



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 78 OF 2010

IN THE MATTER OF ESTATE OF GIOVANNI GREMMO (DECEASED)

MILENA BORA.....APPLICANT/OBJECTOR

VERSUS

LIANA TAMBURELLI.....RESPONDENT/PETITIONER

R U L I N G

The notice of motion dated 10th February 2015 seeks to have the objection proceedings herein be struck out or in the alternative the objection proceedings dismissed for want of prosecution. The application is supported by the petitioner's affidavit sworn on 10th February 2015. The objector filed a replying affidavit sworn on 29th July 2015.

Mr. Ole Kina, counsel for the Petitioner raised two issues namely that the objector has taken too long to prosecute the objection proceedings and secondly, that the objection is an abuse of the court process. The first issue is based on the ground that the objection proceedings were filed on 12th April 2012 and since then no action has been taken. The objection has made two other matters pending on other courts not to proceed.

On the issue of the objection being an abuse of the court process, counsel maintains that the objection is grounded on the allegation that the objector was the deceased's second wife and that when the petitioner filed this cause, she did not include the objector as the second wife. Mr. Ole Kina contends that both the deceased and the objector were lawfully married to their respective spouses. The objector was granted an order of separation from her husband by the court on 5th May 2010. The deceased herein died on 18th December 2009. The allegation that the objector lived with the deceased for a period of 16 years as husband and wife cannot be sustained as they were both legally married to other people. Counsel submitted that section 37 of the Matrimonial Causes Act outlaws a married person from entering into a second marriage. Counsel relied on the case of ESTHER NJERI GICHURU VS SAMUEL KIMUCHU GICHURU; Nairobi HCC No. 2 of 2007 and that of MACHANI V VERNOR, Civil Appeal No. 61 of 1984.

It is the Petitioner's submissions that the deceased lacked capacity to marry a second wife. Since the objection is based on the allegation that the objector is a second wife, it ought to be struck out as the objector cannot be one of the deceased's beneficiary due to lack of capacity to marry another wife.

Mr. Matheka, counsel for the objector contends that the objector is the deceased's beneficiary by

virtue of having lived together for sixteen (16) years. She can be recognised as the next of kin. She is the one who took the deceased to hospital before he died. There are some properties that were jointly purchased in the name of the deceased and the objector. There were allegations that the objector fraudulently had her name included in the title deed but she was acquitted by the court: On the issue of delay, counsel maintains that the matter could not have proceeded as there was a ruling on representation before Justice Meoli and it took some time for the ruling to be delivered.

The main issue for determination is whether the objection proceedings should be struck out. The objector maintains that she is one of the beneficiaries to the deceased's estate. She also contends that some of the properties included in the succession cause had been transferred to her by the deceased as a gift during his lifetime: The objector further submit that by virtue of long period of cohabitation, she became a common law wife for purposes of inheritance and therefore qualifies to be a Dependant.

Section 29 of the law of Succession Act states as follows:

A “Dependant” means

(a) 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;

(b) such of the deceased's parents, step parents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death, and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

It is clear to me that due to her alleged long period of cohabitation with the deceased, the objector would like to be presumed to be the deceased's second wife. In the case of HARTENSIAH WANJIKU YAWE VS PUBLIC TRUSTEE, CA, Civil Appeal No. 13 of 1976, the court stated as follows on the issue of presumption of marriage:

“Long cohabitation as man and wife gives rise to a presumption of marriage and that only cogent evidence to the contrary can rebut such presumption”.

Similarly, in the case of MARY WANJIRU GITHATU V ESTHER WANJIRU KIARIE CA Civil Case No. 20 of 2009 (Eldoret), Justice Bosire J.A stated as follows:

“In the circumstances where parties do not lack capacity to marry, a marriage may be presumed if the fact and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

The court also stated the following.

“It (presumption of marriage) 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 recognised form of marriage, then a presumption of marriage arises. If the woman is left stranded either 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”

The record herein clearly shows that the objector was lawfully married to another man. Although there was a pending divorce case, she was still lawfully married. The order of separation issued on 5th May 2010 did not make the sixteen year of cohabitation to amount to a valid marriage. Both parties

lacked capacity to enter into other marriages. Section 171 of the Penal Code creates the offence of bigamy: it states as follows:-

Any person who, having a husband or a wife living, goes through a ceremony of marriage which is void by reasons of it taking place during the life of the husband or wife, is guilty of a felony and is liable to imprisonment for five years; Provided that this section shall not extend to any person whose marriage with the husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if the husband or wife, at the time of the subsequent marriage, has been continually absent from such person for the space of seven years, and had not been heard of by such person as being alive within that time.

The dispute herein revolves around the issue as to whether the objector can qualify to be the deceased's beneficiary. Blacks Law Dictionary defines a *beneficiary as a person for whose benefit a property is held in trust, especially, one designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy etc), or assignment.....or to receive something as a result of a legal arrangement or instrument.*

- A person whom another is in a fiduciary relation, whether that relation is one of agency, guardianship or trust.

From the record, it is evident that the deceased and the objector lived together as friends and were viewed as husband and wife. There is the affidavit of A.T who alleged to have had an extra marital affair with the deceased too. Under section 29 of the Succession Act, a Dependant or a beneficiary need not be a close family member. Any person who the deceased took care of during his lifetime can qualify to be a Dependant. In the case of EVES V EVES [1975] WLR 1338, [1975] 3 ALL E.R 768, a couple cohabited whilst married to other persons and they sired children before their respective divorces were finalised. Subsequently, their relationship broke down and the "wife" was kicked out together with her children. The woman had greatly contributed to the improvement of their home though not financially. The court held that a constructive trust had arisen. Mr Eves was declared to hold the legal estate on trust for the benefit of the parties.

In the case of COOKE V HEAD [1977] 1 WLR 518, the court stated the following:

"whenever two parties by their joint effort acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner is bound to hold the property on trust for them both. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. It applies to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too."

The objector herein was lawfully married to her husband. She cohabited with the deceased until his death. The two acquired some properties together as alleged by the objector. Polyandry, the status of having more than one husband at the same time, is not recognised in Kenya. Similarly, under Kenyan law, where a man is lawfully married under certain status, he would lack capacity to enter into a second marriage.

The objector may qualify to be the deceased's Dependant if she can be given an opportunity to explain her position before the court. It would not be prudent to strike out her objection at this stage. The delay in prosecuting her objection is understandable. Her previous advocate applied to withdraw from acting for her. That issue remained unresolved for quite sometime. That's why the matter could not proceed. Upon hearing the objector's evidence, the court will decide as to whether there is a constructive trust as this line of claim can be implied from the objection, as well as whether the objector was the deceased's dependent even if she was not the deceased's wife. Dismissing the objection at this stage of the proceedings is not the best way forward.

In the end, the application dated 10th February 2015 seeking to strike out the objection proceedings is hereby dismissed. Costs shall follow the outcome of the objection proceedings. Parties to list the matter for directions on how the objection proceedings shall be determined.

Dated and delivered in Malindi this **15th** day of **February** 2016

S.CHITEMBWE

JUDGE