



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION CAUSE NO. 610 OF 2014
IN THE MATTER OF THE ESTATE OF
FREDRICK LARRY ONDOO OLENDU (DECEASED)

BETWEEN

ROSE AGOLA ONDOO APPLICANT

AND

MELENIA ACHOLA ONDOO PETITIONER/RESPONDENT

RULING

1. This case concerns the estate of **Fredrick Larry Ondoo Olendo** (“the deceased”) of Simur Sub-location, Siaya County who died on 30th September 2013. The petition for grant of letters of administration for his estate was taken out by his wife, **Melenia Achola Ondoo** (“Melenia”). She stated that the deceased was also survived by two daughters; **Caroline Achieng Ondoo** and **Lilian Akoth Ondoo**. His only assets listed were **Plot No. 736-266 at Kayole Nairobi** and **Plot No. 279-5-A at Umoja Estate Phase II, Nairobi**.
2. The grant of letters of administration intestate was issued to Melenia on 28th October 2014. By an application dated 10th December 2014, she moved the Court to confirm the grant before 6 months had expired. The grant was confirmed and the certificate of confirmation dated 10th December 2014 issued whereupon all the deceased’s properties devolved her absolutely.
3. What is now before the Court is a summons for revocation of grant dated 2nd July 2015 brought by Rose Agola Ondoo (“Rose”) who claimed that Melenia secured the grant of representation in her favour by failing to disclose that the deceased had another wife and children namely herself and seven children; Janet Asiala, Tairus Maranie Ondoo, Victor Oduor Ondoo, Ken Rawelo, Charles Otieno, Chris Malachi and Brenda Atieno.
4. The parties filed affidavits and exchanged witness statements. I directed that the matter be tried by *viva voce* evidence.
5. Rose (PW 1) testified that the deceased was working in Nairobi City Council when they met and married in 1987. She stated that he paid dowry to her parents in Bukhalarire in Busia County. Thereafter they started living together in Jericho, Nairobi. She testified that in fact, the deceased was already married to Melenia and had two children going to primary school. Rose told the court that they all cohabited in the same house at Jericho in Nairobi and while the deceased was alive, they all had a good

relationship. During the time of marriage, she gave birth to a total of 10 children.

6. Rose testified that Court that the deceased started ailing in 2013 when he was taken home whereupon he died. She accused Melenia of sidelining her by failing to involve her in the burial arrangements. She stated that when the deceased died at Simur, she requested for time to make financial arrangements from her employer but Melenia decided to bury the deceased before she could attend the funeral. Rose testified that she contributed to the purchase and development of the property at Kayole. Rose realized that Melenia had taken out letters of administration when her son, Chris Malaki (PW 3), who was residing at the Umoja house, evicted by persons who had purchased the property.

7. Josphat Ouda Onyango (“Josphat”) (PW 2), told the Court, he was the deceased’s step brother and that he knew that the deceased had two wives. He recalled that the deceased introduced him to Rose in 1988 as his second wife and that they lived in the deceased’s father’s house in Jericho. He testified that he went for the deceased’s funeral and noticed that Rose was absent. When he asked where she was, he was told that she would come after a week and that the funeral could not be postponed. He recalled that when Chris was arrested in Nairobi, he intervened and Chris was released from custody.

8. Chris Malaki Ondoo (“Chris”) (PW 3), the deceased first born son, testified that he knew that the deceased was his father and that when he was growing up, he was staying with the Melenia and her two daughters in their house at Jericho and that Melenia would take care of them while their mother went to work. He testified that before his father died, he was looking after the Kayole property. He told the Court that when his father died, he rushed home to try and get the Chief to stop the funeral so that their mother could travel back home but his requests were rebuffed and the funeral took place without their participation.

9. PW 3 told the court that his problems began when the deceased passed away. He found out that Melenia had taken over the Kayole plot and instructed the tenants to pay the rent to her account. Melenia lodged a complaint against him to the police for failing to pay rent causing him to be arrested. He was later released when the matter was deemed to be a family issue. Thereafter he received a call from Melenia to go upcountry. He proceeded there and visited his grandmother. As he was leaving, he was arrested on the allegation that he had stolen Kshs. 10,000/- from Melenia and charged with the offence of house breaking and stealing at ***Ukwala SRMCR. Case No. 67 of 2015.***

10. Melenia (DW 1) testified that she married the deceased in 1969 and that they had two daughters. After marriage, they resided at Mathare Estate, then moved to Umoja. Thereafter, she would normally stay in Simur but come to Nairobi from time to time. She categorically denied that Rose was the deceased's wife or that she had his children. She told the Court that before her husband died he told her to take care of his properties and that is why she took out letters of administration. Melenia testified that before the deceased died, she received a call from a neighbour that he was very sick. She went and picked him from his house in Kayole where he was living alone and took him to Simur where he died. She was involved in the funeral arrangements and denied that anyone intervened to stop the funeral. She denied that the deceased had a co-wife as he had never built a house for her.

11. Regarding the case against PW 3, Rose testified that some strangers came to attack her and broke her door and took money that belonged to her women’s group. She could identify the suspects, who were arrested and charged at Ukwala.

12. The issue in this case is whether the applicant is the wife of the deceased and therefore entitled not only to administer the estate but also benefit from it with her children. It is the duty of the applicants to prove this fact on the balance of probabilities.

13. It is well established that proof of customary law is a question of fact proved by evidence, including testimony of experts (see ***Gituanja v Gituanja [1983] KLR 575 and Eliud Maina Mwangi v Margaret Wanjiru Gachangi CA NRB Civil Appeal No. 281(A) of 2003 [2013]eKLR***). Rose did not lead any evidence regarding the nature and content of the customary law applicable to the marriage between her and the deceased. Her evidence was sketchy and did not convince me that they underwent a ceremony of

marriage under customary law to seal the relationship.

14. Even if a customary marriage is not established, the court may well find that the parties cohabited for a period of time and conducted themselves in such a manner that a marriage could be presumed. In ***Hortensiah Wanjiku Yawe v Public Trustee CA Civil Appeal No.13 of 1976 (UR)*** the then Court of Appeal of East Africa held that a long period of cohabitation as man and wife may give rise to a presumption of marriage in favour of the party asserting it. Mustafa JA., held as follows:

I find nothing in the Restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising out of long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case, should not apply just because she was married according to Kikuyu customary law. It is a concept that is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages, however celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage ...

15. In ***Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR***, Bosire JA., stated as summarized the position thus:

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

16. I hold that there is ample evidence to support a presumption of marriage. Rose and the deceased cohabited from 1987 at the deceased's father's house in Jericho. During that time they lived together they had a total of 7 children together between 1988 and 2007. Apart from the fact that Rose took the deceased name, she also produced birth certificates and immunization cards that showed that the deceased was the father to her children and they also took his name. I cannot say this relationship was a one-off affair but a relationship that had acquired such depth and breadth as to be labelled a marriage.

17. I found both Rose and Chris honest and sincere in their testimony and it appeared to me that there may have been a problem between Melenia and Rose. Melenia denied that she knew Rose or her children but this denial rang hollow. Melenia admitted in cross-examination that the young man who assaulted her in Nairobi and whom she reported at Buruburu Police Station, is also the one who assaulted her in Simur. She even denied knowing his name yet she was the complainant against two people who bore her husband's name. It cannot be by sheer luck or happenstance that Chris crossed her path in Nairobi and Simur without reason. It is also not by coincidence that Chris was living in Umoja, a house Melenia said had been her matrimonial home. Her denial and evidence corroborates the testimony of Chris and confirms that she knew him as her husband's son.

18. I find and hold that Rose was the wife of the deceased. Melenia acknowledged as much in the proceedings before the Ukwala Court where she testified on oath that, "*Accused's mother is my co-wife. Accused assaulted me at Umoja Estate in Nairobi*" Why would she acknowledge Rose and her son when this was clearly not in her interest? Either Melenia was lying in these proceedings or before the Court in Ukwala. I found Melenia dishonest and frankly her testimony was evasive and she did not impress me at all as a witness.

19. The fact that Rose did not attend the deceased burial does not undermine her case. The totality of the evidence is that there was a concerted effort by Melenia to exclude Rose and her family from any possibility of recognition by the deceased's family. I would even venture to say that the criminal

proceedings are an attempt to shut the prison door on the children of Rose and the deceased. Melenia did not call any other witnesses to support her case and as such I find that she failed to rebut the presumption of marriage between Rose and the deceased.

20. I find and hold that Melenia intended to take out the grant and apply for confirmation before 6 months had elapsed to steal a match on Rose and her children and ensure that they did not benefit from the deceased's estate. She failed to disclose that the deceased had another wife and children hence the court would be entitled to revoke the grant issued to her under **section 76** of the ***Law of Succession Act***.

21. Regrettably, Melenia sold the deceased's properties after the grant was confirmed. The law protects bona fide purchasers under **section 93** of the ***Law of Succession Act***. Their titles are indefeasible and cannot be set aside even if the grant is revoked.

22. The findings I have made do not leave the applicant without a remedy. **Section 94** of the ***Law of Succession Act*** imposes on a personal representative the duty to account in the event of loss or damage to the estate. It states;

94. When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies such an asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

23. I direct the **MELENIA ACHOLA ONDOO** to account for the proceeds of sale of **Plot No. 736-266 at Kayole Nairobi** and **Plot No. 279-5-A at Umoja Estate Phase II, Nairobi** within **thirty (30) days** from the date hereof.

24. The issue of costs is reserved pending further proceedings.

DATED and DELIVERED at KISUMU this 21st day of November 2016

D. S. MAJANJA

JUDGE

Mr Munuango, instructed by M. M. Omondi and Company Advocates for the applicant.

Mr Jaleny instructed by Jaleny and Company Advocates for the respondent.