produced the birth certificates of three children: PN; JM; and DI.

Although these certificates were issued later in life – they were all issued in mid-2010 – their authenticity was not questioned. These three being official government documents, they must be taken to be dispositive of the matters they present unless contrary evidence is presented. There was no such contrary evidence. Indeed, there was corroborative evidence in the form of the oral evidence of C; M; and S that these were children of the Deceased. There is also the letter dated 19/11/1996 from the Children's Officer which confirms that the Deceased had some children with C even though it does not identify those children by name. Finally, there is the letter by the Chief, Elburgon, which names all the five children of C as children of the Deceased.

43. The conclusion is that there is sufficient evidence to conclude that these three children respecting which birth certificates are available are children of the Deceased. I would hold, by the same token, that no evidence was placed before the Court to establish the other two children of C are, in fact, children of the Deceased. It is incumbent for a person asserting to prove their allegations. In this case, the claim that MWM and WKM are children of the Deceased has not been proved.

44. The upshot, then, is the following:

- a. The claim that the 1st Petitioner, CWI, is the wife of the Deceased, BM K, fails. Consequently, CWI is not an heir in the estate of the Deceased and cannot petition for letters of administration in the circumstances of this case.**
- b. The claim that MWM and WKM are children of the Deceased for purposes of the Law of Succession Act fails.**
- c. The claim that JMM, DIM; and PNM are children of the Deceased for purposes of the Law of Succession Act succeeds. The three are, therefore, rightful beneficiaries of the estate of the Deceased as his children.**
- d. The beneficiaries to the estate of the Deceased are the following:**
 - i. LWM – widow**
 - ii. PM – daughter**
 - iii. WK. M – son**
 - iv. MWM – daughter**
 - v. JMM - son**
 - vi. DIM – son**
 - vii. PNM– son**

45. The following orders recommend themselves:

- a. Letters of Administration to the estate of the Deceased, BMK, shall issue jointly to LWM and JMM.**
- b. The joint administrators to confer with all the other beneficiaries listed in paragraph 45 above and bring Summons for Confirmation of the Grant. If there is no agreement on the mode of distribution, either one of them to file the Summons for Confirmation of Grant and the other to file their protest.**
- c. The six-month waiting requirement before the filing for confirmation of the grant of letters of confirmation is hereby waived in view of the age of this litigation.**
- d. Each party will bear its own costs.**

46. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF AUGUST, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.