



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI SUCCESSION CAUSE NO. 989 AND 1110 OF 1999 (CONSOLIDATED)

IN THE MATTER OF THE ESTATE OF GERISHON JOHN MBOGOH

J U D G M E N T

The applicants filed a summons for an interim grant of letters of administration (intestate) ad-coligenda bona to the estate of one Gerishon John Mbogo deceased who died intestate on 3rd March 1999. The application has been objected to by Veronicah Rwamba Mbogo who claims to be the rightful administrator of the estate of the deceased as she was the wife of the deceased having been married to him in 1984.

The main issues to be determined are whether the objector was a wife of the deceased and hence entitled to apply for grant of letters of administration and whether the objector had capacity to marry the deceased.

The evidence led by the objector in court was that she and the deceased got married in January 1984 under the Embu customary law. Her witness Francis Njue Emos testified that he knew the deceased since 1958, they lived in the same village and that they were related and from the same clan – the rukwaro clan. He stated that in 1985 the deceased called his family members to go visit Veronicah Rwamba's family at Runyenjes to discuss marriage and take the bride price according to the Embu tradition. He further testified that they did go to Veronicah Rwamba's home and they took with them Kshs.50,000/-, 10 crates of beer, 1 carton of tea leaves, 1kg of cooking fat, 3 bales of wheat flour, 1 big sufuria and a goat. He stated that there was a ceremony according to the Embu custom and they danced; Veronicah and the deceased were garlanded with flowers of the passion fruit tree as per the Embu custom. It is worthwhile to note here that Francis did not explain the kind of ceremony that took place he merely stated that there was a ceremony. When cross-examined by counsel for the Petitioners he stated that no *ngurario* had been performed after that first visit and that he did not know if any such ceremony had been performed. Francis Njue further produced some photographs of the ceremony however he did admit that he did not feature in any of them yet he stated that he and the deceased were very good friends. It seems very odd that he did not appear in any one of the photographs.

Veronicah Rwamba in turn testified that in 1985 she and the deceased went to her parents' home and that her husband took with him money to give her parents as well as sugar, a he-goat and other things. She stated that also present at her parents home were her husband's first cousin, his wife, his brother (N. Wangiri), his sisters (Karen, Wangeci) and brother Bernard. She stated that all but one of the deceased's children were present. It is interesting to note that she left out the witness who testified on her behalf – Francis Njue.

The petitioners in their submissions have pointed out that the evidence led by the objector contradicts that of Francis Njue as has been observed above. They have further stated that the version of Embu customary law that the Objector and Francis Njue gave was not in conformity with known Embu customary marriage. In stating so they have relied on the book *RESTATEMENT OF AFRICAN LAW OF KENYA*,

The Law of Marriage and Divorce, Volume 1 by Eugene Cotran which sets out the procedure followed during the formation of marriage on page 11 as:-

- i) Proposal;
- ii) Among the Embus the boy's parents take beer to the girls parents;
- iii) The first instalment of the bride price is then paid and thereafter pther payments are paid until the full amount of the bride price is paid;
- iv) A ram (ngoima ya *ngurario*) is then sent from the boy's home to the girl's home and slaughtered.

When this process is completed, the parties are considered legally betrothed.

I am convinced by the petitioner that the Objector did not follow the procedure in formation of marriage as set out in Cotran's book. The objector even produced the same extract on page 11 of the said book and has sought to rely on it. The evidence she led does not show this process in fact her witness Francis Njue said they only paid one visit and everything was done in that first visit. At one point in cross examination he stated that he did not know whether the *ngurario* ceremony had been conducted.

I therefore find that the objector has been unable to prove that she was married to the deceased under Embu customary law.

The Objector has further asked me to find that there was a presumption of marriage as the objector and the deceased had cohabited for some time before the deceased's death.

It is settled law that a presumption of marriage is a rebuttable presumption.

The objector stated that she was previously married to one Bernard Njiru Robson. She stated that they got married in 1971 at the DC's Office. She went on to say that they separated in 1977 and further stated that she initiated Nyeri divorce cause number 5 of 1992 which was finalised. To support this, she produced a copy of a Certificate of Making Decree Nisi Absolute. The said Certificate is not certified and does not contain any signature of the Magistrate who issued the same. I am bound by section 79 of the Evidence Act chapter 80 of the Laws of Kenya which clearly states which documents are considered to be public documents. The certificate produced is therefore a public document and under section 80 and 81 of the Evidence Act such documents can be certified and produced in proof of the contents of the documents. I cannot therefore consider the said Certificate.

The objector, in her supplementary submissions has asked me to exercise the discretionary powers conferred on this court by the provisions of sections 83 and 84 of the Evidence Act chapter 80 of the Laws of Kenya to presume both the genuineness and the existence of the Nyeri divorce cause number 5 of 1982. I am however constrained not to exercise the discretionary powers under section 83 and 84 for the following reasons.

Firstly, the Certificate produced in court does not purport to have been certified by the magistrate. Secondly, The signature is very faint and is illegible and for those reasons I cannot consider the said documents.

I therefore find that the objector's previous marriage which is a statutory marriage has not been dissolved and as such no other marriage under any other form is legal. Section 37 of the Marriage Act chapter 150 of the Laws of Kenya states that Any person who is married under the said act shall be incapable of during the continuance of such marriage of contracting a valid marriage under any native law or custom. For this reason I hold that the objector did not have capacity to marry the deceased and dismiss the objection with costs to the Petitioner.

DATED and DELIVERED at NAIROBI this 12th July, 2001.

ALNASHIR VISRAM

JUDGE