REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO.9 OF 2018

IN THE MATTER OF ESTATE OF JECINTER NJOKI OKOTH (DECEASED)

BETWEEN

AMOS OKOTH OLUOCH.....OBJECTOR

VERSUS

SIMON HAROLD SHIELS.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Khaminwa & Khaminwa advocates for the Petitioner

Omollo Onyango advocates for the objector

JUDGEMENT

This matter pertains to the estate of **Jecinter Njoki Okoth**, who met her untimely death on the 21st of January, 2018. On 18th of June 2018, the Petitioner filed for a grant of Letters of Administration Intestate of the abovementioned estate. He described himself as the husband of the deceased. He lists the survivors of the deceased as **Simon Harold Shiels (Husband), Mary Akinyi Okoth (Daughter), Antony Otieno Okoth (Son), Oliver Alexander Shiels (step son), Samuel James Shiels (Step son), Mary Mumbi Wambui (Niece), Freshia Njeri Wambui (Niece), Freshia Njeri Mutua (Niece), Alex Mutual Maina (Nephew), Samuel Njenga Maina (Nephew) and Anthony Wainaina Wanjiku (Nephew).**

The foregoing prompted the Objector **Amos Okoth Oluoch** to file an objection on the 15th October, 2018 to the making of a Grant by Simon Harold Shiels, the Petitioner herein. He describes himself as the legal husband of the deceased having been married under Luo customary law on 7th January, 1981 and later on they separated but never divorced. He contends that **Mary Akinyi Oko, Anthony Otieno Okoth** and him are the lawful beneficiaries being the children and the husband of the deceased respectively.

The objector filed an affidavit in support of the Objection to making of a grant dated 15th October 2018. He maintains that he is the husband to the deceased. He contends that the Respondent in the cause is not a husband for his late wife and his allegations are marred with falsehoods. According to the Objector, the Respondent was just a casual boyfriend after his separation with the deceased.

It is averred that the true beneficiaries listed in the Petition are relatives and were not under maintenance of his late wife and some of them were employees at the deceased hotel working for gain. He maintained that the deceased was married to him under customary marriage. He further avers that the deceased was the owner of all the properties listed by the Respondent in the assets Schedule belonging to the deceased and the Respondent owns nothing.

He further asserted that the deceased was an able businesswoman, owning several business and properties that enabled her acquire the assets listed thereto. He also averred that the deceased worked in the UK and in Kenya, dealt with import business and she took bank loans which she used to buy and build some of the properties including the UK Lounge, Guest House.

It is the Objection's contention that there is no proof of marriage between the Respondent and the deceased. He argues that the respondent is a mere tourist in Kenya and he is not allowed to work in Kenya and his contribution to the estate of the deceased was little if not nil. He alleges that the Respondent has hiked the value of the assets but in real sense, their value cannot be above twenty million shillings and most of them have depreciated.

The Objector also trashed the Chief's letter citing that it is marred by falsehoods. He further stated that the chief does not know the family of the deceased and he gave the wrong information. He deposed that the chief has no powers to confirm marriages as alleged in the letter.

The Petitioner respondent to the objection by way of a supplementary affidavit. He raised several arguments against the objection. He argues among other things that the objector has never been a legal husband to the deceased since no proof of marriage was produced. I have also looked at several other affidavits which were sworn both in support and in reply to the matter in question herein.

Inevitably given the lengthy written submissions, oral submissions and the authorities I cannot rehearse in this judgement all of the erudite, wide-ranging submissions that were made to me. I hope the parties will forgive me for what inevitably is a brief summary of the arguments that were put before me. I will explore the arguments in somewhat more detail later in this judgement.

Analysis

The objection to a making of grant is premised on Section 76 of the Law of Succession Act. Section 76 makes provision for revocation of grants of representation on various grounds. The relevant grounds for our purposes are set out in Section 76(a), (b) and (c) of the Act, which states as follows-

> ***"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-***
>
> ***(a) That the proceedings to obtain the grant were defective in substance;***
>
> ***(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***
>
> ***(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to just the grant notwithstanding that the allegation was made in ignorance or inadvertently …"***

The objector presented himself as a spouse to the deceased and argues that him and his son and daughter are the only rightful beneficiaries to the estate of the deceased hence the grant obtained by the Petitioner ought to be revoked and a fresh one be made in his favour. Thus, if this court is to consider the objector's prayer, he must fulfill one of the elements set out in section 76 aforementioned. For the objector to be able to benefit from the estate of the deceased, he ought to prove dependents. What amounts to a dependent is encapsulated in terms of **Section 29** of the **Law of Succession Act** which provides that:

> ***"For the purposes of this Part, "dependant" means –***
>
> ***(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***
>
> ***(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;***

In view of the foregoing provision of law, the word "wife" applies mutatis mutandis to husband or spouse. In this matter, the Objector is charged with the onus of proving to the satisfaction of this court that he was the spouse to the deceased hence a dependent of her estate. He claims to have been married to the deceased under Luo customary law which was solemnized on 7th January, 1981 and that the marriage was blessed with two issues. He also claims that he later on separated with the deceased but they never divorced.

The difficulty with the narrative that has been advanced by the Objector is that he has not provided any proof of marriage, whether legal or customary, to satisfy this court. His assertion of having conducted a luo customary marriage is not backed by any evidence hence it remains a mere assertion which does not hold any probative value. It is more worrying to note that none of the deceased's relatives has verified the same at least on behalf of the deceased.

If indeed the deceased was married to the objector under Luo customary law, he ought to have provided credible evidence showing that he met requisite elements of the luo customary marriage. This was held in the case of **Rosemary Aoko Munjal v Noel Namenya Munjal [2015] eKLR** where the Honourable Court cited the book, Restatement of African Law by Eugene Contran in respect of a valid marriage under Luo Law at page 175 states as follows:

> ***"The following are the essentials of a valid marriage under Luo Law***
>
> ***a. CAPACITY. The parties must have the capacity to marry and also the capacity to marry each other.***
>
> ***b. CONSENT. The parties to the marriage and their respective families must consent to the union.***
>
> ***c. DHO I KENY. There can be no valid marriage under Luo law unless a part of the dho i keny has been paid.***
>
> ***d. COMMENCEMENT OF COHABITATION. The moment at which a man and woman become husband and wife legally is***

when the man and woman commence cohabitation i.e. when the bride is deflowered after meko".

Payment of *Dho I keny,* even partly, is essential to the validity of a marriage under Luo law.

It is instructive to note that the existence of a customary marriage is a question of fact which ought to be proved with evidence. In that regard, the Objector herein has dismally failed to lead any shred of evidence to prove that any of the above prerequisites were observed. I therefore find that the alleged fact of a luo customary law is not meritorious.

However, the evidence on record may be able to satisfy a presumption of marriage even under the common law. In an attempt to define what presumption of marriage is and whether a presumption of marriage arises from these fact, Bromley Family Law, 5th Edition 64 says: -

> ***"If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove that there was in fact no marriage, and not upon those who rely on it to prove that it was solemnized."***

In the case, the objector and the deceased might have cohabited for more 10years and their marriage was blessed by 2 issues. In the case of **HORTENSIAH WANJIKU YAWE V PUBLIC TRUSTEES EACA C.A. NO. 13 OF 1976 (UR) Mustafa J.A.** said: -

> ***"The position seems to me to be this. The appellant had testified that she was married to the deceased, and the deceased in an application in 1966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died... and during that time the appellant bore him four children... long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant only cogent evidence to the contrary can rebut such a presumption... such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance into the appellant's favour the scale must tilt in the direction. Even if the proper ceremonial rituals were not carried out that would not invalidate the marriage."***
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> **HALSBURY'S LAWS OF ENGLAND 3RD EDITION VOL. 19 PAR 1323** says: -
>
> **"Presumption from Cohabitation**
>
> **Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary".**

In the case of **GOODMAN V GOODMAN (1859) 28 LJ CH. 742.** A Jewish man cohabited with a Christian woman for 28 years, there was general reputation that they were married and their children were baptized as Christians of both "husband", "wife" the husband's relatives declined to recognize the marriage the Court held that there was a presumption of marriage and the onus was on the person denying it.

In view of the foregoing, the objector and the deceased's relationship fits in the shoes of presumption of marriage. The objector and the deceased cohabitated for a considerable period of time, they treated each other as husband and wife, their families and everybody around them considered them married among other things. Therefore, there was a presumption of marriage. However, it is also factual that the said marriage ended at some point despite the fact that the divorce/seperation was not formalized.

There are two central questions which I have to consider: Can the objector to be treated as validly married under Kenyan Law by operation of Customary Law or presumption of marriage if not is the marriage a void marriage, susceptible to a decree of nullity.

According to the objector he has exclusive rights over the deceased Estate in exclusion of anyone else. He does so because both have been known to be married to each other and held themselves out to the whole world at large as husband and wife until her demise.

However, in the follow up cogent evidence availed to court the circumstances of the marriage between the objector and the deceased can best be described as a non-marriage case. To this court, the parties may have married and held each other as couples but at the other end of the spectrum the deceased had moved on and entered into a marriage union with another man, the petitioner. The petitioner has demonstrated that when he met the deceased, there was no such evidence of her having been in another relationship save for the existence of the children.

To all intents and purposes he entered into a relationship with the deceased knowing too well she was a single lady only characterized with the existence of children.

That is how they dealt with issues of property, acquisition maintenance, support investments and other areas of common interest when I review and appraise the evidence of the objector and that of the petitioner what comes out is an inference from the circumstances of this case. That between the objector and the deceased, theirs was a non-marriage from the date of separation. I think the deceased took an approach that at the material time there was nothing to hold unto in the name of a marriage with the objector. I accept the evidence that her family accepted the petitioner and went further to receive dowry within the context of the essentials of Kikuyu Customary Law.

However, in this approach to matters of formalities and given the preferred method, circumstances their daughter had by presumption entered into a completely new chapter of her life. I characterize the relationship between the deceased and the petitioner as that of presumption from cohabitation followed with a brief ceremony of payment of dowry to the parties of the deceased.

There is positive evidence of a marriage where both cohabited together for such a length of time so as to acquire the reputation of spouses.

This begs the question whether any other previous union there was, must have been rebutted by this new arrangement. It appears that where any marriage, so called has been absconded by conduct of one party followed with another marriage, particularly on the side of a woman she may have by intention and conduct dissolved her marriage.

Put another way any possibility of ties with the previous union and any formalities of dissolution of marriage aside, the presumption goes in favour of an irretrievably broken down marriage.

It is a curious feature of this case that the objector would claim validity marriage relationship with the deceased but in her death he did not advance a case for the application of having the sole custody of burying and to inter the body in accordance with two Customary Law. The thrust of the reasoning is that if this court accepts the version by the objector, the deceased by dint of marriage was answered a Luo.

In the case of **Ruth Wanjira Njoroge v Veronicah Njeru Njoroge & Another {2004} eKLR** the court stated:

> ***"In the social context prevailing in this country, the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to the deceased in legal terms. Generally, the marital union will be found to be the focus of the closest chain of relationship touching on the deceased. And therefore it is only natural that one who can prove this fundamental proximity in Law to the deceased has the color of right of burial ahead of any other claimant."***

In the instant case logically, the objector must acknowledge that the deceased passed on in Malindi, however if the parties reputation as husband and wife could be inferred he was the first in line to bury the deceased.

There is no evidential material why this particular ceremony was not performed by the objector but satisfactorily so the petitioner must have given effect to the deceased wish. This single act demonstrates that the marriage so touted by the objector as valid had become void or voidable marriage without any possibility of a reunion even in death.

This was also the case in **John Omondi Oleng and Another v Sneflan Radal {2012} eKLR:**

> ***"When it comes to the disposal of the body of a married man or woman the spouse should play a leading role."***

In view of the foregoing were it otherwise that the claim of marriage by the objector would have, in such a case invoked his right to bury the deceased, even when evidence showed that no valid marriage in substance was in existence between him and the deceased. It is difficult in the circumstances of this case as a matter of policy and justice how a Court of Law can exercise discretion to infer a marriage. Where the evidence is clear and complete that one spouse fundamentally the wife has directly entered into a new marriage union notwithstanding no customary divorce had taken place as a necessary pre-condition for a further marriage ceremony.

Therefore, marriage being a voluntary union, and any woman knowingly and willfully has constitution at right secured without discrimination on any ground such as sex, race, colour, language, religion, political, national, social origin, birth or age, conscience, belief, marital status, ethnic."

In relation to Article 45, the Law is emphatic on the right to marry a person of the opposite sex. The issue of pursuing divorce is a procedural issue recognized under our Law to give effect to dissolution of the existence of a marriage and create inherent respect to human dignity and freedom of association.

It seems that by the year 2009, the deceased had already moved on. She was living and conducting herself as a single woman when she met with the Petitioner. There is no proof led by the Objector to show that at that time he was still a dependant to the deceased. Neither did he seek to prove that he participated that in the acquisition of the properties that the deceased acquired after their marriage had broken down. In my view it would be a failure of justice to allow the objector to benefit from the sweat of another man under the guise that his marriage with the deceased was not formally dissolved.

The Petitioner has submitted that he was the deceased's lawful husband and not the objector. He has sought to prove that he had been married to the deceased under kikuyu customary law after having met in the UK sometime in 2009. This is confirmed by the affidavit evidence of **Hannah Waithera** dated 9th July 2019, **Terry Wanjiru Samuel** dated 15th June 2019, **Michael Njuguna** dated 7th February 2019 and **Njoki Mwaura Gachira** dated 16th May 2019 who are sisters, brother and aunty to the deceased respectively.

In my view, the problem as it seems to me, requires to be approached de novo and from quite a different angle. The question posed in this matter needs to be decided with due regard to common sense and some attention to reasonable policy. So the issue in this case is whether the union between the deceased and the Petitioner which lasted for about 10 years, and where all persons around them accepted them as husband and wife in fact is to be treated in Kenyan Law as not marriage at all? Having made a finding that the marriage between the deceased and the objector can be said to have ended by presumption of divorce.

The provisions of article 45 of the Constitution of Kenya, every adult has the right to marry a person of the opposite sex, based on the free consent of parties. This suggests that one may walk into a marriage voluntarily and may also leave voluntarily. On top of that the constitution guarantees freedom of choice and association. It seems that in realization of the aforesaid rights the deceased made a choice to abandon her first marriage and decided to leave a life as single person.

Even before she met the Petitioner 2009, the deceased had been in out of other relationships in exercise of her constitutional rights. The fact

that her previous marriage had not been formerly dissolved, should not be a hindrance for her exercise of fundamental rights and freedoms to choose and to associate.

In my view, the objector's cause does not hold water. It is the view of this court that the deceased moved on with her life as she had abandoned the marriage with the objector, engaged in relationships with other men other that the objector, behaved and conducted herself like a single person, a free woman capable of entering into a marriage and actually solemnized the marriage with the petitioner and acquire properties together, after many years of having lived away from the objector. This shows that she had no intention of going back to the objector. These are all indicators that the deceased had moved on permanently. This is distinguishable from adultery in the sense that in adultery does not have an intention to abandon the marriage.

The marriage between the deceased and the objector was founded upon the basis of presumption of marriage and it is logical to say if the same is applied mutatis mutatis to the circumstances of this case, a presumption that they divorced suffices. The circumstances that the deceased find herself in can safely satisfy a presumption of divorce.

All the properties liable for distribution herein were acquired after or with the contributions of both the deceased and the Petitioner. The question as it presents itself to my mind gives me an impression that the objector's interest is solely directed towards the property acquired during the relationship of the deceased and the Petitioner. The affidavit evidence produced by the deceased's family members show that the Petitioner was the one who had the financial muscle to fund the businesses they had with the deceased. In any event, if indeed the objector was still a spouse to the deceased as he claims, he ought to have claimed burial rights for the deceased upon her death. Nothing of that sort happened.

Divorce is not the procedure of filing for a decree nisi in court per se. On a much broader perspective, divorce pertains to the intention and conduct of parties. If parties in a marriage shows an intention not to continue with their marriage or conduct themselves unmarried persons, then the same should treated as such. The law cannot attach obligations upon persons who have decided to part ways but fail to formalize the same, because that is not the true reflection of what they want. In that regard the objector stopped being the deceased's husband when they separated and moved on.

For all intents and purposes, I find the marriage between the objector and the deceased to have been overtaken by events. The Petitioner must have reasonably believed that the deceased was a single person with capacity to marry. And such a marriage entered by two adults, voluntarily cannot be said to be invalid. Therefore, the objector has not satisfied neither the parameters set out in terms of section 76 nor section 29 of the Law of Succession Act, Laws of Kenya. He is neither a spouse nor a dependent of the deceased.

In my Judgment pursuant to Section 119 of the Evidence Act, its proper for their marriage to be construed for purposes of the Law to have ended by presumption of divorce, notwithstanding that no formal petition was filed in a Court of Law to be decreed as such in accordance to the Law.

As a consequence the objection proceedings challenging Grant of Letters of Administration under Section 76 of the Act issued to the petitioner to entitle this court to annul or revoke is hereby dismissed for lack of merit with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10th DAY OF MARCH, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwadilo for the petitioner

2. The objector