



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2847 OF 2011
IN THE MATTER OF THE ESTATE OF E R O N (DECEASED)

JUDGMENT

1. The deceased herein died on 22nd June 2010. A letter from the Assistant Chief of Laiser Hill Sub-Location, Ngong, dated 25th November 2011, states that he was survived by nine individuals, being his widow, E M O, and his children – J G, J B, L N, R K, K N, J K and R O. Representation to the estate was sought in this cause in a petition filed herein on 22nd December 2011 by E M O and J G. She listed herself and the children in the Chief's letters as the survivors of the deceased. The deceased was expressed to have died possessed of Plot No. [particulars withheld] Ongata Rongai.
2. The gazettelement of the cause in the *Kenya Gazette* of 20th April 2012, provoked the lodge of a notice of objection at the registry on 11th May 2012 by N K O, N O N and L B O. The notice was followed up by an answer to the petition and a cross-petition, both dated 11th June 2012. The first objector, N K O, claims to be a widow of the deceased, married under Kisii customary law. She avers that she, the deceased and the children lived together at Umoja 2, before moving to a development at Ongata Rongai. She claims to have contributed to the completion of the development at Ongata Rongai using her own funds. She states that N O N and L B O are her children with the deceased. She avers that the deceased was estranged from the first petitioner, who did not participate at all in the completion of the development and who did not help at all with the treatment and hospitalization of the deceased. She mentions that the first petitioner only materialized after the death of the deceased. she states that apart from Plot No. [particulars withheld] Ongata Rongai, the deceased also died possessed of plots at Kiserian along Olosurutia Road commonly known as Boka Boka Vilas, Plot No. [particulars withheld] at Metamaywa Keroka, the home at Matangi in Keroka, a plot at Kierira, money in an account with the Housing Finance, motor vehicles KQP[particulars withheld] and KAH [particulars withheld], computers, office chairs and tables. She would like representation to be granted to her jointly with her son N O N.
3. The objection prompted a response from the petitioners, vide an affidavit sworn on an unknown date but filed herein on 13th July 2013. The first petitioner says in that reply that she had been married to the deceased under customary law since 1968, and asserts that the deceased was never married to the first objector at any time or at all. She avers to have been working at Housing Finance, and to have contributed to the acquisition of some of the assets listed in the answer to petition as forming part of the estate. She says that some of the assets are even registered in her name. She alluded to having been separated from the deceased at some point.
4. Directions on the disposal of the objection were given on 23rd September 2013. The same was to be disposed of by way of *viva voce* evidence.
5. The oral hearing commenced on 8th October 2014. The first objector was the first to take the stand. She

mentioned her children to be R O, D K, L B, N O and G M. She stated that G M died in 1999, and was buried at Boka Boka, within the estate. She mentioned that she and her children were recognized in the deceased's obituary. She stated that N O was the only biological child she had with the deceased, stating that the rest were not born within wedlock. She said that although she first met the deceased in 1974, they did not marry until 2000, when they started living together at Ongata Rongai, and 2001 when they went through a ceremony under Kisii customary law. She mentioned that the *okomana chiombe* was done in 2002, but the *ekeri boko* was not done, for it is no longer done. She then went into details of how she contributed to the acquisition of some of the estate assets. She stated that she was never previously married, neither had she lived with the fathers of her first children.

6. The next witness for the objectors was J M. He described himself as a cousin of the deceased. He lived with the deceased after he graduated, and claimed to know about his family. According to him, the deceased married the first petitioner under customary law in 1968, although he, the witness, was not party to the ceremony. He stated that when he began to live with the deceased 1974, he was with the first petitioner. He knew that she had ten children. He mentioned the various areas where the deceased lived with the first petitioner and her children. They separated sometime in the 1990s, and he gave the background to that separation. Regarding the first objector, he stated that the deceased had introduced her as a girlfriend. He said that when she began to work in Nairobi, the two related closely as husband and wife after he separated from the first petitioner. He stated that the deceased had mentioned to him about a customary law ceremony held with respect to the first objector. He said that he was aware some of the first objector's children were biological children of the deceased. He named N and L. He asserted that all the other children of the first objector became the deceased's children after he took them in as his. He stated further that the family had established a home for the first objector after the deceased died. He mentioned that the first petitioner used to come to Ongata Rongai where the deceased and the first objector were living and would shout insults at them. He completed his testimony by stating that he was among those who brought the first petitioner back after the deceased's death.

7. The objectors' third witness was J G N, a brother of the deceased. He described the first petitioner and the first objector as wives of the deceased. He stated that he was introduced to the first objector in the 1990's by the deceased, and he was also visiting his brother at Ongata Rongai when he lived there with her. He mentioned that the first petitioner was not on the Ongata Rongai property when the deceased died. He explained that she had moved out of the matrimonial home at South B, but after the deceased died they agreed with the children to bring his two widows together. He said dowry was paid for the first objector, and he was categorical that the two lived together. He stated that the deceased and the first objector got a biological child between them, N. He mentioned that the two lived at Ongata Rongai with two children, a girl and a boy. He averred that the deceased had accepted the two as his children. He confirmed that the family put up a house for the first objector upcountry after the deceased's demise.

8. The first petitioner's first witness was J K N, a son of the deceased. He stated that the first objector had been living with the deceased at Ongata Rongai, and took care of him when the deceased was admitted at the MP Shah Hospital. He stated that she was not a stranger to him. He also said that he knew N O. He used to see him and L at Ongata Rongai, when he visited the deceased, although he could not say whether they lived there.

9. The next witness was the first petitioner herself. She stated that she separated from the deceased in 1999. She said she was chased out, leaving the deceased with the children, but she was not able to explain what happened thereafter. She left him at their house at South B, Nairobi, although they built a house at Ongata Rongai. She explained how she contributed to the acquisition of the various assets that make up the estate. She said she was unaware of the first objector's contribution to the said acquisitions. She conceded to seeing the first objector's children at the funeral, but she said she could tell who was responsible for the obituary. She said that the deceased under Kisii customary law was obliged to tell her that he was taking a second wife. She conceded to meeting Nicky at the hospital where he was introduced to her. After the deceased passed on, she was taken by her son to Ongata Rongai to help bury her husband, and she found the first objector there.

10. The petitioners' third witness was S M N, a cousin of the deceased, on account of their mothers being

siblings. He said that whereas he was aware of the deceased's marriage to the first petitioner, he knew nothing about his alleged marriage to the first objector. He conceded though that he saw the first objector at the Ongata Rongai home when he visited the deceased there. He asserted that he knew that the first petitioner lived with the deceased to the very end.

11. The petitioner's last witness was R T N. He testified that the first objector was a widow of the deceased while the second objector was a woman that was introduced to him as a fiancé of the deceased. He said that he found her staying together with the deceased at his home at Ongata Rongai. He claimed that she was not married to the deceased, but his stepbrother had gone on to treat her as a wife of the deceased. He said that he was unaware that a child of the first objector had been buried at the deceased's home at Ongata Rongai. He conceded that there were certain things that he was not privy to in the life of the deceased. He stated that he was not aware who was taking care of the deceased during his illness. He stated that he was not aware that the first petitioner ever lived at the Ongata Rongai home, saying that after she differed with the deceased he chose to stay out of their affairs. He added that he was not within Kenya at the time of the funeral, but during cross-examination he said the opposite, that he was physically present at the burial. He stated that he differed with the deceased over his alleged marriage to the first objector. He said that if he had been the chair of the funeral committee he would not have allowed the first objector to be put in the programme, as she had not been legally married to the deceased. He complained that the stepfamily was interfering with his side of the family.

12. At the close of the oral hearing I directed the parties to file and exchange their respective written submissions. The objectors complied with the directions, but the petitioners did not. I have perused through the submissions filed by the objectors and taken note of the arguments made therein.

13. The issues for determination are fairly straightforward – whether the objectors were survivors of the deceased and whether they are entitled to representation in the estate of the deceased.

14. Whether the objectors are survivors of the deceased depends on how the relationship between the deceased and the first objector is interpreted. All the witnesses who testified for both sides placed the first objector in the life of the deceased at some point or other. It is therefore common ground that the two related quite closely; indeed they lived together in his final years. The question then is whether she was ever married to him at all.

15. If I understood the case as presented by the first objector well, she appeared to be arguing that the deceased had married her under customary law. She referred to the certain Kisii rites of marriage that were allegedly observed. Curiously her principal witnesses on the matter were largely vague on whether any such ceremonies were ever conducted. There was also little effort to establish what the Kisii customary law of marriage is. No treatises nor case law on Kisii customary law of marriage were cited or referred to. No expert on Kisii customary law was presented to guide the court on what that law is, and to attempt to bring the first objector's alleged marriage under that law. My conclusion from the evidence presented is that there is insufficient material upon which I can hold that the deceased had contracted a Kisii customary law marriage with the first objector. The law on the matter remains as stated in the old decision of the former Court of Appeal for Eastern Africa in *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* (1965) EA 735.

16. The first objector's alternative argument, in the event that the first argument does not hold, is that the two cohabited for a considerable period time, and generally carried themselves out as a married couple. She talked of having begotten a child together, of acquiring property together, living together and of actively playing a role in his life during his final hospitalization and later at his burial. There was even an obituary which listed her and her children as survivors of the deceased. Her witnesses testified along similar lines. The witnesses for the petitioners all acknowledged the cohabitation and the involvement of the first objector in the funeral.

17. The principle on presumption of marriage was stated in *Hotensia Wanjiku Yawe vs. Public Trustee* CA No. 23 of 1976. I am satisfied that the principle stated in that case, and others that followed thereafter, are applicable to the instant case. There is material which establishes that the deceased and the first

objector did cohabit from 1999/2000 or thereabout till his death on 22nd June 2010. The said cohabitation appears to have been continuous and unbroken throughout. The first objector was in the picture during the deceased's final illness, she was his primary caregiver, and upon his death she played a key role in his burial. She was for all intents and purposes a wife of the deceased.

18. From the material before me, the first objector begat five children, R O, D K, L B, N O and G M. One is said to have died, and his remains disposed of, during the deceased's lifetime, in the estate during the first objector's cohabitation with the deceased. Of the five, it would appear only two lived with the first objector and the deceased, that is to say L B and N O. Of the five only the last two have objected, and therefore it is only these two that I should concern myself with. I note though that the first objector did during the hearing claim that all her five children had been embraced by the deceased as his and therefore entitled to stake claim to a share in the estate.

19. I need to decide whether the children of the first objector were survivors of the deceased, and whether they should be provided for out of the estate. As mentioned here above, the first objector had five children. The first three do not appear to be serious contenders to a stake in the estate, in any event one of them is himself deceased. They were no biological children of the deceased, according to the first objector, and she led little evidence as proof that the deceased had accepted them as his own and that he had provided for them during his lifetime. I shall hold that the first three children of the first objector are not survivors of the deceased and are not entitled to a share in the estate.

20. It is the last two of her children who have been listed in the papers as survivors of the deceased. She testified that the last born was the only biological child of the deceased, and appeared to present a case that the second last born, L, was a child that the deceased had taken in as his own. From the oral testimony, all the witnesses placed L in the house where the first objector and the deceased were cohabiting. Not much evidence was presented as to what the deceased might have done in terms of support to the said child, and therefore I cannot definitively say that he provided for her. However, from the totality of the evidence I am persuaded that she was a child that the deceased had informally adopted as his own, and therefore she survived him and she should be entitled to a share in his estate. She is no doubt a child within the meaning of 'child' in section 3(2) of the Law of Succession Act, Cap 160, Laws of Kenya.

21. The case in relation to N O is that he is a biological child of the deceased. A certificate of birth, serial number [particulars withheld], dated 10th February 2006, was produced, which names the deceased as the father of the said child. No evidence was adduced by the petitioners intended to challenge the authenticity of the said birth certificate, either to demonstrate that it did not emanate from the relevant government office or that it was procured by reliance on false information. I shall conclude that N O is a biological child of the deceased, and therefore a survivor of the deceased, entitled to a share in his estate.

22. The objectors have submitted that the objectors were dependants of the deceased, inviting me to make a finding in that behalf. The proceedings that I conducted culminating in this judgment are in the form of objections founded on sections 68 and 69 of the Law of Succession Act. Dependency is provided for in Part III of the Law of Succession Act. A person seeking provision moves under section 26 of the Act. The proceedings that I was called upon to conduct were not founded on section 26, and therefore issues relating to dependency are beyond the scope of the trial. In any event, the evidence adduced was not geared at establishing the matters envisaged in section 28 of the Act. It would, in the circumstances, do injustice to the matter if I were to venture to make a determination on dependency.

23. As a matter of principle, for it is not in statute, where the deceased died a polygamist, or had more than one wife, regardless of the system of marriage under which the wives were married, it would be just to have all the houses represented in the administration. I note that the petition for representation was by E M O and J G, while the cross-petition is by N K O, N O N and L B O. On 23rd September 2013, the parties recorded a consent for appointment of J K N and N O N as administrators. The appointment was without prejudice to the outcome of these proceedings. A grant of letters of administration intestate on those terms was duly issued to them, dated 23rd September 2013.

24. I am moved in the circumstances to resolve the objection proceedings in the following terms –

- a. That I hereby declare that N K O, N O N and L B O are survivors of the deceased in their capacities as widow and children thereof;
- b. That N K O, N O N and L B O shall be entered into the schedule of the survivors of the deceased, and shall be provided for out of the estate of the deceased at confirmation;
- c. That I hereby confirm the appointment of J K N and N O N of 23rd September 2013 as administrators;
- d. That I direct that the two administrators, or either of them, to file for confirmation of their grant within thirty (30) days of date hereof;
- e. That should any one of the administrators disagree with the proposals in the application to be filed under (d) above, he shall be at liberty to file an affidavit or affidavits in protest;
- f. That any other survivor of the deceased who shall disagree with the distribution to be proposed in (d) above shall equally have liberty to file affidavit or affidavits in protest;
- g. That the matter shall be mentioned on a date to be given at the delivery of this judgment to confirm filing of the confirmation application; and
- h. That costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE