



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

H.C. SUCCESSION CAUSE NO. 2098 of 2001

IN THE MATTER OF THE ESTATE OF JOSEPH KIRAGU MUNYI

(DECEASED)

PHYLIS WANGARI KIRAGU APPLICANT

V E R S U S

1. HENRY GITHINJI

2. SAMUEL M. NYINGI RESPONDENTS

3. BENJAMIN IRERI JAMES

R U L I N G

The objector in this application, for revocation of grant of letters of administration issued in respect of the estate of the deceased herein, claims to be the wife of the deceased and her two daughters fathered by him.

The petition for grant was filed by one Henry Githinji Munyi stating he is the sole brother surviving the estate. In his own replying affidavit to the application the Administrator has annexed two letters one from Assistant Chief and another from Senior Chief. The first one is dated 9th February, 2001 wherein it is mentioned that the deceased had two surviving brothers namely the Administrator and one Christopher Mukunga Munyi while the other letter dated 15th February, 2001 mentions only the name of the Administrator as a sole surviving brother to the deceased. The averment by the Administrator that the deceased had no relation with the other brother is not substantiated. He has stated that the second brother Christopher refused to be either named or involved in Resident Magistrate's Succession Cause No. 44 of 2001 but has fallen short of getting any written confirmation from his brother. The second letter from Senior Chief does not even mention the existence of the second brother. This fact only can raise a cloud of suspicion over the integrity of the petitioner.

The applicant's case is that she has been a friend of the deceased since 1982. The first daughter was born on 23rd November, 1984 and the second one was born on 23rd June, 1988. The birth certificates are produced which were obtained after the death, the reason was, according to the applicant, that they were required by Teachers Service Commission. She has been living with the children at Kimilili and looking after the land of the deceased. The deceased was a teacher at Kalewa School and was living at that school. He used to come to Kimilili during week ends and holidays. She also said that when the deceased was unable to come she used to visit him in school during weekends with the children. That evidence has been corroborated by PW 3 Gera Odhiambo John who was co-teacher with the deceased. He also said that the deceased introduced the applicant to him as his wife and that he has visited their Kimilili Home. According to him after the death of the deceased, he first informed the applicant. The applicant also said that she in turn informed the Administrator.

P.W 3 also said that the applicant came with the Administrator and the body was transported to Kimilili. The goods belonging to the deceased at the school were also transported to Kimilili.

Thereafter as per the evidence of the applicant the funeral arrangements were made at Kimilili and the funeral programme was also prepared which was to be printed by the Administrator at Kerugoya. According to her the funeral programme which was produced by her was given to her at the funeral. This fact once again is corroborated by P.W.3 as well as P.W.2. Emmanuel Juma Wanyonyi the pastor and who presided over the funeral ceremony. They both also produced their own copies of the funeral programme given to them at the funeral. Her evidence that she was treated as a widow and her children as the children of the deceased were fully corroborated by both P.W.2 and P.W.3. She also produced photographs taken during life time of the deceased which were taken as a family and those taken during the funeral along with the teachers and friends and family members including the Administrator. The funeral programmes produced during the evidence clearly mentioned her as the wife and the two daughters as his children. Except for that fact the funeral programme produced by the Administrator is similar. It was also mentioned that the deceased was a member of the Church of Africa Sinai Mission Kimilili. In my view that fact is important to this cause because of the testimony of P.W.2. He unequivocally deposed that the applicant was considered and regarded as the wife of the deceased who was the secretary of the church at the time of his death. He also confirmed that he baptized all the four members of his family. i.e the deceased, the applicant and two children. He also stated that during funeral arrangement made with the administrator at Kimilili, he also treated the applicant as a widow of the deceased. Similar treatment was accorded to her and the children during funeral presided by him. He did not raise a little doubt that the applicant and the children were not the wife and children of the deceased.

The applicant has agreed that before 1992 they were only friends and that the children were born before their continuous cohabitation.

This in short was the evidence produced by the applicant.

The administrator on the other hand simply refuses to acknowledge the applicant. He reiterated that his brother was not married. He agreed though that he has never visited his brother at Kimilili but when he used to go and visit him at school he has not met the applicant. That could be so obviously because the applicant also has stated that she was living at Kimilili and it was only when the deceased was unable to visit them due to sickness during weekends or holidays, she used to go to school. It is also true that in his school record he was mentioned as next of kin by the deceased. He denied that the applicant with or without the children has ever visited their homestead at Kerugoya. He stressed that the deceased has not performed any customary rites of Kikuyu marriage and that none of the children was named as per Kikuyu custom. Apart from stating that he was in forefront of the funeral arrangement and ceremony he did not elaborate.

The issue of photographs also was brushed aside by him by stating that many photographs were taken and that there was no restriction. During cross-examination he explained content of Senior Chief's letter to the effect that he was the only surviving brother, by stating that he used that letter to apply for letters of administration. He also said that the loan of Kshs.350,000/= from KCB Sacco was taken to assist his son and that the loan was taken by him and his son. He refused first to recognize the applicant as well as photographs produced by her but then relented by accepting. He downplayed the participation of P.W.2 as presiding pastor during funeral by stating that he just took over despite the fact that he himself arranged for a religious pastor. This assertion does not conform to this Chief role at the funeral ceremony. He argued that he had taken Kshs.93,000/= from the Sacco of the deceased and has spent that sum.

The other four witnesses called by the Administrator echoed the story that the deceased was not married and that the applicant did not attend the funeral as a wife but as a friend.

It was also stated that the deceased did not come to his homestead frequently. An averment that the deceased having a wife and a child and separated since 80s was also mentioned. It was also stated, unlike the Administrator, that it was agreed during funeral arrangement that a pastor from western part would come and preside the ceremony.

From the evidence, some facts emerge as indisputable, that the Administrator has stolen a stealthy match over other siblings. His averment that the other brother did not want to inherit from the estate is not convincing, and in any event not proved to my satisfaction. He has totally ignored to state what is the position of the third sibling. His admission that the loan was taken by him and his son and not by him and deceased go a long way to prove his lack of sincerity and integrity. He has, to my mind, taken undue advantage of the situation and tried to usurp the estate to his own sole advantage.

But this alone shall not help the applicant. She has alleged that she was the wife of the deceased. She is the one who has to satisfy the court to its veracity. Her averment of the payment of Kshs.8,000 as dowry obviously is not proved. But only because she has failed to prove the requirements of a customary marriage, can this court be precluded from looking into the issue of presumption of marriage? I think not.

I shall adopt a passage from the Judgment of *Mustafa Wanjiku Yawe V. Public Trustee C.A. No. 13 of 1976*.

I can find no thing 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, the evidence concerning cohabitation was adduced at the hearing, and formed part of the issue concerning the fact of marriage, and even if no specific submission on that point was made by Mr. Muite, I do not think that he is precluded from relying on it before us. It is directly concerned with the burden of proof to be discharged by the appellant, and this presumption enhances the quality of the evidence adduced on her behalf and weighs heavily in her favour. There was no evidence adduced in rebuttal of that presumption. In this case the applicant has shown from the evidence of two independent witnesses who had been closely associated with the deceased that she was regarded as a wife of the deceased and the two daughters as his children. A pastor who was from Kimilili went to Kerugoya the ancestral home of the deceased to preside over the funeral ceremony.

His testimony was unscathed and so was the testimony of P.w.3 a co-witness. It is also not disputed that it was the applicant who was informed first of his death who in turn informed the family members. One does not do so with a friend. It arises without much difficulty that the deceased was not close to his family, was working at a far place from home and none of his family members has visited his Kimilili farm. These facts corroborated the claim of the applicant that she has been cohabiting with the deceased and they have been living together as husband and wife and were so regarded by the church (where the deceased was a member) and by his workmates. The fact of her not changing her maiden name on Identity Card and the Birth Certificate obtained after the death, in my view fall by the side way in view of the aforesaid fact.

I have considered the submissions made by both the counsel and in my opinion, the case of *Mary Njoki V. John Kinyanjui Muthuru and 4 others* in my view can be distinguished from the facts of this case. I also get support from the fact that the court in the said case did not find that the presumption of the marriage cannot be made in a marriage as per customary law.

In view of the premises aforesaid, I find that the applicant has satisfied me that the grant of letters of administration was obtained by the Administrator Henry Githinji Munyi fraudulently and by concealment of material facts. The confirmed grant dated 28th June, 2001 issued in Succession Cause No. 44 of 2001

at Kerugoya court is revoked with costs to the applicant. The applicant may file the petition for the grant of letters of administration and for any other appropriate order deemed fit.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of December, 2002.

K. H. RAWAL

JUDGE.