REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION 277 OF 2013

IN THE MATTER OF THE ESTATE OF ALEXANDER MANDI OMWENE....DECEASED

AND

RAPHAEL RATEMO DENNIS OMWENE.....PETITIONERS/RESPONDENTS

VERSUS

EMILY NAKHANU MUSINAI.....OBJECTOR/APPLICANT

RULING

Background

1. **ALEXANDER MANDI OMWENE**, (hereinafter "the deceased") died on 30th October,2012. Grant of letters of administration intestate in respect to his estate was made to his sons RAPHAEL RATEMO and DENNIS OMWENE, the petitioners herein, on 10th February 2014. The said grant has not yet been confirmed. The deceased was, prior to his death, married to one Josephine Moraa Omwene (also deceased) with whom he had six children including the petitioners herein namely:

a. Raphael Ratemo

b. JoramGetugiOmwene

c. Brian KariukiOmwene

d. EverlineKemunto

e. Mathew Menge

f. Dennis Omwene

2. The said Josephine Moraa Omwene predeceased the deceased herein who later had a relationship with the applicant herein Emily Nakhanu with whom he had a son, Gilbert Makori Omwene. At the center of the instant application for revocation of grant issued to the petitioners herein is the nature of the relationship that existed between the deceased and the applicant herein because, while the applicant's case is that the grant was obtained fraudulently without her knowledge or inclusion as the widow of the deceased, the respondents contend that the deceased never married the applicant even though she bore him a son.

Application

3. This ruling relates to the application dated 11th March 2014 which is brought under Section 44, 73 and 76 of the Law of Succession Act Cap 160 Laws of Kenya (hereinafter "the Act"). It seeks the revocation of the grant of letters of administration, issued to the petitioners herein on 10th February 2014.

4. The applicant, EMILY NAKHANU MUSINAI, claims that she is the widow of the deceased herein in view of the fact that she is the one who was issued with the deceased's original death certificate and burial permit and therefore, according to her, she was the rightful person to administer the estate of the deceased. The other grounds are that the respondents had a sinister motive as they obtained the grant fraudulently through concealment of some material facts from the court.

5. The application was supported by the applicant's affidavit dated 11th March 2014 wherein she repeated the grounds contained in the body of the application and added that she lived with the deceased as husband and wife prior to his death and that she was surprised to learn that the respondents had obtained the grant of letters of administration in respect to the estate of the deceased without the original death certificate which was at the time in her possession. She therefore contended that the documents used to obtain the grant were forged and as such, the grant was obtained fraudulently.

6. The respondents opposed the application through the 1st respondents replying affidavit dated 21st May 2014 in which he avers that the deceased married his mother, one Josephine Moraa Omwene (deceased) who was his only wife and that they had 6 children. He further avers that after the death of their mother, the deceased had an affair with the applicant with whom he had a son, Gilbert Makori Omari. The respondents contended that the applicant was the wife of one Kakai with whom she had 3 other children.

7. According to the 1st respondent, the applicant did not satisfy any of the conditions set, under the Act, for revocation of the grant issued to them. The respondents added that the applicant was only interested in gaining, materially and financially, from the deceased's estate so that she could support the children from her marriage to the said Kakai.

8. To fortify his contention that the deceased never married the applicant, the 1st respondent stated that the deceased nominated him as his next of kin at his place of work, Nzoia Sugar Company, which would not have been the case if he was truly married to the applicant as he would have in that case, nominated his wife as his next of kin. He attached the next of kin nomination form marked as **'RRO1'** to his replying affidavit.

9. The application came up for hearing on 8th February 2016, when parties agreed to canvass it by way of oral evidence.

Oral Evidence

10. The applicant's testimony was that the deceased was her husband and that they had a son, Gilbert Makori Omwene, who was born on 22nd May 2007. She stated that she cohabited with the deceased from 2005 up to the time of his death in 2012 and that they even purchased land jointly as husband and wife. Her case was that she filed the instant application because the respondents did not involve her in the filing of the succession case. She added that she took care of the deceased during his illness and participated in his funeral rites in her capacity as his wife and that the deceased's family paid dowry of Kshs. 10,000/= to her aunt Ruth Khabhakha Makhanu (PW2) before the burial could take place.

11. In her bid to prove that she was indeed married to the deceased and that they lived together as husband and wife, she produced photographs that she had taken in Bungoma in the company of the deceased and his father as exhibits before the court. She also produced photographs taken at the funeral as exhibits.

12. On cross examination, the applicant stated that she lived with the deceased as husband and wife even

though the deceased had not paid any dowry to her parents prior to his death but that dowry of Kshs. 10,000/= was paid to her aunt (PW2) before the burial as a symbol of recognition of their union. She conceded that she had 3 other children with one Kakai with whom she also had an intimate relationship before she met the deceased. She also admitted that the 1st respondent was the person nominated by the deceased as his next of kin in his employment documents held by Nzoia Sugar Company where he worked before his death.

13. PW2 RUTH KHABHAKHA MAKHANU testified that the applicant was her niece and that the deceased's father paid Kshs. 10,000/= to her as dowry in acknowledgement of the applicant's union with the deceased. She also produced a photograph taken at the funeral of the deceased to show that she attended his burial.

14. On cross examination, she admitted that the applicant was previously married to one Wanyonyi Kakai but that the said Kakai did not pay any dowry for her even though they lived together for 6 years and had 3 children. She stated that under Luhya customary law, dowry is paid to a girl's father but that in the instant case, the applicant's father was unwell and that is why Kshs. 10,000/= was paid to her as dowry for the applicant.

15. DW1 was the 1st petitioner/respondent RAPHAEL RATEMO OMWENE. His testimony was that the deceased had only one wife, Josephine Moraa Omwene (deceased) and that they had 6 children including the respondents. He stated that the applicant was not married to the deceased even though they had a son, Gilbert Makori, together. He confirmed that the said Gilbert Makori was listed as a beneficiary of the deceased's estate in the succession documents filed in court. His case was that the applicant is not entitled to benefit from the deceased's estate because she was not married to the deceased.

16. On cross examination, he stated that the applicant worked for the deceased as a house maid and maintained that she attended the deceased's funeral as an employee and a friend.

17. DW2 was MANDU MOCHACHE, the father of the deceased and the grandfather of the 1st respondent. He testified that the deceased had only one wife, Josephine Moraa (deceased) and that they had 6 children. He denied the applicant's claim that she was married to the deceased while stating that she had never come to his home as his daughter in-law. He also denied the claim that he paid dowry for the applicant and added that he was not aware that the deceased had a child with the applicant. He stated that the applicant attended the deceased's funeral as a friend.

18. DW3, ATISI OTUNDO MANDI, the deceased's elder brother testified that he knew the applicant as the deceased's employee as he is the one who hired her to take care of the deceased when he fell critically ill. He maintained that he did not know if the applicant had a son with the deceased and added that she was not recognized as the deceased's widow by the deceased's employer, Nzoia Sugar Company. He denied the allegation that his father paid dowry to the applicant's family and reiterated that he considered the applicant to be the deceased's former employee.

19. On cross examination, he stated that he had lived among the Luhya community for over 40 years and he knew that customarily, dowry could not be paid to an aunt.

Analysis and Determination

20. Upon considering the pleadings, the evidence tendered by both parties and their respective written submissions, I note that the issues for determination are:

a. Whether the applicant was married to the deceased.

b. Whether the grant issued to the respondents herein on 10th February 2014 should be annulled/revoked.

21. On the first issue, I note that marriage is defined by **Black's Law Dictionary, 9thed** as **"The legal union of a couple as husband and wife"**. It also elaborates the essentials of a valid marriage as: (1) parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law.

22. The definition of marriage under the **Marriage Act, 2014** is in tandem with Black's law dictionary and I wish to adopt it. **Section 3 (1) of** the said Act provides that:

> ***"Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act."***

23. Article 45(2) of the Constitution provides for the right to marry a person of the opposite sex based on the free consent of the parties.

24. ***PW1*** testified that she lived with the deceased as husband and wife from the year 2005 and that they had a son in 2007. She added that she took care of the deceased during his illness and that when he died, she attended his funeral in her capacity as his widow. PW1 confirmed that the deceased did not pay any dowry to her parents up to the time that he died thereby prompting the deceased's father to pay Kshs. 10,000/= to her aunt as dowry in recognition of their union before the burial of the deceased could be conducted. The applicant was not however very clear under which customary law the alleged dowry was paid considering that the deceased was a Kisii and the applicant a Luhya. However, this court takes judicial notice of the fact that in most African traditions, dowry is ordinarily paid to the woman's parents and therefore, this court will be in order to assume that the applicable custom in this case will be the Luhya customary law.

25. In this case, I find that the applicant was under an obligation to prove, on a balance of probabilities, that there existed a customary law marriage between her and the deceased. Courts have held time and again that whoever alleges a custom has the burden to prove it. Whether or not the marriage existed, therefore, is a fact that needed to be proved.

26. The decision of Duffus JA in **Kimani v Gikanga [1965] EA 735 at pg. 739** supports my view on this issue. I find, as he did in the above case, that if the Applicant's case was that she was married to the deceased under Luhya customary law or any customary law for that matter, then she was under a duty to prove her allegation on a balance of probability. The judge pronounced himself as follows on customary law:

> ***"To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."***

27. **Similarly, in the case of Gituanja Vs Gituanja (1983) KLR 575, it was held that the existence of such a marriage is a matter of fact which is proved with evidence. In that case the court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the "ngurario".**

28. **Under section 51 of the Evidence Act, Cap 80 Laws of Kenya, opinions of persons who are likely to know of the existence of any general custom or right are admissible where the court is required to form an opinion of the existence of such custom or right. The phrase "general custom or right" is defined in section 52(2) to include customs or rights common to any considerable class of persons.**

29. **Rule 64 of the Probate and Administration Rules makes provision for the application of African Customary Law in the following terms: -**

> ***"Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African Customary law he may do so by the production of oral evidence or by 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."***

30. **The effect of the above provisions of the Evidence Act and the Probate and Administration Rules had been to make admissible, among others, the works of Dr. Eugene Cotran pertaining to the Customary Laws and practices of many Kenyan Communities.**

31. What the Court of Appeal is saying is that where it is necessary to prove customary law in a cause under The Law of Succession Act, a party desiring to do so must produce oral evidence or refer to any recognized Treatise or other Publication dealing with the subject. And generally, Eugene Cotran's Restatement of African Law has been accepted by our courts as a recognized treatise dealing with the customary law of succession, and marriage and divorce for many communities in Kenya.

32. In the instant case, I note that the applicant did not call any expert witness on the Luhya customs to confirm if payment of dowry to an aunt after the death of a 'husband' was part of their marriage custom. PW2 who testified on the alleged payment of dowry did not state that she was an expert on Luhya customary law. I therefore find that the applicant's claim that she was married to the deceased under Luhya customary law was not proved.

33. Apart from failing to prove the customary law marriage, I also note that the applicant did not come clean on the lingering questions surrounding her relationship with one **Kakai Wanyonyi** with whom she admitted that she had a total of 3 children after a cohabitation period of 6 years. According to the respondents, the applicant was the wife of the said Kakai Wanyonyi and therefore could not have been married to the deceased at the same time. On her part, the applicant contended that the said Kakai was merely a boyfriend as he had not married her. PW2 on the other hand testified that the applicant and the said Kakai were married. On cross examination, PW2 stated as follows: -

> **"The objector was previously married to Wanyonyi Kakai, but he did not pay any dowry. They stayed for 6 years and had 3 children."**

34. In sharp contrast to the testimony of PW2, the applicant stated as follows on her relationship with the said Kakai;

> **"I was not married before I met the deceased. I had 3 children before I met the deceased. The children are with their father one Kakai. We never lived as husband and wife. We just had children. He was a boyfriend."**

35. This court observes that the applicant could not have been married to two men at the same time and the contradictions in the testimonies of the applicant and that of PW2 lends credence to the respondents' claim that the applicant was not married to the deceased. This court is at a loss as to how the applicant could claim that Kakai, with whom she had a total of 3 children could be a mere boyfriend and in the same breath maintain that the deceased with whom she had only one child was a husband. While this court acknowledges that it is possible for one to formally terminate a marriage through divorce and contract another marriage to a completely new partner, in the instant case, I find that the applicant was not only vague but also evasive on what relationship actually existed between her and Kakai. However, considering that her own aunt testified that she was married to Kakai, this court is of the view that the applicant could not hop from one husband to the next without formally terminating the earlier marriage. It is therefore my finding that there was no sufficient proof of a marriage relationship between the applicant and the deceased in view of lack of proof of a customary law marriage coupled with the glaring contradiction between the testimony of the applicant and her sole witness regarding her relationship with

Kakai.

36. On the flipside, one could still argue that the applicant can be said to have been married to the deceased by cohabitation going by her claim that she lived with the deceased from 2005 to 2012.

37. Under **Section 2** of the Marriage Act, to, *"cohabit"* means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage. This is the definition I wish to go with. Under Black's Law Dictionary, a '*marriage by habit and repute'* is defined as an irregular marriage created by cohabitation that implies mutual agreement to be married.

38. The Court of Appeal in ***Phyllis Njoki Karanja & 2 Others v Rosemary Mueni Karanja & another*** **[2009] eKLR** held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows: -

> ***"Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed."*** **(***own emphasis***)**

39. In cohabitation, two essentials must be present, the legal capacity to contract a marriage and consent. The Court of Appeal in ***P K A v M S A [2014] eKLR*** adopted the decision in the case of **Hortensiah Wanjiku Yawe V Public Trustees EACA C.A. No. 13 Of 1976 (Ur**) where ***Mustafa J.A.*** held that: -

> *"**...long cohabitation as man and wife gives rise to a presumption of marriage ...only cogent evidence to the contrary can rebut such a presumption**"*
>
> and ***Wambuzi P*** stated the following: -
>
> "***The presumption is nothing more than an assumption rising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted."***

40. **Black's Law Dictionary** defines '*presumption*' as '**a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts**'. As per the Court of Appeal in ***Joseis Wanjiru v Kabui Ndegwa Kabui & Another*** **[2014] eKLR** the presumption of marriage is a presumption of fact. The Blacks' **law** Dictionary states that a presumption of fact is ' **A presumption that may be, but as a matter of law need not be drawn from another established fact or group of facts'.** And **Section 119 of the Evidence Act** 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."***

41. Most of the decided cases involving presumption of marriage involved issues dealing with succession. The cases of ***Mbogo v Muthoni & Another [2008] 1 KLR; 357*** and that of ***Kimani v Kimani [2006] 2 KLR 292*** dealt with presumption of marriages during succession proceedings. In the latter case, the parties had cohabited for 18 years. The Court of Appeal considered the following factors which could have led to a presumption of marriage in that particular case. It stated as follows: -

> ***"…They included the long period of cohabitation in Kabati town and Gitura farm for 18 years; the undisputed fact that the deceased maintained and educated the appellant's two children from a young age of one year and less upto completion of secondary school, and that they adopted the name of the deceased as their father throughout; the undisputed evidence relating to the appellant's identity card which identified her as the wife of the deceased, and family***

photographs taken with the deceased; visits to the appellant's parents' home and the gifts given out, even if, as found by the judge, they did not amount to dowry or customary marriage negotiations; the evidence that the first wife, Wanjiru (deceased) and Joyce, 1st respondent, visited Beth when she was admitted at Thika maternity hospital; and the reluctance by the children of the 1st wife Wanjiru (deceased) to testify against the appellant as tacit acknowledgment that she was their father's third wife. We think, with respect, that those were all weighty matters of fact which would have made all the difference if they were considered. The evidential burden of proof is not on the appellant, but on the respondents to show that the appellant was not the deceased's wife or put another way, to rebut the presumption of marriage."

42. In the case before me, I am unable to find that there could have been a presumption of a marriage by cohabitation, between the applicant and the deceased having found that the applicant may not have had the capacity to contract a marriage with the deceased because of her existing marriage to one Kakai. In any event, the applicant did not plead that she was married to the deceased by cohabitation and neither was any material, proving acts of general repute, placed before me on which I can make a finding that the applicant lived with the deceased as husband and wife for the period that she claims that they stayed together.

43. From the evidence tendered by the applicant in this case, I am not satisfied that a presumption of marriage can be made. While the applicant claimed that they had cohabited for a long period of time, none of the deceased's relatives recognized her as his wife. In fact, DW3 was categorical that the applicant was an employee of the deceased. It is also highly likely that the deceased did not consider himself married to the applicant going by the uncontested evidence by the petitioners that the deceased nominated the 1st petitioner as his next of kin at his place of work instead of the applicant. My humble view is that if the deceased considered himself married to the applicant and carried himself out as such, then he would have not only introduced the applicant as his wife to his relatives and work colleagues, but would have also nominated her as his next of kin or at his place of work.

44. In an effort to prove that she cohabited with the deceased for a long period of time, the applicant claimed that they purchased land parcel number East Bukusu/North Sangalo/3201 together, which parcel was then registered in the deceased's name. The applicant did not, however, tender any evidence in support of the claim that she participated in the purchase of the land. My take is that land purchase is ordinarily a serious undertaking that is usually documented and the applicant could have at the very least availed to court the land purchase agreement itself or even the oral testimony of the seller to buttress her allegation that she participated in the land purchase transaction.

45. The applicant also produced photographs that she took with the deceased and his father as proof that she was married to the deceased. I however find that photographs *per se* cannot be taken to connote existence of Marriage. In any event, the applicant did seek an assumption declaration of marriage between herself and the deceased but insisted that there existed Customary law marriage between herself and late Alexander Omwene which customary marriage she was obligated to prove on balance of probabilities but miserably failed to do so.

46. My finding therefore is that what existed between the deceased and the applicant was a simple friendship which led to the birth of the child. Giving birth to a child during such sexual relationship cannot lead to a presumption of marriage. The relationship cannot be held to be a marriage.

47. This court decries the trend, that has on many occasions been witnessed in our courts, of claimants, mostly women, literally crawling out of the woodwork upon the death of a man, especially men of means, to claim that they were married to the said deceased even in cases where the people who were closest to the said men, such as their immediate family members and close friends, cannot attest to the existence of such marriages. My own understanding of customary law marriages or any marriage for that matter is that they are usually preceded by certain rituals and ceremonies that are conducted openly in the full view of the relatives and friends of both parties in which case all and sundry can attest to their existence with certainty. This was not the case in the instant proceedings.

48. Quite unfortunately, and contrary to the known customary marriage practices, a trend known in common parlance as *'mpango wa kando'* whose literal meaning is "side plan" but which can be translated to mean 'a secret affair' has been witnessed in our courts and other places whereby men take up secret 'wives' without the knowledge of their immediate family members only for such affairs to come to light upon their demise. Courts are in such instances, as was the position in the instant case, faced with the delicate and daunting task of trying to figure out, by piecing together bits and pieces of evidence in order to establish if indeed a marriage can be said to have existed. This court is hopeful that following the commencement of the Marriage Act (No.4 of 2014) and Marriage (Customary Marriage) Rules, 2017 which requires all parties married under African customary law to register their marriages with the Registrar of Marriages starting from 1st August 2017 will bring this *'mpango wa kando'* dilemma to an end.

49. The upshot is that I find and hold that the applicant was not a spouse of the deceased, Alexander Mandi Omwene. My finding that a marriage relationship between the applicant and the deceased was not proved has the effect of settling the second issue for determination which was whether the applicant is entitled to the orders sought. In view of my above findings on the issue of the existence of a marriage, the answer to the second issue is to the negative.

50. **Section 76 of the Law of Succession Act** under which the instant application was filed provides as follows: -

> ***"76. 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 afact essential in point of law to justify the grant notwithstanding that the allegationwas made in ignorance or inadvertently;***
>
> ***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either"***

51. In the instant case, I find that the respondents adhered to the right procedure in obtaining the grant of letters of administration by disclosing all the rightful beneficiaries of the deceased estate including the applicant's son who was sired by the deceased. None of the conditions for revocation of grant enumerated under section 76 of the Law of Succession Act were proved by the applicant. I further find that the applicant's claim that the respondents forged the deceased death certificate so as to obtain the grant fraudulently was not proved. It is therefore my finding that the instant application is not merited and I therefore dismiss it with no orders as to costs.

52. Before I sign off, I wish to add that in the interest of justice for all the parties in this case, especially Gilbert Makori Omwene who is still a minor, and in exercise of the courts inherent jurisdiction in succession causes it would be desirable, and indeed necessary in the interest of maintaining peace in the deceased's estate to make the following further orders:

53. That the parties herein do maintain the status quo in respect to the deceased's parcels of land that they currently occupy pending the distribution of the deceased estate in which case the applicant will be at liberty to hold her son's (Gilbert Omwene) share of the estate in trust for him until he attains the age of majority.

54. That the respondents herein do file the application for confirmation of grant within 60 days from the date of this judgment.

55. Mention on 4/10/2017.

Dated, signed and delivered in open court this 28th day of June, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

Petitioners

Objectors

Mr. Oribo for the respondents

Omwoyo: court clerk