



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

Civil Case 1403 of 2001

IN THE MATTER OF THE ESTATE OF ALFRED NDALO KEBEYA – (DECEASED)

JUDGMENT

The Petition for the grant of representation for the estate of the deceased Alfred Ndalo Kebeya was filed by Truphosa Mmbone Kebeya and Patrick Ndalo Kebeya (wife and son respectively of the deceased).

Thereafter, Andrew and Beatrice Khasei (I shall refer to them as Objectors) filed their cross-petition for the same grant. It is claimed in the Cross-petition that Beatrice Khasei was a co-widow and that her two children and aged mother are also dependants of the deceased along with Truphosa (I shall refer her as the Petitioner) and her children as well as one child born out of wedlock.

It is not disputed thus that the Petitioner is a widow of the deceased and children named by her in the petition are the children of the deceased.

The issue before me is whether the Objector is also a co-widow of the deceased, and her children and her mother the dependants of the deceased.

The Objector led her case by giving her testimony and calling her cousin Khamede Asawa as her witness.

The Objector stated that she met the deceased in 1991 and their relation became close. They stayed as husband and wife in her home in Ngara and at Kenya Commercial Bank staff Home in Mombasa during holidays. She stated that the deceased would visit her at her Ngara house as her husband. They would stay at his rural home during Christmas holidays at the home of his mother at Chemago in Hamisi, while saying that the deceased had also built his house in the same homestead.

The deceased used to visit her daily and would spend weekends at her home and this continued up to 10 years. She stated that she was aware of his first marriage but did not meet the first wife until the funeral. She also stated that their relation was known to the public including Mr. Eboso, the learned counsel for the Petitioner. She specified that he was also the lawyer of the deceased and he found her in the deceased's office when he had come to discuss some legal issues. I note however, that she fell short of stating that the deceased introduced her as his wife.

She also stated that the deceased used to pay school fees for her two children. Once again no proof of such payments is before the court.

Then she testified that when they went to see her mother, the deceased bought a blanket for her and gave Shs.10,000 each to her father and her uncle. She further stated that she was introduced as his wife

by the deceased to his mother during Christmas time. She did not specify when she added that the first Objector Andrew and his wife were also present. Once again, Andrew did not give his evidence.

During funeral arrangement, she was introduced. I do not know as I was not told by whom and to whom. The first thing she did was to view his body at Lee Funeral Home. Then she, Andrew and his cousins started for the funeral arrangement. She took her relatives to the deceased's home to check on funeral arrangements. They were waiting for the Petitioner to arrive which she did after three days. She stated that she contributed for transport and bought clothes for the deceased's mother, after stating that the deceased's brothers were making arrangements.

She further testified that she was with the mother in a car when the Petitioner accompanied the body when they were going home for burial. A dispute arose as to who was to enter the deceased home and it was the Petitioner who did so. After the burial she stayed on while the Petitioner left.

She then produced the death and funeral announcement in East African Standard of 7th May, 2001 wherein she was mentioned as '**The beloved wife**' where the Petitioner was mentioned simply as a wife.

Similarly she produced Funeral Programme where she is mentioned as a speaker after the Petitioner and Andrew and in her speech she told the mourners that the deceased was her mentor and husband and no objection was raised.

As regards the properties mentioned in the cross-petition she stated that she had seen the title deed of the first property listed but did not know how it was acquired. Similarly she also stated that she did not know how the other properties were acquired. As regards the terminal benefits from Kenya Commercial Bank, she simply stated that the deceased had indicated that he would put her name as a beneficiary as the first wife was not in his life.

In cross-examination, she stated that she considered herself as the deceased's wife in 1995 when they went to Mombasa to see her sister and later to see his home. She agreed that she got her new ID on 16th June, 1998 and that it does not bear the deceased's name. In her examination-in-chief she had mentioned the date of the death as 29th May, 2001 and that he was taken home on 14th May, 2001 and buried on 15th. But she corrected later to read as 29th April, 2001. She also agreed that apart from what she had mentioned in her examination-in-chief, there was no further ceremony as regards their marriage.

She described the home at Ngara as one bed-roomed house where she used to stay with her children adding that they were mostly in boarding school. She also confirmed that she did not know how the rural home was purchased and built. She also corrected her earlier evidence that the deceased's home was at Langata and not at Otiende. She said that it was shown to her from the distance by the deceased. She also agreed that she did not visit ailing mother of the deceased at Nairobi as she was staying with the Petitioner. She confirmed that she was not introduced as a co-wife to the Petitioner and that she knew that he was married to the Petitioner in church which is a monogamous marriage.

She agreed that from the documents produced by her it is indicated that Kenya Commercial Bank has made payments of terminal benefits as per the deceased's nomination form after having stated that she did not know that terminal dues were paid. She also agreed that Andrew received Co-operative Society's shares as he was a nominee but she did not object to that payment.

As regards the text of Death and Funeral advertisement and funeral programme she stated that she did not participate and that it was done by Andrew and his cousins and that there were earlier announcements and that she did not know whether her name was in those announcements. She however denied that herself and Andrew conspired to place those advertisement and programme produced by her to place her as a wife to the deceased.

When asked about details of the Funeral committee meetings she testified that, as she was mourning, she did not know any of them including who chaired those meetings. She agreed that during the long stay

with the deceased she did not bear any child from him.

It was agreed by her that the deceased was a very senior officer at the KCB earning according to her more than Shs.100,000 but less than Shs.300,000. But despite that he agreed to stay with her in the home whose rent was Shs.5,000 per month. She also did not remember the road along which the deceased's home was situated, and confirmed that the deceased's body was not taken to her house at Ngara. This she agreed despite her averment that funeral arrangements were also made from her Ngara home.

She also agreed that she did not attend the funeral meeting but programme was sent for approval to Nairobi Pentecostal Church. She stated that she did not know that the programme would not have been approved if her name was placed. She also stated that she did not know when the programme was circulated.

She also could not produce anything to prove that the properties mentioned in the cross-petition belonged to the deceased.

Lastly she stated that the dowry was paid in form of money and the first visit was an introduction. The dowry of Shs.30,000 was paid in 1998 when the deceased stated to her father that he came earlier and was still living with her. But she agreed, however, that there was no prior meeting for negotiation. Even after she stated that her mother was alive and could testify, she was not called.

PW.2 is cousin to the Objector. The deceased and the Objector used to visit her home at Eastleigh Air Force Base to drink during weekends and sometime to purchase drinks.

In 1995 when the deceased told her that he wanted to go and see the Objector's mother she advised him to get a blanket for her. Her (the deceased's) mother was present when they visited Objector's mother in Christmas.

According to her the Objector considered herself as a second wife to the deceased.

In 1999 she went home and the Objector's mother told her that "***she was happy about Beatrice coming with her husband to be***" (*emphasis mine*).

Although she was not present she said as per her knowledge the father of the Objector was paid Shs.30,000. She did not mention anything about Shs.10,000 each to the father and the uncle earlier as evidenced by the testimony of the Objector.

In cross-examination she agreed that Beatrice had close relations with two other men and had born two children from them. She however, denied knowing one Mr. Tsigandia who was alleged to have given her the job at Kenindia Insurance Company.

She also agreed that as per Luhya custom, dowry has to be negotiated and women do not participate in the negotiations.

This was the evidence in short from the Objector.

The Petitioner related the marriage life and how the properties were acquired and how they moved from one home to another as a family. She produced her marriage certificate and birth certificates of the children. She agreed that Stephen was not their child but was born out of wedlock who was accepted by her when so introduced by the deceased. This fact shows that the couple had a relation wherein the deceased could openly inform her of his extra marital affairs. It is undisputed fact that he did not disclose to her his alleged relation with the Objector. She also stated that the deceased swore to her during their family discussions that he had not contracted any other marriage.

On 28th April, 2001 she left the deceased with Andrew and his mother to go to Kitale to cultivate her sister's farm. According to her the mother-in-law was staying with them. She died in 2005 and the

Objector did not attend her funeral.

On 30th April, 2001 she was informed about the deceased's death through a call and left immediately and arrived at late evening due to break down of the car she was traveling in.

The funeral committee was appointed under the chair of one Mr. Lubia who was elder cousin to the deceased. She stated that all the funeral arrangements were arranged by the said committee which also prepared the funeral programme. A draft was prepared and she and other committee members took the same to the Pastor of Nairobi Pentecostal Church. The same was approved and was taken by Andrew for printing to his friend although it was to be done by one Mr. Akinda who was a Church member. The money for the printing was given to Andrew and John his cousin.

The programme, although was supposed to be distributed before the arrival of the body, the same was done in the middle of the service. She saw it later. And found that the Objector's name was inserted. She stressed that the church would not have accepted to conduct the service in respect of a party of a polygamous marriage.

She also stated that the committee approved advertisement in Daily Nation and the one relied upon by the Objector was not sanctioned by the committee. I have already noted that the said advertisement was in East African standard.

She then testified on how the properties were acquired and how the same was distributed during commemoration.

She also produced letters from Kenya Commercial Bank stating inter alia that the terminal dues were not the estate asset and was distributed by the Bank as per the nomination.

She thus stated that the three properties are:

- 1. Title No.Kigama/Nambai/1206 which was an ancestral property which includes the mother's home.**
- 2. Title No. Kigama/Nambai/204 which was acquired through her efforts and whereon their matrimonial home was built.**
- 3. Title No. Tirika/Hamisi/141 which is a grazing land and its title is not yet acquired.**

She also stated that she paid debt of Shs.493,534 to Co-operative Bank, Shs.30,000 to Safaricom and Shs.20,000 to KCB car loan.

In cross-examination nothing much changed and that she stated that the deceased was at home most of the time except when he left on official work after he had informed her. She stressed that she informed the deceased about her leaving home during weekend when he was sick prior to his death. She also stressed that the reason that the draft had to be approved was that the church would not conduct service in a polygamous marriage. She further stated that Andrew was restrained by the committee to place any further advertisement after it came to their knowledge.

She once again described Lovego ceremony wherein elders decide what was owned by the deceased and how the same be distributed.

She explained that the first property has a home of deceased's mother and she was alive when the petition was filed. Second property which is a matrimonial property was in the name of the deceased and she did not place the same in her petition as it was in rural place.

In any event she has stated how the elders and family members had distributed them during Lovego ceremony wherein I do note that even as per the Objector, she was not present, during that ceremony.

After the close of the evidence, the written and oral submissions were made.

The Learned Counsel for the Objector Mr. Khaminwa relied on the evidence led by the Objector as well as some authorities mainly that of **Muigai –vs- Muigai and another (1995 - 1998) EAHCK 206** wherein Amin J. relying on a dissenting judgment of Madan J., as then he was in the case of (**Njoki –vs- Matharu Civil Appeal No.71 of 1989**), did find that the Objectors have discharged the burden of proof that they were customarily married to the deceased.

In the case of Njoki (*Supra*) Madan J. stated that even though there was no proof of any customary marriage, due to the evidence of long cohabitation and repute, the parties were presumed to be married under Common Law.

I however must put forth that the Objector herein has relied on her marriage with the deceased as per Luhya customary law. It was testified that the dowry as per the custom was paid. I had already detailed the evidence on this issue.

Marriage consideration which is called Bukhwi in Luhya customary law has to be negotiated between the families and can be paid by cattle or by money and can be paid by installments commencing before the marriage and continuing afterwards.

Apart from evidence of the Objector, that at the first visit by them to her parents Shs.10,000 each was paid to the father and uncle and a blanket was given to the mother, and in 1998 Shs.30,000 was paid to the father during cross-examination, there is no evidence of any negotiation prior to the payment of dowry or any other ceremonies like feast among the families.

The Objector has stated that Andrew the first Objector was present during both payments but he did not give his evidence. Similarly despite the fact that the Objector testified that her mother could give evidence on these ceremonies, she was not called to give her evidence to corroborate her testimony. The gift of blanket to the mother also was at the suggestion and/or advice by PW.2. This shows that the deceased was not visiting the home of Objector's parents as regards any of the ceremonies of the marriage.

Both Counsel have relied on the book titled **Restatement of African Law Vol.1, The Law of Marriage and Divorce, by Eugene Cotran**. It is apparent that the formalities of a Luhya marriage were not observed or performed, in this case.

Coming to the contention of cohabitation and repute, I have this to state.

The Objector has herself stated that she was not introduced to the Petitioner or anyone else as a co-wife by the deceased. PW.2 also stated that she was told by the Objector that she considers herself as a second wife. She did not state that she herself also regarded her as such. The Objector did not stay in the rural home of the deceased although it was built when they visited the rural homestead, nor was she allowed to enter the same before the burial. The body of the deceased was not taken to her Ngara home. She did not attend the ceremony of Lovego nor did she attend the funeral of the mother of the deceased. She is not aware of how the properties, she alleges were that of the deceased, were acquired. She has also not been built any matrimonial home by the deceased although she averred that their relation continued since 1991.

The deceased was visiting to cohabit in her one bed roomed house at Ngara where her two children were also staying. PW.2 also stated that the Objector fell in love with the deceased and they used to come to her to drink at Eastleigh Air Force Base. She did state that on the first visit of the deceased to Objector's parents she talked only of a purchase of a blanket for the mother. Apart from saying that as per her knowledge Shs.30,000 was paid to the father of the Objector, she did not corroborate evidence of the Objector that they were accompanied by any relative of the deceased. She also testified that as per her mother the deceased was her daughter's husband to be and not the husband.

Lastly, I shall dwell on the evidence of an Advertisement in East African Standard and the Funeral Programme wherein the name of the Objector appears.

The Objector herself has stated that she did not participate in their text and publication which was done by Andrew the first Objector. I have already noted that the advertisement not only curiously mentioned only the Objector as “*beloved wife*” but was so published in East African Standard which, I can state without much difficulty, is not a widely read newspaper as those local dailies like ‘*Daily Nation*’ and ‘*The standard*’ .

Moreover, the 1st Objector Andrew was not before the court to shed more light on its publication which is the only advertisement before the court.

I do not think the Petitioner had to produce any advertisement to show that she was the wife. She has explained the insertion of the Objector in the Programme and in absence of the evidence from the 1st Objector Andrew I shall take her evidence as more probable and creditworthy.

No explanation is given to me on the total absence of the 1st Objector before the court, but I have the evidence that he was given the money as a nominee of Co-operative shares of the deceased which has not been either objected to by the Objector or shown as an asset of the estate in their cross-petition. However, she does object to similar payments made by Kenya Commercial Bank to the petitioner. On page 13 of the bundle of documents produced by the Objector, there is an affidavit sworn by Andrew on 27th July, 2001 wherein it has been averred by him (paragraph 4) that he is the only next of kin of the deceased. In the said bundle there are two letters from Kenya Commercial Bank addressed to the Advocates of the Objector and the 1st Objector Andrew stating that the benefits payable in respect of Pension Fund would be paid in accordance with the Trust Deed and Rules of the Pension Fund and as set out in his nomination form.

The Petitioner also has produced a letter from KCB (DEx.6) stating inter alia that service benefits do not fall within the scope of the Administration of the Estate. She has also attached a letter from the said Bank (DEx.5) showing the nominees and their share which include the Petitioner and four children of the deceased. This also proves that the Objector was not a nominee selected by the deceased.

The 1st Objector after receiving his share has kept quiet. But I cannot help to notice that his averment of being the next of kin is definitely not the truth.

Considering all the facts and circumstance of the case set forth in evidence and also having considered the submissions made, I do find that the Objector has failed to discharge the burden of proof that she was a wife of the deceased either under Common Law or under Customary Law.

I thus dismiss the cross-petition dated 16th August, 2001 with costs to the Petitioner.

Dated and signed at Nairobi this 20th day of June, 2006.

K.H. RAWAL

JUDGE

20.6.06