



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PROBATE & ADMINISTRATION CASE NO. 3 OF 2017

IN THE MATTER OF THE ESTATE OF BILLIAH MARUBE NYANGOTO....(Deceased)

BETWEEN

- 1. HELLEN MORAA KIVINDYO.....1ST PETITIONER/RESPONDENT**
- 2.PETER KENYANZA NYANGOT.....2ND PETITIONER/RESPONDENT**
- 3.SAMWEL NYANGOTO.....3RD PETITIONER/RESPONDENT**
- 4. MARGARET GESARE NYABUTO.....4TH PETITIONER/RESPONDENT**

=VRS=

GLADYS BOCHABERI KOROSO.....APPLICANT/PROTESTOR

RULING

The deceased to whose estate these proceedings relate is Billiah Marube Nyangoto who died intestate on 7th March 2014 domiciled in Nyamira County in the Republic of Kenya. A Grant of Letters of Administration Intestate was issued to Hellen Moraa Kivindy, Peter Kenyanza Nyangoto, Samuel Nyangoto and Margret Gesare Nyabuto on 20th March 2017. On 22nd March 2017 the administrators filed a summons for confirmation of the grant notwithstanding that six months had not elapsed but their application was rejected by the court. Thereafter on 17th May 2017 Gladys Bochaberi Koroso (the applicant/protestor) filed a summons for revocation or annulment of the grant issued to the administrators/respondents. The gist of her application is that the administrators are intent on side-lining and disinheriting her yet she was married to a son of the deceased one Stephen Koroso Nyangoto, deceased, with who she begot three children.

The summons was opposed with the administrators vehemently disputing that the applicant was married to their late brother Stephen Koroso Nyangoto.

Both sides filed their pleadings and witness statements and as directed by this court the application proceeded by way of viva voce evidence. Thereafter parties summed up by way of written submissions.

The applicant herself has no relationship with the deceased that would entitle her to be counted as one of the beneficiaries of her estate. However, she would be a beneficiary if she proved on a balance of probabilities that she was married to Stephen Koroso Nyangoto who admittedly was a son of the deceased. The issue for determination therefore is whether she has proved on a balance of probabilities that she was the wife of Stephen Koroso Nyangoto and that they had three children.

The applicant testified that she got married to Stephen Koroso Nyangoto on 5th July 1997 but after two weeks he was poisoned and he died. She stated that as required by the customs of the Abagusii a goat was slaughtered to bind her to the family. Thereafter one Samuel Omari Nyangoto was picked to cohabit with her so that she could perpetuate the lineage of the deceased. However, after they had stayed together for eleven years Samuel Omari chased her away at the instigation of his own wife. She stated that life for her became worse when she rejected her brother-in-law one Henry Nyabuto's advances as she already had a man taking care of her. It was then that she was allegedly evicted from her house and the same was taken over by the children of Samuel Omari Nyangoto. She stated that she sought assistance from the local administration and Assistant Chief Mike Onsombi wrote her a letter acknowledging that she was one of the beneficiaries of the estate of the deceased. The administrators however refused to attend meetings called by the Chief prompting the Chief to take them to Manga Police Station. Even then, they would not allow her to go back. She contended that the Chief who wrote the letter of introduction used by the administrators to petition for letters of administration also omitted her name because she rejected his advances towards her. She vehemently denied allegations that her children were not sired by the late Stephen Nyangoto and urged this court to declare that they were and also that she and her children are beneficiaries to a share of the estate. She produced a bundle of documents as exhibits and called three witnesses Senior Chief Nicholas Mong'are, Peter Kenyanza Nyangoto and Josphat Asaeri Koroso in support of her case.

Senior Chief Nicholas Mong'are testified that the applicant was the legal wife of Stephen Koroso Nyangoto under Abagusii Customary Law and that he played a part in re-instating her to her matrimonial home when she was chased away by her in-laws but after he left office she was chased again. He asserted that under Abagusii Customary Law even if one is married for a day and she buries her husband she is a legal wife.

Peter Kenyanza Nyangoto abandoned his own summons for revocation so as to bear witness for the applicant and it was his evidence that she was the wife of Stephen Koroso Nyangoto. He stated that the late Stephen Koroso paid dowry for the applicant and sired her three children although only one was born in his lifetime. He contended that Kelvin Nyabate Koroso and Kelvin Omari were two different children. He further stated that his brother Samuel Omari Nyangoto sired one child with the applicant/protestor.

Josphat Asaeri Koroso testified that he was the brother of Biriam Marube Nyangoto, the deceased in this case and that she sold a parcel of land in Nakuru that belonged to her late husband and also that they also sold land belonging to the husband of the applicant and chased her away. He stated that the applicant was married to Stephen Koroso and that they bore one son Kevin Nyangweso or Nyabeta. He stated that he participated in her dowry negotiations.

The administrators through Margret Gesare Nyabuto, Mike Migwogo Onsombi and Henry Ratemo Manoti denied that the applicant was married to their brother or that she resided on the deceased's land. Margret Gesare Onsombi stated that in 2017 the applicant tried to force her way into their land but she was chased away. The administrators also denied that their brother Stephen Koroso begot children with the applicant. They too produced documents to support their claims.

I have carefully considered the evidence by both sides including the exhibits and also their rival submissions. The deceased in this case died intestate so the law applicable to her estate is the **Law of Succession Act**.

Section 3 (2) of the Law of Succession Act defines a wife as follows: -

“ “Wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and “widower” shall have a corresponding meaning.”

As I stated earlier, in order for the applicant to succeed in her application, she was required to prove on a balance of probabilities that she was the wife/widow of the deceased or in other words that she was married to the deceased. The Law of Succession Act does not define the word “married” or “marriage” so we must resort to the definition set out in the statutes governing marriages at the time material to this case. The law at the time recognized monogamous marriages contracted under the **Marriage Act (Cap 150 Laws of Kenya)** and the **Subordinate Courts Marriage & Divorce Act (Cap 151 Laws of Kenya)**. Marriage could also be presumed after a long cohabitation and lastly there was also marriage under customary law.

The applicant alleges to have wedded the deceased on 15th July 1997 and contends that they lived together for only two weeks after which he died. It is her case that they were married under Abagusii Customary Law. It is my finding that the period of two weeks was not long enough to give rise to a presumption of marriage and it was incumbent upon the applicant therefore to prove the existence of a customary marriage. In her pleadings and testimony, she did not make mention of any traditional customs such as negotiation and payment of dowry. This was alleged by her three witnesses. Apart from Josphat Asaeri Koroso (OPW3) the others did not allege to have witnessed such a ceremony. Senior Chief Nicholas Mong'are seemed to state that because the applicant buried or attended the burial of Stephen Koroso then she was his legal customary wife even if their marriage did not last for long. It is however instructive that he did not attend the burial so his evidence that the applicant buried her husband is based on hearsay and hence of no probative value. So too was his evidence that the late Stephen Koroso paid dowry for the applicant as he himself did not witness the payment of dowry. His evidence is therefore not reliable. Josphat Asaeri's allegation that he witnessed the dowry negotiations was not supported by the applicant as she herself did not allude to such negotiations. He cannot therefore be believed. Moreover, taken together, the evidence of the witnesses was very inconsistent and contradictory and this dented their credibility. Firstly, the applicant admitted to have had a son before “getting married” to Stephen Koroso. That son is Kelvin Omari. It transpired during the hearing that the applicant obtained more than one certificate of birth for all her three children. For Kelvin the two birth certificates have different dates of birth one showing he was born in 1995 and the other 1997. Both have the name and surname of father as Stephen Koroso Nyangoto. While the one with the 1995 date was obtained on 27th January 2015 the one with the 1997 date was obtained on 29th March 2017. The applicant did not give a plausible explanation for obtaining two certificates of birth and my finding therefore is that they were obtained for the purpose of this case in order to hoodwink this court into believing Kelvin was the biological son of Stephen Koroso. This is unfortunate given that she readily admitted in her evidence that she already had Kelvin when she “married” Stephen Koroso Nyangoto and he obviously could not have been his biological child. Her untrustworthiness is compounded by the Identification Report which Kelvin used to apply for a national identity card upon attaining the age of majority. In that report his father's name is Albert Omari meaning his father was not Stephen Koroso Nyangoto. The applicant's explanation that Albert Omari is not Kelvin's father and that he was only assisting Kelvin to get funding is not convincing and if it is true it only goes to show how much of an unreliable and untrustworthy witness she is. If she and her son could lie when he was applying for such an important document like a national identity card, she could also be lying in this cause.

Moreover, **Section 3 (2) & (3) of the Law of Succession Act** states: -

“(2) References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

There is no evidence that Stephen Koroso Nyangoto expressly recognized or in fact accepted or voluntarily assumed permanent responsibility of Kelvin which would warrant this court to find Kelvin was his child even had a marriage of two weeks been proved on a balance of probabilities. Further, the allegation that the applicant was married to one Samuel Omari Nyangoto, a brother of Stephen Koroso Nyangoto (the deceased), was also not convincing at all and seems to have been fabricated for the same purpose. Peter Kenyanza Nyangoto who was called to corroborate the applicant in this respect seemed to contradict her evidence and stated that the applicant already had two children when she got married to Stephen Koroso and that she begot one child with their brother Samuel Omari. Obviously this was an exaggeration as the applicant herself stated that she only had one child prior to the "marriage" and she did not claim to have begotten a child with Samuel Omari. Indeed, she admitted that her other two children were born long after Stephen Koroso's death and they were not his biological children. Peter Kenyanza appeared to have been coached but even then his evidence could not withstand the test of cross examination. The other reason that makes the applicant's case doubtful is an introduction letter written by the Assistant Chief of Mobamba Sub-location on 4th March 2017. The same was written to support the application for a national identity card by Kelvin. In that letter the Assistant Chief introduces the applicant as a resident of his area and states that she married Albert Omari according to Abagusii Customary Law. The applicant admitted that letter was used by her son to obtain an identity card. If its contents were not true she would not have authorized its use and my finding therefore is that the contents might have been true. If she was married to the said Albert Omari, then she could not have been lawfully married to Stephen Koroso Nyangoto. Thirdly, there is the insertion of her name to a copy of the letter used by the administrators to petition for letters of administration in this cause yet her name does not appear in the original. There is also the manipulation of the Land Control Board minutes in her favour by Senior Chief Nicholas Mongare. All these paint her and her witnesses as very untrustworthy and it is my finding that her evidence and that of her witnesses is not reliable. In the premises I find that the applicant/objector has not proved on a balance of probabilities that she was married to Stephen Koroso Nyangoto. She has also not proved on a balance of probabilities that either herself or her three children are legitimate beneficiaries of the estate of Stephen Koroso Nyangoto and by extension heirs of the estate of Billiah Marube Nyangoto. In the premises her application is not merited and it is dismissed with costs to the administrators/respondents. It is so ordered.

Signed, dated and delivered in open court this 5th day of March 2020.

E. N. MAINA

JUDGE