



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO 24 OF 2011

IN THE MATTER OF THE ESTATE OF ONDIEKI ONSONGO (DECEASED)

RUTH MORAA NYABENGLI.....OBJECTOR/APPLICANT

VERSUS

KENNEDY MOKAYA ONDIEKI.....PETITIONER/RESPONDENT

RULING

1. The deceased, **Ondieki Onsongo**, died on 27th February 1988. On 19th January 2011 the deceased's son **Kennedy Mokaya Ondieki** ("Mokaya") filed the petition for letters of administration intestate and the deceased's only asset is land **Parcel No. West Kitutu/Mwamonari/258** (parcel 258). On the 17th December 2012 the grant was confirmed and a certificate of confirmation of the grant was issued distributing parcel 258 to **Kennedy Mokaya Ondieki (2.0 Ha)** and **Henry Gichana Nyangena 91.6 Ha**.

2. The application for consideration is the summons for revocation dated 23rd February 2018 filed by Ruth Moraa Nyabengi ("Ruth"). Ruth seeks the annulment of the grant of letters of administration issued to Mokaya on grounds that the grant of letters of administration was obtained through fraud, deceit and concealment of material facts. She deposed that she was not included in the list of dependents. That her late husband Micah Onyiego Ondieki ("Micah") was one of the deceased's children, and after his demise she moved to parcel 258 which had been allocated to Micah. She contends that she later discovered that the chief's letter was forged when Chief Titus Mokaya confirmed he did not author the letter listing the beneficiaries.

3. The matter was set down for hearing and Ruth Moraa Nyabengi testified as PW1. Ruth told court Micah was her husband and the son to the deceased. She testified that at the time of his death they were not living together and only moved back to the home after Micah's death. She told court that she filed an application before the **Environment and Land Court ELC Case No.4 of 2018** so that she could continue living in her husband's house. She testified that she was not consulted when the current succession cause was filed by Mokaya. That upon perusal of the court file, she discovered a letter from the Chief of Mwamonari. When she confronted the chief about the letter, the chief denied authoring the said letter and the matter was taken up by CID Nairobi and it was found that Mokaya wrote the letter. She told court that she was married to Micah and also buried him. She recalled that Mokaya came with 2 wazees to her home paid dowry and a goat was given as per the customs. She testified that the dowry was paid to her parents. She had not been married before and John Gichana Mayienga Mong'are was not her husband. She also testified that Titus had not inherited her as alleged. Ruth testified that she did not have a child with her husband Micah but has 4 children. She is a dependent and entitled to inherit from the deceased.

4. Beatrice Nyakundi (Pw2) testified that the deceased was her father and Micah her brother who was married to Ruth. She told court that Mokaya did not include their deceased brother as a beneficiary. She also testified that Ruth's dowry was paid by her family.

5. Mokaya (Dw1) testified that his brother Micah died without any children and was not married. That Ruth was not married as alleged. He explained that the chief gave him the letter but the chief denied writing the letter. That on instructions of the DCIO he wrote 8 copies of the said letter. He was later summoned and charged in court. He testified that **Case No. 454** was filed but dismissed. That Ruth is married to John Ayiera. That he included the name of PW2 in his petition for grant of letters of administration and that PW2 was in court when the grant was confirmed. He told court that Pw2 only intends to stir trouble as Ruth is not one of the beneficiaries of the estate.

6. At the close of the hearing, the parties filed their respective written submissions. The main issue arising for determination is whether Ruth is a wife to the late Micah, who was a son of the deceased. If so, would the grant of the letters of administration issued to Mokaya be annulled in the circumstances? In **ELC No. 4 of 2018** filed by Mokaya he describes Ruth, who is the plaintiff in that's suit as follows

"8. The defendant herein was married to the plaintiff's late brother Micah, she has been staying on the said piece of land."

7. Mokaya also filed a verifying affidavit to which he deposed that he verified the correctness of the plaint. However Mokaya explained to court that his description of Ruth as a wife in the plaint was a mistake by his advocate **M/s Aboki Begi & Co. Associates** who erred to describe her as such. He told court that Peter Museri brought Ruth during his brother's burial to be like Micah's wife. That Ruth did not

explain the traditions leading up to her marriage.

8. It cannot be denied that the onus of proving the existence of a customary law marriage lies on the party alleging the customary law marriage. In the case of *Njoki –vs- Mathara and Others Civil Appeal No. 71 of 1989 (UR)*, Kneller J. A held that (i) the onus of proving a customary marriage is on the party who claims it; (ii) The standard of proof is the usual one for civil action, balance of probabilities; and (iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.

9. Ruth testified that she was notified of Micah’s death so that she could bury him. In her testimony claimed that Mokaya together with 2 wazees paid dowry to her parents. She did not call any witness who participated in the marriage ceremony to testify that the customary laws of Ekegusii were followed. On the other hand the only person Ruth claims participated in the customary ceremony was Mokaya, who denied the existence of the marriage. As much as this court appreciates PW2’s testimony that her family paid the dowry of Ruth, this court also considers that she was not present at the ceremony. What emerged from the testimony of Ruth was that she was not living with Micah. In fact she testified that the deceased had no house and lived with Mokaya. *Eugene Cotran: Restatement of African Law of Kenya Vol. 1. The Law of Marriage and Divorce in Chapter 6 page 66* lists the essentials of a valid marriage under Kisii customary law to include;

“(a) CAPACITY. The parties must have the capacity to marry and the capacity to marry each other (see pp. 60-61).

(b) CONSENT. The parties to the marriage and their respective families must consent to the union (see p. 60).

(c) CHIOMBO CHO OBOKO. There can be no valid marriage under Kisii law unless a part of the chiombo choo boko has been paid.

(d) COMMENCEMENT OF COHABITATION. The moment at which a man and woman becomes husband and wife legally is when the man and woman commence cohabitation, i.e when the marriage is consummated at the beginning of the honeymoon period.”

10. Ruth in her testimony admits that Micah did not have a house and lived with Mokaya. It is clear from the evidence of Ruth that there was no cohabitation between her and Micah as Micah was living with his brother Mokaya until his demise. There is also no evidence that any customary ceremony was performed to validate marriage. I therefore find that Ruth failed to prove on a balance of probabilities, that there existed a customary law marriage.

11. Having held that no customary marriage was proved to exist between Micah and Ruth, I turn to whether the letter by the chief was forged by Micah. I agree with the observation of Njagi J in *Re Shem Kitanga (Deceased) 2018 eKLR* in which he observes that an introduction letter from the chief is not a legal requirement. Ruth gave evidence that the forgery of the chief’s letter was reported and a criminal case instituted against Mokaya. It is trite laws that fraud is a serious offence and the standard of proof required is usually higher. In *re Estate of Samuel Ngugi Mbugua (Deceased) [2017] eKLR* the court was of the view that;

‘The allegation that the said signature was not that of the deceased amounts to a claim that the signature was forged or that fraud was exercised in the procurement of the alleged will. That is to say that someone other than the deceased had affixed that mark on the will with the intent of passing the same as the signature of the deceased. Forgery is a criminal offence. The applicant is in fact imputing criminal conduct on either the person propounding the will or those who were involved in the operation that is purported to have been its execution. The burden of proving forgery lies with the person alleging it. In Elizabeth Kamene Ndolo vs George Matata Ndolo Nairobi Court of Appeal civil appeal number 128 of 1995 it was stated that the charge of forgery or fraud is a serious one, and the standard of proof required of the allegor is higher than that required in ordinary civil cases.’

12. In this case the chief denied authoring the introduction letter which was filed together with the petition. There is however no report by the handwriting expert showing that it was Mokaya who had indeed forged the letter. In any case if the letter was forged, it is not clear whether Mokaya was responsible for the forgery. A perusal of the record shows that all the beneficiaries consented to the mode of distribution by filing affidavits in support of the mode of distribution including Pw2.

13. For the reasons above, I hereby dismiss the summons for revocation or annulment of grant dated 23rd February 2018. This being a family matter there shall be no orders as to costs.

Dated, signed and delivered at Kisii this 9th day of August, 2019.

R. E. OUGO

JUDGE

In the presence:

Mr. Kerosi For the Petitioner

Petitioner Present

Respondent Absent

Rael Court clerk