



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION NO. 866 of 2015

IN THE MATTER OF THE ESTATE OF JAMES MWANGI NJUGUNA (DECEASED)

BANCY AWINO OTANA..... APPLICANT

VERSUS

CATHERINE NJURA MWANGIRESPONDENT

RULING

1. The proceedings herein relate to the estate of James Mwangi Njuguna, deceased, who died intestate on 7.11.10. The record shows that he was survived by a widow, Catherine Njura Mwangi, the Respondent herein and 2 daughters and 2 sons. The record further shows that the estate of the deceased consisted of a property known as Title No. Dagoretti/Kangemi/626 (the Kangemi property), a bank account at Barclays Bank and another at Co-operative Bank. The Respondent petitioned and was issued with a grant of letters of administration (the Grant) on 30.7.15. The Grant was confirmed on 25.4.16 and a certificate of confirmation was issued on even date. The entire estate was devolved to the Respondent and a tile in respect of the Kangemi property registered to the Respondent.

2. By her Summons dated 19.8.20, Bancy Awino Otana, the Applicant herein seeks the following prayers:

i) Revocation of the Grant.

ii) Cancellation by the Chief Land Registrar of the transmission of the Kangemi property in favour of the Respondent so that the same reverts to the deceased.

iii) In the alternative, that the Applicant and her son Oby Tylene Mwangi be included as beneficiaries of the estate of the deceased and that the Kangemi property be redistributed to the Applicant and the Respondent in equal shares.

iv) Costs.

3. The Application is supported by the Applicant's affidavits sworn on 19.8.2020 and 8.2.21 and opposed by the Respondent and her children Roy Phillip Nyaga Mwangi and Elizabeth Wendy Wangari Mwangi by their replying affidavits sworn on 16.9.2020.

4. It is the Applicant's case that she too was the deceased's wife, having gotten married to him in 1995. They were blessed with two children, Oby Tylene Mwangi born on 23.11.95 and Elizabeth Wangari Mwangi born in 2003, who has since died. The Applicant stated that the deceased owned the Kangemi property which had rental units and another known as Dagoretti/Riruta/2046 (the Riruta property) which was his matrimonial home with the Respondent. The Applicant further stated that on 5.1.11 the Kangemi area chief summoned her, the Respondent and other family members to a meeting. It was agreed at the meeting that the Applicant would take the rent from 6 units while the Respondent would take the rent from 7 units. The rent from 1 unit was to cater for the bills. Later however, the Respondent evicted the Applicants' tenants and demolished her units, a matter that was reported at the Kabete Police Station.

5. The Applicant averred that she and the deceased got married in the 1995, and lived in Kitale where the deceased was working at the time. Upon his retirement, they moved to Nairobi and began to live in Uthuru and then Kayole and Zimmerman. That in 1998, the deceased accompanied by elders, Mr. Edward Njenga and Mr. John Karani both deceased, went to the Applicant's parents and paid Kshs.5 0,000 towards her dowry. Both her parents are deceased. Also present in the occasion and have since died were her brother George Otana, her uncle Ojung'a, and Mzee Okong'o. The Applicant avers further that they kept shifting from one place to another with the deceased, in fear of threats by the Respondent. Soon after 2007 post- election violence, they moved to Zimmerman where they lived until the demise of the deceased. The Applicant's complaint is that the Respondent petitioned for the Grant without involving her, and the Kangemi property was distributed to her solely. A search at the Lands Registry revealed that the property had already been transferred to the Respondent. The Applicant's prayer is that the Grant be revoked and the estate be redistributed equally.

6. The Respondent denied that the Applicant is the wife of the deceased and that Oby Tylene Mwangi is his child. Her case is that she and

the deceased got married in Kikuyu Customary Law on the year 1976 and were blessed with 4 children, Sheila Wanjiru Mumo, Roy Philip Nyaga Mwangi, Elizabeth Wendy Wangari Mwangi and Derek Isaiah Njuguna. They both worked with Barclays Bank of Kenya Limited and purchased the Kangemi property in the year 1982 through bank loans and built 13 iron sheet rental units. The Respondent contended that in spite of her protest, she was forced under threats to sign the rental income agreement and that the chief was very biased against her. As regards the Riruta property, she purchased the same from the deceased as he was going to lose if for defaulting on repayment of a loan he had taken. She then continued to repay the loan as she was still working with the Bank. To the Respondent, the Application is driven by malice and she prayed that the same be dismissed.

7. The matter proceeded by way of *viva voce* evidence at the conclusion of which, parties filed their written submissions which I have duly considered. The following issues fall for determination:

- i) Whether the Applicant was a wife of the deceased
- ii) Whether Oby Tylene Mwangi is a child of the deceased
- iii) Whether Title No. Dagoretti/Riruta/2046 forms part of the estate of the deceased
- iv) Whether the Grant should be revoked

Whether the Applicant was a wife of the deceased

8. The Applicant's case, which is denied by the Respondent, is that she began to cohabit with the deceased in 1995 in Kitale. In 1998, they relocated to Nairobi and lived in Uthiru. In 2003, they moved to Kayole before settling in Zimmerman where they cohabited until the time of the deceased's demise. The Applicant claimed that in December 2008, the deceased paid Kshs. 50,000/= as her dowry at a ceremony held in accordance with Luo customs.

9. A person who seeks to propound customary law must call evidence to prove that customary law. In Sakina Sote Kaitany & another v Mary Wamaitha [1995] eKLR, Gicheru, J.A. (as he then was) had this to say concerning proof of customary law and practices:

...the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case... As a matter of necessity the customary law must accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case.

10. The Applicant did not bring in an expert of Luo customary law to support her claim that a customary marriage took place between her and the deceased. Additionally, all the witnesses to the alleged ceremony who would have corroborated her claim were all said to be deceased. Her claim is therefore not supported by any credible evidence and is hereby rejected. My incontestable finding therefore is that no customary marriage took place between the deceased and the Applicant as alleged.

11. The Applicant has urged the Court to presume a marriage between her and the deceased on account of long cohabitation and general repute. She submitted that she had a long cohabitation with the deceased and had 2 children; that the deceased paid school fees and maintained the surviving child of their marriage; that she nursed the deceased when he was hospitalised prior to his demise and participated in burial arrangements. The Applicant had in her possession the deceased's national identity card, passport and driving licence.

12. The statutory basis of the doctrine of presumption of marriage is contained in section 119 of the Evidence Act which provides:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

13. The *locus classicus* on the doctrine of presumption of marriage is the celebrated Court of Appeal case of Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi CACA No. 13 of 1976 where Mustafa JA held:

"...long cohabitation as man and wife gives rise to a presumption of marriage...only cogent evidence to the contrary can rebut such a presumption"

For his part, Wambuzi P observed:

"The presumption is nothing more than an assumption rising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted."

14. Long cohabitation and general repute are the key ingredients for presumption of marriage. Where parties in no formal marriage have cohabited for a long time and there exist other circumstances indicative of an intention of the parties to live and act together as husband and wife, our Courts have presumed the existence of a marriage between such parties.

15. In the present case, the Applicant claims that she began to cohabit with the deceased in 1995 when he was working at Barclays Bank in Kitale. From the evidence adduced, it became quite evident that the marriage between the deceased and the Respondent fell apart and they were not living together prior to his demise. Indeed, when the deceased collapsed in town, it was his brother Dr. Charles Irungu and not the Respondent who was called to take him to hospital, which he did. Dr. Charles Irungu testified that he met the Respondent at the hospital who introduced herself to him as the deceased's wife. He further testified that the Applicant participated in burial arrangements. Jane Njuguna, a sister to the deceased testified that she met the Applicant at Antonio's hotel during burial arrangements. Jane further stated that after the burial of the deceased, the Applicant was welcomed and accepted by their mother who had asked to see the woman who nursed her son during his illness. Both Dr. Irungu and Jane referred to the Applicant and the Respondent as the wives of the deceased.

16. Paul Thiongo testified that he met the Applicant in 2010 when she was introduced to him by Jane to repair the houses in the Kangemi property. The Applicant told him that the property belonged to her late husband. Towards the end of that year, a dispute arose between the Applicant and the Respondent over the property which was resolved at the Chief's office. The Applicant asked him to collect rent for her from 6 units which he did, until they were demolished by the Respondent on 25.7.2020.

17. The Respondent stated that she met the Applicant at the funeral where she was wailing and making a nuisance of herself. The Respondent's children Roy and Wendy testified that they first met the Applicant at the meeting at the chief's office.

18. It is not disputed that the meeting at the Chief's office resolved that both the Applicant and the Respondent share the rental income from the Kangemi property. The record shows that the meeting at the chief's office was attended by among others, the Applicant, the deceased's mother Elizabeth Wangari Muturi, his brothers George Chege Njuguna and Dr. Charles Irungu and sister Jane Njuguna. Also present were the Respondent and her daughters Wendy and **Sheila Wanjiru Mumo**. Had the deceased's mother and siblings not considered the Applicant a wife to the deceased, then they would surely not have attended the meeting, nor allowed a stranger to collect rent from the property of their deceased kin. There was also the letter dated by 9.2.11 by the deceased's mother Elizabeth Wangari Muturi addressed to the Chief of Kangemi. In that letter, the deceased's mother confirmed that the Applicant was known to her and that she was the wife of the deceased with whom he had lived in Zimmerman. Further, the Respondent in her own testimony stated that the deceased left the matrimonial home in 2003. It is therefore possible that she was not aware that the deceased was cohabiting with the Applicant. There is also evidence that the Applicant visited the deceased at the hospital while the Respondent and her children did not. The Applicant was also in possession of the deceased's national identity card, passport and driving licence.

19. The Court notes that there appears to be hostility between the Respondent and the deceased's family. As she testified, the deceased's sister Jane appeared to be particularly bitter with the Respondent. This may have been caused by the breakdown of their marriage and it is possible that they blamed the Respondent. The question that begs is, in what capacity was the Applicant allowed to collect rent from the Kangemi house by the deceased's family? Had they not considered the Applicant a wife of the deceased, they would have sought to collect rent from the Kangemi property themselves. Again, in what capacity did the Applicant have in her possession the deceased's national identity card, driver's licence and passport? Hardly will a person entrust such vital documents on a mere girlfriend. All these factors point to a relationship between the deceased and the Applicant that was more than casual.

20. Long cohabitation and general repute are the key ingredients for presumption of marriage. Where parties in no formal marriage have cohabited for a long time and there exist other circumstances indicative of an intention of the parties to live and act together as husband and wife, our Courts have presumed the existence of a marriage between such parties. In the present case, the Applicant claims that she began to cohabit with the deceased in 1995. The Respondent refutes this claim. Although the date of commencement of cohabitation remains unclear, the evidence on record is that there was a breakdown of marriage between the deceased and the Respondent and he found solace with the Applicant with whom he cohabited for a considerable period of time up to his demise. There is also evidence that it was the Applicant and not the Respondent who visited him in hospital as his wife.

21. For the Court to presume a marriage, it is necessary that the parties have capacity. This was the holding in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR cited by the Plaintiffs, where the Court of Appeal stated:

As Madan, J.A (as he then was) said in Njoki v. Mutheru [1985] KLR at page 882

“The concept of presumption of marriage is not new in Kenya. It was recognized by the former Court of Appeal in Hortensiah Wanjiku Yawe v. Public Trustee in Civil Appeal No. 13 of 1976 and by this Court in Mbithi Mulu & Another v. Mitwa Mutunga in Civil Application No. Nai 17 of 1983.”

This presumption arises from long cohabitation and repute between the man and the woman who have capacity to marry and have consented to do so – see Yawe (supra). We consider that the deceased and 1st respondent in this appeal had capacity to marry while the deceased was married to the deceased 2nd appellant under Kikuyu customary law but this was not a bar to him marrying any other woman since customary law of marriages under Kikuyu customs are potentially polygamous. (emphasis mine).

22. In the present case, the deceased was married to the Respondent under Kikuyu customary law. Such marriage is potentially polygamous. The marriage to the Respondent was not a bar for the deceased to marry another wife. Being in a potentially polygamous customary marriage to the Respondent, the deceased had the capacity to take on another wife.

23. In the case of N L S v B R P [2016] eKLR, the Court stated:

The Court of Appeal in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows: -

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long

cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed” (own emphasis)

24. Having carefully considered the testimony of the witnesses and submissions by the parties, it is my finding that the relationship and cohabitation between the Applicant and the deceased crystallized into a marriage. Accordingly, it is safe to presume the existence of a marriage between them.

Whether Oby Tylene Mwangi is a child of the deceased

25. The Applicant has asked the Court to include her son Oby Tylene Mwangi (Oby) as a beneficiary of the estate of the deceased, claiming that he is a son of the deceased. This is denied by the Respondent. The Applicant produced a birth certificate to buttress her assertion. Looking at the birth certificate, I have no reason to doubt that the same is genuine or legal. The question however, is whether the particulars contained therein are correct. I note that this birth certificate was issued on 30.12.10 while the date of registration is given as 29.12.10. What is interesting though is that this birth certificate was issued barely 2 months after the demise of the deceased. No reason or explanation was given for the delay in the registration of the birth of Oby until after the demise of the deceased and Oby was 15 years old. Indeed, in response to the Respondent’s challenge of the late registration, rather than giving an explanation to the satisfaction of the Court, the Applicant stated that even Roy’s birth certificate was issued late after the death of the father. The problem with that response however, is that it is the late registration of the birth of Oby and not Roy’s, that is in question herein. Further, the deceased was a Kikuyu by tribe. The patrilineal naming system among the Kikuyu is a notorious fact, under which the first born son is named after his paternal grandfather. Oby’s name therefore ought to have been given as Njuguna and not Mwangi as indicated in the birth certificate. From the material placed before me therefore, I am not persuaded that Oby is the son of the deceased. Accordingly, I make a finding that Oby is not a son of the deceased.

Whether Title No. Dagoretti/Riruta/2046 is part of the estate of the deceased

26. This Court is mandated under the Law of Succession Act, to deal with the intestate and testamentary succession and the administration of estates of deceased persons. For this Court to deal with any property, it must be demonstrated that it belongs to the estate of a deceased person. The Applicant averred that she was aware that the deceased was the registered owner of 2 properties that is, the Kangemi property and the Rituta property. The Applicant did not produce any evidence to support her allegation that the deceased owned the Riruta property. On the other hand, the Respondent stated that when the deceased fell into loan arrears and was about to lose the Riruta property, the same was transferred to her at his request, and she took over repayment of the loan owed to Barclays Bank of Kenya Limited. She exhibited copies of correspondence to this effect. In a letter dated 18.9.97, the Bank instructed Waruhiu and Muite Advocates to prepare the transfer of the Riruta property from the deceased to the Respondent and a charge in its favour over the property. A copy of the charge dated 14.1.98 from Respondent to the Bank was also exhibited. It is therefore evident that the Riruta property belongs to the Respondent and does not form part of the estate of the deceased.

Whether the Grant should be revoked

27. I now turn to the question as to whether the Grant should be revoked. The grounds upon which a grant may be revoked are stipulated in Section 76 of the LSA which provides:

76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

28. The jurisdiction of the Court to revoke a grant is discretionary. The Court has made a finding of presumption of marriage between the Applicant and the deceased. Accordingly, she ought to have been involved in the proceedings to obtain the Grant. Rule 26 of the Probate and Administration Rules provides:

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require

29. As a wife of the deceased, the Applicant was entitled to apply for a grant in the same degree as the Respondent. Her involvement and consent were therefore mandatory. The exclusion of the Applicant by the Respondent in the proceedings to obtain the Grant is sufficient ground to have the Grant revoked. The Court has however considered that a lot of water has gone under the bridge and no useful purpose will be served by such revocation. I will therefore not disturb the Grant.

30. In order to remedy the exclusion of the Applicant in the distribution of the estate, this Court invokes the provisions of the LSA relating to distribution of the estate of a polygamous intestate. Section 40 of the LSA provides:

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) ...

31. The deceased was married more than once. By dint of Section 40 of the LSA therefore, the estate of the deceased shall devolve amongst the 2 widows of the deceased and his children in equal shares.

32. In the end and in exercise of the powers conferred upon this Court by Section 47 of the Law of Succession Act and Rule 73 of the Rules made thereunder I do make the following orders which are necessary for the ends of justice:

i) The Court presumes a marriage between **Bancy Awino Otana and the deceased.**

ii) The beneficiaries of the estate of the deceased are:

a) Catherine Njura Mwangi

b) Bancy Awino Otana

c) Sheila Wanjiru Mumo

d) Roy Phillip Nyaga Mwangi

e) Wendy Elizabeth Wangari Mwangi

f) Derek Njuguna Mwangi

iii) The order of 25.4.16 confirming the grant of letters of administration is hereby set aside and the certificate of confirmation of grant issued on 25.4.16 and amended on 27.7.16 is hereby cancelled.

iv) The transmission to Catherine Njura Mwangi of Title No. Dagoretti/Kangemi/626 is hereby nullified and the title deed issued to the said Catherine Njura Mwangi on 18.7.18 is hereby cancelled. *Status quo ante* be and is hereby restored and Title No. Dagoretti/Kangemi/626 do revert to the deceased, James Mwangi Njuguna.

v) In line with Section 40 of the Law of Succession Act, Title No. Dagoretti/Kangemi/626 shall be distributed to the stated 6 beneficiaries of the deceased in equal shares.

vi) Fresh certificate of confirmation to issue to reflect the orders herein.

vii) This being a family matter, each party to bear own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 9TH DAY OF JULY 2021

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent

..... Court Assistant