REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1620 OF 2011

IN THE MATTER OF THE ESTATE OF ALFRED MESO NONO (DECEASED)

ADDAH JAMILLA MEMO.....APPLICANT

VERSUS

MARGARET VERONICA MESO..... RESPONDENT

JUDGMENT

1. The deceased Alfred Meso Nono died intestate on 20th July 2011. He left a widow Margaret Venonica Meso (the respondent) with whom he got four children:

(a) Muriel Martha Meso;

(b) Andrew Isaac Meso;

(c) Anthony Noel Meso; and

(d) Michelle Meso.

The respondent and the deceased had got married in 1976 under the **African Christian Marriage and Divorce Act (Cap 151).** She and the children live in the United Kingdom, where she has worked since 1994. The children went to school in the United Kingdom.

2. The deceased had retired from the Central Bank of Kenya when he died. He was found dead at his house at Spring Valley.

3. The estate of the deceased comprised:-

(a) LR 1870/11/225;

(b) Mombasa Block 1/552;

(c) Kisumu/Kanyakwar“B”/214;

(d) a share of West Seme/Kadero/245; and

(e) Central Bank pension benefits.

4. Following the death of the deceased the respondent and Andrew Isaac Meso petitioned the court for the grant of letters of administration intestate. The grant was issued to them on 30th January 2012. It has not been confirmed.

5. The present application dated 3rd August 2011 is by the applicant Addah Jamilla Memo who sought orders that she and her son Bill Otieno be declared as dependants of the deceased, and that reasonable provision from the estate be made for them. Her case was that the deceased and her begun cohabiting as husband and wife in 2005 at her house at Tena Estate and later at his house at Spring Valley, and that this went

on up to his time of death. She already had the child, but that the deceased took over parental responsibility over him up to the time of his death.

6. The respondent opposed the application. She stated that the deceased had only one family, which was hers; that he never married the applicant; and neither did he maintain the applicant or her child.

7. The dispute was heard through oral evidence. Mr Anyona represented the applicant and Mr Ochieng represented the respondent. At the conclusion of the evidence the court asked each side to file written submissions. Mr Ochieng filed the written submissions.

8. The applicant testified. Before the conclusion of her evidence in chief her counsel stood her down to bring further evidence. She did not return to testify, even after several adjournments. Her evidence was not cross-examined by the time her case was closed. She had no witnesses.

9. The respondent testified and called Jorgensen Vetle Wesnaes (DW 2), Jafred Otieno Nono (DW 3), Stephen Maurice Ochieng (DW 4), Hesborn Odinga Nono (DW 5) Angeline Anyango Owiti (DW 6) Alice Adhiambo Nono Ndonga (DW 7) Filgona Owelle Opolo (DW 8), Simon Ndonga (Pw 9) and Wycliffe Adem (DW 10). DW 2 was the deceased's neighbour at Spring Valley. At the time the deceased died he was renovating the house and DW 2 was the architect who was supervising the work. DW 3, DW 4, and DW 5 were the deceased's brothers. DW 9 was the deceased's nephew, DW 7 and DW 8 were the deceased's sisters. DW 6 is wife to DW 4. These witnesses testified that they never knew the deceased to be married to, or living with, the applicant; that they each would visit the deceased at his Spring Valley house, but that there was no time they found the applicant there.

10. The applicant testified that she was a senior administrator at the Teachers Service Commission. She met the deceased in 2005 through a schoolmate. They became intimate friends and met severally. He invited her to his house at Spring Valley on several occasions. He told her he had a wife and family in the United Kingdom, and that he was a pensioner. She was then living in a servant's quarter in Lang'ata, a place he visited but did not find comfortable. They agreed that she should get a bigger house. She had a son born in January 2005 before they met. She had financial challenges and could not afford to stay with the child or afford a bigger house. The child was then staying with the applicant's aunt in Kisumu. She got a bigger house at Tena Estate. He agreed to be the one paying rent, although the house was in her name. Rent was Kshs.12,000/= per month. The deceased kept a key to the house, to come in whenever he wanted. He did all her monthly shopping. The child joined the mother at Tena Estate. They found a school for him and the deceased paid fees. He also paid for her house help. He was a member of Nairobi Club and had nominated the respondent as his wife. He nominated the applicant as a spouse. The child's birthdays would be held at the Club.

11. The deceased would visit his family in the United Kingdom and his wife (the respondent) would visit him in Kenya. He told the applicant that he was divorcing the respondent.

12. The deceased was sickly and would visit either Nairobi Hospital or the Aga Khan Hospital. The applicant took care of him. He wanted to improve his house at Spring Valley. It was DW 2 who drew the architectural plans. She helped in the improvement by taking a loan. She spent in all Kshs.800,000/= on the improvement.

13. Lastly, they discussed about marriage and he kept saying he would open discussions with her parents. He did not come round to doing this before he died. He died alone in his house.

14. The applicant was not cross-examined. The respondent's counsel asked that no value be placed on the evidence, now that it was not tested on cross-examination.

15. The respondent was entitled to challenge the evidence of the applicant by cross-examining her. Cross examination is intended to test the veracity of what a witness is saying, and to gauge his demeanour. As was stated by the Supreme Court in **Christopher Odhiambo Karan – v- David Ouma Ochieng & 2 Others [2015]eKLR,** the purpose of cross-examination is to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted; and second, to cause doubt upon the accuracy of the evidence in chief given by such party. In this case, why would the applicant seek to be determined as a wife and a dependant, and her son to be determined as a dependant, and then run away from being interrogated on her claims? The respondent lives and works in the United Kingdom, and every time the case was on she had to travel to Kenya. The applicant lives and works in Nairobi! The question is what value the court should, in the circumstances, attach to the applicant's evidence! I determine that the value is little.

16. Even if the evidence-in-chief were to be accepted, against it was the evidence of the respondent, the deceased's family, and the deceased's neighbour at Spring Valley. They all testified the deceased married no other wife, and that he did not live or cohabit with the applicant. The applicant was not known to them.

17. The applicant testified that the deceased did not formally meet her parents, to discuss or pay dowry. There was therefore no proof of customary marriage. I talk of customary marriage because the deceased had a monogamous relationship with the respondent. Reliance can therefore be placed on **section 3(5)** of the **Law of Succession Act (Cap 160),** but that is only if it can be proved that there was a relationship between the applicant and the deceased from which a marriage can be presumed. In the Court of Appeal decision in **Phylis Njoki Karanja & 2 Others –v- Rosemary Mueni Karanja & Another [2009]eKLR**, it was held that before a presumption of marriage can arise the applicant has to establish long cohabitation and acts of general repute. The long cohabitation should not be mere friendship, or the woman should not be a mere concubine. The long cohabitation should have crystallised into a marriage so that it is safe to presume the existence of a marriage.

18. The deceased did not have a child with the applicant. It would appear that at her place of work she was known to be single. At Tena Estate she was the known tenant of the house she was staying in. She says the deceased would visit her there and intimately relate, and that she would visit him at Spring Valley. What is not in dispute is that each lived separately, despite all this. She stated that she was introduced at the Nairobi Club as a spouse, but the CEO of the Club (DW 10) stated that the alleged introduction was a forgery on the part of the

applicant. But more telling, there is no single witness who came to say that he/she knew the two, and that they were living together as husband and wife. No neighbour came from Tena Estate to say the two were known to be married. Marriage by presumption is grounded on long cohabitation and repute. People who ordinarily know and deal with the two should come out and say that they knew the two as husband and wife.

19. The two did not buy any property together. The deceased did not, for instance, buy the applicant property, or take out an insurance cover for her or the child. He did not take out a medical cover for her or the child. He did not take out an education policy for the child. At the child's school he was not known as the parent, or guardian. Those are normal things that a man would do for a woman he considers he is married to, or for a child he considers to be his child.

20. For the applicant to prove that she and her child depended on the deceased under **section 26** of the **Act** there has to be demonstrable evidence that they were being maintained by the deceased immediately prior to his demise; that the two were sustained by the deceased, and relied on the deceased for support or necessities. There was no such proof.

21. After the consideration of the evidence, all that one can say is that the deceased and the applicant had an intimate relationship and that money exchanged hands. But this was a concubinage relationship. The two continued to have separate lives, as the deceased had a family that visited him in Kenya and he visited in the United Kingdom. Lastly, I find that the applicant and her son were not the deceased's dependants.

22. The result is that the application dated 30th August 2011 by the applicant has no merits. It is dismissed with costs.

DATED and DELIVERED at NAIROBI this 27TH NOVEMBER, 2019

A.O. MUCHELULE

JUDGE