



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.1667 OF 2007

IN THE MATTER OF THE ESTATE OF ENOS MASINDE OOKO (DECEASED)

MARYANNE W. OOKO.....
.....PETITIONER

VERSUS

EMILY RACHEL AKINYI
OOKO.....OBJECTOR

JUDGMENT

Enos Masinde Ooko, the deceased to whose estate these proceedings relate died on 23rd November 2006. The Petitioner herein petitioned the court on 23rd June 2007 and sought to be issued with the grant of letters of administration intestate in respect of the estate of the deceased. In the petition, the Petitioner claimed that she was the widow of the deceased. She listed one other dependant of the deceased, namely RJO, then aged 12 years. Upon gazettment of the Petition, the Objector filed objection to the said grant being issued to the Petitioner. The Objector claimed that she was the first wife of the deceased. Her consent had not been obtained before the Petitioner applied to the court for the said grants of letters of administration intestate. Parties filed pleadings and documentary evidence in support of their respective cases.

Directions were taken before this court for the sole issue in dispute to be determined by the parties adducing *viva voce* evidence. The sole issue for determination was whether the Objector was indeed a wife of the deceased. The Objector acknowledged that the Petitioner and her son were indeed dependants of the deceased. On her part, it was the Petitioner's case that the Objector was not a wife of the deceased. In support of her case, the Objector testified that she met the deceased in Mombasa in 1976. She got married to the deceased in 1979. The marriage was customary. An affidavit was sworn on 10th June 1979 to signify the celebration of the said marriage. The Objector testified that soon after the celebration of the said marriage, she moved into the married quarters at Kenya Navy Barracks in Mombasa. She lived as husband and wife with the deceased until 1989 when the deceased was transferred to Nairobi. During their cohabitation, the Objector stated that she was not blessed with any child. The Objector testified that she was left in Mombasa by the deceased. She later learnt that the deceased had started another relationship with a woman whom she later identified as the Petitioner. She came to Nairobi and confronted the deceased. They temporarily separated. They later reconciled when the Objector accepted the fact that the deceased had married the Petitioner as a second wife.

From her testimony, it was evident that the Objector had an on-off relationship with the deceased after he married the Petitioner. The Objector produced the record of service kept by the Military *marked ERAO-1* which was annexed to the affidavit sworn by the Objector on 15th July 2008. There were two records of service forms which were filled. The first one indicated that the deceased was married to the Objector on

10th June 1979 in Mombasa. The second indicated that he was married to two wives, namely the Objector and the Petitioner. In the record, the Petitioner is said to have been married by the deceased on 19th August 1988. The Petitioner did not dispute the existence of this record. Indeed the Objector called Major Alexander Muoki Nyumu (Retired) who confirmed the celebration of the marriage between the deceased and the Objector. He also testified that the record of service kept by the Military reflected information given to the officers who kept the records by the particular officer.

The Petitioner countered this evidence offered by the Objector by stating that the deceased had divorced the Objector at the time of his death. She produced an affidavit which was sworn by the deceased on 17th July 1994. In the affidavit, the deceased indicated that he was married to the Objector but had divorced the Objector by customary law. In paragraph 10 of the said affidavit, the deceased stated as follows:

“That before my marriage aforesaid, I had got married to my previous wife, EMILY RACHEL AKINYI under Luo Customary Law and traditions aforesaid but due to several matrimonial problems and incompatibility of our respective characters, our relations in the said marriage deteriorated to the extent of irreconcilability and meaninglessness, resulting in a customary law divorce between us sometime in September 1987.”

The Objector produced another affidavit sworn by the deceased dated 1st April 1994 in which he confirmed that the Objector was his wife. In the affidavit, he made a request to the immigration authorities to allow the Objector to be issued with a passport in her marital name. The passport was duly issued to the Objector under the name Emily Rachel Akinyi Ooko. The Objector further testified that her employer allowed her spouse to benefit from the medical cover accruing to her by virtue of her employment. She produced a medical card which was issued to the deceased by virtue of the deceased being the Objector’s husband. She also produced an identification tag which was issued to the deceased by virtue of being her husband. This tag allowed the deceased to gain access to the United Nations compound at Gigiri. The Objector worked at the time for the United Nations Development Programme. She also produced a letter written by the Ministry of Defence dated 29th August 2007 addressed to the Director of Pensions, Military Pensions Liaison Office at the Treasury. In the letter, the dependants of the deceased are identified as the Objector, the Petitioner and the son of the Petitioner. It was the Objector’s case therefore that she was the first wife of the deceased as shown by the various documentary evidence that she had produced. She reiterated that she had no problem with the Petitioner and her son being considered as dependants of the deceased. She urged the court to make a finding that she was also a dependant of the deceased.

On her part, it was the Petitioner’s case that the Objector was not a wife to the deceased. The Petitioner conceded that the deceased had indeed previously married the Objector. However, by the time he got married to the Petitioner, the deceased had divorced the Objector. In support of her case, the Petitioner relied on the affidavit dated 17th July 1994 in which the deceased swore that he had divorced the Objector. She reiterated that since getting married to the deceased in 1988, she was certain that the deceased had not had any relationship with the Objector. She testified that by virtue of being the wife of the deceased, she lived in the married quarters at Defence Headquarters until after the death of the deceased.

In support of her case, she called four witnesses, namely POO, a brother of the deceased, KO, a nephew of the deceased, POA, an uncle of the deceased and RAO, a sister of the deceased. All these witnesses testified that the deceased was married, under Luo Customary Law to the Petitioner. They were not aware if any customary marriage rites were performed as alleged by the Objector. They denied that any customary marriage rites were performed when the Objector was allegedly married by the deceased. RAO however testified that while studying in Mombasa, she lived with the Objector and the deceased. She conceded that at the time the deceased lived with the Objector. She was however of the view that the deceased lived with the Objector as his girlfriend and not as a wife. The four witnesses’ testimony dwelt to a large extent on establishing the fact that the deceased had married the Petitioner in accordance with Luo Customary Law. The deceased had also ensured that the home of the Petitioner was established at their rural home in accordance with Luo Customary Law. They reiterated that no such customary rites

were performed to establish a home for the Objector. Their evidence also narrated the circumstances under which the deceased was buried. It was apparent from their evidence that the family of the deceased did not desire that the Objector participates in the funeral programme even though she was present when the deceased was buried. The evidence showed that the Objector was hustled from the burial by the relatives of the deceased. It was the Petitioner's case that the deceased, at the time of his death, was not married to the Objector. The deceased had divorced the Objector some time prior to his death. In the premises therefore, it was the Petitioner's case that the Objector was not a dependant of the deceased.

After the close of the respective cases of the Petitioner and the Respondent, learned counsel filed written closing submission. They said submission was highlighted before the court. As stated earlier in this Judgment, the issue for determination by this court is whether the Objector was married to the deceased at the time of his death and whether the Objector is a dependant of the deceased in accordance with **Section 29(a)** of the **Law of Succession Act**. As regard the first issue, having evaluated the evidence adduced by the parties in this case, it was clear to this court that indeed the Objector was married to the deceased at the time of his death. The Objector testified that she was married to the deceased in 1979. Although it was indicated that the deceased married the Objector under Luo Customary Law, what emerges from the evidence is that the deceased and the Objector cohabited together as husband and wife. The cohabitation started while the deceased was working in Mombasa. The deceased swore an affidavit acknowledging the Objector as his wife. He gave information to his employers, the Kenya Military, that he was married to the Objector. Because of this information, the deceased was allocated married quarters at the Kenya Navy Barracks in Mombasa.

The sister of the deceased, RAO confirmed in her testimony that she lived with the deceased and the Objector while she was a student in Mombasa. Although she tried to explain the Objector's presence in the house as in the capacity of a girlfriend, the court is persuaded that the Kenya Navy would not have allocated the deceased married quarters if indeed he was not married to the Objector.

It was apparent from the thrust of the Petitioner's case that she was of the view that the Objector ought or should have established her marriage to the deceased under Luo Customary Law. In the considered view of this court, and with respect to the Petitioner, the fact that the Objector claimed that she was married to the deceased under Luo Customary Law, does not require that this court investigates whether or not the deceased was married to the Objector under the said customary law. What this court is required to establish is whether, indeed, by their conduct, the deceased and the Objector considered themselves to be husband and wife.

In the circumstance of this case, there was evidence which established the fact that the deceased and the Objector lived together as husband and wife in the married quarters at Kenya Navy Barracks from 1979 to 1989 when the deceased was transferred to Nairobi. Upon his transfer, the deceased left the Objector in Mombasa in the same married quarters. When the deceased came to Nairobi, he met and married the Petitioner. On her relocation to Nairobi, the Objector discovered that the deceased had married the Petitioner. She was not happy. She was temporarily separated from the deceased. They however made up when the Objector accepted the Petitioner as a second wife to the deceased. From the evidence adduced, it was clear that the deceased and the Objector did not relate well. They had an on-off relationship. However, during this entire period, the deceased did not make any effort to formally divorce the Objector. This court agrees with the decision of Anyara Emukule J **In The Matter of the Estate of Njuguna Ngengi (Deceased) [2011] eKLR** where he held thus:

“In absence of either a statutory divorce (through the courts) or customary divorce through clan elders and return of dowry, the petitioners, notwithstanding their wanderings and cohabitation elsewhere, are lawful wives of the deceased and have under Section 66 of the Law of Succession Act (Cap 160 Laws of Kenya) preference the administration of his estate.”

In the present case, although the deceased swore an affidavit at one time that he had been customarily divorced from the Objector, there was no evidence which was adduced to support the claim that indeed such divorce took place. To the contrary, the deceased appears to have related with the Objector in the same capacity as husband and wife even after swearing the said affidavit.

The deceased did not change the particulars of his marital status in the record of service kept by his employer. He allowed the Objector to get him a medical cover from her employer. He even allowed the Objector to use his name when she applied to the Immigration Department to be issued with a passport. Although evidence was adduced to the fact that at various times during their long cohabitation the deceased had disagreements with the Objector, which resulted in separations at various times, this court is not prepared to find that there did not exist a marriage between the Objector and the deceased at the time of his death. This court holds that their marriage was by virtue of their long cohabitation. There is presumption of the existence of marriage as a result of the long period in which the Objector and the deceased lived together.

From the evidence adduced by the Petitioner, it was apparent that the thrust of her case was that no Luo customary marital rites were celebrated between the deceased and the Objector. According to the Petitioner, the failure by the Objector to establish the celebration of such customary marriage is proof that there existed no marriage between the deceased and the Objector. The Objector was not able to prove that indeed Luo customary marriage rites were performed when she got married to the deceased. This court however holds that the failure by the Objector to establish that a Luo customary marriage took place does not preclude this court from making a finding that the deceased was married to the Objector. In **Hotensiah Wanjiku Yawe –vs- Public Trustee CA Civil Appeal No.13 of 1976**, the Court of Appeal grappled with a situation similar to the present one where it was alleged that the Applicant in the case was not married to the deceased by virtue of the fact that all ceremonies to validate a marriage under Kikuyu Customary Law had not been performed. Mustafa JA held thus at page 5 of the Judgment:

“But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as a 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, see re: Taplin – Watson v Tate (1937) 3 ALLER 105. The trial judge did not consider the factor. The trial judge was not satisfied that the appellant had established, on a balance of probabilities, that the Kikuyu customary marriage was performed in accordance with all the necessary ceremonial rituals. It is not clear whether he found that the marriage was not valid because all the rituals were not performed, or that no marriage of any kind had taken place at all. However in considering whether there was a marriage the trial judge ought to have taken account of the presumption of marriage in the appellant’s favour. Such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance in the appellant’s favour, the scale must tilt in her direction.”

The above case was cited by the Court of Appeal with approval in the case of **Mary Wanjiru Githatu – vs- Esther Wanjiru Kiarie CA Civil Appeal No.20 of 2009**. Bosire JA held thus at page 5 of the Judgment:

“There is a line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the Evidence Act, Cap 80 Laws of Kenya, which provides as follows:

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.”

The existence or otherwise of a marriage is a question of fact. Likewise, whether the 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 on intention of living together as husband and wife.”

In the present appeal, the Objector adduced evidence which established to the required standard of proof on a balance of probabilities that she cohabited with the deceased since 1979 to the time of his death. Although there were periods when the Objector and the deceased had disagreements, no evidence was placed before the court to support the assertion by the Petitioner that the deceased had divorced the Objector. Furthermore, the documentary evidence produced by the Objector established the fact that the deceased acknowledged the Objector as his wife. There was nothing that would have prevented the deceased from deleting the name of the Objector from his record of service kept by his employer. The affidavits sworn by the deceased acknowledging the fact that the Objector was his wife cannot be wished away by oral evidence adduced by the Petitioner and her witnesses.

The upshot of the above reasons is that in answer to the issue for determination on whether the Objector was a wife of the deceased, this court holds that the Objector was a wife of the deceased by virtue of long cohabitation. This court presumes the existence of marriage between the deceased and the Objector. The Objector is therefore a dependant of the deceased by virtue of **Section 29(a)** of the **Law of Succession Act**. She is entitled to benefit from his estate. Prior to the dispute arising as to the question whether the Objector was a widow of the deceased, and therefore his dependant, counsel for the parties had, in a consent dated **19th November 2013**, agreed on the mode of distribution of the estate of the deceased. To obviate further proceedings in this matter, and to bring an end to litigation in this matter, this court adopts the said consent as the order of the court. The estate of the deceased shall be distributed in accordance with the said consent. The Petitioner and the Objector shall be at liberty to apply for the grant issued to them to be confirmed in terms of the said consent. Since this case involved family members, there shall be no orders as to cost *i.e.* each party shall bear their own cost. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF JULY 2015

L. KIMARU

JUDGE