



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

Succession Cause 573 of 2003

IN THE MATTER OF THE ESTATE OF THE LATE G K G

RULING

This dispute involves the administration of the estate of the late G K G deceased who passed away intestate on the 9th day of June, 2003.

The Letters of Administration was issued to E W M who claimed to be the widow of the deceased and J M K who is the daughter of the deceased with the Petitioner. The applicants in the present application are the deceased father and the 2nd applicant claims to be the wife of the deceased. Two issues were settled for a determination when the directions as to the hearing and determination of the matter were settled namely:

- (a) Was the 1st administrator the deceased wife at the time of his death.
- (b) Was the 2nd Objector/applicant the deceased's wife at the time of his death.

During the hearing the Objectors gave their own evidence in addition to the affidavits sworn in support of their application for the revocation of grant. They also called three other witnesses who gave evidence in support of their claim that the 1st petitioner was not the wife of the deceased. According to the 1st objector, he is the father of the deceased. He acknowledges the 2nd objector as the wife of the deceased and also the three applicants of the 1st Petitioner as the children of the deceased. Indeed these children are named according to the Kikuyu Customary Law as far as naming of the children of a married couple are concerned.

This witness categorically denied that the deceased had notified him or his family for that matter of his marriage for the 1st petitioner whom he referred to as a friend who has never been brought to his home but lived with the deceased at his place of work. On the other hand this witness duly recognized the 2nd objector F N M as the only wife of the deceased. He alleged that he duly paid the dowry for F N and visited her parents twice on account of between F and the deceased towards the marriage ceremony. The deceased had intended to have a church wedding but he passed away before this was done. According to this witness the 1st petitioner did not participate in the funeral of the deceased, she had separated and moved on to stay with another man and she misrepresented to the court when she was given the Letters of Administration.

The second objector too gave evidence of how she started living with the deceased in 1997 and reiterated the evidence by the 1st objector. The second objector claimed that she never met the 1st petitioner in her capacity as the deceased's wife, except after the funeral when they were seeking to apply for letters of administration, although she knew the deceased has three children from a previous

relationship she did not know the 1st Petitioner as a wife of the deceased.

The 2nd objector testified of how she lived with the deceased through very difficult times when the deceased was interdicted from employment and was facing court cases for a period of two years. This was followed by a period of sickness when the deceased was in and out of hospital and at this time the 1st petitioner never visited the deceased even in hospital.

The 2nd objector produced many documents to support that she is the one who paid the hospital bills for the deceased and obtained the burial permits and death certificate. The deceased also was too survived by the 2nd objector and her daughter J W, who was born on 11th November, 1998. She produced the original birth certificate to show the name of the father of this child was G K G the deceased herein.

According to the 2nd objector they had a joint business that the deceased was carrying on before his death where they had purchased jointly a motor vehicle registration [particular withheld] a Microbus, she produced a copy of a sale agreement although it would appear the vehicle was not transferred in the name of the deceased. The third witness for the Objector's case was the 2nd Objector's mother whose evidence was to confirm that the deceased brought to her the initial payment of the dowry namely the ewe and the small goat to signify that they accepted the relationship between the deceased family and the 2nd Objector's family.

The gift of the evidence by the 4th objector's witness can be summarized as follows:

The 4th Objector's witness was an employed by the deceased from the year 2000 at his parcel of land in Laikipia and for the duration of his employment he said he only used to see the 2nd Objector who used to visit the parcel of land in the company of the deceased. He knew the 2nd objector as the wife of the deceased and only came to know of the 1st Petitioner after the demise of the deceased when she went to this shamba to claim ownership of the land.

A W W, a sister of deceased also testified on the side of the Objectors. She was categorical that the deceased never solemnized any marriage with the 1st Petitioner. According to this witness the 1st Petitioner abandonment children with the 1st Objector and would not even pay school fees for the son despite the fact that she had withdrawn some many from the deceased estate from the Mwalimu Co-operative Savings Account.

During cross-examination, this witness admitted that the deceased was only involved with the 1st petitioner as a friend out of which they had three children. She however admitted that she did not know how long the friendship lasted.

On the other hand the Petitioner gave documents in support of their petition. They also relied on their testimony and the 1st Petitioner's father one J M K who gave evidence and supported the allegation that the 1st petitioner was indeed married to the deceased.

He contended that although no dowry was paid, the deceased had promised him to formalize the marriage. There are three children born out of the union and all the three are named in accordance with the Kikuyu Customary Law of naming children. According to this witness, his daughter was never separated from the deceased nor was he aware of any divorce.

The petitioners on their part denied that they obtained the Letters of Administration fraudulently. According to the 1st petitioner the second objector herein is an imposter who interfered with her marriage and betrayed her friendship to the family as she was in the first place a family friend.

The Petitioner produced a bundle of documents being photographs that were taken with the deceased and the 2nd objector at a family function which according to the Petitioner is an indication that she was a

family friend.

The petitioner contended that the 2nd objector and could not have been married by the deceased if her child is named after her mother which is not in accordance with the Customary Kikuyu way of naming children. Thus the petitioner urged this court to dismiss the application for revocation.

I have carefully considered this matter as well as the evidence and the material that was placed before me. What comes out clearly in these proceedings are that the deceased cohabited with the 1st Petitioner and they had three children. No witness even on the part of the objector was candid enough to inform this court when the cohabitation ceased if at all it did. Suffice it to say that the relationship between the deceased and the 1st petitioner must have deteriorated for sometime. There is a possibility that this happened because of the deceased relationship with the 2nd objector.

It is quite clear that the deceased was involved in personal problems with his employer when he faced interdiction from employment and subsequently court cases and this was followed by sickness and hospitalization. In all these instances the 1st petitioner chooses does not seem to have featured anywhere, not even at his funeral. These are the circumstances that lead me to conclude that the relationship with the 1st Petitioner had broken down but did it lead to divorce or was there a marriage in the first place between 1st Petitioner and the deceased.

Counsel for the Petitioner submitted at length on the ingredients of customary marriages which includes long cohabitation of a man and wife. He put forward several decisions of the Court of Appeal on the issue of presumption of marriage and excerpts from the leading text on customary marriage by E c. I particularly find the findings of the celebrated Court of Appeal authority in the case of

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Quite relevant especially the judgment of Justice Madam (JA):

“The presumption of marriage is an appreciation of the needs of the Society that in life when a man and a woman cohabit for a long period without solemnizing their union by going through a legalized form of marriage. That is a woman is left stranded either by being cast away by her husband or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestow, the status of wife upon the woman to enable her to qualify for maintenance or share in the estate her deceased husband”.

Apart from this leading authority, considering the evidence by the parties, I am satisfied that there was cohabitation between the 1st petitioner and the deceased whereby three children were born one of whom is over 20 years, this can be considered as marriage by reputation that required a formal divorce.

Since no Sum Proceedings were initiated, I am satisfied the 1st petitioner was a wife of the deceased and should be considered as a widow.

As requested 2nd Objector, there was overwhelming evidence by the deceased father, sister and her own mother that some initial and very compulsory steps towards formalizing the marriage were undertaken and the parties intended to formalize the marriage in church and that explains why the child was named after the 2nd Objector’s mother. Further evidence shows that the deceased died in the hands of the 2nd Objector who bore the responsibility of settling medical bills and she enjoys cordial relationship and support of the deceased parents who regard her as a wife.

Similarly, the Petitioners have also recognized that the 2nd Objector who was cohabiting with the deceased from 1997. This therefore leads me to the inescapable conclusion that the deceased was survived by two widows and 4 children and his estate should be determined according to the provisions of section 40 of the Law of Succession. The Petitioner thereafter ought to have cited the 2nd Objector and accordingly I hereby revoke the grant that was issued to the Petitioners for reasons that there was material

non disclosure of vital information. The amount of money withdrawn by the petitioner should be regarded as part of their share of the deceased estate. If the same cannot be repaid to the estate for distribution.

Accordingly in the interest of justice, I direct that another grant should be issued to the 1st Petitioner and 2nd Objector who shall be at liberty to apply either jointly or severally for the distribution and conformation of the Grant.

Each party shall bear their own cost of this litigation.

It is so ordered.

Ruling read and signed on 3rd January, 2006.

MARTHA. KOOME

JUDGE.