



REPUBLIC OF KENYA

High Court at Nakuru

Succession Cause 35 of 2004

IN THE MATTER OF THE ESTATE OF DAVID KANGURU KABIRA (DECEASED)

AND

IN THE MATTER OF GRACE WANJIRA KAMAKIAOBJECTOR

VERSUS

PUBLIC TRUSTEE.....RESPONDENT

JUDGMENT

David Kangura Kabira (the deceased) a resident of Kajiado died intestate on 23rd October 2002. The deceased's brothers gave consent to the Public Trustee to administer the deceased's property and on 23rd February 2004, this court issued the Grant of Letters of Administration Intestate of the Estate of the deceased to the Public Trustee. Pursuant to the provisions of Section 76 of the Law of Succession Act Cap 160 and Rule 44 of the Probate and Administration Rules, Grace Wanjira Kamakia (hereinafter referred to as the Objector) filed a summons dated 14th October 2010 seeking inter alia-

(1)That this Honourable court be pleased to set aside review and/ or vary its orders issued suo moto on 23rd February 2004 granting the Letters of Administration Intestate of all the estate of the deceased to the Public Trustee and the grant issued be revoked or annulled.

(2)That upon grant of prayer 3 herein above, the applicant's interest as per the objection be confirmed.

(3)That in the alternative, all the money released to Mr. Joseph Macharia Kibira as a next of Kin be deposited in court and accounted for.

(4)That the costs be paid.

The application is supported by an affidavit sworn by the objector, Grace Wanjira Kamakia, on 14th October 2010. It is opposed by the affidavit of Joseph Macharia Kibira, brother of the deceased, sworn on 2nd November 2010 and filed on 3rd November 2010 and the affidavit sworn by J.A Nyangol, Counsel for the Public Trustee on 3rd November 2010 and filed on the same day.

The Objector's contention is that the Public Trustee fraudulently concealed from the court information that the deceased had a wife and a child and thereafter excluded the Objector and her child from the Petition for Letters of Administration and produced a letter dated 29th April 2010 (exhibit 1) from the Acting Chief Ngong Sub Location recognizing her and her daughter as wife and child of the deceased respectively. The Objector testified that she and the deceased cohabited as man and wife in Ngong from 1990 to 2002 when the deceased passed on. That on 14th October 1994, their union was blessed with one

issue namely Ruth Wambui Wanjira and a copy of a notification of birth registration from Avenue Hospital was annexed to the supporting affidavit. The Applicant acknowledged that the deceased had not paid for her dowry but had however introduced her to his brother (PW1) and his wife (PW3) who were hostile to her. They also refused to accept or acknowledge her daughter. The Objector added that at the time of the death of the deceased, she had traveled to her home in Kitale, and only learnt of his death from the newspaper. That she had last seen the deceased in July 2002, 3 months prior to his death, and did not know that the deceased had become sick. She also stated that she did not participate in the funeral arrangements although she attended the burial ceremony.

The objector also summoned the evidence of Danson Thanui Mwihiya, a resident of Juja who was an intimate friend and a former schoolmate of the deceased. He averred that the deceased introduced the Objector as his girlfriend and they later started living together. He testified that he had seen the deceased visiting the Objector severally in her house in Juja. He also stated that he knew PW1 and he was very close to the deceased, he was like a father to him.

The Objector claimed that her relationship with the deceased was well within the knowledge of the family. She therefore accused them of concealing the fact that she was the deceased's wife and of not including her or her child in the petition.

On his part, PW1 a brother of the deceased testified that the deceased was his younger brother and that after the death of their mother in 1952 he took in the deceased. At that time, the deceased was about 12 years old and was in class 3. PW1 testified that he brought him up as his own child and educated him from primary school through secondary school up to college level. PW1 further testified that the deceased never had any wife throughout his life and denied knowing the objector or her daughter. He added that if the deceased had a child, then she would have been named after their mother as per the Kikuyu customary law. During cross examination, he stated that if the child had been born out of wedlock, then she is named after her mother's mother. If the child's parents get married thereafter, and the child is introduced to the father's family under the customs, her name may be changed depending on the circumstances. He further stated that he had visited the deceased in his residence in Ngong and had never met the Objector and she was never introduced to her by the deceased. That she did not attend the deceased's funeral because if she had then she would have been photographed.

PW2, was also a brother of the deceased. He confirmed that PW1 and his wife PW3 took care of the deceased after the death of their parents. He testified that the deceased lived in Ngong and that after the deceased's death, he together with his brothers and some of the deceased's friends attended the funeral arrangement meetings. He denied ever having met the Objector and did not see her during the deceased's funeral. He further testified that he used to visit the deceased in his house in Ngong every 6 months or so and did not during any of his visits meet the Objector. He averred that the relationship between himself, PW1 and the deceased was very cordial.

PW3 was the wife of PW1. Her testimony was that she had never met the Objector and added that if the deceased had a wife, then he would have introduced her to them. She confirmed having asked the deceased severally if he had a wife and he would deny. She added that she did not find any woman in the deceased's house claiming to be his wife and no family ever went to their home claiming that their daughter had been married by the deceased. PW3 denied ever being cruel or having molested the deceased.

PW4 lived in Ngong and was a friend, colleague and neighbour of the deceased. He averred that he had known the deceased in 1983 when he was purchasing the parcel of land on which he had built his house. He said that the deceased had built some rental houses on his parcel of land. PW4 testified that on the day the deceased died, they had received a call from a lady, who was a tenant of the deceased, informing them that the deceased was unwell. They went to his house but upon reaching there, found that he had already passed on. It was his testimony that the deceased lived alone and averred that he was close to the deceased, that the deceased had told him about PW1 and how he had brought him up. He like all the other witnesses also denied having met the Objector and further stated that before the burial, questions were asked whether there was any claim against the deceased or any wife and none were raised.

The parties herein filed submissions in further support of their respective positions, the Objector's are dated 7th December 2012 and the Plaintiff's are dated 28th November 2012. The Public Trustee stated that at the time of filing the petition for letters of administration, it was not aware of the Objector's claim and would be very capable of administering the estate of the deceased to its rightful heirs.

The first issue for determination in this matter is whether the objector was a wife within the meaning of Section 3(5) of the Law of Succession Act, Cap 160 and therefore a dependant under Section 29 of the said Act. Section 29 of the Law of Successions Act defines a dependant to mean “*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.*”

Section 3 (5) thereof further provides-

(5) Notwithstanding the provisions of any other written law , woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

The Objector admitted that she and the deceased were not legally married. The courts have severally held that even in the absence of a formal marriage, it may be presumed between parties as a result of long cohabitation and general repute. In the case of **MWG VS. EWK** [2010]eKLR -

..... 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.

In **Phyllis Njoki Karanja & 2 Others V Rosemary Mueni Karanja & Another** [2009] eKLR

“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 it is safe to presume the existence of a marriage.”

Non-payment of dowry does not preclude the court from presuming marriage where the other essentials are satisfied. In the Phyllis case (*supra*) the court held that under Kikuyu Customary Law, although payment of dowry was not a vital requirement, the parties had to have cohabited together in order to be presumed as married. It stated-

Cohabitation is one of the essentials of a Kikuyu marriage. Likewise providing residence and maintenance for a wife are among the other essentials of a Kikuyu marriage. The main component lacking here is dowry. There is no fixed time for paying dowry. Cotran, in his works, The Restatement of African Law (Kenya) Vol. 1, (The Law of Marriage And Divorce) states that dowry may be paid by installments and may even be paid after cohabitation has taken place. It would appear that if other essentials are satisfied but dowry is not paid, it may be paid even after one of the parties to the relationship is dead. It is clear from Cotran’s works that elopement is a common feature among the Kikuyu, and such relationship in most cases matures into an acceptable Kikuyu marriage upon payment of dowry. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.”

In the present case, the Objector alleged to have cohabited with the deceased since the year 1990 and urged the court to find that on the basis of this long cohabitation, there existed a marriage. Cohabitation connotes living together as husband and wife and being perceived by the public as such. The Objector clearly testified that the two did not live together as the Objector resided and worked in Juja whereas the

deceased resided and worked in Ngong and they would only visit each other on weekends. The Objector testified that when the cohabitation started in the year 1990, the deceased lived in Ngong whereas she lived in Kiambu. At the time of the deceased's passing, she was living in Thika, Juja. There is no evidence that at any time during the alleged marriage, the two ever cohabited together. PW2 testified that he used to visit the deceased severally and stayed with him for a while and he did not during any such visit find the Objector in the deceased's house.

In addition, the deceased did not intend for the Objector to be perceived as his wife. I say this because he did not at anytime introduce her to his family. PW1 and PW2 were like parents to the deceased having taken care of and educated him since he was 12 years old. PW3 was a brother to the deceased and PW4 was a colleague, neighbour and close friend of the deceased. If indeed he was in a close relationship and living with the deceased as alleged, then he would have disclosed the same and introduced her to them. The Objector's testimony that the deceased had introduced her to PW1 who did not accept her saying that she was not legally married to her brother, or that the reason the deceased's family rejected her because he would stop taking care of them once he married her is simply not credible. During the alleged 12 years marriage, there is no evidence that the couple attended any family functions together or ever visited each other's rural homes or did activities together that as a husband and wife would.

As a result, the people in the deceased's life did not see her as his wife. **Firstly**, the tenant who realized that the deceased was ill, called PW4 and not the Objector. Secondly, although she alleges that at that time she was in Kitale and could not be reached, because communication was difficult, unlike now when there are mobile phones, there is nobody who made any effort to reach her and inform her of the death of he deceased. **Thirdly** even if the deceased's family knew of her and her child and opted not to include her because they disliked her as alleged, it is unlikely that all the deceased's friends and colleagues who participated in the arrangements would collude not to inform her. It is strange that none of them thought of getting in touch with the Objector to inform her of the death. It is therefore apparent that neither the deceased's family nor colleagues perceived her as his wife. In addition, It is PW1 who reported the death of the deceased to the Police, his place of work and thereafter took steps to have the estate of the deceased administered. There is no evidence tendered that the Objector was ever a part of the deceased's life. It is also noteworthy that the objection proceedings were filed 6 years after the Grant of Letters of Administration had been issued to the Public Trustee and the explanation by the Objector that she did not have sufficient funds to bring any action against the plaintiffs is not believable hence not sufficient to explain the inordinate delay. I therefore find that there was no marriage between the deceased and the Objector and therefore find that the Objector is not a dependant within the meaning of Section 29 of the Law of Succession Act.

Having found that the Objector was not a wife to the deceased, she is therefore required to prove that her child was indeed the deceased's child. **Firstly**, all the Respondent's witnesses deny ever having met Ruth Wambui Wanjira, the alleged child of the deceased. The Objector attached to the affidavit sworn in support of her Summons, a Notification of Birth Registration issued by Avenue Hospital although the original of the same was not tendered as evidence during the hearing. This document does not indicate the deceased was the father of the Objector's child. Instead, the name father has been cancelled and replaced with "next of kin" against which the name of George Kamakia Macharia appears.

Even if Ruth Wambui was not the deceased's child, then she could be deemed as a dependant where, as per Section 3(2) of the Law of Succession Act *the deceased had expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility*. In the present case, there is no evidence that the deceased acknowledged the child as his own or that he voluntarily assumed permanent responsibility over the child. The deceased did not introduce the child to his family or close friends and it was their testimony that they did not know of her existence. The Objector did not provide any documentary proof by way of photographs showing the deceased with the child or receipts to prove that the deceased maintained the child prior to his death.

For the above reasons, the Summons for Revocation or Annulment of Grant dated 14th October 2010 and filed on 15th October 2010 is dismissed in its entirety with costs to the Respondents.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of April, 2013

M. J. ANYARA EMUKULE
JUDGE