



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1252 OF 2006

IN THE MATTER OF THE ESTATE OF MARK KALE WAFULA (DECEASED)

RULING

1. The deceased to whom these proceedings relate died intestate on 17th July 2005 and on 8th June 2007 William Wambilianga Wafula and Linda Wafula the deceased's parents filed for letters of administration in respect of the deceased's estate. The petitioners only listed themselves, Shanelle Margaret Kale (deceased's daughter), Paul Wafula and Alan Wafula (deceased's brothers) as the only ones surviving the deceased. The same was advertised vide Gazette Notice No. 6651 of 25th August 2006. On 13th November 2006 Vicky Kemunto Ocharo filed an objection on basis of being a wife and beneficiary/dependant of the deceased. This is the application coming for determination before this court.

2. The objector avers that she is entitled in priority to the petitioners for the grant of letters of administration by reason of being the deceased's widow. That the petitioners left her name out of the list of beneficiaries yet her daughter Shanelle has been included as a beneficiary an aim she claims is intent on disinheriting her. Adding that the said petition is done in bad faith as the petitioner knew very well of the existence of the marriage between her and the deceased. That the petitioners have failed to disclose the material particulars concerned with the estate of the deceased adding that the materials disclosed is false and is intent on misleading the honorable court. That the petitioners failed to issue any citation to her to allow her an opportunity to apply for or renounce her right to apply for the grant of letters of administration and that she did not give a consent for the filing of the same. She avers that the deceased died intestate and is survived by herself Vicky Kemunto Ocharo (widow) and Shanelle Margaret Kale(daughter). She avers that it is dishonest of the petitioners to allege that the deceased was not married yet they recognized her as a daughter in law. She avers that she and her family attended the deceased's funeral and also sought to adduce photographs of various functions where the petitioners and her family attended. That the petitioners have failed to disclose that they have received Kshs. 271,310 and Kshs. 623,290 paid through Judiciary Insurance AON Minet Insurance Brokers in respect of insurance compensation as a result of the deceased's demise. That the petitioners have further received Kshs. 894,600 from the Judiciary and a further Kshs, 50,000/- funeral expenses and have tried to access Kshs. 200,000/- held in a joint account she held with the deceased. She avers that the parcels of land **Title. No. Kajiado/Kaputiei 17373** and **17374** were purchased jointly by her and the deceased and not by the 1st petitioner as alleged. She urges the court to disallow the petitioners' petition and grant her the grant of letters of administration.

3. In her affidavit in support of her cross petition the objector avers that she and her daughter Shannel Margaret Kale are the only beneficiary of the deceased and that she is the one and only wife of the deceased and hence his dependant. She listed the following as the properties surviving the deceased.

- i. Land parcel No. KJD/Kitengela/17373
- ii. Land parcel No. KJD/Kitengela/17374

- iii. Land Parcel No. Wabukusu/North Myanga/1378
- iv. Land Parcel No. KJD/Kitengela/10438
- v. Insurance monies and claims
- vi. Burial benefits
- vii. Shares at Sheria Sacco
- viii. Account FDR 7375393
- ix. Savings at Barclays Bank of Kenya Ltd. / house A/C 8421615
- x. Proceeds of cane /contract 79766(plot 146 1 field 64)
- xi. Motor vehicle Registration Number KAE 878P

Total estimated value of Kshs. 2,600,000

4. Linda Wafula William filed an affidavit opposing the objection filed on answer to petition and cross petition all dated 13/11/2006. She avers that Vicky Kemunto does not rank in priority to them as she was never a wife nor widow of the deceased and that the two were never in any recognized form of marriage under the law. That the objector was never the deceased's dependant and as such they were not obligated to cite her before petitioning for grant of letters of administration for the deceased's estate. They aver that the records at the deceased last place of work did not recognize her as the deceased's wife but rather had listed his parents and brothers as his next of kin. She avers that she has paid school fees for Shanelle from September 2004 till November 2006 when she was schooling at Christopher Kindergarten and Acacia Crest Academy. She avers that the vehicle in question was purchased by the 1st petitioner from a colleague and the same never belonged to the deceased as he only drove it with the 1st petitioner's authority. She avers that there was never an agreement to meet the objector's expenses and urge the court to strike out the application.

5. The matter proceeded viva voce. PW1 Mercy Chebesa Kagwiria Kirimi a friend and colleague to both the deceased and the objector. She stated that the deceased and objector met the deceased in 2000 at the time he was working at the account's department and the objector was working as a court clerk they started dating and at times she could accompany them. Vicky at the time was living in Kariobangi and Mark was staying with his parents in Rongai. In early 2001 Mark moved in with Vicky and they started cohabiting around the said time she was transferred to Mombasa and she left them her house which was a bit bigger. In April 2002 they were blessed with a child named Shanelle and after sometime they moved to Innercore-Umoja sometime in 2003. She avers that she saw them as a family. Later on in July 2005 Mark died and she attended his funeral and states that Vicky also spoke at the funeral. On cross examination she reiterated her averments in court adding that Vicky was a student at GTI in Embu for about 1 year both the deceased and Vicky were cohabiting in Kitengela when the deceased died.

6. PW2 Bilha Nyaramgi Ochora mother to Vicky filed an affidavit 17/11/2009. She testified that the deceased and Vicky were married in 2000 although no ceremony was conducted and cohabited in Nairobi Inner-core, Kitengela. That she only met the deceased's parents after his demise and had on occasion stayed with them at Inner-core. She stated that Vicky and the deceased visited her when Vicky had the child and took care of her for about 2 months until she regained her strength. The child was named after Vicky's grandmother in her presence according to the Kisii naming customs and visited them about 3 times but could sleep elsewhere as it was against customs to sleep there.

7. PW3 Vicky Kemunto Ocharo testified that Mark was her husband although they had not formalized their union either in church or at the Registrar's. That they meet in late 2000 and started dating in 2001. They had been blessed with one child Shanelle. That they used to do things together as husbands and

wives do at the time his parents did not protest their relationship. They even bought property **Kajiado/Kabuptiei North/17373** and **17374** which was registered in both their names and they proceeded to start building in the said plots and by the time Mark died the house had gone 1 floor and the roof had not been fixed but she proceeded to improve the same by fixing grills, piped water, electricity water tanks etc. and she and her daughter are currently residing there. That they had opened a fixed deposit account at Barclays in their joint names. She stated that she did not know who prepared the funeral program adding that the eulogy recognized her as a widow to the deceased and one of the persons that was to give a speech. That the advertisement in the nation daily had also mentioned her as the deceased's widow and sought to adduce photographs taken during the burial where she and her family members participated in the said function. Further that the deceased's mother had given her a diary with writings that referred to her as a daughter in law. At the time they were both employee of the judiciary where the deceased was working as an accountant and she was working as a court clerk. Mark died on 17/7/2012 after he was involved in a road accident on his way home from work.

8. She testified further that in 2003 she attended a course at Embu for a whole year but used to come home every weekend in 2004 the deceased also attended a course in Mombasa for a whole year and used to travel home every fortnight adding that from 03 to 04 June the child Shanelle was staying with her parents. She denied that the deceased saw the child four months after birth adding that he saw the child the 1st month after birth but his relatives saw the child 8 months later. That she worked in the judiciary Personnel department between 1997-2010 and Mark did not change his next of kin details. She stated that Marks parents are not his beneficiary but her child is. Adding that she and the petitioner were sharing costs of raising Shanelle with the petitioner paying Kshs. 35,000/- whilst she paid Kshs. 20,000. That her people also attended functions at Marks home and that her parents had met Mark's parents during a joint birthday held for her daughter and Mark's brother's child. That Mark had a vehicle he purchased but at the time of his death the same had not been transferred into his names. She added that although Mark wanted to pay dowry he refrained as his elder brother was not yet married. That when Mark died his father had insisted that she should be inherited by Mark's brother which she opposed she urges the court to grant her letters of administration and she is willing to co-administer the same with her friend Mercy Kagwiria who is her good friend.

9. DW1 Linda William Wafula is the 2nd petitioner and the deceased's mother. She testified that the objector was a girlfriend of the deceased and claims to have met Shanelle Mark's daughter 5 months after birth. Between 2004 and 2005. That Shanelle is Marks beneficiary. She stated that the shares held by Mark Sheria Sacco she was named as the beneficiary adding that her husband the 1st petitioner financed the purchase of **L.R. Kajiado/Kitengela/10438** and started building a house there adding that the person who built their house in the 80's adding that the land **L.R. N/Bukusu North Munyase/1778** which is not developed was purchased by money from the 1st petitioner though it was registered in the name of the deceased adding that the deceased would have developed the same if he was alive. She stated that the deceased was buried in their farm in Ongata Rongai and no one opposed. That Vicky inserted her name in the obituary and the eulogy was prepared by Paul Mark's elder brother. She refuted Vicky's claims that they wanted her to be inherited by Mark's brother after his demise. She added that the motor vehicle KAH 856H was purchased from ex-telcom by the 1st petitioner from his former colleague. She urged the court to dismiss the objection.

10. On cross examination she admitted that Paul Mark's elder brother is the one who prepared the eulogy adding that she was only there as Shanelle's mother she denied knowing Vicky or her mother. She stated that though the parcel of land was in Vicky's and Mark's names her husband was the one who was building for them the house at the time he had not retired. She denied allegations that Mark had grown sugarcane in the said parcel of land.

11. Parties filed written submissions. The objector in her submissions relied on the evidence tendered in court. She submitted that based on the evidence tendered in court she and the deceased not only cohabited but also acquired property together in joint names, saved and invested together. She relied on the case of **HORTENSIAH WANJIKU YAWE V PUBLIC TRUSTEES EACA C.A. NO. 13 OF 1976 (UR)** the decision is an authority for the legal principle that long cohabitation as a man and wife gives rise to the presumption of marriage in favor of the party asserting and only cogent evidence to the contrary can rebut

the presumption and is specific ceremonies and rituals are not fully accommodated does not invalidate such a marriage. She argues that should the court decide otherwise it is still tasked with the duty to determine the fate of the two parcels of land L.R. No. **Kjd/Kaputiei-North/17373** and **Kjd/Kaputiei-North/17374** as the same are registered in the names of both the deceased and the objector and noting that the same are registered under the Registered Land Act Section 102(1)(b) of the Act, which provides that “Where the land, lease or charge is owned jointly , no proprietor is entitled to any separate share in the land and consequently ;

(a) disposition may be made by all joint proprietors ; and

(b) On the death of joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietor jointly”

It was submitted that upon the demise of Mark the objector became the owner of those parcels of land by operation of the law and urged the court to allow her cross petition dated 7th November 2006.

12. The petitioners in their submissions gave a background of the matter culminating to the current application. They listed 15 issues as issue coming for determination. In my view the 15 issue can be consolidated to 3 main issues as follows;

- i. Whether the objector has proved she was ever a spouse under any form of marriage recognized under the law or even satisfied the requirements of presumption of marriage.
- ii. Has the objector proved that she is entitled to the deceased property?
- iii. Has the objector proved fraud on the part of the petitioners in collecting the insurance claim of funeral benefit from the insurance and deceased’s Sacco.

13. The petitioner submits that should the objector rely on presumption of marriage that Section 3(5) is only available to those married under customary law as such the objector does not qualify as no dowry was ever paid or any meetings on the same held in compliance with the Bukusu customs.

In regards to presumption of marriage the petitioners referred the court to Phipson on evidence 5th Edition pp 44 - “*presumption are either of law or fact. Presumption of law arbitrary consequences expressly annexed by law to particular facts and may be either conclusive or rebuttable. Presumptions of fact are inferences which the mind naturally draws from given facts irrespective of their cause. They are always rebuttable.*”

“presumption for cohabitation is where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary.

She relies on the case of ***In Phyllis Njoki Karanja & 2 Others V Rosemary Mueni Karanja & Another [2009] eKLR*** where it was held that, “*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.*”

It was submitted that parties that intend to rely on presumption of marriage must prove two elements;

- Prolonged cohabitation
- That they held themselves out to the general public as a married couple.

The parties started their relationship in 2000 and cohabited in Kitengela before the deceased met his death

on 17th July 2005. Of the said period the petitioner avers that they visited the objector and deceased once. The petitioner argues that the child Shanell was born in Kisii and named after the objector's relatives. It is the petitioners submission that there is no long cohabitation between the deceased and objector to constitute marriage. she relied on the case of in the matter of the ***Estate of Samuel Muchiru Githuka (deceased) Nairobi HCSC No. 1903 of 1994***, “given the evidence herein am , I am satisfied that no presumption of marriage can be made. There is no long period of cohabitation and neither did the parties take themselves to be married. What existed was a simple friendship which led to the birth of the child. Giving birth to the child cannot lead to the presumption of marriage.”

She referred the court to ***Anthony Trollope's The Belton Estate and Hubback's, A treatise on Evidence of Succession at page 244***, where its stated, “It was submitted that a key element of reputation was how the couple were treated by the community within which they lived, the assumption being that society would be able to tell the difference between legitimately married and those merely pretending to be such.”

It is submitted that the objector was not keen on following up on the cause of the deceased's death but was only interested in securing the deceased's estate. That she failed to attend the deceased's 1st year memorial or even visit the deceased's grave site after burial.

How the parties and relatives relate to the child. She relied on the case of ***Fox V. Bearblock (1881)17 Ch. D 429*** where it was held that, “in a society in which a sharp distinction was drawn between legitimate and illegitimate children, particular importance was also attached to the way in which the children of the union had been treated by their parents and family members.”

In ***Goodman v Goodman (1859) 28 LJ CH 745*** “the way in which the children

Were described in the baptism registers, or will, was thus important evidence of marriage between the parties.”

The petitioner submits that the child bears a Kisii name Nyakengese adding that is the objector and deceased were married the child would have acquired a Luhyia name, adding that the deceased revealed the child to the family later on meaning that this was a relationship he was embarrassed with.

It was submitted that the objector attending the deceased's burial was not prove that she was a wife, nor receiving an engagement ring or registering

property in both their names.

Determination

14. I have considered the parties evidence in court and affidavits filed and their submissions. The objector and deceased had cohabited prior to his unfortunate demise. The two had invested jointly in real assets as evidenced by the registration of title documents in both their names. From the deceased's conduct it is clear that his relationship with the objector was not merely casual but appears he had set goals for future with the objector unfortunately his life was abruptly cut short. The argument raised by the petitioner that she remained the next of kin as per some of the vital documents held by the deceased. This I believe was done earlier before the deceased joined into a stable relationship with the objector. It is not unusual that the deceased could have forgotten to make the relevant changes and include the objector as his next of kin. I find this argument alone cannot prove that the deceased and the objector were not married.

15. The deceased and the objector maintained one home and due to work related assignments at one time or the other the parties were forced to work in different towns. Despite this the parties always purposed to be home every weekend or after a fort night to a place they both called home. This in essence does not mean that during the said period the parties were not in cohabitation with each other. I find that the period the two worked out of town and maintained one home is also part of the period the parties were in cohabitation.

16. The evidence and testimony of Mercy Chebesa Kagwiria Kirimi who was a colleague and friend to the couple testified that he witnessed the parties courtship, the birth of their child and their cohabitation in various area in Nairobi. She stated that the deceased held the objector out as his wife and the objector likewise held the deceased as a husband. The two did every ting together even investing. **HALSBURY'S LAWS OF ENGLAND 3RD EDITION VOL. 19 PAR 1323** says: "*Presumption from Cohabitation where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary*".

17. In the case of **HORTENSIAH WANJIKU YAWE V PUBLIC TRUSTEES EACA C.A. NO. 13 OF 1976 (UR) Mustafa J.A.** said: - "*The position seems to me to be this. The appellant had testified that she was married to the deceased, and the deceased in an application in 1966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died and during that time the appellant bore him four children. long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant only cogent evidence to the contrary can rebut such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance into the appellant's favour the scale must tilt in the direction. Even if the proper ceremonial rituals were not carried out that would not invalidate the marriage.*"

18. I find that the conduct of the parties towards each other and their outlook towards the future by investing together and even having a child to nurture together it is clear that the two intended their relationship to last for a long period of time and were saving and investing towards that before the deceased met his unfortunate end. As such I find that the objector herein was a wife by virtue of cohabitation and repute accorded to them. In taking out grant of letters of administration several considerations need to be made especially in consideration to preference given to those who should apply. Section 66 of the Law of succession Act provides, where the deceased died intestate, "*when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference —*

a. surviving spouse or spouses, with or without association of other beneficiaries;"

the deceased to whom these proceedings relate died intestate leaving behind one wife and a child as such the objector has preference to apply for grant of letters of administration.

19. The objector wishes her friend to be made a co-administrator. The petitioner however appear to have beneficial interest as she is listed as the deceased's next of kin in various vital documents of the deceased. No evidence has been tendered if all benefits accruing to the deceased had been paid as such I find it more prudent that she and the objector be appointed as co-administrators. A grant of letters of administration listing all beneficiaries to the deceased's estate be issued to Linda William Wafula and Vicky Kemunto Ocharo as co-administrators. For avoidance of doubt the same will include the deceased's wife, child and the petitioner and the deceased next of kin where provided for. Both parties to work together and ensure quick conclusion of the deceased's estate. Costs in the cause. It is so ordered.

Dated, signed and delivered this 23rd day of June 2017.

R. E. OUGO

JUDGE

In the presence of;

Mr. Amollo For the Objector

Absent For the Respondent /Petitioner

Ms. Charity Court Clerk