



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS**

Prob & Admin Cause 241 of 2000

IN THE MATTER OF THE ESTATE OF JAMES SIMU NTHIWA

RULING

JAMES SIMU NTHIWA died at Machakos Hospital on 3.6.00. He was aged about 51 years and was a teacher by profession.

On 15.8.00 Esther Mutile, the petitioner herein petitioned this court for letters of administration in her capacity as wife of the deceased and on behalf of the beneficiary, Geoffrey Nthiwa Simu, a minor child of the deceased.

A Notice of objection was filed by Makau Advocate on 18.9.00 on behalf of Anne Waeni Nthiwa and John Mutisya Nthiwa the mother and brother of the deceased respectively. They cross petitioned for grant of letters of administration on 7.3.01. The petitioner had filed the petition in person but the same was taken over by Monica Mbaru Mwangi Advocate of Kituo cha Sheria who filed a notice of appointment on 9/4/01. Later, Mr. Mungatta took over the conduct of this matter from Kituo cha Sheria on behalf of the petitioner. An answer to cross petition by the petitioner was filed on 19.2.02. On 22.2.02 directions were given by consent of the parties that the matter be disposed of by way of viva voce evidence.

The objectors' case came up for hearing on 27.6.02 when both objectors testified. The 1st objector Anna Waeni Nthiwa (PW1) testified that James Simu Nthiwa was her son. She produced in evidence a copy of a death certificate dated 30.6.00 (Exhibit 6) which confirms that he died on 3.6.00 aged 51 years old. She said that at the time of his death, he was a teacher at Kinanye primary school. He visited home regularly on weekends and school holidays. She avered that he was not married as he had never informed her of it nor had any dowry been paid in accordance with kamba customary law where goats called "Mbui sya ntheo" are taken to the girls parents and one is slaughtered. She also denied that there were any negotiations with the parents of any girl with a view to marriage. She visited him once in 1977 at his place of work and did not see any woman living with the deceased. She denied knowing the petitioner Esther Mutile or even seeing the child. The only beneficiaries she is aware of are herself and her sons. She was aware that the deceased had built up a plot at Kinanye, had household goods and there are also benefits from his work place. She admitted that some of the deceased's belongings were taken by her daughter while others were left with the petitioner.

John Mutisya Nthiwa, a brother of the deceased also testified that the deceased had no wife. That he was very close to the deceased and that he came home sometimes on weekends and over holidays. He denied ever seeing the petitioner at any time even in hospital when deceased was taken ill. The deceased never told him that he was married or had a child. He produced his pay slip and the deceased's pay slip Exhibit 2a and b as exhibits to show that the deceased contributed to the teacher's benevolent fund and he had written his father as the next of kin. After the deceased's demise, he is the one who paid mortuary charges Exhibit 3. He was issued with a burial permit Ex No. 4 and he had receipts for the deceased

water pump Exhibit 5a, b, and c. He also produced the death certificate dated 31.6.00 as an exhibit. When arranging for the burial he went to report to the benevolent fund but was told that a lady claiming to be the deceased's wife had been there. He went there again on 13.6.00 when he met the petitioner for the first time and he was given Kshs 10,000/= for burial. They wrote down an agreement (Exhibit No. 8) that neither the objector or petitioner would go and claim the deceased's benefits unless the matter was sorted out. They agreed to meet again when PW2 would go and retrieve the water pump which had been given out as security for a debt incurred to pay of hospital bills by the petitioner. He checked with the teachers' Co-operative Society (Sacco) and found that petitioner had been there and left a death certificate in respect of the deceased and birth certificate for a child. They met as a family and agreed on who would apply letters of administration (Exhibit 18). They found the petitioner had filed a petition and they joined the case as objectors. Like his mother, PW2 denied that there was any marriage between the deceased and the petitioner as no goats had been paid to petitioners parents and that there had been no negotiations between the deceased's family and that of the petitioner with a view to the deceased marrying the petitioner. His prayer was that the grant be of letters of administration issued to his mother PW1 and himself.

The objectors called one witness Wilson Mukunzu Nduku who said that he is the Chairman of Nthiwa family. He denied that the petitioner was the wife of the deceased as no dowry was paid to the petitioners family by the deceased's family as is the custom. He stated that he is the one who represents that family on such occasions and that none took piece. He denied seeing the petitioner at the deceased's funeral. PW3 said he had even been involved in subdivision of the family land when the deceased wanted to move to his own land and deceased never told him that he was married. PW3 however denied having taken part in the meetings between the deceased's family and that of the petitioner.

The petitioner gave evidence and called three witnesses in support of her case. The petitioner Esther Mutile Musia (DW1) recalled that she met the deceased when she was living in her mothers plot at Kenanye where she did casual jobs on the farms. He liked her and they got married in October 1998, when they started living together. The deceased sent an old man by name Mutinda to DW1's mother to inform her of their marriage. The mother called both DW1 and deceased and they confirmed they were married. They got a child on 15.4.00. She produced a birth certificate dated 5.8.00 in respect of Geoffry Nthiwa who was born to Esther Mutile Musia and James Simu Nthiwa. She recalled visiting the home of the deceased in September 1999. The deceased's mother was not at home but she was introduced to the deceased's brother PW2 and others. They used to attend the Catholic Church at Kinanye and that the deceased was even denied holy communion until they formalized their marriage. She said that the deceased was asthmatic and became seriously sick in May 2000, was treated locally and transferred to Machakos General Hospital. She took him to hospital cared for him till her brother Justice Kitheka Musia too over. Upon admission at Machakos Hospital DW1 informed the Headmistress at the deceased's place of work who she sent one Wambua to go and inform his people as DW1 had a young child. She gave out deceased's water pump in order to be given Kshs 8,000/= to help offset hospital bills. She met all deceased's brothers and sisters. She even went to stay at the deceased's sister house (Rose) till he died. After the death, the deceased's sister went to the school where deceased used to teach, purported to leave out DW1, went to their house and carried away away their household goods. The deceased's family told her they did not want her and that is why she did not attend the burial. The Chief who had agreed to resolve their problems refused to listen to her. She went to the Kenya Union of the Board who assisted her get a birth certificate for her son and petition the court for letters of administration of the deceased's estate which petition is now challenged. She produced a photograph in which she appears with the deceased and their child (DEX No. 3) She also produced in evidence death certificate issued to her DEX No. 8. It is also her evidence that Rose Mbithe collected a sewing machine which was bought by Union of the Blind before she married the deceased and produced receipts – EXE 6 a& b) Her evidence is that she is partially blind, used to do casual jobs but used to rely on the deceased for her up-keep.

Ruth Muthike (DW2), the mother of the petitioner Esther Mutile testified that Esther married the deceased and they sent an elder one Mutinda to her and she agree to the marriage. She first met the deceased's mother when deceased fell ill and was admitted at Machakos General Hospital. She even stayed at Rose Mbithe's house for two days when deceased was in hospital The petitioner did not attend the deceased's funeral because the deceased family rejected her as the wife of the deceased and her

properties were taken away. She now takes care of the petitioner and her child.

Beth Wangui Kamande, a friend to the Petitioner said that she met the deceased on 29.4.00 at Kinanie when she visited Esther and that the two Esther and the deceased lived together. Before that in 1999 Esther had told her of her marriage to the deceased. She is the one who sent for Mbithe when the deceased fell ill and that she had been staying with DW1 and DW2 as they nursed the deceased but Rose Mbithe took them away.

Justice Kithuka Musia (DW4) is a brother of the petitioner. He said he knew the deceased in 1992 when DW4 was Chairman of Kinanie Primary School where the deceased taught. He recalled that at first, the petitioner was doing casual jobs near the school, but later, moved to reside with the deceased. They got a child in 2000 and that elders were sent to inform DW2 of the marriage. He took care of the deceased in 1999 when he was admitted at Machakos Hospital from 19.5.00 to 4.6.000. She met the deceased's family at Machakos Hospital when deceased was admitted. He witnessed Rose Mbithe Carry away property from deceased's house. There were disagreements between the deceased's family and Esther's family and they did not therefore attend the funeral. He is the one who kept money as he took care of deceased in hospital and paid for the drugs.

Benedict Mutinda Muema (DW5) recalled that he had known deceased since 1992. He was Chairman of St Theresa Kinanie Church where deceased used to worship. Deceased later introduced Esther to DW5 as his wife. The deceased then sent him to Esther's mother informing her of his marriage to Esther. Deceased planned to formalize the marriage later. Deceased could not pay dowry when the wife was pregnant.

In their submissions, the counsels, Mr. Makau for the objector and Mr. Mungatta for the Petitioner/Respondent came up with separate issues for determination. Mr Makau raised 6 issues for determination whereas Mr. Mungatta raised 3. The issues can be summarized up as follows:

1. Whether the petitioner and deceased cohabited as husband and wife – whether they were married.
2. whether there is an issue to the association of the deceased and the petitioner
3. whether the petitioner and the child are beneficiaries of the deceased's estate and if so, to what extent
4. What law is applicable to the association between the deceased and the petitioner
5. Did the Petitioner file this case with the consent and knowledge of the objector.
6. who is entitled to costs of this cause.

This court has considered all the evidence presented before it by both parties and submissions by the counsels. It is common ground that the deceased and petitioner never went through the formalities of a kamba customary marriage, whereby goats would have been taken to the petitioners parents. The petitioner concedes that there had not even been discussions or negotiations between the two families save that her mother had been informed of the marriage to the deceased. According to DW1 the deceased intended to formalise after she got the child but soon after the child came, the deceased was taken ill.

Though the objectors case is that the deceased was not married and lived alone, the petitioners case is the contrary. DW1 said that infact the objectors did not visit the deceased so that they would not have known how he lived. PW1 said that she last visited the deceased at Kinanie in 1977, 23 years before deceased's demise. That is along time for PW1 to have known how deceased lived. PW2 said he visited the deceased at Kinanie about 6 times for the time he was there. Taking into consideration the evidence PW1, and 2 on one hand and DW1 – 5, I am inclined to believe the petitioner, that as of year 2000, she was living with the deceased. There is uncontroverted evidence on record that after the deceased's demise, Rose Mbithe a sister to the deceased went to deceased's house and carried all the goods. They included

DW1's clothes. After negotiations Rose agreed to return DW1's the clothes but she never did. There is also a photograph DEX No. 3 which PW1 and 2 accepted, was of the deceased DW1 and a baby This is evidence of at least some relationship between deceased and DW1 before deceased's demise. Besides, it is DW1 who took the deceased to hospital, organized to pay bills and even gave away deceased's pump as security for some money to offset bills. That evidence was not challenged. From the foregoing, I am satisfied that the petitioner was cohabiting with the deceased at the time of his death and DW1 did not just come up with claims of cohabitation at time of death. DW1 seemed to be more truthful and candid than the objectors were.

DW1 also testified that they have a child with the deceased. She produced the birth certificate as DEX No. 1. It is the same child shown in the photograph DEX 3. The child was born on 15.4.000 and the certificate was obtained after the deceased's death on 3.8.000. The deceased was taken ill soon after the birth of the child and died on 3.6.00 hardly 2 months later. The delay in obtaining the birth certificate is understandable. Having agreed that the deceased was cohabiting with the petitioner at the time of the deceased's death and taking into account evidence of DW2-5 I do believe that the child is the issue of the association between the deceased and DW1. The child is known as Goeffrey Nthiwa. According to PW1 the child should have been named Mutinda after the deceased's father. The deceased had not followed Kamba customs in marriage. He may not have followed the same in naming the child. The court finds that the child was born during the association of DW1 and deceased and is deemed to be the deceased's son.

Under English Common Law which is applicable to Kenya by virtue of Section 3 of the Judicature Act, cohabitation between man and woman as husband and wife raises a presumption of a marriage. The question is whether the deceased and the DW1 can be presumed to have been married. According to the text **BROMLEY'S FAMILY LAW 9TH EDITION BY NIGE HOWE & GILLIAN BOUGLES** page 52, it is stated as follows:

"If a marriage is challenged, the burden lies upon those challenging it to prove that there was infact no marriage and not upon those alleging to prove that it was solemnized."

In the present case, DW1 has said that she was married to the deceased and DW2-5 have confirmed it. It was upto the objectors to prove otherwise.

The principle of presumption of marriage was enunciated in case of **MARY NJOKI JOHN KINYANJUI CA NO. 71/1984** and the case of **HOTENSIA WANJIKU YAWE V PUBLIC TRUSTEES CA 13 OF 1976 NRB** in Which Justice Madan had this to say of the concept of Presumption of a marriage.

"The concept of Presumption of marriage is an appreciation of the needs of the parties in life when a man and a woman cohabit for a long period without solemnizing their Union by going through a recognized form of marriage. That if 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 of the deceased husband".

DW1 testified that she had cohabited with deceased as husband and wife from 1998 till his death. DW2 – 5 have corroborated her evidence. I do find that the objectors have not proved otherwise. The deceased and DW1 held themselves out as husband and wife and were viewed as such and this court does presume the deceased and DW1 to have been married and had one issue of that marriage.

The next issue is whether the petitioner and her child are beneficiaries of the deceased's estate and if so to what extent. Section 29 of the Law of Succession Act lists who dependants are. It reads:

"For purposes of this part dependant means;

(a) the wife or wives or former wife or wives and the children of the deceased and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

(b) Such of the deceased's parents , step parents, grand children, children whom the deceased had taken into his family sisters as well being maintained by the deceased immediately prior to his death.

(c)

DW1 is partially blind. She said that the deceased used to take care of her. She had been doing casual jobs before her marriage to the deceased and at one time sold vegetables from the land. On the other hand, neither PW1 Nor 2 adduced any evidence regarding dependency. Preference is given to the wife and children in matters of inheritance and in this case, DW1 and her child take preference to the deceased's mother. The petitioner was only aged 33 years at the time of death of deceased and there is a baby about 5 years old as of now. They will need shelter, food and school fees for the minor. The deceased's estate should devolve to them. May be the deceased's mother can get a mere token from the estate considering her age and the fact that she failed to prove dependency. PW2 is a teacher and was not dependant on the deceased at all.

DW1 did not consult the objector before she filed this petition. She explained that it was due to the animosity and hostility that had been shown to her by the objectors. She was not even able to attend the burial of the deceased. In any case, having found that she is a wife to the deceased and ranks first in order of preference of dependants, she did not need the consent of the objector before filing this petition. The court therefore holds that the petitioners petition is properly before this court. Apart from the petitioner, the other beneficiary is a minor.

The relationship between DW1 and PW1 is not cordial. Even though a second administrator would be required because one of the beneficiaries is a minor. I doubt whether PW1 and 2 would co-operate with DW1 in administering the deceased's Estate. I order that PW1 be listed as a beneficiary who will only be entitled to a token from the deceased's estate as a mother.

The court do appoint a neutral 2nd administrator. 2nd Objector's prayer that grant be issued to him is refused.

Each party to bear its own costs.

Delivered at Machakos this 15th day of December 2005.

R. WENDO

JUDGE