



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 78 OF 2010

IN THE MATTER OF THE ESTATE OF: THE ESTATE OF GIOVANNI GREMMO (DECEASED)

MILENA BORA.....APPLICANT

VERSUS

LIANA TAMBURELLI.....RESPONDENT

JUDGEMENT

1. Giovanni Gremmo died intestate on 18th December, 2009. I shall henceforth refer to Giovanni Gremmo as the deceased. His wife, Liana Tamburelli, now the Respondent, applied for grant of letters of administration which were issued and confirmed on 17th December, 2010. By summons dated 4th April, 2012 Milena Bora, the Applicant, applied for the revocation of the confirmed grant.
2. In summary, the grounds upon which the Applicant seeks to revoke the grant are that the Respondent failed to seek the Applicant's consent although she was a dependant of the deceased by virtue of being his second wife and that the Respondent misled the court by including the Applicant's properties in the estate of the deceased.
3. The Respondent swore an affidavit on 3rd May, 2012 in opposition to the summons for revocation of grant. She disputed the Applicant's claim that she was married to the deceased and questioned the authenticity of the registration of certain properties in the Applicant's name.
4. A perusal of the pleadings and documents filed by the parties in respect to the summons for revocation of grant reveal that the Respondent was married to the deceased in 1961 and remained married to him until his demise. The evidence also discloses that the Applicant was married to one Dealessi Gian Carlo in 1976 and was still married to him as at the time the deceased passed away. The said marriages took place in Italy. It was also agreed by the parties that the deceased had an affair with the Applicant and that affair was still alive at the time the deceased died.
5. Although the Applicant came out strongly in her pleadings to claim that she was the second wife of the deceased, this was not the case with her testimony. Her testimony was that she was aware that the deceased had not divorced the Respondent. She also testified that a person whose marriage is monogamous would be guilty of the offence of bigamy if he/she enters into a marriage with a third party. She nevertheless talked of a marriage conducted under Masai customary law and indicated that the deceased treated her as a wife. She exhibited a form filled by the deceased when he was admitted at Nairobi Hospital in which the deceased indicated that she was his next of kin.
6. The Applicant's case was supported by PW2 Nicholas Maitha Baya who told the court he was employed by the Applicant and the Applicant lived with the deceased in a house at Vasco Da Gama in Malindi as man and wife. He stated that it was the Applicant who took the deceased to hospital and she together with the deceased's son by the name David lit the pyre during the cremation of the body of the deceased in Mombasa.
7. In her testimony, the Respondent testified that although she lived separately from her husband they were not divorced. She also told the court that the Applicant was also not divorced and that the Applicant divorced her own husband in 2010 after the deceased had passed away. It was the Respondent's testimony that the Applicant was not a dependant of the deceased. She stressed that she had not separated from her husband for sixteen years as alleged by the Applicant. She told the court that in Italy she is recognized as the legitimate widow of the deceased and she is paid pension. She also stated that the Applicant had not made any claim on the estate of her husband in Italy.
8. Counsel for the Applicant urged this court to presume that there was a marriage between the Applicant and the deceased. He relied on the decision in **NLS v BRP [2016] eKLR** as providing the requirements that will make a court presume the existence of a marriage.
9. Counsel for the Respondent's take is that the court cannot presume a marriage where the parties lacked capacity to marry. He pointed out

that in this case the Applicant and the deceased were in monogamous marriages with other parties at the time they had their affair and did not therefore have capacity to marry.

10. Counsel for the Respondent cited Section 37 of the Marriage Act, Cap. 150 and **Machani v Vernoor [1985] eKLR** in support of the said assertion.

11. Counsel for the Respondent is indeed right that a marriage cannot be presumed in the circumstances of this case. The Applicant and the Respondent both testified that their marriages were monogamous and marrying another person during the subsistence of their marriages would have led to prosecution for the offence of bigamy.

12. The same situation applies in Kenya. In **Machani** (supra) the Court of Appeal explained why a marriage could not be presumed where one of the parties was still in a monogamous marriage. The Court stated:

“But serious problems arose. Mr Muthoga very properly pointed out that this court must give a logical interpretation to section 37 of the Marriage Act (cap 150). To answer the spirit of this provision, it would be impossible to evade its unambiguous terms, and to hold that a marriage existed during the continuation of a previous monogamous marriage. It would not be right to acknowledge that existence by presuming that a marriage at customary law had been entered into. Indeed, if *Fender v Mildmay* (1938) AC 1, is considered, it would be wrong to “promise” to marry a third party before a decree nisi of divorce had been granted. Hence, if the adulterous association arose and ended during the continuance of a previous marriage, it would always be illegitimate association. The presumption covers two aspects, that the parties had the capacity to enter into a marriage, and that they did so in effect. During the continuance of a previous marriage, the already married party would have no capacity to enter into the new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree of divorce; such as a decree absolute (see *Rayden on Divorce* 12th Edition volume 1 page 600 – the latest edition is to the same effect).”

13. The Applicant’s plea that she be presumed to have been married to the deceased is therefore bereft of any support by the law. Her closeness to the deceased cannot be disputed but she was not the wife of the deceased. She was only but a concubine who gave comfort to the deceased as he journeyed towards his exit from this world. She is therefore not a dependant in the words of Section 29 of the Law of Succession Act, Cap. 160.

14. Is there any other reason for revoking the grant issued and confirmed to the Respondent? There is undisputed evidence that L.R. No. Gede/Mijomboni/162 and Land Portion No. 1757 (Original No. 1702/1) Malindi were already registered in the names of the Applicant by the time the grant was issued and confirmed. The Applicant also produced agreements showing that she was in the process of purchasing L.R. No. Chembe/Kibabamshe/366 and Chembe/Kibabamshe/250 with the deceased. There is nothing to show that the two properties which were being purchased were already registered in the name of the deceased. I have perused the confirmed grant and I do not see L.R. No. Chembe/Kibabamshe/366 and 250 in the document.

15. It is however clear that Land Portion Number 1757 (Original No. 1702(1) Malindi and L.R. number Gede/Mijomboni/162 are listed in the confirmed grant as forming part of the estate of the deceased. The parties agreed that these two properties are registered in the names of the Applicant and they are subject to court proceedings in case number 56 of 2011 between the Applicant and the Respondent before the Environment and Land Court here at Malindi. It is the Environment and Land Court which will determine whether the deceased gifted the two properties to the Applicant. For now, they do not form part of the estate of the deceased.

16. It follows that the grant was issued and confirmed to the Respondent based on a misrepresentation of material facts to the court. By virtue of Section 76 of the Law of Succession Act, the grant can be revoked and there is sufficient reason to make this court exercise its discretion and revoke the grant.

17. The certificate of confirmation of grant dated 17th December, 2010 issued to the Respondent, Tamburelli Liana in respect of the estate of the deceased Giovanni Gremmo is revoked. I note that apart from the Applicant’s claim that the said two properties included in the certificate belongs to her, there is no other dispute in respect to the other properties of the estate of the deceased. As such, I direct that a fresh certificate of confirmation of grant in which the Applicant’s two properties shall be excluded be issued to the Respondent.

18. Owing to the fact that the deceased had intimate relationships⁹ with both the Applicant and the Respondent, I do not find it appropriate to saddle any of the parties with the costs of these proceedings. Each party will therefore meet own costs of these proceedings.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT