



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CORAM: D.S. MAJANJA J.
SUCCESSION CAUSE NO. 231 OF 2012
IN THE MATTER OF THE ESTATE OF
SAGANA NCHOGU (DECEASED)

BETWEEN

CECELIA KEMUNTO NCHOGU.....1ST APPLICANT

SAMWEL ATIKA NCHOGU.....2ND APPLICANT

AND

MORAA NCHOGU.....RESPONDENT/1ST PETITIONER

CHRISANTUS NCHOGU.....RESPONDENT/2ND PETITIONER

RULING NO. 3

1. Nchogu Sagana (“the deceased”) died intestate on 12th December 1994. His late widow Moraa Nchogu (“Moraa”) and son Chrisantus Nchogu (“Chrisantus”) petitioned this court for grant of letters of administration. The grant was issued to them on 26th July 2012 was confirmed on 12th April 2013 in the name of the Chrisantus when Moraa passed away. The deceased’s properties; NYARIBARI CHACHE/KEUMBU/354 and 325 (“Plot 354 and 325 respectively”) were divided equally between Chrisantus, James Onsare “Onsare” and Christopher Chweya “Chweya” who were listed as the only surviving beneficiaries of his estate in the petition.

2. The objectors, Cecilia Kemunto Njogu (“Cecilia”) and Samwel Atika Nchogu (“Samwel”), who described themselves as the widow and son of the deceased’s, filed summons to revoke the grant on 24th April 2018. They alleged that the grant had been obtained through misrepresentation and non-disclosure of material facts. After taking oral testimony and directed as follows in my ruling dated 18th March 2019:

[6] After hearing the evidence, I am convinced that despite there being a relationship between Cecilia and the deceased, the status of the children remains doubtful. If indeed the deceased married Cecilia in 1965, it appears that she had children much later in her life. Further, there is evidence from the respondents that they came to the deceased’s property in 2001. I am also

convinced that both sides have been less than candid and in order to put the issue of paternity to rest I shall order a DNA test to be conducted on the applicant and the respondent.

3. I therefore exercised the court's powers under **section 47** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the **LSA**") as read with **Rule 73** of the **Probate and Administration Rules** and ordered that pending determination of the summons for revocation:

a. CHRISANTUS NCHOGU or any of his brothers; CHRISTOPHER CHWEYA and JAMES ONSARE and SAMWEL ATIKA NCHOGU shall undergo a DNA test to determine their relationship.

b. The test shall be done at the Government Chemist Offices at Kisumu and the report shall be furnished to the court.

c. Both parties shall share costs of the test equally.

d. Mention on 11th April 2019 for further directions/orders.

4. Although both Chweya and Onsare went to the Government Chemist for testing as directed, Samwel did not. When the matter came up for directions of 20th May 2019, counsel for the applicants indicated to the court that they were not interested in the DNA test. Counsel stated that I should proceed to deliver my decision in light of the evidence on record. I now turn to consider the evidence.

5. In support of the application for revocation, Samwel deposed that the applicants had learnt that letters of administration in the estate of the deceased had been issued and confirmed in favour of the petitioners when they disclosed that fact in response to citation proceedings in **Kisii HC Citation No. 43 of 2018**. He attached a copy of the chief's letter in support of his averment that the deceased had married both Moraa and Cecilia and had more children than those listed in the petition.

6. In the replying affidavit sworn on 21st June 2018, Chrisantus maintained that the deceased had only one wife and that he had no obligation to include the applicants in the succession proceedings. He averred that the deceased had intended to marry Cecilia but Moraa resisted. After two weeks Cecilia left and married one Ogamba Ogamba who had paid her bride price and built her a home where she had all the children listed in the chief's letter. He deposed that sometime in 2001, Cecilia settled on Plot 325 with the assistance of the area chief who claimed that Moraa was the deceased's wife and efforts to take her back to her matrimonial home had been frustrated by the local administration.

7. I directed the application be disposed of by oral evidence. The applicants testified and called two more witnesses to advance their case while five witnesses testified in support of the petitioner.

8. Samwel testified that the deceased and Cecilia married in 1965 and had seven children. He was born on 10th June 1985 and had lived on Plot 325 with his step brothers since he was born. He testified that when his three elder brothers died, they had been buried on the same land. He further stated that Moraa had treated them as her own children and had given him her identity card when he wanted to acquire his own. He denied the petitioner's contention that Cecilia left the deceased to marry Ogamba.

9. Joseph Nyangeri Getuno (PW 2) told the court that he had known Cecilia since 1965. At that time, he was 17 years old and had been part of the procession that took Cecilia's bride price of 12 cows and 3 goats to her home in Kiogoro. The elders from Cecilia's place had deliberated the marriage and a traditional wedding had taken place. He was surprised at Chrisantus' rejection of Cecilia's family and stated that the Chief and other elders had intervened to prevent them from being evicted. He further testified that Cecilia's family had attended the deceased's burial ceremony without resistance and that Cecilia had also buried her deceased children on the land.

10. Cecilia (PW 3) reiterated that the deceased's family had paid her bride price before she got married to

him and that Moraa had let her stay on the land where she had eight children with the deceased. She stated that all her daughters were married and three of her sons had died and had been buried on the land. She further testified that she and her sons had attended and participated in the deceased's funeral without incident and denied the petitioner's allegation that Basweti Ogamba had gone to take her from the deceased's home.

11. The deceased's nephew, Philip Nyambane Getuno (PW 4), testified that he had also been part of those who took the dowry to Cecilia's home in 1965. He testified that Cecilia had lived with the deceased throughout and that she had attended the deceased's funeral and was also present at Moraa's funeral and no issues had been raised about Cecilia's family.

12. Chrisantus (DW 1) testified that he heard about Cecilia when he was 17 years old. He also had heard that dowry had been paid and that she had lived in the deceased's home in 1965 but had left two weeks later and got married to Ogambo. He stated that he knew both PW 2 and PW 4 from home and contended that they could not have participated in the dowry arrangements as they were children at the time. He stated that the deceased had purchased the land with his mother's help and had subdivided it between him and his brothers, James and Christopher in 1975. He told the court that the next time he saw Cecilia was in 2001 when she came and settled on his brother's portion of the land. He testified that Ogambo had visited their home severally demanding that Cecilia and his children go back with him but Cecilia had resisted and had proceeded to bury Ogambo's children in the deceased's land. He stated that he had adhered to the procedure in taking out letters of administration adding that since his two surviving sisters were married they had chosen not to disclose them.

13. Chweya (DW 2) testified that he was the last born of the deceased and Moraa. He stated that he had also learnt about Cecilia from his mother after she trespassed into his portion of land in 2001. Christopher also testified that he had met a man named Ogambo who claimed that Cecilia was his wife but Cecilia had refused to leave with him when he came for her. He denied Cecilia had any children with the deceased and stated that other than his mother and father no one else was buried in his portion of land.

14. The deceased's nephew, Joseph Onchari Apopo (DW 3), maintained that the deceased had only married Moraa. He testified that PW 2 and PW 4 were his age mates and that in 1965 they were too young to participate in the dowry procession but admitted that he was not present when they had allegedly taken the dowry to Cecilia's home. James Nyamamba Ogamba (DW 4) testified that his brother Samwel Ogambo had married two wives; Yosifina Kwamboka and Cecilia Basweti. He then told the court that Cecilia and his brother were just friends and that she had come with two children in the 1970s. Cecilia and her brother later had one daughter but his brother Ogambo had not built Cecilia a home or paid dowry. Patrick Omenyo Nyaega (DW 5), who identified himself as Ogambo's in-law, testified that he knew Cecilia as his second wife. He testified that Cecilia did not attend Ogamba's funeral and that if she had done so she would have been recognized as Ogamba's wife and been given land.

15. At the close of the hearing, the parties filed their respective written submissions. The main issue arising for determination is whether the applicants are the widow and son of the deceased respectively. If they are, then the petitioners failed to disclose them as survivors of the deceased and as such this court is entitled to revoke the grant issued and confirmed under **section 76** of the **LSA**. It is important at this stage to recall that it is the party who seeks to revoke the grant that bears the burden of proof.

16. In order to succeed in her case, Cecilia had to establish that she was married to the deceased under customary law. It is well established that proof of customary law is a question of fact proved by evidence, including testimony of experts (see *Gituanja v Gituanja [1983] KLR 575* and *Kimani v Gikanga [1965] EA 735*). **Rule 64 of the Probate and Administration Rules allows the court to make reference to, "any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination."**

17. On the basis of the aforesaid provisions, the treatise by Dr Eugene Cotran, *Restatement of African Law Kenya, Vol 1, The Law of Marriage and Divorce* has been accepted as a reference point for customary law. He discusses the essentials of a valid Kisii customary law marriage as capacity, consent,

dowry (*Chiombe Cho Oboko*) and commencement of cohabitation and as regards marriage, he states:

Chiombe cho oboko is a payment or payments of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father (or other guardian) of the bride, which is necessary for the validity of marriage and to establish the affiliation or legal control of the issue of the union, and which may be repayable in whole or in part on dissolution of marriage."

18. The evidence of Cecelia, PW 2 and PW 4 was that a Gusii customary marriage took place between Cecilia and the deceased in 1965 when the deceased took her as his second wife. PW 2 and PW 4 testified that they were among those who took the bride price of 12 cows and 3 goats to Cecilia's home. PW 2 testified that at his age, he had not been involved in the dowry negotiations and that it is the elders from Cecilia's place who visited the home to deliberate on the marriage.

19. Chrisantus recalled that Cecilia came in 1965 as the deceased wife but she left after two weeks to get married to Ogambo. He claimed that Ogambo paid her dowry and that she adopted his names and he even had a house built for her. His case was supported by Ogambo's relatives, DW 4 and DW 5. DW 4's evidence on the nature of the relationship between Cecilia and Ogambo was inconsistent. Although he initially stated that Ogambo and Cecilia were married, he later conceded that they were merely friends. DW 5's testimony did not shed light as he could not tell when and under what circumstance Ogambo married Cecilia. He could not recall the names of the children she had with Ogambo.

20. Although there is evidence that there was a relationship between Cecilia and the deceased. In light of the entire, evidence I find that Cecilia did not establish a customary marriage for several reasons. The evidence in fact corroborates what Chrisantus states. There is no evidence that Cecilia and the deceased started cohabiting in 1965 and thereafter. There is no evidence that the deceased constructed for her a house as a second wife. It is also strange that Cecilia obtained her identity card in the deceased's name in 2016, 22 years after the deceased's death, although she had been married in 1965. In cross-examination, she stated that prior to that her identity card was still in her father's name.

21. Cecilia's case is further weakened when I consider the claim by Samwel and his siblings as children of the deceased. In order to succeed in their claim, they had to prove that they were the deceased's biological children or that they were recognised and supported by the deceased. In her testimony, Cecilia recalled that she had eight children with the deceased but could not tell with precision their dates of birth. Her position was supported by Samwel, PW 2 and PW 4 who testified that she had several children with the deceased and that three of her sons had been buried in the deceased's land. I also find the testimony of Cecilia and Samwel lacking in the nature and quality of their relationship they had with the deceased when he was alive.

22. When I directed that Samwel should take a DNA test to establish whether he was related to Chrisantus by having a common father, I had entertained considerable doubt as to his paternity for several reasons. The evidence of DW 1 is that the deceased had divided his land amongst his sons. Why did he not give land to his children from Cecilia while he was still alive? I also find considerable doubt cast in the manner in which Samwel acquired his ID by naming his mother as Moraa Nchogu. Lastly, I note that although the evidence is Cecilia married the deceased in 1965, her life with the deceased from that time is not accounted for until the 1980's when she gave birth to her children. Since she was born in 1937 according to her identity card, she started giving birth when she was 43 years old and continued to give birth to the deceased's children well into her fifties. This in my view, casts doubt on Cecilia's claim that she had children with the deceased.

23. I gave a chance to Samwel to conclusively prove through DNA that he was a son of the deceased but he rejected that opportunity. In the circumstances, I am entitled to draw an adverse inference that in fact he was not a son of the deceased. Consequently, and for the reasons I have given, I find that the Samwel and his siblings were not children of the deceased.

24. Turning back to the case of Cecilia, I prefer the version of events narrated by Chweya that after a long time Cecilia returned to Plot 325 and imposed herself on the land with the aid of the local

administration as evidenced by the correspondence he and his advocate wrote to the local administration regarding the trespass on his land by Cecelia and her children. I have also looked at the letter relied on by the applicants from the Office of the Chief, Keumbu location dated 7th December 2017 which states that the deceased had two wives. It is unclear and does not show which officer signed it. The totality of the evidence is that the applicants have not discharged the burden of establishing their case.

25. The summons for revocation dated 23rd April 2018 is dismissed. I make no order as to costs.

DATED and DELIVERED at KISII this 27th day of MAY 2019.

D. S. MAJANJA

JUDGE

Mr Okemwa instructed by Okwemwa Elijah and Company Advocates for the applicants.

Mr Ongegu instructed by Asati Anyona and Company Advocates for the respondents/petitioners.