



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**SUCCESSION CAUSE NUMBER 8 OF 2012**

**IN THE MATTER OF THE ESTATE OF FRED BARASA WASWA – DECEASED**

**BETWEEN**

**BEATRICE NAFULA BARASA.....1<sup>ST</sup> PETITIONER**

**KENNEDY WEKESA BARASA..... 2<sup>ND</sup> PETITIONER**

**AND**

**FATUMA ABUDALLAR..... OBJECTOR**

**R U L I N G**

The chequered history of Fred Barasa Waswa – the deceased ended when he died on 11<sup>th</sup> February, 2011 at Moi Teaching & Referral Hospital from Chronic Kidney disease due to hypertension at the age of 63 years. He left behind two wives and 8 children. He also left several properties in Bukoli and Kimilili Township, two vehicles and cash in banks.

On 6<sup>th</sup> January, 2012 Beatrice Nafula Barasa a widow of the deceased and her son Kennedy Wekesa Barasa filed this succession cause. In Form P & A 5 they listed that the deceased died intestate and left 5 Sons and 4 daughters surviving him. He left 8 parcels of land, two motor vehicles and Ksh.5,940,049.50 in KCB and funds held by Public Trustees. On 11<sup>th</sup> February, 2011 the grant of letters intestate was issued to Beatrice Nafula (1<sup>st</sup> Petitioner) and Kennedy Wekesa Barasa (2<sup>nd</sup> Petitioner).

The Objector Fatuma Abubakar filed application dated 24<sup>th</sup> September, 2012 seeking of the revocation of the grant issued on the grounds that she is a widow of the deceased, and that the grant was obtained fraudulently by concealing material facts and that she has been excluded from being a beneficiary of the estate. The Petitioner's filed replying affidavit denying that the objector was ever married to the deceased and is therefore, not a widow as claimed.

By consent the objection was canvassed by way of viva voce evidence. OW 1 Fatuma Abubakar Barasa testified that she was married to the deceased on 1<sup>st</sup> January, 2004. She knows the 1<sup>st</sup> petitioner as her co-wife and 2<sup>nd</sup> petitioner as her step-son. She testified that upon marriage she stayed with the deceased at Kimilili and they had one issue of the marriage Charles Waswa Barasa. She produced the birth certificate – Exhibit 4. She testified that the deceased paid dowry, that she is the one who took care of the deceased at Moi Teaching and Referral Hospital. She produced “lufu” minutes and burial programme where she was recognized as a wife of the deceased. She denied the petitioners allegations that she was a girlfriend of deceased son and that the child is actually a grand-child of the deceased.

On being cross-examined by Anwar for the petitioner, the objector testified that the child was born in 2002 and birth Certificate issued on 13<sup>th</sup> June, 2011. She testified that it is true that she married in 2007 but denied that the child born in 2002 belong to deceased's son called Raymond who passed away.

OW 2 James Wanjala Matumbo the clan chairman of Abasefu clan testified that during the ‘lufu’ ceremony the objector was recognized as a wife. OW 3 Cosmas Chaka Makokha who had married deceased's sister testified that the deceased told him he had distributed his property among his two wives. OW 4 James Biketi Khisa attended the funeral of the deceased where the two wives were recognized. He also chaired the ‘lufu’ Ceremony, where a relative of objector asked for payment of the remainder of the dowry.

Petitioner witnesses Beatrice Nafula Barsa, adopted her affidavit evidence as evidence in chief. She testified that she was the only wife of the deceased. She testified that she knew the objector in January 2001 when she came and started staying with her son Raymond Wanjala. There was intimate relationship resulting to the birth of Charles Waswa in 2002. She testified that being in an intimate relationship with the said Raymond with whom they had a child, she would not be married to her husband the deceased. On being cross-examined by Oyando for the objector, she admitted she did include Charles Waswa as a grandson. On being cross-examined Oyando for the objector, Beatrice admitted that she went to Transzoia in 2009 and came back after one year when the deceased was sick and staying with Fatuma.

Petitioner witness 1 – Kennedy Wekesa Barasa adopted his affidavit evidence as evidence in chief. He testified that during the ‘lufu’, one Amutala Kiranyi an uncle of the objector demanded that dowry for objector be paid. He deponed that the objector had never been a wife of the deceased but he knew her as a friend of his brother and the objector was pregnant with the child. On being cross-examined, he testified that the objector was indicated in the funeral programme as 2<sup>nd</sup> wife. During the ‘lufu’ she was recognized as a wife and he confirmed that deceased was staying with Fatuma for 2 years before he died.

By consent both parties filed written submissions. Mr. Oyando for the objector submitted that from the oral evidence of the objector’s witness, it is clear that the objector was a wife of the deceased. He submitted that the objector proved that she was married under Customary Law by dowry being paid; that she was recognized as a widow in the funeral programme. Counsel further submitted that the petitioner’s knew the objector and that she was staying with the deceased. Counsel submits that all these evidence demonstrated that the objector was a wife of the deceased. Finally, to buttress this fact, counsel submitted that the son of Fatuma Charles Waswa Barasa – a son aged 9 years old was listed by the petitioner as a dependent.

Mr. Anwar for the petitioner submitted that though the objector testified that she was married to the deceased, she did not state under what regime of law which creates doubt as to whether she was indeed married. He submits that the affidavit to marriage produced, agreement of payment of dowry, NHIF card with her name inscribed on it as a spouse cannot be relied on as they are deficient in material particulars. Counsel submitted the ‘lufu’ ceremony minutes and funeral programme cannot be relied on as prima facie evidence of marriage as the petitioners’ were not consulted or involved. Further counsel submitted that the objector being a muslim and alleged that she was baptized would have dropped her muslim name.

On the issue whether the deceased and objector had any issue, he submitted that the birth certificate of the child was obtained after the death of deceased. He submitted that the petitioner’s evidence is that Objector was a girlfriend of Raymond, the deceased’s son who was born in 2002 and yet objector said she married deceased in 2007. He, however submits that the child can inherit the estate as a grandson as a share of his deceased father Raymond.

Finally, counsel submits that as there was no marriage between deceased and objector, she does not fall as a dependants under Section 29 of the Law of Succession Act but since the minor was being taken care of by the deceased by virtue of being a grandson, he is entitled to a share of the estate.

From the evidence and submissions the issues that call for determination in my view are as follows: -

- 1. Whether the objector Fatuma Abubakar is a wife of the deceased.**
- 2. Whether the grant issued to the petitioner should be revoked.**

The objector Fatuma Abuybakar testified that she was married to the deceased under Bukusu Customary law. She testified that under the customary law, dowry was paid on 11<sup>th</sup> February, 2008 and produced a dowry agreement. She testified that they were blessed with one issue of the marriage and that the deceased in various statutory documents including the NHIF Card, he included her as a wife. She admitted that she was a 2<sup>nd</sup> wife and that the 1<sup>st</sup> petitioner is her co-wife and 2<sup>nd</sup> petitioner is her step-son. She testified that both in Funeral programme and ‘lufu’ ceremony she was recognized as 2<sup>nd</sup> wife, she, therefore claims that for all intent and purposes she is a wife and entitled to the estate of the deceased. She called witnesses who gave evidence that they knew the deceased and that objector was the 2<sup>nd</sup> wife.

The gist of the petitioners’ evidence is that they knew the objector Fatuma. The evidence is that they knew her as a girlfriend of one Raymond who was the son of the deceased who died. They testify that the Objector and Raymond had a child Charles Waswa who was born in 2002. The petitioners’ aver that since the objector had a child with Raymond, it would be immoral for her to state that she was married to the deceased. Indeed they readily agree that the objector’s son Charles Waswa is entitled to the inheritance from the estate of deceased, not as a son, but as a grandson who would inherit the share of his late father Raymond.

In Kenya, there are several recognized avenues of entering into the institution of marriage. One can enter through a statutory marriage, under the marriage Act, under African Christian Marriage Act, Islamic Marriage, Hindu Marriage, Customary Law Marriage or by presumption of marriage due to long cohabitation. Whichever way you enter into the institution, it creates responsibilities, obligations and benefits.

In this cause the objector submits that she was married under customary law. He adduced evidence that dowry was paid which fact is disputed by petitioner. The basis of the objection is that if indeed dowry was paid, the same would not have been demanded during the ‘lufu’ ceremony. While the petitioners’ dispute the customary law marriage, they in their evidence admits that the objector was staying with the deceased at the time of the death. The objector brought witnesses to show that indeed she was staying with the deceased and that the relatives and friends of the deceased knew her as a wife. She, therefore, was relying on the fact that there was presumption of marriage. In **Eva Naima Kaaka Vs Tabitha Waithera Mararo (2018) eKLR** on this issue the Court of Appeal said: -

***“Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their nature they are a determinant of whether a presumption of marriage can be found to exist.”***

The Court of Appeal in **M.G.W Versus E.W.K (2010) eKLR** in presumption of marriage stated: -

***“There is a line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on Section 119 of the Evidence Act, Cap 80 Laws of Kenya, which provides as follows:-***

**“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

**“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded.”**

While therefore, the existence of a marriage by presumption is a question of fact, the trial court must examine the evidence to determine whether the presumption of marriage has been established.

The 1<sup>st</sup> petitioner gave evidence admitting that she knew the objector but as a friend of her son. Raymond the deceased. Upon cross-examination by Mr. Oyando she stated: -

**“I attended the funeral of deceased. I was introduced as his wife. She was not introduced as wife. It is the clan committee which prepared a programme. In the programme it stated he was married to me and Fatuma Nasimiyu and they drew the programme without consulting me. The ‘lufu’ meeting also indicated she was a wife. In the affidavit dated 14<sup>th</sup> December, 2012 I deponed that Charles Waswa was not deceased’s son. In form P & A 5 dated 28<sup>th</sup> November, 2011 I did identify Charles Wawa as the grandson. It is true I went to Transzoia in 2009. I came after one year. I came when he was sick. He was staying with his friend Fatuma. In 2001 Fatuma had a child with my son. I took care of 2 children of Raymond born out of wedlock.”**

The 2<sup>nd</sup> petitioner Kennedy Wekesa on being cross-examined stated that: -

**“I am the first born of deceased. My mother is in court today. She is not a witness as she has not filed her defence. I doubt that the child belongs to my father. I know the child before deceased died. I did not raise any doubts about the child to deceased. This is the funeral programme. Fatuma was in the programme as wife No. 2.**

**Exhibit 2 is minutes of meeting after 3 days. Min. No. 3. 1<sup>st</sup> wife had 4 boys and 4 girls. Property at Kimilili: -**

**1<sup>st</sup> wife and I one – Fatuma, incomplete house was for Fatuma.**

**Before deceased died he was staying with 2<sup>nd</sup> wife in Kimilili for about 2 years. Fatuma’s parents had a right to demand dowry. All dowry had not been paid. It was resolved that the person who will inherit her will pay the dowry. It is clan the old men that assigned the inheritor. If she is my father’s wife I called her step-mother. I have not stated in my affidavit that was my brother’s wife.”**

From the evidence of the petitioners they knew the objector was staying with the deceased. Indeed, 1<sup>st</sup> petitioner confirms that when she was away for one year in Transzoia, it is the objector who was staying with the deceased. She confirmed that it is objector who was staying with deceased when he was sick. She confirms that the Child Charles Waswa is a son of the Objector. In P & A 5, she had indicated Charles Waswa aged 9 years as son of the deceased.

2<sup>nd</sup> Petitioner in cross-examination confirmed that the deceased was staying with 2<sup>nd</sup> wife, the objector at Kimilili for about two years. He also admits that the objector was indicated in the funeral programme as 2<sup>nd</sup> wife. Further, he agreed with the objector that during ‘lufu’ ceremony she was recognized as a wife and that the incomplete house at Kimilili was for objector.

All the above evidence adduced that the general public and relatives and friends of the deceased knew the objector and deceased lived and acted together as husband and wife. I am, therefore, satisfied that the objector Fatuma Abubakar has established that she is a wife of the deceased. Consequently, as the petitioner did not include her in P & A 5 as a widow surviving the deceased, the grant issued on 11<sup>th</sup> February, 2011 was issued to them by concealing material facts. I, therefore, order that the grant issued to Beatrice Nafula Barasa and Kennedy Wekesa Barasa be revoked. I direct that a fresh grant be issued jointly to 1. **Beatrice Nafula Barasa** and 2) **Fatuma Abubakla**. The Petitioners to jointly file application for confirmation of grant within 45 days from the date of this ruling. Each party to bear his/her own costs.

**Dated, signed and delivered at Bungoma this 29<sup>th</sup> day of May, 2020.**

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**S N RIECHI**

**JUDGE**