



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1206 OF 1995

IN THE MATTER OF THE ESTATE OF

JOSEPH MOSE OKEMWA (DECEASED)

JUDGMENT

Joseph Mose Okemwa, (hereinafter called “the deceased”) died on 25th March 1995 as a result of a road traffic accident along Nakuru – Kisii Road.

His wife Agnes, Kemunto Mose, and sons Lawrence Gitenya and George Ondimu (hereinafter referred to as “the petitioners”) filed an application in this court on 31st May 1995 for letters of administration intestate to the estate of the deceased but before further action was taken thereon, save for an order for gazettment of the petitioners petition dated 24th July 1995, one Belding Moraa Okemwa and one Vincent (hereinafter called “the objectors”) filed an objection to the making of the grant and what they called answer to the petition for grant on 14th September and 2nd October 1995 respectively. They referred to themselves as wife and son of the deceased.

In their objection, the objectors complained that they had never been consulted when the petitioner filed the petition in court, that the petition was filed secretly, that the petitioners had left the objectors out of the estate and were not acting in good faith as they had not given full and accurate inventory of the deceased assets.

The objectors alleged that the petitioners were not competent to administer the estate of the deceased on their own to the exclusion of the objectors since they had not disclosed that the deceased had another wife the first objector and other children.

They called for the dismissal of the application for letters of administration by the petitioners, terming as a fraud on them, the incidences stated in the objection subject to this ruling. The objectors also filed a petition by way of cross-petition for a grant of letters of administration intestate to the deceased estate giving details of their relationship and assets of the deceased in the application. They included in their petition the names of the petitioner and her children.

Thus, a dispute had arisen in regard to the deceased estate to be resolved by the court. On the one hand is the petitioner with her children while on the other is the first objector with her children.

This dispute was placed before this court for hearing, on 11th June 1998 and took quite some time to be completed on 26th April 2001.

The first objector told the court that she became a friend of the deceased in 1968 but that in 1973 she married him and came to live with him in Nairobi. That out of this marriage 3 (three) issues were born, namely Vincent Onserio Mose, Osborne Momanyi Mose and Brenda Mongina Mose.

The first objector produced a number of letters addressed to her by the deceased to confirm that the two were husband and wife (see exhibit 2).

She also produced a number of photographs which she took with the deceased and other members of his family. Some even included some of the petitioner's children (see exhibit 3(a) to (m)).

The first objector also produced birth certificates for Vincent, Hesborn and Brenda all of which included the deceased name as their father (see exhibit 4(a) to (c)). She produced a letter from Kenya Airways authorizing the issuance of a free air ticket for Vincent Onziero Mose to travel out of the country (see exhibit 5) and a letter to the Headmaster of Highway to allow Hesborn Momanyi attend classes while the deceased looked for fees (see exhibit 6).

All these exhibits were intended to confirm that the deceased was the husband to the first objector albeit under customary law and father to Vincent, Hesborn and Brenda – hence entitled to a share of the deceased estate.

The first objector, however, stated that by the time of the deceased death, the two had separated in 1983 due to a small misunderstanding and that she had gone to live at Kenya Railway quarters, where she still resided at the time of hearing of this dispute.

Nevertheless, when the deceased died, the first objector took part in funeral arrangements and even accompanied the body to his rural home for burial but that after burial, she was told she was not wanted in that home together with her children.

The second objector did not testify as the court was told he was away in a foreign country for studies. But the first objector called 3 witness, namely Dickson Ogenche, a relative whom this objector visited and the deceased came to know her there.

The witness testified that the deceased married the first objector around 1972 and that he used to visit the two at their house at South C estate Nairobi.

That when the deceased died, this witness and other relatives of the first objector attended the funeral.

Brenda Mongina Mose testified as to how the deceased used to pay her fees at Kongoni Primary School and that she attended his burial.

Simon Change, a former Police Officer at the Criminal Investigations Department was called to testify as to how he knew the deceased and the first objector and that the latter two (2) were husband and wife.

The witness visited the two often at their Nairobi West home, though one time he went to the house but did not find the first objector. That the deceased told him that she was under discipline after misbehaving. According to the witness, the deceased had three (3) children with the first objector.

The first petitioner opposed this objection and said she was the lawful wife of the deceased having married him in 1956 under statute law at Nyamahwa Catholic Church. That after marriage the two lived at Bunyamasicho sub-location and then moved to Gesima Settlement Scheme in 1964.

According to this petitioner, the settlement land was bought by her while the deceased was studying in India and that she got money to buy it from proceeds of coffee and pyrethrum.

She denied knowing the first objector save that she had seen her in this court and even denied that the objector had been taken to her home in Kisii in 1973 for introduction as a second wife of the deceased.

According to the first petitioner, the deceased's land at Gesima is 35 acres. That he had another piece of land in Molo (5) acres registered in the name of her sons Lawrence Gitiyanya and another measuring 20 acres in the same area registered in his name and those of two (2) other persons. The petitioner did not

give the registration numbers of these parcels of land.

In cross examination, the petitioner was shown a number of photographs in which she recognised her children, the deceased and the objector.

The third petitioner testified as DW 4 in the objection. He is the 1st petitioner's son, a lecturer at Kenyatta University.

He stated that though the objector used to visit the deceased at their Nairobi West Home, she only did so in company of one James Nyarunda who was her friend.

According to this petitioner, the objector never spent a night at any of the deceased houses either in Eastleigh or Nairobi West; yet this witness had been staying with the deceased in Nairobi since 1968 up to the date of his death.

Contrary to the first petitioner's evidence that she never saw the 1st objector either at the Nairobi or Kisii home during the deceased funeral, this petitioner stated that infact the 1st objector was at Nairobi West home of the deceased when funeral arrangements were going on and that she infact raised the issue of her marriage to the deceased and payment of dowry to Jackson Ongeta Change but that she was told to raise this issue at the deceased rural home.

He even testified that a meeting of elders did take place at the deceased rural home to deliberate over the first objector's complaint but that the elders decided not to give her recognition as the deceased second wife because they did not understand why the latter had not paid dowry for marrying her yet he was able to do so before his death.

Jackson Ongeta Change (DW 2) is the deceased brother. He saw the objector for the first time at Nairobi during funeral arrangements for the deceased and that she was then complaining that she be recognized as the deceased wife and for dowry be paid for her.

This witness advised the objector to go call her relatives for a meeting to be held at the deceased rural home for deliberation over the complaint.

That though the elders meeting was held on 2nd April 1995, the objector was not given recognition as the deceased wife and no dowry was paid.

According to him only the first petitioner was and is the only lawful wife of the deceased.

James Mutuli Okemo (DW 3) was called to say though he often visited the deceased at Nairobi, he only found him with children and sometimes with the first petitioner and that at no time did he find any other woman in the house in the position of the second wife.

That the first time he saw the objector was when the deceased died in 1995 and that he attended a meeting of elders at the deceased home when they refused to pay dowry for the objector thus shutting her out of the deceased family membership.

Then there was the evidence of Nelson Kingoina Nyangera (DW 5) who was referred to as an expert in Gusii Customary Law. He outlined to the court his historical background and the positions he held in public life before he retired in 1986.

In his testimony, under Gusii Customary Law, there is no marriage between a man and a woman until dowry is paid.

That even if dowry had not been paid during the man's lifetime, on his death, parents of both sides must agree as to payment of dowry for the woman before she can be accorded full rights of a wife and allowed to participate in the burial of her husband.

In this case, according to the witness, the objector was not married to the deceased since dowry had not been paid. According to him to, in the circumstances, the children born from the union between the objector and the deceased belong to the objector's family.

A sister to the deceased, Anne Nyanchama Oganga, also testified for the petitioner. According to her, she did not know of the marriage between the deceased and the objector and that the first time the witness saw the objector was after the deceased death.

She also testified that though the objector accompanied the deceased body to Kisii, elder's who met to deliberate her fate refused to recognise her as the deceased second wife.

Counsel for both parties submitted either in favour or against this objection on 4th April 2001.

The court is dealing with the objection to the issue of letters of administration to the petitioners by the 1st objector and one Vincent Onserio Mose in respect to the deceased estate.

Vincent was said to be in the United States and the first objector conceded that even if letters of administration were issued to the objectors this particular objector would not be able to participate in the administration of the deceased estate.

The grounds set out for the objection were that the petition was presented in secrecy and without consultation; that the objectors and other children were left out of the list of dependents and that the petitioners failed to disclose the existence of the first objector as the deceased second wife.

I think in this case the central issue is whether the first objector was the deceased wife.

On this issue there was ample evidence that the 1st petitioner had married the deceased under statute in Nyamahwa Catholic Church. This evidence was not contested. If this be so, a person who contracts a marriage under statute law cannot purport to contract another marriage under customary law.

It is true a man married thus, could enter into some relationship with a woman or women but such relationships is/are illicit and do not constitute a valid second or whatever marriage/s.

The 1st objector asserted and testified as to her friendship with the deceased when she was working at Gusii County Council as a Secretary. That this relationship continued until 1973 when she came to Nairobi and married him. This objector produced a number of photograph (exhibit 3) showing the deceased, the objector and the children, including some of the first petitioner and letters exchanged between the two which depicted intimate relationship between them, (See exhibit 2).

This objector also testified as to how she was introduced to the first petitioner by the deceased through a letter which was carried by the deceased brother whose name was given as Moturi. She said she stayed at the petitioners house at the Settlement Scheme for a week before the deceased came for her.

In my view this Moturi must be the witness who testified for the petitioners as DW3 but he was not asked any question about taking the objector to the petitioner's house at the settlement scheme for an introduction.

Also it is noted that at the time of the deceased death, he was not staying with the objector.

Simon Change (PW 3) testified that though he used to visit the deceased at his Nairobi West House where he lived with the objector, one time he went there and did not find her. That the deceased told him that she was under discipline.

Simon did not tell the court when he visited the Nairobi West house and missed the objector, but it is evident from the testimonies that she never went back to live with the deceased after she left but that she resurfaced after he died in a road accident on 25th March 1995.

And even after she surfaced, she was told by Jackson Ongeta Change (DW 2) to go and bring her parents and/or relatives to the deceased's rural home for a decision as to whether she had married the deceased as she claimed.

The evidence from both sides agreed that when she brought her elders and a discussion was held with elders from the deceased side, it was decided that the objector was not the deceased wife because though the deceased was able during his lifetime, he did not pay dowry for her or build a house for her at his rural home.

The objector's allegation that part of dowry had been paid through repair of the vehicle belonging to the objector's father by the deceased was not supported at all. It does not even seem to have been put forward when the elders were discussing the objector's fate.

According to Gusii customs – see the evidence of Nelson Kingoina Nyangera (DW 5), if a man married a woman and he dies before dowry is paid, such dowry must be paid before the man is buried. This condition was not fulfilled in the case of the objector herein.

Given this background and the evidence, the objector could not and cannot, regrettably, be termed the deceased wife. On all fours, the deceased had only one wife, the first petitioner, whom he had married in church. At best the objector can be called the deceased mistress.

If that be the case, was the objector entitled to be consulted before making the petition application? The answer is definitely in the negative.

The petitioner had no basis for doing this. She was the sole surviving spouse after the deceased died and was entitled to make the petition in her sole name or with the names of her children – (see Sections 35 to 41 of the Law of Succession Act).

Thus the question of the objector being informed of the filing of the petition or that there was concealment in the exercise did not arise the matter having been published in the Kenya Gazette as required by law – (see notice dated 24th July 1995 on the file cover). Nor is she entitled to any share of the deceased estate.

Another issue is that of children. The objector, as the deceased mistress or concubine as one would like to refer to her, had 3 children with the deceased. They are Vincent Onserio Mose, Esborne Momanyi Mose and Brenda Mongina Mose.

In disputes of this nature, the welfare of the children take centre state particularly those of tender years like Brenda.

I was told the first 2 live in the United States and are nature while the last born, Brenda, is with the mother studying at a Nairobi School. In normal circumstances and where need arises these children are entitled to support from the man's estate. However, in this particular, case, the evidence of the petitioner's expert witness (DW 5) children of a man who dies before paying dowry for his wife belong to the family of the mother according to Gusii Customary Law. (see page 86 7.c.7 of Def. Exhibit

1). It seems to me a strange custom but during the hearing of this case it was not challenged. In fact evidence was adduced that as soon as the elders refused to pay dowry for the objector, she left the deceased home with her children and did not attend his burial; or that if she remained around she was not allowed to participate therein, not even to throw soil on the deceased grave. These aspects of customary law are very touching and if not performed, then, as the evidence was given, then the objector's membership was not transferred from the objectors parents to the deceased home.

I have regrets for the objector but since she came to this court then she has to accept its verdict. And that verdict is based on the evidence adduced by both parties to this case. In the courts view, this objection has been overshadowed by the evidence adduced by the petitioner's and their witnesses which I

have favoured to that of the objector and her witnesses. In consequence of what has been stated above, I dismiss the objection and cross petition and declare the petitioners to be the proper persons to process the letters of administration intestate in respect to the deceased estate.

And in view of the circumstances of this case, I would order each party/ies to bear their own costs.

Delivered and dated this 5th June, 2001.

D.K.S. AGANYANYA

JUDGE