



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Succession Cause 403 of 2003**

**IN THE MATTER OF THE ESTATE OF JOHN THUO WANJOHI (DECEASED)**

**JUDGMENT**

Hellen Muthoni Maina petitioned for the letters of administration while describing herself as the wife of the late John Thuo Wanjohi. She was issued with the letters of administration on 14<sup>th</sup> January 2004. On 16<sup>th</sup> July 2004 Mary Wambura Wanjohi the mother of the deceased applied for the revocation of the grant on the grounds that the proceedings to obtain the grant were defective in substance and the grant was obtained fraudulently by making a false statement and concealment from court of material factors.

The applicant stated in the affidavit in support of the summons that the petitioner was not the widow of the deceased. The petitioner had only cohabited with the deceased for a short time and was not married. Due to reasons that the status of the petitioner was denied this case proceeded for hearing by way of viva voce evidence.

The petitioner gave evidence and stated that she married the deceased in 1999. The deceased was a secondary school teacher and they were cohabiting as husband and wife. She produced several documents especially a letter from Eming Secondary School where the deceased was teaching. The petitioner and the deceased were blessed with one child called Stephen Wanjohi. The petitioner produced the birth certificate and the names of the father of the child are indicated as John Thuo Wanjohi. That child was born on 20<sup>th</sup> September 1999 and the birth certificate was obtained on 16<sup>th</sup> June 2003. The petitioner testified that although they were not formally married with the deceased, their cohabitation was open and notorious. They used to visit the deceased's parents during the weekends. The deceased also took out an educational insurance policy for their child which was produced as an exhibit. The policy was taken on 1<sup>st</sup> September 2002 and the beneficiary is indicated as Stephen Thuo and Hellen Maina.

The deceased died on 3<sup>rd</sup> June 2003 at the Provincial General Hospital when he was living with the petitioner and the petitioner thus applied for the death permit as the next of kin. That is when the applicant protested and filed a case CMCC No. 1399 of 2003 seeking to restrain the petitioner from interfering with the burial of the deceased. A consent order was recorded before the Senior Principal Magistrate to the effect that the body of the deceased be released to the petitioner and the applicant for burial at Mukurweini Kaharo Division and the officer-in-charge Mukurweini police station to provide security during the burial.

The petitioner contended that she was married to the deceased between 1999 and 2003. However the applicant took away her household goods after the death of the deceased and chased her from the house. The petitioner claimed that she is the one entitled to administer the estate of the deceased for the benefit of herself and her son.

On the part of the applicant Mary Nyambura the mother of the deceased, denied that the deceased was married to the petitioner or at all. She was never informed of any such marriage which is contrary to the Gikuyu custom which entailed elaborate procedures involving parents, relatives and friends. The applicant contended that she met the petitioner on the 18<sup>th</sup> of May 2003 when she was pursuing the certificate of her son. She however had not visited her son who was working in Nakuru as a teacher. She admitted that the petitioner comes from around her neighbourhood, she is well known to her and so are her parents but the issue of marriage was never been discussed.

The applicant therefore maintained that she is the only one entitled to the letters of administration and the estate of the deceased. During cross examination, she denied that she knew that the petitioner had a child with the deceased and that the child is named after her own husband. Shown photographs that were taken with the petitioner, she denied that she could see herself in the photograph. Shown also the education policy taken out for the benefit of the petitioner and her child, she said she was surprised because the deceased did not have a child or a wife.

Going by the evidence on record, the petitioner has been able to prove that she cohabited with the deceased between 1999 to 2003. That evidence is not at all dented by the applicants denials. The petitioner had a child with the deceased. The birth of the child was registered even before the death of the deceased. The deceased is indicated as the father in the birth certificate. Moreover the deceased took out an educational policy for the child who is clearly named as the beneficiary together with the petitioner. The deceased was living with the petitioner as at the time of his death and that is why she was recognised by the principal of the Eming Secondary School in Koibatek District as the wife of the deceased.

Marriage by cohabitation has been recognised as a form of a marriage especially in modern day living where parties live far away from their homes especially in urban towns or other work stations. Many couples cohabite as man and wife for years, they avoid the costs associated with elaborate marriage ceremonies either under the customary law, church or civil marriages.

However in the event of death, one is faced with the burden of proving there was cohabitation for a long which should be presumed as a marriage by reputation. Although the petitioner produced documents to show that she was recognised by the deceased as his next of kin there were no witnesses either her parents or neighbours who gave evidence in this case. However the petitioner is the mother of the deceased only child. The deceased is survived by the child who in essence is the sole beneficiary of his estate.

I find that the applicant's evidence lacks credibility, she was contemptuous of the petitioner. Her demeanour in court was most wanting. She chose to deny even the basic and obvious facts. Her evidence is worthless. She however testified that she used to rely on the deceased who used to help her with money. That is indeed as it should be, that parents expect to be supported by their children especially in old age. Since the beneficiary of the deceased is a minor, there is a continuing trust, the letters of administration herein ought to have been issued to two administrators who are supposed to hold the deceased's estate in trust for the minor until he attains the age of majority.

Due to the acrimony, exhibited by the applicant towards the petitioner and her child which ranged from the time the deceased died snow balled into a civil suit and now the present proceedings, it will not serve any useful purpose to issue the letters of administration jointly to the applicant and petitioner. It is clear that they cannot execute the duties jointly.

As regards the interest of the applicant I agree with counsel for the applicant that as a parent she can be considered as a dependant of the deceased under the provisions of Section 26 of the Law of Succession Act. As a dependant of the deceased I apportion upon her 20% of the net estate of the deceased. 80% of the estate of the deceased shall vest upon the petitioner with one other administrator to be named and shall be held in trust for the benefit of Stephen Wanjohi Thuo until he attains the age of majority.

This being a family matter each party shall bear their own costs.

**Judgment read and signed on 9<sup>th</sup> day of May 2008.**

**M. KOOME**

**JUDGE**