



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 417 OF 1992

IN THE MATTER OF THE ESTATE OF CHARLES ANYANDA LUYUDI (DECEASED)

GRACE MWAYITSI LUYUNDI...PETITIONER/ADMINISTRATOR

VERSUS

EDWARD KAUNDA ANYANDA.....1ST RESPONDENT

MATHEW LUYUNDI.....2ND RESPONDENT

AND

MABEL ANYANDA.....1ST OBJECTOR

MAUREEN KHADIEVI ANYANDA.....2ND OBJECTOR

JUDGMENT

1. The deceased Charles Anyanda Luyundi died on the 16th of April 1991 and surviving him were 6 children with his wife Hellen who predeceased him. The Petitioner claims the status of a widow of the deceased as well. She has two daughters.
2. Grace Mwayitsi Luyundi, made a claim as a widow of the deceased. Her claim is that after the death of the deceased wife they were friends and the relationship culminated in a marriage on the 27th of July 1985 under Luhya customary law. The two thereafter lived and cohabited with as husband and wife, and the said union begot two daughters Nelly Indasi born on 14th January 1985 & Faith Rubi Vwamula born on 22nd April 1987.
3. On the other hand the Objectors and Respondents who are children of the deceased and Hellen his first wife do not accept Grace as a wife, citing luhya customary law that forbids a union between the deceased and Grace due to reasons of consanguinity between Grace and Hellen the deceased first wife. They equally deny the claim that a dowry ceremony between the deceased and Grace ever took place.
4. Grace and some of the deceased close relatives dispute the allegation that Grace and the deceased did not have capacity to marry, denying the kinship relationship cited and gave evidence that the deceased and his relatives paid dowry to Grace's father.
5. The issue before court for determination therefore; is whether or not Grace is a wife within the meaning of the Law and whether she stands to inherit the estate of the deceased as a wife. Whether or not Grace's children; the two daughters are heirs will be resolved alongside the main issue.
6. Edward Kaunda Anyanda and Mathew Luyundi (1st and 2nd Respondents) were on 22nd of July 1992 issued with grant of letters of administration. Grace (the administrator) applied to have the same revoked and said grant was indeed revoked on 18th June, 1998. Grace thereafter Petitioned and was issued with one and pursuant to the said grant on the 12th of October, 2014 she made an application for confirmation of the same and the objectors and Respondents who are the deceased children from his wife Hellen raised protests.
7. Edward Kaunda Anyanda the 1st Respondent in his evidence informed the court that the administrator being their cousin, through their

mother could not have been married to their father as Luhya customary law prohibits such a union. Further that he did not attend any marriage ceremony between his father and the Grace.

During cross examination he informed the court that at the time of the purport marriage between his father and Grace he was away. He admitted though that he was aware that Grace and his father cohabited together.

8. The 2nd witness for the Respondents/objectors was Gaiteno Lihutsu, a nephew of the deceased. He informed the court that he was close to the deceased and was involved in important family matters. He was involved in payment of dowry for the Hellen but not Grace, neither did he get to hear of the alleged marriage. Further he did not see Grace at the deceased funeral.

9. The 3rd witness, Obadiah Lisanza, a brother to Hellen, who explained that Grace was a daughter to their brother in law, one Benjamin Musundi and customarily she is a daughter to the deceased as Grace's aunt was married to their brother. In cross examination he confirmed that the relationship between Grace and deceased was through marriage.

10. The 4th witness, Enoch Khirachili Shisietsanga attempted to testified as a Luhya customary law expert. It was his evidence that one cannot marry a cousin. Further under Luhya customary law, it is the elders who discuss dowry. Further he informed the court that it is elders who organise burial and widow would participate with other women. As for the matter before court, he was not aware that the deceased had married Grace.

He also said that the customs do not allow one to marry a sister, or an aunt's daughter or from where one's sister comes from and the deceased could not marry in Hellen's home.

Grace was not at the burial.

11. Mable Anyanda the 4th child of the deceased gave evidence as the 5th witness. She stated that she was not aware that her father married Grace and the alleged dowry payment. she objected to Grace inheriting her father. She however recognises Nelly and Faith, Grace's children as her father's children.

12. On her part, Grace informed the court that the deceased was her husband since July 1985 having paid dowry to her parents. She confirmed that the deceased children were not involved in the ceremony. According to her, Gaitano Lihutsu was involved in taking cows to her home.

It was also her testimony that she worked as a subordinate at the CID training school initially but later moved and lived with the deceased as his wife at his home in Donholm. The deceased paid dowry to her parents in line with Luhya customs. That their first child died but they have two children alive, Faith and Nelly Ayanda. She further informed the court that later she stayed at her husband's upcountry home. While at Donholm the 1st Respondent would visit and the 2nd Respondent stayed with them. She lived with the deceased for 7 years.

She testified also that the husband introduced her to the Commissioner of Police as his wife. She produced a copy of a letter addressed to the Commissioner of Police by the deceased. She informed the court that as a result she is the one who was paid his death benefits.

She denied that the deceased was related to her.

In cross examination she informed court that the deceased's brother Nathan Liyundi was present at the dowry payment.

She further informed court that she nursed her husband in hospital where his children would visit. However, upon his death the sons warned her not to attend his burial.

13. At the close of the Respondent's case the court found it necessary in the interest of justice and to enable the court arrive at a fair decision based on substance justice devoid of technicalities to have witnesses who were present during payment of dowry be made available. In this regard the court was guided by **Rule 73 of Probate and Administration Rules** that provides:

“nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of court process.”

The court also considered Section 3A of the Civil Procedure Act which empowers the court in similar terms.

14. As a result, 3 more witnesses were called by Grace and cross examined extensively by the Objectors and Respondents' counsel.

15. **Vitalis Injehu Musoka**, testified that he knew the deceased as a village mate and was aware that he paid dowry for Grace in 1985 as he was present at the ceremony that was attended by Gaitano and other family members.

16. **Luka Muzani Lunyundi**, a brother to the deceased recognises Grace as the deceased wife. Though he did not attend the dowry ceremony he was part of those who negotiated the same. He further informed the court that their mother who was alive then was aware but did not attend as mothers do not attend such ceremonies. He used to visit his brother and Grace.

17. **Robert Adande Musibwa**, a brother to Grace, referred to the deceased as his brother-in-law. According to him Rhoda their aunt, lived in Nairobi and he did not know who her husband was. He received dowry from the deceased; cows and Kshs.20,000/=. That deceased

brother Nathan and Luka took the dowry. His sister has 2 children with the deceased.

18. Counsel for the parties are agreed on two issues for determination namely:

i. Whether there was a marriage between the petitioner and the deceased &

ii. Whether the petitioner and her children are entitled to inherit the deceased.

19. The petitioner and her witnesses alluded to a Luhya customary marriage between the petitioner and the deceased. They testified that dowry was paid by the deceased to the petitioner's parents on 27th July, 1985. Further out of the union the two sired two girls; Nelly & Faith and who the Objector's acknowledge though the Respondent do not openly acknowledge.

20. The Respondents and the Objectors deny the marriage between the two; they were not involved or aware of any dowry payment and go further to argue that Grace is their cousin through her aunt married to their uncle and falls under prohibited degree of consanguinity and under customary law Grace was not capable of being a wife.

21. The Marriage Act, 2014 is an Act of Parliament that amended and consolidated various laws relating to marriage and divorce. It recognises various forms of marriage including marriages celebrated in accordance with customary law.

The act goes further to describe marriage as a voluntary union of a man and a woman whether in a monogamous or polygamous union.

22. Having stated the above there are situations where marriage is prohibited and Section 10(1) of the Act prohibit a person to marry:

“that person's grandparents, parent, child, grandchild, sister, brother, cousin, great aunt, great uncle, aunt, uncle, niece, nephew, great niece or great nephew.”

Section 10(2)

“any other person where such marriages are prohibited under customary law.”

23. As quoted by J Njagi J in **Vincent Oliero Anyumba vs Livingstone Eshikuru Liakayi & Another Civil Appeal No. 137 of 2014, Eugene Contran** in his book restatement of African Customary Law, the law of Marriage and Divorce volume I, essentials of Luhya Customary Law are;

- **Capacity to marry**
- **Consent by respective parties and their families.**
- **Payment of dowry &**
- **cohabitation.**

24. Both parties confirmed cohabitation of the deceased and the petitioner although objectors and respondents do so half-heartedly.

25. Both deceased and petitioner were over 18 and had capacity to contract a marriage. The issue is whether the two were prohibited to marry each other as they fell under prohibited degree of consanguinity.

26. There was an attempt by the objectors and respondents to prove prohibition of a union such as the one by the two.

PW4 Enoch K. Shisietsanga, informed the court that he is working with a team to write down Luhya customary law. He informed the court that the two could not marry as customs prohibit such a union.

PW2 Obadiah Lisanza a brother to the deceased wife, Hellen explained that the Grace is a daughter to another brother in-law; one Benjamin; Benjamin's sister Rhoda is married to their brother David. Briefly, Grace's aunt is married to Hellen's brother.

27. The relationship between the deceased and Grace is not capture in the degree of prohibited relationship Under Section 10(1) of the Marriage Act, 2014.

The court turned to Section 10(2) to see if Luhya customary Law prohibited the relationship, and formed the opinion that the attempt to prove prohibition failed miserably. The witness who was called as an expert did not show any evidence of his qualification or expertise nor was his evidence corroborated. The court cannot therefore rely on the evidence before it to authoritatively make such a finding. He who alleges must prove.

28. As for dowry some witnesses for the objector/respondents were said to have been present, others had an issue with payment of dowry at night and/or secretly as they had heard of the same and the deceased children were not aware.

The petitioner's witness Vitalis Injehu Musoka informed the court that he was present at the dowry payment ceremony. Luka Muzami Lunyandi, a brother of the deceased recognises the petitioner as his deceased brother's wife whom the deceased married after losing his 1st

wife Hellen in 1984. He informed the court that though he did not attend the dowry ceremony he wrote a letter sending the cows to the petitioner's home and had been involved in dowry negotiations

Robert Adande, the petitioner's brother was present at the ceremony and received cash and cows as dowry on behalf of the parents.

29. The court is persuaded that the deceased paid dowry for the petitioner, his children may not have known, however, the court finds other relatives of the deceased who testified to have been less than candid. The court believes the evidence of the deceased brother and the petitioner's brother and finds that indeed the deceased paid dowry to Grace's parents.

30. Even if the above is not clear, there is proof that the deceased and Grace cohabited for a period of 7 years and out of the union two girls were sired; Nelly and Faith Anyanda.

31. Evidence of an affidavit sworn by the deceased and the petitioner on 11th January 1986 where they declared having been married on 27th July, 1985 under Luhya Custom was produced and the signature of the deceased acknowledged by the respondents and Objectors.

32. In evidence was produced a copy of a letter dated 31st December, 1985 addressed to the Commissioner of Police by the deceased informing the Police Commissioner of his 1st wife's demise and introducing his other wife Grace Mwayitsi Luyundi and seeking to have amendments done. This letter was not challenged. Indeed, Grace informed the court that she was paid benefits as a widow by the deceased employer.

33. In **Hottensiah Wanjiku Yawe vs Public Trustee E.A.C.A CA No. 13 of 1973** the court stated inter alia;

“I agree with the trial Judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial Judge omitted to take into consideration a very important factor. 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 of marriage; see *Re: Taplan Watson vs Tate (1973) 3 All E.R. 105*. The trial judge did not consider this factor...

However, in considering whether there was a marriage the trial court ought to have taken account of the presumption of marriage in the appellant's favour. Such presumption carries considerable weight in the assessment of evidence. Once the factor is put into the balance in the appellant's favour, the scale must tilt in her direction.”

“I can find nothing in the “Restatement of African Law” to suggest that kikuyu customary law is opposed to the concept of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issues of their union and in my view, is applicable to all marriages howsoever celebrated.”

34. The above doctrine has been applied severally by courts in Kenya and is now settled law. In the circumstances of this case the Petitioner proved long cohabitation and the facts that they presented themselves as husband and wife through a statutory statement (Affidavit) and introduction to the deceased employer. In my view this is ample evidence in support of the union, the feelings of the deceased children who certainly detested the union notwithstanding.

The court is therefore of the opinion that the evidence before it tilts in favour of Grace and does proceed to presume the existence of marriage between the deceased and Grace.

35. With the above Grace, the petitioner and the children sired out of the union between her and the deceased are heirs to the deceased estate.

36. Counsel for the Respondents raised as an issue the evidence of Vitalis Injehu Musoku, Robert Andande Musibwa and Luka Muzami Liyundi and sought to have the same expunged from the record.

In the court's mind the matter is a non-issue as the court dealt with the issue extensively on 18th of February, 2019 and 8th April 2019.

37. Costs to the Petitioner.

Dated and Delivered in Nairobi on this 25TH day of JUNE, 2020.

ALI-ARONI

JUDGE