



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.374 OF 2012

Consolidated with

NAIROBI SUCCESSION CAUSE 976 OF 2012

THE MATTER OF THE ESTATE OF JNM (DECEASED)

JMMAPPLICANT

VERSUS

EKM.....RESPONDENT/PETITIONER

RULING

1. The application by way of summons under Section 47 of the Law of Succession Act CAP 160, Rules 49, 59(3) and 73 of the Probate and Administration Rules and Section 72 of the Interpretation and General Provisions Act and dated 18th May, 2012 is brought by the applicant who avers that she is the wife of the deceased. She wants the respondent restrained from interfering with peaceful occupation of Mavoko Town Block 12/243 and that the respondent be restrained from dealing in the said property together with death gratuity from the deceased's employer as well as bank account no [...] at National Bank of Kenya Limited- Head office.
2. The applicant explains in her affidavit that she was married to the deceased and was acknowledged in the eulogy as a widow and she had one son with the deceased.
3. In reply to the application, the respondent vide affidavit deponed on 11th June, 2012 averred that she was married to the deceased and she attached a copy of her marriage certificate. She averred that she and her husband bought shares that were converted to a parcel of land in Mavoko Town Block [...] and that the property was jointly developed and she moved onto the land. She averred that the deceased in his bouts of anger chased her from the home and J claimed to be a wife yet the customary rites according to Kamba Custom had not been performed in respect of the applicant. By consent the affidavit was expunged from the record.
4. The applicant vide further affidavit deponed on 4th September, 2012 averred that she was married to the deceased on 5th March 2008 under Kamba Customary law at [particulars withheld] Village, Kasikeu Location in Makueni County and which was witnessed by NWM, SM, EM, WM, GM, GN, CM, PM, MI, SI and PM.
5. On record is an application for letters of administration by the respondent and it is dated 12th April, 2012. The same was gazetted on 11th May, 2012
6. The applicant filed an objection to grant that is dated 6th June, 2012 and averred that the respondents are not entitled to full grant as they failed to indicate an inventory of assets, failed to include her as a beneficiary and that she had not renounced her right to apply for letters of administration and further that she and her son had been disinherited.
7. She also filed an answer to petition for a grant that is dated 29th June, 2012 in which she reiterated the grounds in the objection to grant. The same was expunged from the court record by consent.
8. The applicant and BN filed a petition by way of cross-petition on 20th June, 2012 and averred that she and B as widow and nephew of the deceased sought grant of letters of administration. In support of the application was an undated joint affidavit wherein it was averred that the deceased has 2 houses and that she and the respondent are widows of the deceased.
9. In reply to the application, the respondent vide affidavit deponed on 24th June, 2012 averred that she was married to the deceased and she

attached a copy of her marriage certificate. She averred that she and her husband bought shares that were converted to a parcel of land in Mavoko Town Block [...] and that the property was jointly developed and she moved onto the land. She averred that the deceased in his bouts of anger chased her from the home and that the applicant herein came from nowhere and claimed to be a wife although the customary rites according to Kamba Custom had not been performed in respect of the applicant.

10. By consent Succession cause Nairobi 976 of 2012 was consolidated with Machakos Succession number 374 of 2012 and that directions were taken to the effect that the protest be heard via viva voce evidence.

11. Pw1 was EKM, the petitioner who testified that she married the deceased under Kamba traditional custom and that they later registered their marriage in 1987 at the Attorney General's Chambers. It was her testimony that they lived in Highview Estate from 1986 to 1987, then in Zimmerman for two years then they lived in Canada until 1993 and all that time the house in Kamulu was being constructed from 1987. It was her testimony that the Kamulu plot Mavoko Town Block 12/243 was registered in the names of the deceased but however it had been purchased with their joint savings and that they moved into the Kamulu house in 2000. She told the court that she had two issues with the deceased and that the deceased died in 2012 when they had not divorced. It was her testimony that in 2011 it was discovered that he had a malignant tumor and that from 2008 to 2010 their marital relationship had soured and she was denied access to the marital home and was thus housed by Kenyatta University. She testified that when the deceased died, his body was taken to Montezuma by N and J and that she had to swear an affidavit in order to be allowed to access the body. She explained that she buried the deceased at the Kamulu home and added that she did not know the applicant who should not be a beneficiary. She added that the child whom the deceased is said to have sired has a questionable birth date since in 2011 the deceased was hospitalized. She told the court that at the funeral of the deceased, the applicant introduced herself as a wife to the deceased and later claimed that she was married customarily to him. It was her testimony that BN was a son to Naomi. On cross examination she told the court that she did not have receipts to prove that she was depositing money in the savings account and that she did not have documentation in respect of the properties of the deceased. She told the court that the existence of the applicant came to her knowledge after the death of the deceased.

12. The petitioner's first witness was NDN who testified that the deceased was his nephew. He told the court that after the death of the deceased the family gathered to organize a funeral and a second wife appeared and he learnt that the said woman was using the matrimonial home when Pw1 was being housed by Kenyatta University.

13. The petitioner's second witness was MNN who told the court that the deceased was her father who died in 2012. She told the court that their house was in Kamulu-Kangundo road. She stated that she had two sisters namely MKN and MN. She stated that they live in Kileleshwa and had no access to the Kamulu home but when the deceased was alive he used to pay her school fees. On cross examination, she testified that she did not know J and that BN is the son to N who was a sister to the deceased.

14. The petitioner's third witness was KKM who testified that the deceased had been married to his sister. It was his testimony that he was not aware that the deceased married another wife and only heard about the second wife during the burial of the deceased. That marked the close of the petitioner's case.

15. The objector's case commenced with JMM testifying as Pw1. She testified that she was married to the deceased on 5.3.2008 vide customary law and had one child with him named PNN who was born on 14.3.2011. She told the court that she lived in Kamulu and was taken there in 2008 and that was where P was born. It was her testimony that while she lived with the deceased he became ill. She produced in court copies of title deeds of the Kamulu home as well as two other plots in Donyo Sabuk and Gathigiriri that were registered in the names of the deceased. She testified that the petitioner did not recognize her as a wife and she wanted to benefit from the estate of the deceased together with her son. On cross examination, she testified that she met the deceased in 2006 who informed her that he was married but had separated. She testified that she was married to the deceased customarily and that the deceased constructed a house for her and that she did not contribute to the acquisition of the properties. She told the court that she was aware that the deceased had three children but that she had a son with the deceased and the only document she had was a birth certificate. She told the court that she chose the second objector since her son was still young. She told the court that she contributed money towards the deceased's funeral and wanted to be made administrator of the property.

16. Pw2 was Christopher Musembi who testified that the deceased was his fellow church member and who revealed to him that he had a second wife called J who delivered a child towards the end of 2010 that was named PM. On cross examination, he testified that he was neither a priest nor official of the church. He told the court that he did not see the marriage certificate and did not witness the marriage ceremony between the deceased and J.

17. Pw3 was SMM who testified that the deceased was her elder brother who had two wives and that the elder wife deserted him in 2005 and left the matrimonial home and went and lived elsewhere. It was her testimony that the deceased fell ill and he married J under Kamba customs and that she accompanied him to Mwendu's home where dowry was paid. She testified that J lived in Kamulu and that she was the one who took J there and she never saw the petitioner there. On cross examination, she told the court that the deceased lived with the petitioner in Highview Estate while the Kamulu house was being constructed and at that time J had not come into the picture. She testified that the Kamulu house belonged to the deceased and the petitioner before 2005 and she was not aware of the court order that allowed the applicant to the Kamulu house. She testified that she did not have the book that contained the customary rites that were performed when J was married to the deceased under Kamba Custom. She testified that she was not aware that the deceased divorced the petitioner and was aware that divorce in Kamba involves the return of a goat to the family of the wife.

18. Pw4 was NWM who testified that the petitioner was married to the deceased and who deserted him and that the deceased informed her that he wanted to marry again and in March 2008 she accompanied the deceased to J's home for introductions. She testified that the deceased was allowed to cohabit with J and they lived in Kamulu up to his death during which time the deceased sired a son called PMN. She testified on cross examination that she wanted to be made an administrator of the estate of the deceased. She testified that the deceased and the petitioner acquired the property.

19. The court directed that the application be canvassed vide written submissions. It is only the objector's submissions that are on record. Learned counsel for the objector submitted that the petitioner was aware of the existence of the objector who participated in the burial of the

deceased and that the eulogy recognized the objector therefore implying that the deceased died and left two houses meaning that the law recognized the objector as a widow to the deceased. In this regard it was counsel's strong argument that Section 29 and 40 of the Law of Succession Act guaranteed the objector's entitlement to a share of the estate of the deceased. Counsel placed reliance on the case of **In the matter of the Estate of K (2017) eKLR**.

20. The petitioners have not filed any submissions. The issues for determination are: the locus standi of J and BN in this succession cause: whether the objector is entitled to be administrator of the estate of the deceased; whether the objector has proved that she is a wife of the deceased; whether the court should grant the orders sought and what orders the court may make.

21. The applications by the objector seek for injunction orders against the petitioner and seek that she be appointed administrator. The petitioner equally had petitioned for letters of administration. In **Re The Matter of the Estate of Samuel Kiarie Kirimire (Deceased) (1999) eKLR** Justice Githinji (as he then was) held that the fact that the applicant was included as a wife of the deceased in the eulogy is not proof of marriage. Section 39(1)(c) of the Law of Succession Act provided that the petitioner is the next in order or priority as administrator of the estate of the deceased

22. The matter in issue in this case is the omission of the applicant and her child from the administration and benefiting from the estate of the deceased. The explanation given by the applicant in this application is that she was married customarily to the deceased. In this case it cannot be said that such an omission was by error or mistake but the facts do not support her averments.

23. The applicant alleges that she is a wife to the deceased and that the child listed in the application is an heir of the deceased. The respondent has not controverted the facts that are alluded to by the applicant in her affidavit. Instead her affidavit was expunged from the record. The consequences of such failure were addressed in the case of **Mohammed & Another v. Haidara [1972] E.A 166** at page 167 paragraph F-H, where **Spry V.P** considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

“The respondent made no attempt to reply to these allegations and they therefore remain unrebutted... Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”

24. The applicant seeks that in the absence of uncontroverted evidence the court should find that she was a wife to the deceased. In the case of **Hortensiah Wanjiku Yawe v The Public Trustee, Civil Appeal No. 13 of 1976**, the court held:-

- (i) The onus of proving customary law marriage is generally on the party who claims it.*
- (ii) The standard of proof is the one usually for a civil action namely “on the balance of probabilities.”*
- (iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.*
- (iv) Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.*
- (v) Only cogent evidence to the contrary can rebut the presumption.*
- (vi) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.*

25. In the case of **In Re Estate of Stephen Kimuyu Ngeki (1998) eKLR J.W Mwera, J.** (as he then was) stated that Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of three traditional goats called Mbui Sya Ntheo.

26. In his book; **Marriage and Divorce, 1st edn, (1968) 28 Dr. Cotran** summarizes the essentials of a valid Kamba customary marriage as follows:-

- (a) Capacity.**
- (b) Consent.**
- (c) Slaughter of a billy goat.**
- (d) Marriage consideration.**
- (e) Cohabitation.**

27. From the uncontroverted evidence on record, the applicant is of age, as well as cohabitation is established by the applicant vide her affidavit, but not the element of consent and slaughter of a billy goat. The applicant testified and her evidence is not corroborated despite not being challenged. None of the persons who witnessed this event have filed witness statements nor did they attend court to substantiate this claim. Those who attended the ceremony should have been called to testify. I am not satisfied that the applicant has demonstrated to this

court that she is a wife to the deceased or her child a dependant to the deceased and hence I find that neither she nor her child are entitled to any share in the estate of the deceased. The marriage between the deceased and the 1st petitioner was still subsisting even at the time of his death. The evidence of some of the relatives to the deceased cannot support the applicant's claim of marriage. Even though the applicant might have nursed the deceased during his twilight years the same cannot amount to a marriage. It seems the relatives who testified for the applicant were sympathetic to her as by then the 1st petitioner was not residing at the matrimonial home at Kamulu. The said relatives cannot elevate the applicant's condition to be a lawful marriage with the deceased. The applicant is at liberty to agitate claims if any to the estate during the confirmation of the grant. As the applicant has failed to prove the existence of a marriage between her and the deceased it follows that she lacked capacity to lodge the present application.

28. The upshot of the above observations is that the applicant's application dated 18.5.2012 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this 23rd day of **January, 2020**.

D. K. Kemei

Judge