



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 1584 of 2002

IN THE MATTER OF THE ESTATE OF

SAMUEL KIBUI MWANGI - (DECEASED)

ROSE WANJIRA KIBUIPETITIONER/APPLICANT

- VERSUS -

WILFRED MWANGI KIBUIOBJECTOR/RESPONDENT

JUDGMENT

The petitioner (hereinafter referred to as Rose) filed the petition for the estate of the deceased herein as his widow. She mentioned 11 persons as children of the deceased. 7 persons alleged to be children named have and signed the consent.

One Elizabeth Njeri who is alleged to be of unsound mind has affixed her thumbprint after certificate from an Advocate was given as to her understanding of the contents of the document. In any event, I do not have any medical report as to the mental incapacity of Elizabeth and/or its extent. In view thereof, I shall not disregard her consent given and annexed to the petition which was filed on 26th July, 2002.

The two of the named children namely Monica Wanjiru Kabui and Wilfred Mwangi then filed a cross-petition and objection on 13th November 2003, alleging that the petitioner and other persons named herein are total strangers and that only five children of the deceased survived the estate – namely the two objectors, Elizabeth Njeri Kibui, David Kibui and Dorcas Mwara.

It appears that in the process of these proceedings, Monica seems to have lost interest and she neither participated nor gave evidence before the court. It is also pertinent to note that the 2nd objector claims to be of 19 years of age on November 2003. The deceased died on 29th October, 2001.

I shall also put on record that I only heard the last witness from the office of the Registrar of Marriage.

All other witnesses had testified before Hon. Dulu J. who had directed the matter to be heard by the Family Division of the High Court on 22nd October, 2008, when he was transferred to another division of the High Court. In the premises, this court had to continue and finish this old matter.

From the evidence before the court, it is clear that Rose had started living in the deceased's premises in Uthuru from 1995. She claimed they started living together as a man and wife while the objector claims that she was a tenant of the shop owned by the deceased and no more. It is also before the court that before 1995, both the deceased and Rose had their own children, and she stayed at Uthuru with them. They did not have any child together.

Rose has produced a marriage certificate as evidence of her marriage. She was asked about the authenticity of the certificate and stated that the certificate was under Christian Worship Church Elbergon Branch which was the main church.

She was shown that her name is not included as a beneficiary by the deceased with City Council where the deceased worked, but commented that she was not aware when the names were put by the deceased.

She also produced two witnesses who signed the marriage certificate as witness of the marriage and whose evidence in its substantive parts was not scathed. They testified that they were asked to be the witnesses for a church wedding on 17th January 2001 which according to PW2 was a Monday (though it was shown to fall on a Wednesday). They stated that there were only five persons in the church including the pastor. They denied that the said pastor was their son. This court is unable to understand that only because Harvest Church was not the church to which these witnesses belong, there was anything wrong in them going there to attend to witness a marriage, and that because there were only five people in the wedding, the marriage is questionable. As correctly responded by the two witnesses, that it was for the couple to decide whom to call and where to wed. These witnesses have not shown to have any bias or any good reason to lie as regards the event of the marriage.

Moreover, Rose also produced a marriage invitation card of her son's marriage which mentioned Rose and the deceased as his parents. She also produced photographs of the said marriage which showed Rose and deceased sitting together. She also produced photographs of Monica's (1st objector) wedding which she attended and was seen with the deceased (Ex. 3 (a) and (b) and 4 (a) and (b)). The wedding invitation card was produced as (P Ex.2).

It is before me that Rose was a complainant in a criminal case when the house she was staying at the time of the deceased's death was demolished. Not much detail of the said case was produced during cross examination or during objector's case.

Rose also gave evidence as regards payments of dowry after the solemnization of the marriage in the month of March, 2001. I also note that PW4 who was brother-in-law to Rose testified that on 17th March, 2001, he accompanied mother of the deceased, his brother's wife Grace Wanjiku and one Njaho and an old man, who were present in court when he gave evidence. He stated that a total of Kshs.10,000/= for dowry and Kshs.3,000/= for women, soda and shs.500/= for elders were given. According to him, the wife of the deceased's brother called Grace carried shs.3,000/- for women. He further stated how payments were made. His evidence in all relevant aspects remained untainted.

As against the said evidence, 2nd objector Wilfred denied that Rose was a wife of the deceased. According to him Initially, she was a tenant to his uncle and then became the deceased's tenant. He stated that his grandmother paid money for mortuary but further added that Rose "went to the mortuary but did not have money."

His evidence as regards payment of the dowry is as under:- *"I heard that son of PW1 wanted to make arrangements to pay dowry for PW1. It was not my father."* This evidence evidently is hearsay. I also note that except for general statements as regards Rose being a tenant and pastor who solemnized the marriage was a son of PW2 and PW3, none of these facts is substantiated. It is worth noting also that this witness is the youngest son of the deceased with first wife. He simply testified in opposition to the wedding claimed by Rose that on 17th January 2001, he was at home and the deceased went to his job. This evidence is not at all convincing. His averments that the deceased was not maintaining Rose and his children also cannot be accepted without much substantiation, specially coming from a son who was not

an adult at the time of his death.

He was shown exhibits produced by Rose, and gave his unsubstantiated opinion that the marriage certificate was not genuine and further stated that he did not know who printed the wedding card as well as commented that simply because Rose is in the photograph that fact only does not prove the marriage.

As regards the events of payment of dowry, he had to state as under:-

“Chege is the one who was sending Kshs.10,000/= to his grandmother for Rose to be allowed to marry. That money did not come from my father. My father went as a witness. There were many other people who went there. My father did not have a relationship with Rose. I was not present. My father and my aunties informed me what happened.”

In any event, this witness is not a proper person to give the said evidence. He further stated that Rose used to pay rent and receipts were taken by her during funeral, similarly, she took title deeds from house. He denied Rose was chased away from house by them, but did not explain the reason of demolition of the house which she was occupying at the death of the deceased.

Second witness introduced himself as a friend of the deceased and stated that Rose was simply a tenant and not a wife. But he also stated that he could not know internal matters in the house and who was sleeping where. In cross examination, he stated that he sold land of deceased's father and that he did not have any other relations with the deceased.

However, he conceded that he was in a group people who went to the house of Rose to pay dowry to her parents/brothers. The group included Grace, wife of deceased's brother. He also conceded that money was given to Rose's brothers but added that as he was at the back, he could not say who paid the money and who received.

He also attended wedding of Rose's son but denied he was aware of what was written in the wedding card.

The last witness works as a marriage officer with the office of the Registrar of Marriages whose duty is to register marriage applications and to receive returns from the Churches or from D.C's office and to issue Marriage Certificates. She also issues licences to the church ministers to solemnize the marriage and provide them with Marriage Book containing the Certificates of Marriage.

She testified that she could not get any record of the marriage certificate dated 31st October 2001 or had any records of the marriage between the deceased and Rose. I may pause here and note that the certificate of entry of marriage certificate to the petition is dated 7th November 2001 bearing no. 037972 solemnized at Harvesters Church by one Pastor Charles N. Njenga and the Marriage Certificate. P Ex. 1 does not give any date except the date of marriage which is 17th January 2001. She further stated that the office did not receive return of the said marriage and on investigation it has been found that the pastor named in the certificate is not a licenced pastor. No official records or document to prove the said averment is before the court. She then conceded that unless the marriage returns are filed at the office of the Registrar, no record of marriage could be available at the office and when shown the marriage certificate in question (PEX.1), she responded that the validity of the certificate had to be determined from the returns filed. She also conceded that the certificate before the court is in duplicate and either of them is expected to be returned to the Registrar, and without such returns, the marriage certificate is not conclusive proof of the marriage.

With the background of the aforesaid evidence, submissions were filed and made.

The objectors mainly relied on the evidence of the officer from the Registrar of Marriages to stress that the marriage certificate produced by Rose is not genuine and thus her claim of being a widow of the deceased should be dismissed. It was also submitted that she was not included by the deceased as beneficiary in the record of his employment with City Council, where the deceased worked upto his

death, which is admitted to have occurred as a result of a road accident on 29th October, 2001.

From the record of the court, I have two documents – a handwritten certificate of marriage issued on 17th January 2001 which was produced as PEx. 1 and certified copy of entry of marriage no. 037972 issued on 7th November, 2001, which is annexed to the petition. Obviously, no question on this latter document is raised and I am also not shown how the Registrar of Marriage only talked about a certificate of 31st October 2001 which date apparently is not mentioned in either of these documents.

Much reliance was also placed on the evidence of DW2 Karugi who denied having carried the money by Rose and thus contradicted her evidence. But he was present amongst the group of people who took money to Rose's parents home and money was given to her brothers. Whether he carried himself the money or not, in my opinion is not relevant. What is relevant is that the money was taken and given to her brothers and the deceased was present, during the occasion accompanied also by his brother's wife Grace.

The learned counsel of Rose relied on evidence to show that Rose was, after co-habitation with the deceased since 1995 married to him in church. It was stressed that the confusion created over the marriage certificate is kind of red herring. I have also amply detailed the evidence as regards the marriage certificate as well as the certificate of entry of marriage filed with the petition which this court, under the circumstances of this case "cannot simply overlook". DW3's evidence did not conclusively disprove the validity of the marriage certificate and I put on record that her attention was only drawn on the record of 31st October 2001, which date is not in the certificate of marriage. It was in fact a handwritten document mentioning 17th January 2001.

Rose has also produced other evidence to show her close relation with the deceased, namely wedding card of her son, receipt of money by her brother after the church marriage, photographs, two independent witnesses who witnessed the couple exchanging vows in church. The objector's case also supports her relation with deceased when he himself said that Rose came to the mortuary but as she did not have money, his grandmother gave the money. If she was a tenant of the deceased, as alleged, why was she expected to pay the money for the mortuary?

In this confused and uncertain evidence on the marriage in church, I would tend to agree with the submission by learned counsel appearing for Rose that the facts of their cohabitation and relationship show on balance of probability that they lived and were considered as a married couple since 1995 upto the tragic death of the deceased. I would thus presume their marriage under common law and declare as a widow of the deceased. I thus dismiss the objections filed by the objector.

However, Rose has not satisfied the court that her own children were really dependents and/or well maintained by the deceased. Yes there is a wedding card where the deceased is described as the husband of Rose but no further evidence is shown that he ordinarily took over responsibilities as a father of her children and I find that Rose's children mentioned in her petition are not dependents of the deceased.

There is a cross petition also by the objectors. In the premises, I direct that the joint grant of representation be issued in the names of Rose Wanjira Chege and Wilfred Mwangi Kibui.

On issuance of the above directed grant, the administrators either file joint or individual summons for confirmation of the grant within 30 days.

Both parties to bear their own costs for this proceedings.

Dated, Signed and delivered at Nairobi this 9th day of October, 2009.

K. H. RAWAL

JUDGE

9.10.2009