



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 605 OF 2014

IN THE MATTER OF THE ESTATE OF DANSON NZIOKI MUSAU – DECEASED

BETWEEN

C N M.....APPLICANT/OBJECTOR

VERSUS

J M M

S M M.....RESPONDENTS

RULING

1. The deceased, **D N M**, passed away on 30th October, 2013. Subsequently, the Respondents herein, **J M M** and **S M M**, as the deceased's father and mother respectively petitioner for grant of letters of administration intestate of the estate of the deceased and the Court vide a grant issued on 16th May, 2014 granted the same to the said petitioners.

2. However on 21st January, 2015, the Applicant/Objector herein, **C N M**, filed an application dated 20th January, 2015, by which she sought that the grant issued herein to the Respondents be revoke and/or annulled based on the grounds that the petitioners had fraudulently misrepresented facts to the Court; that the Petitioners had withheld and failed to disclose material information; that the deceased was married to the Objector at the time of his death; and that the Objector expected either that she would be a Co-Petitioner or that the Citation would be served upon her.

3. According to the Objector, she was the wife to **D N M** (the Deceased) having been married for one year. It was her evidence that her parents and those of the deceased had held the first traditional rites meeting but the rights were not complete. In her evidence this was due to the fact that she was pregnant and that the Kamba customs did not permit dowry to be paid during the pregnancy of the wife.

4. It was deposed that the deceased died from a road traffic accident by which time she was two months pregnant and subsequently on 11th June, 2014, she gave birth to **D M**, who is the deceased's son, born after the deceased's death hence a dependant and a beneficiary to the estate of the deceased. She accordingly produced the birth certificate as evidence to that effect. According to her, during the time she lived with the deceased they operated the same account and they exchanged their Mpesa PINs and admitted that when the deceased passed away she was the first person to be called by the doctor for information and she did withdraw money from the Deceased's Mpesa Account. She however averred that she was left out of the funeral arrangements though she was included in the programme and attended the funeral of the Deceased accompanied by her parents and they were even invited to speak thereat according to the traditional rites and customs. She exhibited copies of the photographs as evidence of this fact. While she was not aware of who prepared the programme, the Objector stated that a copy of the same was given to her by the Deceased's brother, **B**. It was her evidence that she was correctly recognised as the wife of the Deceased who during his lifetime catered for her needs and that of the family while she was a housewife. Following the death of the Deceased, she obtained burial permits in her capacity of the wife of the Deceased.

5. According to the Objector, she had jointly purchased land with the deceased in an agreement in which she was indicated as a witness and which agreement for sale was similarly witnessed by the Deceased's father.

6. Following the death of the deceased, the Objector averred, she had a meeting with the Deceased's parents when she requested them to sign a Petition for grant of letters of administration intestate but they declined to do so. Instead in July, 2014, the said parents and the Objector were summoned by the Deputy County Commissioner, Masii with a view to resolving the matter at which meeting the Deceased's parents stated that they did not recognise the Objector as the wife of the Deceased. Accordingly the Objector sought legal advice and was advised to obtain citation. Accordingly, she filed Succession Cause No. 2746 of 201 for the said purpose and served the same on the Respondents. In their response the Respondents disclosed that they had commenced the present succession cause in which the Objector insisted that the Respondents had failed to disclose that she was the Deceased's wife and had the Deceased's child.

7. As regards the allegation that the Objector obtained the Chief's letter by fraud, the objector averred that the Respondents lodged a complaint against her in respect thereof and the matter was heard by the County Administrators and dismissed.

8. In his reply, the 1st Respondent, **J M M**, stated that the Deceased was his son but was not married to any one and that the objector was a stranger to them. According to him, it was not true that the Deceased cohabited with the Objector and that the Chief's letter relied upon by the Objector was fraudulently obtained. In his testimony in Court, he however alleged that the Objector was merely being accommodated by the Deceased. He however conceded that the Objector's parents visited their home, but according to him, this was just due to the fact that the Deceased had accommodated the Objector. He also admitted that the Objector had visited his home. He however insisted that no dowry was paid by them to the family of the Objector. While admitting that the Objector was included in the programme, it was his evidence that this was to avoid the problems which the Objector was causing by her claims that she was a wife to the deceased. As for the attendance at the funeral, he stated that the Objector did so just like any other mourner.

9. In his further testimony, the 1st Respondent averred that had the Objector returned after the funeral she would have been considered as the wife of the deceased but she did not do so.

10. According to him, the Objector was only a witness of the agreement for sale but not a joint purchaser of the land with the deceased.

Determination

11. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

12. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

13. In this case the applicant's case seems to be based on grounds (b) above. Her contention is that the Respondents did not disclose the fact that she is the wife of the deceased. It is clear that the Respondents did not disclose the applicant and her child as beneficiaries of the estate of the deceased. The Respondents however contend that the Objector was not the wife of the Deceased and was a stranger to them.

14. What is however not in doubt is that the Deceased was staying with the Objector. This was confirmed by one of the 1st Respondent's son, **B**, who according to the Applicant was the person who gave the funeral programme to the Objector. It is also not in dispute that the Objector was included in the programme, a programme which she did not herself prepare as a wife of the Deceased. It is further not in dispute that the Objector was not a complete stranger to the Respondents as the Respondents initially wanted the Court to believe since, the Objector had occasion to visit the Respondents' home and her parents similarly had occasion to do so. It is also not in dispute that the Objector had access to the Deceased's Mpesa PIN which according to her was disclosed to her by the Deceased.

15. In fact in cross-examination, the 1st Respondent's only unhappiness with the Objector seems to have stemmed from the fact that the Objector did not return to the Respondents' home and carry herself as the widow/wife of the deceased. In fact the 1st Respondent expressly admitted that had she done so she would have been recognised as the wife of the Deceased.

16. It is however true that the Kamba customary rites relating to marriage were not undertaken in full by the parties. In this regard in **M N M vs. D N M K & 13 Others [2017] eKLR** it was held that:

“To prove a valid Kikuyu customary marriage, E was obliged to adduce evidence showing on a balance of probabilities the essential rites and ceremonies, without which a Kikuyu customary marriage is not valid, were performed. On the essentials of a valid Kikuyu customary marriage, Dr. Eugen Cotran, in his seminal work Restatement of African Law: Kenya Volume 1 The Law on Marriage and Divorce (supra) explains that no marriage is valid under Kikuyu law unless the *ngurario* ram is slaughtered and that there can be no valid marriage under Kikuyu law unless part of the *ruracio* has been paid. (See also Zipporah Wairimu v. Paul Muchemi, HCSCNO 1880 of 1970). These are the rites that E readily admitted were not performed on account of her father's Christian background, and yet she was insisting that she was married under Kikuyu customs. Although she later on changed track and insisted that dowry was paid and *ngurario* performed, there is no credible evidence on record to prove that. It is inconceivable that the *ngurario* ceremony could be performed by a few people in a hurry, as she testified, on a day when the family was also involved in a funeral, and also in the absence of the deceased, who with E would have been the stars of the ceremony and responsible for cutting the lamb's shoulder. It is also far fetched to claim, as she did, that a different person represented the deceased in such an important ceremony. As this Court observed in Eliud Maina Mwangi v. M Wanjiru Gachangi:

‘Even if we allow room for evolution and development of customary law, it does not appear to us that *ngurario* under Kikuyu customary law has today transformed into a casual ceremony performed by a delegation of just two people.’”

17. Based on the admission by the Objector that the only step that was taken by both families towards the formalisation of the marriage was the visit by her parents and the participation by them during the funeral, I am unable to find that there was a customary marriage formalised between the Objector herein and the deceased. That however is not the end of the matter. As appreciated in M N M vs. D N M K & 13 Others (supra):

“This leads us to the question whether on the evidence before it, the court could have presumed a marriage between the deceased and E based on cohabitation and the parties holding themselves out to society as husband and wife. In Mbogoh v. Muthoni & Another [2006] 1 KLR 199, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the Court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (See also Kimani v. Kimani & 2 Others [2006] 2 KLR 272).”

18. That the concept of presumption of marriage exists in our jurisdiction is no longer in doubt. In fact that concept has a statutory underpinning and this was recognised by the Court of Appeal in Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie Civil Appeal No. 20 of 2009 [2010] 1 KLR 159 where it was held that:

“There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the Evidence Act, Cap 80, Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

19. In M N M vs. D N M K & 13 Others (supra) it was held that:

“The presumption of marriage has been recognised in our jurisdiction for a long time. (See for example Hortensia Wanjiku Yawe v. Public Trustee, CA No. 13 of 1976). In MWG v. EWK [2010] eKLR, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact.

20. That the said presumption is not dependent upon the existence of a marriage was affirmed in M N M vs. D N M K & 13 Others (supra) where the Court held that:

“As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the Hortensia Wanjiku Yawe v. Public Trustee (supra), Wambuzi, P. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.”

21. This rationale, as Madan, JA (as he then was) articulated in Njoki vs. Muthuru [2008] 1 KLR (G&F) 288:

“...is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the ‘husband’, or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of ‘wife’ upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased ‘husband’.”

22. According to Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie Civil Appeal No. 20 of 2009 [2010] 1 KLR 159:

“The cases of Machani and Njoki above were based on the old thinking and it is noteworthy that Parliament realised that women who genuinely had been taken as wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnise the union and by Act No. 10 of 1981, Parliament added section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya to the effect that “notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of the Act.”

23. Once it is proved that there was long cohabitation between the deceased and the person claiming to be the wife, it was further held in M N M vs. D N M K & 13 Others (supra) that:

“The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (Mbogoh v. Muthoni & Another, (supra). Mustapha, JA added in Hortensia Wanjiku Yawe v. Public Trustee (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. (See also Kimani v. Kimani & 2 Others (supra).”

24. In this case, the Deceased and the Objector were staying together. That stay according to the Objector led to a conception through which a child was born albeit after the death of the Deceased. The Respondents did not dispute the fact of the existence of the child. The parties agree that after the death of the Deceased, the Objector withdrew money from the Deceased's Mpesa Account using the Deceased's Pin. No action was taken against the Objector for this action which would have ordinarily been taken against a stranger. The Respondents did not attempt an explanation as to why the Deceased should disclose to the Objector his PIN number unless they were in very close relationship. It is to be noted that even in cases where couples are formally married it is not commonplace to find them sharing knowledge about their Mpesa PINs.

25. While the Respondent would like the Court to believe that the Deceased was just a Good Samaritan in accommodating the Objector, there is no plausible reason why the Objector's parents would take the trouble of visiting the Respondents' home. Further the explanation as to why the Objector was included in the programme as the wife of the Deceased does not seem convincing.

26. Having considered all the evidence on record in totality, the inescapable conclusion that this Court can come to is that for all intents and purposes, the Objector and the Deceased considered themselves as wife and husband and that the only matter remaining was the formalisation of the same and that the same could not be undertaken during the currency of the Objector's pregnancy.

27. It is therefore my finding that there was a long cohabitation between the Deceased and the Objector which warrants this Court in drawing a presumption of marriage. Such long cohabitation coupled with the manner in which the Deceased and the Objector conducted themselves during the Deceased's lifetime can only lead to the conclusion that the deceased and the Objector intended that they be presumed to be husband and wife and this Court ought not to put their desires as under.

28. Having so found section 118 of the *Evidence Act* provides that:

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

29. In the premises both the Objector and the Child ought to have been included as beneficiaries to the estate of the Deceased.

30. It follows that the Respondents herein clearly obtained the grant herein either fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

31. In the premises the summons for revocation of grant succeeds and I hereby revoke the grant issued herein. I direct that a fresh grant of letters of administration intestate of the estate of **D N M** (Deceased) be issued in the joint names **C N M** and **J M M**.

32. There will be no order as to costs.

33. It is so ordered.

Read, signed and delivered in open Court at Machakos this 26th day of September, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Patrick Murimi for Mr Mutinda for the Petitioner

CA Geoffrey