



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO.2676 OF 2013

IN THE MATTER OF THE ESTATE OF MICHAEL GICHUKI KIOI (DECEASED)

LUCY WANJIKU.....APPLICANT

VERSUS

GLADYS WAKANYIKIOI.....1ST PETITIONER/RESPONDENT

LEONARD MWANGI KIOI.....2ND PETITIONER/RESPONDENT

RULING

1. Michael Gichuki Kioi died intestate on 2nd April 2013 in Kasarani. On 15/10/2013 his widow Gladys Wakanyi Kioi(1st petitioner/respondent) and son Leonard Mwangi Kioi(2nd petitioner/respondent) petitioned this court for grant of letters of administration intestate. It was stated that the deceased was survived by the 1st respondent and three adult children. The said grant was issued to them on 13th January 2014 and is yet to be confirmed.
2. The applicant Lucy Wanjiku filed summons dated 28th May 2014 seeking reasonable provision from the estate of the deceased. In the affidavit she swore in support of the summons, she stated that she was a dependant of the deceased having cohabited with him as husband and wife for 5 years since January 2009. She stated that their union was blessed with one issue, M.N, aged 1 year 5 months. She averred that she and the child were entitled to reasonable provision out of the estate of the deceased having been dependent on him as his wife and as both were being maintained by the deceased prior to his demise. She told the court that she was not in any permanent form of employment and was solely relying on the deceased for upkeep. She listed her present and future needs which included food, shelter, clothing, medication and education for the child.
3. The application was disposed off by way of written submissions. It was submitted for the applicant that the issues for determination were whether the applicant was a widow of the deceased and whether her child was the child of the deceased, or child that the deceased had taken into his family and treated as his own. It was submitted that there was sufficient evidence to demonstrate that the applicant was a widow for purposes of succession, and that her child was the child of the deceased as demonstrated by the child's birth certificate, and thus both of them were entitled to benefit from the estate of the deceased.
4. The 1st respondent in her submissions challenged the child's paternity and put the applicant to strict proof in light of two birth certificates which had been issued in respect of the said child. She stated that the deceased did not have any child out of wedlock and, unless the applicant proved the

child's paternity, it would be premature to grant her application as prayed. The respondent further denied that the applicant was a widow of the deceased stating that she was married to the deceased under the Marriage Act which provided for monogamous unions. Further, that the applicant never attended the deceased's burial ceremonies and that her alleged cohabitation with the deceased for 5 years was disputed and subject to strict proof. Lastly that the applicant and her child could not be sustained under the provisions of **section 26** of the **Law of Succession Act (Cap 160)** as they did not fall within the cluster envisaged by **section 29** of the said Act.

5. **Section 26** of the **Law of Succession Act** provides for provision for dependants not adequately provided for by will or in intestacy. It states that:

" Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

6. **Section 29** further outlines the categories of dependants who can benefit from reasonable provision under **section 26**. The first category includes the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death. It is under this category that the applicant and her child sought reasonable provision from the estate of the deceased. It was therefore imperative that the applicant proves that she was indeed the wife of the deceased and that the child was a child of the deceased.
7. The applicant contended that she cohabited with the deceased as husband and wife for a period of five years as from the year 2009. Our courts have held that the principle of presumption of marriage after a long cohabitation between a man and a woman was applicable in Kenya (**Hotensia Wanjiku Yaweh –Vs- public Trustees C.A. No. 13 OF 1976**). 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 that it was safe to presume the existence of a marriage. It has been stated that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed (**Gachege v. Wanjugu [1991] KLR 147.**)
8. Other than mere assertion, no evidence was led to support the applicant's claim of cohabitation with the deceased. No effort was made to get any third party to swear an affidavit to say he/she witnessed any long stay, or at all, between the applicant and the deceased. It was not indicated where they cohabited. No document was annexed from which an inference could be drawn that the two lived together. Lastly, the applicant did not attend the deceased's burial. She stated that she did not attend because the burial was a secret. If she was staying with the deceased when he died, how could she not know about the funeral arrangements? She did not know where the body was kept before burial? She did not know to which church, for instance, he belonged? If she knew he was married to the respondent, she did not go to ask? Can a burial of a family person be secret? I find that the applicant did not satisfy the court that she was married to the deceased under any system of law, and neither could a marriage be presumed in her favour so as to entitle her to reasonable provision from his estate.
9. Regarding the child M.N, the applicant produced a birth certificate ("LW3") to show that the child was born on 10/10/12 and that the father was the deceased. This was challenged by the 1st respondent. I note that the deceased died on 2/4/13. This birth certificate is dated 28/5/14, and the birth was registered on 31/5/13. Both these were after the deceased had died. There was no explanation for this. When the 1st respondent pointed out that she had two birth certificates for the child, one for 5/6/13 and the other for 25/5/14, she stated that she misplaced the earlier one and that is when she went for the later one. She went on to say the later one contained "proper amendments". Which were these amendments? Did they include the name of the father? On balance, I find that it not proved that the child's paternal parent was the deceased. That being the

case, I dismiss with costs the applicant's application dated 28/5/14.

DATED and DELIVERED at NAIROBI this 18TH JANUARY 2016

A.O. MUCHELULE

JUDGE