



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Succession Cause 82 of 1999

IN THE MATTER OF THE ESTATE OF PATRICK KIBUNJA KAMAU

MILKA GITHIKIA KAMAU.....PETITIONER

VERSUS

FAITH WANGECHI KAMAU.....OBJECTOR

JUDGMENT

The petitioner Milka Githikia Kamau while describing herself as the widow of the deceased petitioned for the letters of grant of administration on 12th February 1999. According to the affidavit in support of the petition, the petitioner stated that the deceased died on 19th January 1999 at Nyahururu and was survived by the petitioner and three minor children namely K. W. K. aged 17 years, C. W. K. aged 14 years and C. N. K. aged 12 years.

The letters of administration were issued to the petitioner on 13th May 1999. On 7th December 1999 the petitioner applied for the confirmation of the grant. That is when Faith Wangechi Kamau filed an affidavit of protest, of the grant being confirmed, on the grounds that the deceased was also married to her from 1993. She had two children with the deceased namely L. G. and M. N. who also survived the deceased. The applicant contended that she was left out as a widow of the deceased and she protested the confirmation of the grant unless her name and those of her children were included as beneficiaries of the deceased. The petitioner denied any knowledge of the applicant as well as the children. The petitioner also relied on an affidavit by Elkanan Kibunja (PW2) the father of the deceased who denied that the deceased had married the applicant under the Kikuyu Customary Law since the applicant was never introduced to him or her children.

This matter was heard by way of oral evidence which was recorded by The Hon. Justice Ondeyo before she was transferred from the High court Nakuru. The petitioner gave evidence and relied on the evidence of her father-in-law Elkana Kibunja PW2 and Leah Nduta PW3 a step-mother of the deceased. It was the petitioner's case that she got married to the deceased in 1981 under the Kikuyu Customary Law and they were blessed with three children. Upon marriage, the petitioner and the deceased cohabited as husband and wife, in Mombasa, they moved to Maralal, Kabarnet District and Nyahururu.

The deceased was working with the Ministry of Agriculture and as at the time he passed away he was the Deputy Provincial Director of Agriculture based in Nyeri. The deceased was also running a business at Subukia town centre where he used to visit frequently to check on his business but he would always return to Nyahururu where the petitioner lived with the children. When the deceased was taken to hospital he was at Subukia and he was admitted at the Nyahururu Cottage Hospital where he passed

away. Upon his death, meetings to arrange the burial were held at Subukia by friends and relatives. The funeral committee decided that the death of the deceased be announced by way of advertisement in the newspapers but the name of the petitioner or the children were not included. The petitioner sought an explanation from the deceased's father why they were left out in the death announcement. PW2 held a meeting with the funeral committee at Subukia and directed that the names of the petitioner and the applicant as well as any other woman claiming to be his wife be included in the death announcement.

Thus the name of the petitioner, the applicant and all their children were included in the death announcement and also in the funeral programme. The deceased was buried on his parcel of land at Piave Estate Njoro. During the funeral, photographs which were shown to the court were taken of the petitioner and the respondent when the master of ceremony announced that the family of the deceased be photographed with the body.

The petitioner denied that all the time they lived with the deceased, the deceased had another wife or that she had met the applicant or her children. The deceased never disclosed to the petitioner that he had another wife. The petitioner also vehemently denied that she had differences with the deceased prior to his death. She denied that the deceased been separated and was living in a hotel in Nyahururu instead of the matrimonial home. Asked why the deceased was taken ill while at Subukia and why the funeral meetings were held in Subukia instead of the matrimonial home in Nyahururu, the petitioner explained that the deceased was at his business premises and it was in Subukia where he had many friends and relatives.

Elkana Kibunja PW2 supported the petitioner's evidence in every material aspect. The deceased was his 5th born child. He was close to the deceased because the deceased used to help him and even constructed for him a modern house. He confirmed that the deceased married the petitioner in 1981 under the kikuyu customary law and they have three children. The deceased never informed PW2 of his marriage to the applicant. He never even introduced the applicant as a wife or the applicant's children. PW2 sent his wife PW3 to check on the deceased who had been ailing. PW2 learnt from his wife that the deceased had passed away. He travelled to Subukia to find out about the deceased's demise and the funeral arrangements. That is when he found a funeral committee comprising of his son Mbugua and nephew Kibunja. They were finding difficulties in how to deal with the deceased's personal life so they informed him they decided to leave out the deceased's wives and children so as to minimise controversy. PW2 advised them to indicate all the persons claiming to be the wives of the deceased so that the funeral can go on without any problems.

After the burial, PW2 and PW3 held a meeting with the applicant and her parents to find out more about her alleged marriage to the deceased. Two meetings were held and the applicant's father stated that the applicant had given birth to children before she married the deceased. According to PW2 no dowry was paid by the deceased and even during the meeting the applicant's father did not ask for dowry. PW2 was categorical that the applicant's children did not belong to the deceased and he did not recognise them. Under the kikuyu Customary Law, if a man married a woman with children, he is supposed to pay dowry in order to adopt the children.

Leah Nduta PW3, the step-mother of the deceased also testified that she had brought up the deceased as own child. She fully participated when he married the petitioner and when the deceased was hospitalised prior to his death she visited him in hospital on 18th January 1999. He advised her to go to Subukia and collect his car keys. The following day she learnt that he had passed away, when they returned to subukia that is when she discovered the house where the applicant was living. She denied that she was ever introduced to the applicant as a wife of the deceased and even during the meetings that were held with the applicant's father it became clear that the children of the applicant were born before the applicant met the deceased and were staying with the applicant's father.

On the part of the applicant, she relied on the evidence of Peter Chege (DW1) a friend of the deceased. Peter testified that the deceased requested him to accompany him to the home of the applicant sometimes in December 1996. They were met by the applicant's parents and village elders where he acted as the spokesperson for the deceased. During that visit they paid Kshs 19,000/= made up as

follows:

- (a) Two sheep at Kshs 3,000/-,
- (b) Kshs 3,000 for soda and beer,
- (c) Kshs 10,000/- cash

According to Peter, the deceased was married to the applicant and during that visit the father of the applicant asked the deceased whether he would take the applicant's children and the deceased agreed. Peter met the deceased in 1994 while they were working in Nyandarua and the deceased was staying in a hotel. They became friends and later the deceased moved to Subukia where he was running a business. Peter was also running a business within the same town centre but whenever he asked the deceased about his family or why he was staying in a hotel while he had a home in Nyahururu, the deceased just used to cry.

Subsequently in 1995, the deceased started living in Subukia with the applicant. Peter testified that he fully participated in the funeral arrangements of the deceased. They prepared the death announcement and the funeral programme which indicated that the deceased was survived by two widows and all the children.

Faith Wangechi the applicant testified that she met the deceased in 1990. They became friends and he is the biological father of her two children. The first child was born in 1991 and the second child was born in 1993. In October 1993, the deceased requested the applicant to start living with him as a wife. They first of all, stayed in a hotel for one month in Nyahururu. They later on moved to a house at a place called Site and Service Scheme Nyahururu where the deceased was paying rent. In 1995, they moved to Subukia and eventually the deceased bought a plot and constructed a business premises called Village Villas Inn. The applicant was in-charge of the business and the deceased used to live with her.

The applicant and the deceased visited the applicant's parents and the deceased paid Kshs 19,000/= as dowry. The deceased fell sick when he was still living with the applicant at subukia, He was hospitalised and it is the applicant who informed his relatives. The applicant looked after the deceased when he was in hospital and even the time he passed away, it is the applicant who had taken him to hospital. They were later joined by PW3 who stayed with the applicant at Subukia. They even prepared a meal for the deceased and after the deceased passed away, the funeral meetings were held at Subukia which was generally known as the deceased's home.

The applicant testified that the deceased used to support her and the children who were staying with her parents by sending Kshs 5,000/= every month for their upkeep. According to the applicant, she is the second wife of the deceased. She recognises the petitioner as the first wife and urged the court to grant the letters of administration to the two widows. The applicant derives her livelihood from the proceeds of the business that she runs at the deceased's premises in subukia. Despite several adjournments to allow the applicant call the evidence of her father, this evidence was not forthcoming and the matter was closed.

Both counsel for the petitioner and the applicant have filed submissions and made reference to extensive case law. I have gone through the submissions and the case law. I am particularly grateful to both counsel for their research, although I may not quote all the authorities in this judgment, I found myself greatly assisted by their research.

The single issue for determination in this succession cause is whether the applicant and her children are beneficiaries of the deceased's estate. In particular, whether the applicant was married to the deceased under the Kikuyu Customary Law and whether the deceased was the biological father of the applicant's children or whether he had adopted them under the Customary Law by virtue of the marriage to the applicant.

It is clear from the evidence that the deceased was cohabiting with the applicant at Subukia town

centre where he was running a business premises. This cohabitation may have started on or about 1993 until the deceased passed away. According to the petitioner and the deceased's father and mother, the deceased never introduced the applicant as a second wife. That may very well be so, thus leading to the determination of whether by virtue of cohabitation, can the applicant be presumed to have been married under the kikuyu customary law?

According to the applicant, she contends that the deceased paid part of the dowry to her father while in the company of Peter Chege who testified as DW1. However the applicant did not call her father or any of the elders who received the dowry. This is compounded by the fact that the deceased's father or any of his relatives did not accompany him during such a solemn occasion. In this case I am prepared to find that probably no dowry was paid.

Counsel for the applicant invited the court to find that there was marriage by cohabitation which can be presumed from the relationship between the deceased and the applicant and for that matter he referred to the case of Hotensiah Wanjiku Yaweh vs. Public Trustee Civil Appeal No. 13 of 1976 where the Court of Appeal held as follows:

"I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as 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 (1973) 3 ALL ER 105. The trial judge did not consider this 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 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."

He continued:

"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 issue of their union, and in my view, is applicable to all marriages howsoever celebrated."

On the same issue, Wambuzi P. stated:

"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 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 to assert that there was no marriage. It is at this stage that the nature of the marriage becomes relevant and the incidents thereof examined."

In this case I need to establish whether the applicant has been able to discharge the burden of prove that due to the long cohabitation living as man and wife with the deceased this court should presume a marriage. The applicant must have lived with the deceased for almost six years if it can be taken that they started living together in 1993. Although the applicant testified that her two children were the biological children of the deceased she at the same time testified that the two children were staying with her parents and the deceased used to send them money for upkeep. If these children were the biological children of

the deceased I do not see any reason why the applicant and the deceased who were living as man and wife were not staying with their children at Subukia.

The applicant stated in her own affidavit that she married the deceased in 1993. PW2, the father of the deceased stated in his evidence that the applicant's father confirmed that the applicant's children were born while the applicant was staying at home. Moreover these children are not named after the deceased's parents. Ordinarily if they were the deceased's children they ought to have borne the names of his parents. From the evidence on record, the applicant has not proved that these were deceased's children. No birth certificates were produced or even evidence to show that the deceased used to support them. In that case the court would have held that the deceased had adopted the children socially as their sole provider.

The final issue to determine is whether the applicant has discharged the burden of prove that by virtue of the long cohabitation she should be presumed a wife of the deceased. I would answer this question in the affirmative. I have considered that the deceased used to live with the applicant at Subukia from 1993. The deceased personal effects such as clothes and motor vehicle were retrieved from the applicant's house when the deceased passed away. It is the applicant who took the deceased to hospital when he was taken ill. The funeral meetings took place in Subukia which was recognised as the deceased's residence. The funeral committee included the applicant as the widow of the deceased and she was accorded the full honours of a widow. The deceased who was married to the petitioner under the customary marriage had capacity to marry the applicant.

The applicant herself lived with the deceased for those years. It is clear from the evidence that she held herself out as the wife of the deceased. She worked at the deceased's premises and even the deceased's father recognised her as the manager of the premises and allowed her to continue managing the premises even after the death of the deceased he allowed her to pay the workers. This is not a mere stranger who was given such responsibilities even though she was never introduced to the deceased's family, her relationship with the deceased was open, notorious both the deceased's parents and his friend in Subukia. It would be unconscionable for this court to hold that the applicant was a mere impostor looking out to enrich herself as the petitioner has described her. All those years the applicant must have held legitimate expectations that she was the wife of the deceased and thus entitled to a share of his estate. Denying her a share of the deceased estate is tantamount to denial of the fundamental rights as regards fair treatment and equality before the law.

Before I finish this judgement, I wish to point out that family law in this country has taken inordinate time to review and make provisions for this kind of relationships. This scenario is an every day fare in the courts; the courts have struggled with these relationships from the early 1970's. It is necessary to revise marriage laws to make provisions for the thousands of women who find themselves trapped in such relationships which are not recognized as customary or statute. Couples are living together and holding themselves as married while post phoning formal ceremonies which entail great expense and time. The problem arises if there is death or one partner decides to desert the other. It is time Parliament made provisions for these kinds of relationship creates an orderly society.

In the circumstances I find that the applicant can be presumed a wife of the deceased. The deceased used to support her through the business at Subukia. However her children cannot be declared the beneficiaries of the deceased. The deceased was therefore survived by the petitioner, the petitioner's three children and the applicant who should be entitled to $\frac{1}{5}$ of the deceased's estate. Looking at the schedule of properties, and considering that the applicant had all along lived and worked at the Subukia plot while running the business known as Village Villas, it is in the interest of justice that she should be awarded plot No. 404 Subukia as well as the business known as Village Villas.

The rest of the property should go to the petitioner who shall hold the same in trust for her three children until they all attain the age of majority. Since there is a continuing trust, one of the children is still a minor, the grant shall be confirmed to the petitioner Milka Gathithia Kamau jointly with Karen Wanjiku Kamau who shall distribute the deceased's estate according to this judgment.

Judgment read and signed on 16th day of May, 2008

M. KOOME

JUDGE