



REPUBLIC OF KENYA



**In re Estate of Gerald Otieno Kajwang (Deceased) (Succession Cause
241 of 2015) [2024] KEHC 5528 (KLR) (Family) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5528 (KLR)

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

SUCCESSION CAUSE 241 OF 2015

SN RIECHI, J

MAY 22, 2024

IN THE MATTER OF THE ESTATE OF GERALD OTIENO KAJWANG (DECEASED)

RULING

1. The deceased Gerald Otieno Kajwang died on 18.11.2014 at Mater Hospital due to Myocardial infarction due to arteriosclerotic coronary artery disease and systemic Arterial due to hypertension. He died intestate.
2. On 17.2.2015 Faith Vivian Otieno filed a citation citing Rose Bujehela Otieno, Brian David Ajwang' and Olivia Dorcas Akumu to accept or refuse Letters of Administration of all the estate that by law devolves to the preserve representation or show cause why the same should not be granted to Faith Otieno and Ronnie Odinga Otieno. In response the Petitioners filed this Petition on 15.4.2015. In the Petition they indicated that the deceased died intestate and left the following surviving him.
 1. Rose Bujehela Otieno – Wife
 2. David Brian Ajwang' – Son
 3. Dorcus Olivia Okumu – Daughter
 4. Ronnie Odinga Otieno – Son
 5. Christy Rhoda Otieno – Daughter.
3. In Paragraph 5 they stated the inventory of his assets which included Motor Vehicles, Bank Accounts, Sacco Shares and immovable Property. The Petitioners applied for grant of Letters of Administration. Faith Vivian Otieno filed Petition by way of cross application for grant dated 16/3/2016 seeking grant of Letters of Administration to be issued to her in her capacity as the 2nd Widow. David Ajwang Nyakwamba the father of deceased and Joseph Akoto Ajwang a brother of the deceased also filed objection. The matter was referred to Court Annexed Mediation but same was not successful.
4. On 26.2.2019, the Parties before Achode J recorded the following consent



1. That on Dr. Rose Bujehela Otieno and Ronnie Odinga Otieno be and are hereby appointed as administrators of the estate.
2. The Administrators to file an application for confirmation of grant together with their respective affidavits together with proposed modes of distribution.
3. All objections to be heard as affidavits of Protest to the confirmation of grant.
5. The grant was issued to the 3 administrations dated 26th day of February 2019. On 10.5. 2019 the Administrators filed Summons for Confirmation of grant. They identified the beneficiaries as:
 1. Rose Bujehela Otieno – Wife
 2. David Brian Ajwang’ – Son
 3. Dorcus Olivia Okumu – Daughter
 4. Ronnie Odinga Otieno – Son
 5. Christy Rhoda Otieno – Daughter.
6. In Paragraph 6 of the Affidavit in support, they proposed a schedule of distribution. Ronnie Odinga Otieno filed an affidavit of Protest stating that he was protesting at the mode of distribution and in particular that his mother Faith was left out. David Ajwang Nyakwamba protested that some of the Assets stated do not belong to the estate.
7. On 23.2.2023 upon hearing the parties the Court directed for the issue for determination by Court as:
 1. Who is the wife or wives of the deceased?
 2. Distribution of the deceased estate after determination of 1 above.
8. It was agreed that the issues be canvassed by way of viva voce evidence.
9. The objector Faith Vivian Otieno adopted her affidavit sworn on 8.7.2023 and 7/.11.2016 as evidence in chief. She testified that she met the deceased in 1993 when she went to his office to seek legal advice over an accident she had been involved in. They started cohabiting together in 1993 and were blessed with 2 children Ronnie Otieno born on 28.11.1994 and Christine Rhoda Otieno Born on 25.12.1996. They stayed in Parklands and later Akiba estate. Their marriage was under Luo Customary Law and dowry was paid. At the times he knew the deceased had a first wife but they had separated. The deceased being a Politician she supported and campaigned for him in 1997 and 2002 campaigns in Mbita.
10. In 2003 she filed a children’s cause in Nairobi Children Cause No. 46/2003 seeking Maintenance and custody for the children. In her amended Plaintiff in Children Court, she averred that she was not married to the deceased and that they only had children and deceased was ordered to provide maintenance of the children. In her objection she wants to be recognized as a wife.
11. On being cross examined by M/s Oduor for the Petitioner she admitted that she knew the deceased was married and had seen the marriage certificates. She stated that the deceased recognized her as a wife by;
 1. Taking her to his parents
 2. He paid dowry
 3. Building her a house in Homa bay.
 4. Taking care of her.



12. She confirmed that while the deceased had built a house for Rose outside his father's homestead, he had not built a house for her at Waondo. On the suit in Children Court, she stated that it was upon the advice of her advocate that she amended the Plaint to state that she was not married to the deceased. In his defence the deceased also confirmed that she was not married to him. She also confirmed that in none of the deceased official documents is she named as a wife.
13. The objector called Wilfred Onyango Kajwang the deceased's brother who testified that the objector is the deceased's 2nd wife. On 24.2.2001 he attended a marriage ceremony where they paid 6 cows and Ksh.100,000/- as dowry to Faith's father. On cross examination by M/s Oduor he confirms that Rose is a wife of the deceased and that he is close to her. He admits sending an offensive Whats-app message to Rose over the circumstances of deceased's death.
14. Ow3 Albert Kiteko Onyango a cousin of the deceased testified that he went to the home of Faith on 24.2.2001 when dowry was paid. He also confirmed he was at the wedding ceremony at Central SDA Church in Nairobi when Rose and deceased married.
15. Rose Bujehela Otieno the Petitioner gave evidence. She adopted her affidavits sworn on 16.5.2016, 26.9.2017, 20.1.2020 and 22.1.2024 as evidence in chief. She stated that she met the deceased in 1982. They married at Nairobi Central SDA Church and had a church wedding in 1985. Davit Brian Ajwang was born. She went to the United Kingdom in 1985 to pursue a PHD degree. She testified that she did not know of any marriage to Faith and saw her wailing when the deceased died and she maintained she was the only widow of the deceased.
16. In Cross examination by M/s Ndirangu for Faith she stated that in 2000 deceased had told her that a woman had sued him for child support. She did not know if he had cohabited with her but she has accepted the children to be children of the deceased and included them, and one of the children is a joint administrator. She denied that she went to Britain because their relationship was strained.
17. By consent Counsel for both parties filed their respective submissions. Judy Thongori for the objector, Faith Vivian Otieno submitted that the objector and deceased cohabited together for 8 years before a customary marriage was performed. During that time, they had 2 issues of the marriage. Counsel submitted that objector filed a matter in the Children's Court for Child Support and amended her Plaint on bad legal advice where the objector stated that she was not married to the deceased. Counsel submitted that the customary marriage was however proved by evidence of the objector's witnesses; without prejudice to the existence of the customary marriage, counsel submitted that her long cohabitation with the deceased ought to be presumed as a marriage. Counsel submitted:
18. In *NK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021)* [2023] KESC 2 (KLR) the Supreme Court laid out 8 guidelines upon which a presumption of marriage must be gauged;
 - a. The parties must have lived together for a long period of time.
 - b. The parties must have the legal right or capacity to marry.
 - c. The parties must have intended to marry.
 - d. There must be consent by both parties.
 - e. The parties must have held themselves out to the outside world as being a married couple.
 - f. The onus of proving the presumption is on the party who alleges it.
 - g. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.



- h. The standard of proof is on a balance of probabilities.
19. Counsel urges the Court to find that Faith was a wife of the deceased.
 20. M/s Oduor for the Petitioner submitted that it is not in contention that the deceased married 1st Petitioner in 1986 through a Church Ceremony and issued with Certificate of marriage. Counsel submits that through the objector stated that she was married under Luo Customary Law, she did not call any witness to state what Luo Customary marriage entails and if all ingredients of a Luo customary marriage were met.
 21. Counsel further submits that the deceased having denied in his lifetime that the 1st objector is his wife and the objector having accepted that position in pleadings in court she is estopped for saying that she is now a wife. On Whether the court can presume a marriage arising from cohabitation counsel submits that the 1st objector's evidence was that she was married under Luo customary law and cannot again seek presumption of marriage. In any event Counsel submits the deceased was already married under the marriage Act which is monogamous and that even if he wanted to, he had no capacity to contract another marriage.
 22. Upon hearing the objector's response and submission the first issue determination is whether Faith Vivian Otieno the 1st objector is a wife of the deceased Gerald Otieno Kajwang'.
 23. The objector Faith in her evidence testified that she knew the deceased in 1993. They started a romantic relationship with the deceased and cohabited together. She informed Court that she knew the deceased was married to the Petitioner. In spite of that knowledge she stated she married the deceased under Luo Customary law where dowry was paid and on 24. 2.2001 and she considered herself a wife from then. She admits she knew deceased was married in a Christian Church.
 24. The objector without prejudice to what she has stated in respect to the Customary Law marriage asks this court to presume a marriage between her and the deceased. Her grounds for presumption of marriage are that they cohabited with the deceased; he introduced her to people as his wife; she supported him in his political campaigns; built her a home and they had 2 children together. She therefore urges the court to find that she is a wife and therefore a dependant in this Succession Cause.
 25. Rose Bujehela Otieno contends that she was the only legal wife of the deceased having married in church, that the deceased informed her that he had the 2 children with Faith but not in a marriage relationship. Consequently, upon the information by the deceased, she has accepted the two children Ronnie Odinga Otieno and Chrisly Rhoda Odinga Otieno as children of the deceased. She contends that the deceased and Faith were not man and wife as evidenced in the Pleadings in Nairobi Children's cause No. 46/2013 where she categorically stated that she is not the wife of the deceased.
 26. A marriage is a union of a man and woman where both parties who have capacity and not within the prohibited degrees of consanguinity enter by consent. Where the marriage is entered through a Customary Process then all the elements of the customary marriage for that community must be proved. Where a person seeks the court to presume a marriage, the elements which the Petitioner has to prove to court were set out by supreme court in
 27. The Supreme Court case of MNK v POM • Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 9 of 2021) [20231 KESC 2 (KLR) which quoted the case of Hottensiah Wanjiku Yawe V Public Trustee C.A 13 of 76. This position was further reiterated by the court in the case of RLA V FO & Another [20151 eKLR (supra), where the courts stated that for a marriage to be presumed between a couple:



- i. The parties must have lived together for a long period of time;
 - ii. The parties must have the legal capacity to marry or capacity to marry;
 - iii. The parties must have intended to marry;
 - iv. There must be consent by both parties;
 - v. The onus of proving the presumption is on the party who alleges it;
 - vi. The evidence to rebut the presumption has to be strong. Distinct, satisfactory and conclusive;
 - vii. The standard of proof is on balance of probabilities;
 - viii. The couples must have carried themselves as man and wife not only to their close friends but also relatives and other acquaintances and
 - ix. Their actions and lifestyle should leave not doubt in the minds of those who know them and even strangers that the couple must be in a marriage relation and not necessarily a relationship of convenience.
28. The singular thread that runs in all marriages whichever form or method of contracting it is that the parties must have capacity to marry. This capacity is proved by showing that:
1. The parties must be 18 years or older.
 2. At time of marriage parties must not have entered into a civil, Christian monogamous marriage.
 3. The parties must not be within the prohibited degrees of consanguinity
 4. The parties must freely consent to the union.
29. The Petitioners submit that, a marriage can be presumed based on long cohabitation if indeed the person had capacity to marry. While tackling the issue of capacity, the Supreme Court in the same case *MNK v POM* (supra), quoted the case of *Machani v Vernoor* [1985] KLR 859, where it was held in the Court of Appeal that:
30. The presumption covers two aspects, that the parties must have capacity to enter into a marriage and that they did so in effect. During the continuance of a previous marriage, the already married party would have no capacity to enter into the new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree or divorce.'
31. Additionally, in the same case, *MNK v POM* (supra), the Supreme Court quoted the case of *Mary Wanjiku Gitbatu v Esther Wanjiru Kiarie* [2010] eKLR where Bosire J stated:
- The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except whereby reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation, or other circumstances evinced an intention of living together as husband and wife."
32. At the time when the 1st Objector first met the Deceased, the Deceased was already married to the 1st Petitioner. Additionally, the 1st Petitioner was married to the Deceased under the statute law,



the now repealed The *African Christian Marriage and Divorce Act* (CAP 151), as reflected in the marriage certificate of the 1st Petitioner. The marriage certificate adduced by the first Petitioner dated 2nd November 1986, 7 years before the time the 1st Objector purports to have met the Deceased. Moreover, the 1st Objector admitted to this Honourable Court that she knew that the Deceased had a wife. If then the Deceased cohabited with the 1st Objector (the position which the Petitioners deny), the Deceased lacked capacity to engage in any form of marriage and therefore the presumption of marriage cannot hold and this Honourable Court cannot hold otherwise.

33. In support of this submission the 1st Petitioner relies on the Supreme Court Case of *MNK v POM* where the court quoted the case of *Indra Sarma Vs VKV Sarma* (2013) 15 SCC 755 where the supreme court of India held that:

"There is no necessity to rebut the presumption since the appellant was aware that the respondent was a married person even before the commencement of their relationship, hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage...."

34. Faith the Objector when she approached the Children Court in 2003 informed court that she was not married to the deceased as per her amended plaint. In court she confirmed that she did inform the Children' Court that she was not a wife. It is upon the pleadings that the court made the decision. She blames bad legal advice for that.
35. However, she was then as she is now an adult. She knew she had been married under Customary Law. She averred in the amended Plaint that she was not a wife. The deceased agreed with her position. The court proceeded to make a ruling on those pleadings and evidence. Marriage is a status which does not change like whether. You are either married or not married. You cannot be somehow married. Credibility of a witness is an important aspect in the trial process. A court of law cannot allow a party to approbate and reprobate in judicial proceedings. This is an attitude that cannot be encouraged by Court.
36. Considering all the evidence, it all points to what Faith informed the Magistrate's Court in 2003 that there was no marriage between her and the deceased which fact the deceased accepted during his lifetime and that she is not a wife of the deceased. The objector Faith would be anything but not a wife of deceased Gerald Otieno Kajwang.
37. Upon hearing the objector, the evidence and submission I find that the evidence point to the position Faith stated in her pleadings in the Children's Court that she was not a wife of the deceased. That position remained during the lifetime of the deceased. She cannot now be a wife of the deceased in his death. I find that Faith would be anything but not a wife of the deceased Gerald Otieno Kajwang and therefore not a beneficiary of his estate. Her objection is hereby found without merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 22ND DAY OF MAY, 2024.

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S. N. RIECHI

JUDGE

