REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Succession Cause 158 of 2005

IN THE MATTER OF THE ESTATE OF DICKSON KIHIKA KIMANI

ALIAS KIHIKA KIMANI (DECEASED)

J U D G M E N T

DICKSON KIHIKA KINANI (the Deceased) died intestate on the 19th November, 2004 and on 3rd March 2005, Margaret Wambui Kihika, Alice Mukuhi Kihika Daniel Kungu Kihika and Winnie Wanjeri Kihika (the Petitioners) applied for a grant of letters of administration to his estate. Before their petition could be considered, on 10th June, 2005 GRACE WANJIRU KIHIKA (the Objector) filed an objection claiming that the Petitioners had, by misrepresentation of facts excluded her and her daughter, WINNE NYAMBURA, from the list of the heirs of the deceased. After the Petitioners had filed their responses to the objection, directions were taken and the matter was heard by viva voce evidence.

The Objector's case as can be gleaned from both her testimony and that of her father is that on a date she cannot remember in year 2000 she went to the deceased's home at Lanet to ask him to assist her get a job. The deceased loved on first sight and said he wanted to marry her. After introducing her to all his wives, she stayed with him in his house while his other wives stayed in their respective houses in the compound.

On another date she cannot remember in 2000, while accompanied by his other wives Charity Wangari, Lucy Nyambura, Winnie Wangari and Esther as well as his friends Ndegwa and Muchiri, the deceased went with her to her home. Because the deceased was an old man aged about 70 years, he did not go with elders as is customary and instead he spoke for himself and said he wanted to marry her and take care of her seven years old child Winnie. He then paid her father Kshs. 30,000/= as a sign of his seriousness. She said that the deceased and his entourage slept in her home on the first visit. She produced several photographs that she claimed were taken at her home on that occasion.

On another date in April 2001, the deceased returned to her home with his other wives and paid Kshs. 120,000/= as final dowry payment. On 30th October, 2000, during the preparations for his campaign, while accompanied by his other wives, the deceased went with her to Njoro where he introduced her to the public as one of his wives. She produced a Taifa Leo news paper cutting which stated that. Later the deceased gave her a 10 acre portion of his Muthengla farm along with her co-wives.

After living with the deceased for two and half years, the deceased's wives made false allegations against her as a result of which the deceased asked her to leave his home and she went to stay at Kenlands in Shabab. She said deceased wanted to have children with her later but that was not to be as he died before they decided to have children.

Although separated, when the deceased died she went back to his Lanet home and informed the funeral committee that she was one of his wives. They told her they would revert to her but they did not. She conceded that neither her name nor her daughter's featured in the death announcement in the news papers but she attended the burial.

The Objector's father, James Maina Kawanga, testified that on his first visit the deceased gave him Kshs. 15,000/= "for introducing himself as a prospective son-in-law and Kshs. 5,000/= for drinks. On 1st September, 2001, the deceased went back with about 50 people and paid him Kshs. 100,000/= and said he would go for Ngurario later but he did not as he soon thereafter fell sick. He said it is during the Ngurario Ceremony that there could have been a written document on the dowry payment and the marriage as a whole. He also said the deceased being an old man he did not want anyone younger than him to speak on his behalf. As he did not at any time tell him he had divorced his daughter or claim for the refund of the dowry, he regarded the deceased as his son-in-law until he died. He did not know why the Objector's name was not included in the eulogy or funeral announcement and yet the deceased had introduced her to the public as one of his wives.

In cross-examination, the Objector's father said the Kshs. 100,000/= was for all the Kikuyu marriage ceremonies of "Mwathi", "Arika" "Senge" etc. and that Ngurario which equivalent to 100 goats was to be paid later.

On their part, the Petitioners relied on the evidence of the deceased's second wife, Alice Mwuhaki Kihika. She testified that the deceased had seven other wives all of whom she named. She did not know the Objector. She saw her first when testifying in court in this case. During the six months hospitalization of the deceased before he died, she said she was with him in hospital. All his other 7 wives visited him but the Objector did not. She denied that the Objector was one of the deceased's wives and gave that as the reason why her name did not feature in the deceased's eulogy or in the funeral announcements. She denied that the Objector's father visited the deceased at all. She conceded that except for herself and the deceased's first wife Margaret, no Ngurario Ceremony was carried out in respect of the other wives.

Although this witness conceded that indeed the deceased and his other wives as well as the Objector and her father appear in the photo produced by the Objector, she said those were campaign photos. In cross-examination she denied the suggestion put to her that the reason why she does not know of the Objector is because she was not close to the deceased. She said she was the deceased's confidant and he did not even mention the Objector to her.

Basing themselves on this evidence, counsel for the Objector submitted that some of the wives of the deceased, as is clear from the photograph produced in court, accompanied him to the Objector's home during the dowry negotiations. The only complaint Alice Mukuhi Kihika, who testified on behalf of all the Petitioners, had was that, unlike the other wives of the deceased, she was not involved in the arrangements that gave rise to the union between the deceased and the Objector. As none of the other wives testified, the Objector's evidence and that of her father that the deceased went to her home and paid dowry should be accepted. And with that acceptance the court should hold that the deceased married the Objector under Kikuyu Customary Law notwithstanding that the *Ngurario* ceremony was not carried out as the Second Petitioner confirmed in her testimony that it was not carried out even in respect of the other wives. If overruled on that counsel for the Objector cited the cases of Hortensiah Wanjiru Yawe Vs Public Trustee, Civil Appeal No. 13 of 1976 and Mbogoh Vs Muthoni & Another, [2008] 1 KLR 357 and urged me to presume a marriage between the deceased and the Objector.

For the first Petitioner, Mr Waiganjo dismissed the Objector's case as totally unfounded. He said the marriage under Kikuyu Customary Law is not a one day affair as the Objector would like us to believe. It is a process that involves the whole family. He further submitted that besides the Objector's contradictory evidence, no one testified on the Rurario (dowry) negotiations or the amount agreed upon. He invited me to find that the Objector could not have lived and cohabited with the Deceased at Lanet as the latter did not have a home there and dismissed the theory presumption of marriage.

On behalf of the Second Petitioner, Mr. Mutonyi made long submissions and cited several authorities. To

him the Objector's case appears like a scene lifted from a script in Hollywood. He dismissed the Objectors claim and said that at most she may have been the deceased's concubine. Citing the decision of Madan J (as he then was) in Zipporah Wairimu Vs Paul Muchemi, HCCC No. 1280 of 1970 (unreported) he took me through the requisite ceremonies for a valid Kikuyu Customary Law marriage and asserted that without the Ngurario ceremony in which a goat is slaughtered and shared by the members of the two families or their representatives and/or Ruracio (dowry) paid, there can be no valid marriage under Kikuyu Customary Law. He said although various figures were thrown to the court, there is no evidence of any negotiations or dowry paid. As pictures are not among the essentials of a valid Kikuyu Customary Law marriage, he dismissed the photographs the Objector produced as of no consequence.

On the presumption of marriage, Mr. Mutonyi also cited the case of Hortensiah Wanjiru Yawe Vs Public Trustee, Civil Appeal No. 13 of 1976 and others and argued that the Objector's alleged cohabitation of only two and half years with no issue is too short to warrant the court to presume a marriage.

I have considered these submissions. The Objector claims to have married the deceased under Kikuyu Customary Law. The onus of proving a customary marriage is generally on the party who claims it and the standard of proof required in such case is the usual one for a civil case, namely on a balance of probabilities- Hortensiah Wanjiru Yawe Vs Public Trustee, Civil Appeal No. 13 of 1976 and the evidence required on the formalities of such a marriage must be to that standard- Mwagiru Vs Mumbi, [1967] EA 639 at p. 642. The Objector has therefore to establish her claim of marriage to the deceased.

After evaluating the evidence on record, I am satisfied that the Objector has failed to prove a marriage under Kikuyu Customary Law. In her testimony, she contradicted herself on the amount of dowry paid for her. In examination in chief, she said the deceased first paid Kshs. 30,000/= and then Kshs. 120,000/= but later in cross-examination she changed the figures to Kshs. 15,000/= and Kshs. 100,000/= respectively. She conceded that she does not know if there were any dowry negotiations before either of these payments were made and she did not witness the actual dowry payments. She did not call her cousin, Stanley Njoroge, to whom she claimed the final dowry payment of Kshs. 120,000/= was made or her father's spokes man John Njoroge who was in the negotiations. She claimed there was a document written on the dowry payment which was with her father but her father later testified he said there was no such document. Although, as I have said, she claimed to have been married under Kikuyu Customary Law, she conceded that no Ngurario ceremony was carried out. As a matter of fact she said she did not even know of it.

Although her father claimed that the sum of Kshs. 100,000/= the deceased paid to him was for "Mwathi", "Arika" "Senge" etc, he conceded that the actual Rurario (dowry) was not paid. He also conceded that the essential Ngurario ceremony was not carried out. In the case of Case V Ruguru (1970) E.A. 55 Miller J. stated the law thus:-

"It is enough to say that, as there can be no valid marriage under Kikuyu customary law if among other things this vital ceremony has not been performed, the court finds that on the evidence a marriage between the Plaintiff and Defendant under the custom never took place."

In the absence of these essential rites being carried out, like Justice Kimaru and Justice Rawal did in T Vs W [2008] 1 KLR 276 and Re the Estate of Wakaba [2008] 1 KLR 328 respectively, I find that there was no Kikuyu Customary Law marriage between the parties in this case.

That brings me to the presumption of marriage which the Objector urged me to consider in the alternative.

The concept of the presumption of marriage is not new in Kenya. It was recognized and accepted by the Court of Appeal for Eastern Africa in the said case of Hortensiah Wanjiru Yawe Vs Public Trustee, Civil Appeal No. 13 of 1976, in which Mustafa JA stated:-

"I can find nothing in the Restatement of African law to suggest that Kikuyu customary law is opposed to

the concept of presumption of marriage arising from 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 which 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, it is applicable to all marriages howsoever celebrated. The evidence concerning cohabitation was adduced at the hearing, and formed part of the issue concerning the fact of marriage, and even if no specific submission on that point was made by Mr. Muite, I do not think that he is precluded from relying on it before us. It is directly concerned with the burden of proof to be discharged by the Appellant, and this presumption enhances the quality of the evidence adduced on her behalf and weighs heavily in her favour. There was no evidence adduced in rebuttal of that presumption. The trial judge omitted to take this crucial matter into consideration: if he had, he would probably have held that the Appellant was married to the deceased and was his wife."

On his part, Wambuzi P. put the point across in the following words:-

"In the first place, no authority was cited to us that the presumption does not apply to customary law marriages and secondly, the presumption has nothing to do with the law of marriage and as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. It may be shown that the parties are not married after all but then the burden is on the party who asserts that there was no marriage. It is at this stage that the nature of marriage becomes relevant and the incidents thereof examined. The same kind of problem arose in *Sastry Veliader Aronegary V Smbecutty Vaigali (1880-1) 6 App Cap. 3645* a case referred to in the judgment of Mustafa, J.A. A customary marriage was claimed and it was contended that the presumption of marriage from cohabitation with habit and repute did not apply to the parties who were Tamils and the Country which was Ceylon. It appeared that according to Roman Dutch Law applicable in Ceylon there was a presumption in favour of marriage rather than concubinage. I accept Mr. Oluoch's contention that Section 3(2) of the Judicature Act (Cap.) provided for the application of customary law in certain circumstances. However, the same section in sub-section (1) thereof provides for the application of the common law to Kenya. I would not say in the circumstances of this case that there is any conflict between the common law and the Kikuyu customary law of marriage as the presumption relates only to proof. In my view once the Appellant proved that she was living with the deceased as man and wife for over 9 years she was in law presumed to be married to the deceased unless the contrary be clearly proved. In other words, the burden is thrown on the respondent to show that she was not so married."

This decision has since been followed and applied in several other decisions of the Court of Appeal and those of courts subordinate to it. In the case of Njoki v Mutheru Njoki Vs Mutheru [2008] 1 KLR 288, Nyarangi JA put these conditions succinctly at page 311 lines 4-20 when he stated thus:-

"The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife. In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of the presumption of marriage. Also, if say, the two acquired valuable property together and consequently and jointly repay a loan over a long period, that would be just what a husband and wife do and it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine that the cohabitation has crystallized, into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in Yawe and Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, or an attempt to go through a form of marriage known to law."

In the case of T V W [2008] IKLR (G & F) Kimaru J found that Kikuyu Customary Law marriage had

been established, he nevertheless held that a period of over 7 years was enough period to establish a presumption of marriage. This is how he put it at page 284 Lines 32 to 39:-

"In this case, I hold that the fact that the Kikuyu Customary Law Marriage ceremonies were not concluded does not preclude this court from finding from the evidence presented before it that there existed a common law marriage between the Applicant and the Respondent by virtue of the fact that they had lived together as a husband and wife for a long period of time, in this case for a period of over seven years."

The presumption does not depend on the law of any system of marriage. It is simply an assumption based on very long cohabitation and repute that the parties are husband and wife. It is nothing more than an assumption that the parties must be married irrespective of the nature of marriage, if any, contracted or whether or not the parties contracted any marriage at all. As Madan JA stated in Njoki Vs Mutheru, [2008] 1 KLR 288, "It is a concept born from an appreciation of the needs of the realities of life when a man and a woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage…." Being an assumption, it does not therefore require proof, of any attempt to go through any form of marriage known to law. All that is required is evidence of cohabitation. Before it is made there must be evidence of the parties begetting children, owning bank accounts or acquiring property jointly and or being visited by friends and relatives who would be surprised if not shocked to hear that the two were after all not husband and wife.

In the Njoki Vs Mutheru case, Nyarangi JA alluded to these kind of things when he said that:-

"Before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage."

In Re Estate of Wakaba,[2008] 1 KLR 328, on the evidence that the Applicant was looking after the deceased husband's business during his lifetime, that after his death a funeral committee was formed at the applicants home, that the applicant bore the deceased 4 children, that she cultivated the deceased's farm even during his lifetime and that the eulogy had her name as one of the deceased's wives, Rawal J found that a presumption of marriage had been established as the customary ceremony of *Ngurario* had not been completed. However, in T Vs W [2008] 1 KLR 276 where a dispute over the ownership of matrimonial property and marriage was denied, long cohabitation of over seven years and joint development of property, led Kimaru J to presume a marriage.

In this case it is common ground that there was no issue of the alleged marriage between the Objector and the deceased. The Objector said the deceased never supported the child she had before marrying him although he paid her school fees proof of which she never availed. Her ID card does not have the deceased's name. Although she said she has lived in Nakuru for 10 years, she first claimed the deceased's home where she went was at Lanet. It was until the cross-examination by Mr. Githui and in re-examination that she changed and said the home was at Engachura. She did not visit deceased even once while he was sick in hospital until he died.

From all these, I am satisfied that there is no evidence at all to warrant the finding of a presumption of marriage between the parties. In the circumstances I find that the Objector has failed to prove her claim in this cause and I accordingly dismiss it with costs.

DATED and delivered this 13th day of October, 2009.

D. K. MARAGA

JUDGE.