



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

P & A CASE NO. 65 OF 2010

IN THE ESTATE OF THE LATE KIPKOECH MOSONIK ARAP KORIR (DECEASED)

JECINTA NGARE.....1ST PETITIONER

ELIZABETH PHILIP KENDUIYWO.....2ND PETITIONER

VERSUS

SUSAN WAITHIRA WANGARU.....OBJECTOR

J U D G M E N T

1. Dr. Kipkoech Mosonik arap Korir died on 6th October 2009. He was residing at Ngata LR 13287 (IR 78212).
2. From the evidence placed before me he had married Jacinta Ngare Mosonik in 1974 under Kipsigis Customary Law and they had two children born in 1974 and 1975.
3. In 1977 he left for Russia for further studies. He remained there till 1988 when he came back with a Russian wife Elena (now deceased) with whom he had two children.
4. Upon his death Susan Waithera Wangaru filed Succession Cause No 210 of 2009 and an application for Summons for Letters of Administration *Pendente Lite*. She named Jacinta Ngare as the respondent. She sought orders limited to the provision of payment of school fees and provision for maintenance for two minors PM and LM from the benefits accruing to the estate of the deceased from his employer Egerton University, and the occupation of and administration of the matrimonial premises upon parcel no. LR 13827/150(IR 78212). She also sought an order that the respondent to hand over vacant possession of the matrimonial home to her.
5. In the affidavit in support of her application she claimed to have been married to the deceased under ***Kalenjin customs in 1986***, cohabited with the deceased and ***established a matrimonial home in 2006***. That they had lived together in that home for over 6 years, that she had invested heavily in terms of finance and time in the construction of the said home
6. It was her case that Jacinta was a stranger who was installed in the house upon the death of Mosonik, when his relatives had evicted her, Susan, from her matrimonial home without allowing her to remove her personal effects, and forcing her to go live with friends while her children were out of school.
7. The deceased's mother swore an affidavit in response and ***denied that Susan married her son in 1986 as at that time he was in Russia***. She also pointed out that the same Susan had told a newspaper reporter that she was married in 1995. That she knew that Susan had cohabited with her son at Kenlands Nakuru as a mistress. That when he worked for the CKRC he constructed the house at Ngata between 2003 and 2005 when he occupied it. That in 2006 the said Susan and the deceased disagreed after he found out that she had diverted materials for the construction of the house from his house at Ngata to her own site in Engashura. That she left on her own volition to the house she had constructed. The deceased's mother produced evidence to support her claims vide the annexures to her affidavit.
8. She deponed further that in 2006 the said Susan carted items away from the house and rang her to tell her to go take care of her son. That she also left her minor son PM with the deceased and only took him away in August 2009. That as a result she, the deceased's mother, moved into the house to take care of her son and was assisted by Jacinta. That all the time that Mosonik was hospitalized Susan did not visit except once. That even when Mosonik died Susan never participated in the funeral. That Susan was not a beneficiary to the estate. She however conceded that Susan and her son Mosonik had two children.
9. Jacinta also filed a replying affidavit. She demonstrated that the deceased was out of the country in 1986 and could not have married Susan. She also demonstrated that as at the time of his death the deceased was earning about Ksh 3000 after deductions as he had huge bank and Sacco loans. That he had been sickly for a while and she, her children and other family members had borne the burden of his treatment.

10. Jacinta Ngare and the deceased's mother Elizabeth Philip Kenduiywo filed this cause on 9th February 2010 naming themselves as the beneficiaries of his estate together with Jacinta's children.

11. On 18th February 2010 the two causes were consolidated. Susan was deemed the objector and directed to file cross petition in 15 days. This she did on 2nd March 2010. She also filed an objection under rule 17(1) of the P&A Rules in which she reiterated that she was married in 1986 by the deceased under Kalenjini Customs and had lived as husband and wife since then.

12. On 15th March 2010, Elena Korir filed her objection as the wife of the deceased stating that they got married on 14th May 1987 and together they were blessed with two children AKRM aged 23 years and LCK aged 20 years.

13. She denied that Susan Waithera was married to the deceased. It was her case that Susan Waithera was not entitled to the grant. She faulted her for failure to enjoin her and to disclose the full inventory of the deceased's estate as required by the law. Elena Korir sadly passed on during the pendency of this cause and her advocate on record indicated to this court that her children had expressed their disinterest in the deceased's estate.

14. I heard oral testimony from the objector, her son PM, her brother in law Jonathan Kibet Chebii (married to her sister), Charles K. Rono who said he was the deceased's driver, and one Martin Makande Kariuki who testified that he had been employed to construct a water tank at the deceased's Ngata home.

15. I also heard the petitioner, Joseph Kipkoskei Kenduiywo an uncle to the deceased, Bengeria Arap Korir, and brother to the deceased.

16. Counsel for each party filed written submissions, Mr. Githui for the objector, and Mr. Ndubi for the Petitioner.

17. Upon considering the evidence and the submissions only 2 issues emerge for determination.

1. Who is beneficially entitled to the deceased's estate, in other words who are the dependants of the deceased estate as per section 29 of the Law of Succession Act?

2. What is the net estate available for determination and how should it be distributed.

Who is beneficially entitled to the deceased's estate, in other words who are the dependants of the deceased estate as per section 29 of the Law of Succession Act?

18. It is not disputed that the deceased was the father to the children of the three women herein, Jacinta, Elena and Susan. Upon the demise of Elena, the question for determination is whether both Jacinta and Susan are widows of the deceased and therefor beneficially entitled to the estate as such.

19. For Jacinta, it is on record that she and the deceased got married while they were in college and had 2 children between them. The family of the deceased, the mother to the deceased, his brother and uncle testified to this. That before the deceased left for Russia in 1977 he had married Jacinta, and she is the one they knew as a wife.

20. The family also concedes that when he went to Russia he stayed there for over 10 years, married Elena, with whom he returned to Kenya with their two children. As a result of his marriage to Elena, he did not continue with his marital relations with Jacinta but they continued to communicate and to share parental responsibility for their 2 children.

21. Counsel for the objector, Mr. Githui submitted that the evidence on record demonstrated that the petitioner was widely recognized by the family of the deceased as the wife of the deceased. The deceased left the petitioner for further studies....***He never reunited with his family, however there is no evidence that a divorce was ever done. This court ought to consider her as a wife even by virtue of the marriage under Kipsigis customary law or by presumption of marriage***"

22. Clearly there for the objector has conceded that Jacinta was married to the deceased, or at least there was a marriage between them recognised by the family. To this end then the only issue on this point is whether the objector was a wife/spouse to the deceased.

23. Her counsel submitted that there was evidence that the objector came into the life of the deceased in 1992 after his '*Russian wife eloped with a Luo Man*'. That the objector and he deceased lived at Egerton University staff quarters, as evidenced by the deceased's driver who testified that he would pick and drop the objector from the quarters to the site at Ngata where the deceased was constructing his house, that even the PW2 confirmed that the deceased and the objector lived together at Egerton. Counsel submitted further that there was evidence that the deceased and the objector moved in together into the Ngata house where he conducted his affairs with her as husband and wife.

24. It was further submitted for the objector that there was marriage by presumption from the evidence she led that he deceased lived with her at Egerton quarters to the exclusion of the petitioner, that deceased constructed a house at Ngata where the two moved in together, that the deceased paid fees for her 2 children, that she was reputed by neighbours and her brother in law to be his wife, that the children took his name, that they lived together for 17 years from 1992 to 2009 and that upon his death, the benefit accruing from his pension were shared among the three, herself, the petitioner and Elena. For this argument counsel relied on the case of the **Estate of Francis Kambo Ndirangu deceased** [2012]eKLR where the conditions of a Kikuyu customary marriage were not met but the judge found that there was nothing in customary law that excluded a presumption of marriage.

25. Further that since presumption of marriage is a presumption of fact, taking into consideration the cumulative set of circumstances in this

case, the court could conclude that the couple were widely considered and that they held themselves as husband and wife. He also cited Mary Wanjiru Githaru vs Esther Wanjiru Kiarie [2010] eKLR Phyllis Njoki Karanja and 2 others vs Rosemary Mueni Karanja [2009]eKLR both cited with approval in BCCUJMC [2018]eKLR, where the courts were of the view that a presumption of marriage could arise from long cohabitation, acts of general repute, not mere friendship, not mere concubine,...” **but that long cohabitation has crystallized into a marriage...**” Counsel urged the court to find that the fact that deceased paid school fees for the children, the children adopted his name and the period they lived together, were sufficient to draw this conclusion., He also referred to Kamau vs Kimani [2006] eKLR 292 cited with approval in NLS vs BRP [2016] eKLR.

26. He urged further that the fact that the marriage to the petitioner was customary marriage hence open to polygamy made the subsequent marriage to the objector valid by presumption, and a dependent under section 29 of the Law of Succession Act.

27. Mr. Ndubi for the petitioner, submitted that the petitioner was the only legal wife of the deceased.

28. He argued that the evidence on record pointed out that the objector was not a wife to the deceased. 1st that her claim to a marriage under customary law come to nought as she did not produce any evidence to support that claim. Even her own witness, her brother in law by marriage to her sister, who was called to say that there was some form of customary law occasion, could not confirm this claim. He confirmed that the visit he alleged was made to the home of the objector was not attended by the parents of the deceased.

29. It was further submitted that the objector was not a truthful person in this regard. She, in her affidavit in support of the summons for letters of administration *pendete lite*, swore to facts that she knew were not true, these being that; she was married to the deceased under Kipsigis customary law in 1986, yet at that time he was in Russia hence contradicting her own testimony and that of her witness, that she was evicted from the house at Ngata, yet there was evidence that she had left prior to the death of the deceased.

30. It was submitted further that her allegation that she had cohabited with the deceased from 1986 and 1992 was not supported by any evidence. No witness from their days at Egerton staff quarters was called to support that fact, since her claim was that she was reputed to be the wife of the deceased, then who better than his own colleagues at the staff quarters would have supported that allegation. Her 2 witnesses could only testify to the period between 2004 and 2005 when the deceased was constructing the house. It was submitted that their evidence was of no value with regard to proving longevity of cohabitation, because by the time of his death, the objector had moved to her own house at Engashura, which she was constructing at the same time as the deceased. This was the testimony of her witness, PW2 her brother in law. Her own son also confirmed that the two houses were constructed simultaneously. Counsel for the Petitioner argued that there was implicit acceptance that the house would be the objector’s residence.

31. It is evident from the evidence and submission that there is no dispute that there a valid Kipsigis customary law marriage between the deceased and the petitioner.

32. On her part the objector presents two scenarios, one a Kalenjin customary marriage, and if the court finds that that was not there a deduction from the evidence, of the fact of a presumption of marriage.

33. The court then has to determine whether the objector is saying there was a Kalenjin customary marriage or whether she is simply saying there was no customary marriage but they lived together as husband and wife.

34. It is evident that there was no customary marriage and there was no evidence to support that claim.

35. Is there a set of facts to support a presumption of marriage?

36. From the authorities cited one of the key pillars of this is the longevity of cohabitation. The objector began by saying she was married to deceased in 1986 under customary law. However this date turned out to be an impossibility because he was out of the country. She also told a news reporter that she was married to the deceased in 1995, yet in her submissions she settles for the year 1992 as the year of marriage. From the outset it is evident that the objector’s testimony is colored with some untruth and that raises the issue as to whether she is a credible witness. There was a deliberate effort on her part to create time spent with the deceased that never existed.

37. This is brought to life by the fact that there was no evidence to support this allegation of long cohabitation in the form envisaged in the presumption of marriage for any of the periods of time alleged. The only witnesses to the relationship were for the years 2004 and 2005. It is utterly dumbfounding that not a single witness was called to testify as a friend or neighbour of the couple, if indeed the two lived together for 17 years. Not even one colleague of the deceased could be called to testify to this alleged long cohabitation. The only conclusion I can draw from this is because that long cohabitation never happened. There appears to have been a relationship between the two. The objector had other children. The deceased was in these two other relationships- his marriage to Jacinta and Elena. This relationship resulted in two children but from what I have before me it never did crystallize into a marriage.

38. In fact the facts in the objector’s are clearly distinguishable from the case cited e.g from Kamau vs Kamau above cited with approval in NLS vs BRP above where in addition to long cohabitation, maintaining the children of the objector and the children adopting the deceased’s name, the court pointed out

“... The undisputed evidence relating to the appellant's identity card which identified her as the wife of the deceased, and family photographs taken with the deceased, visits to the appellants parents, home and gifts given out, even if, as found by the judge, they did not amount to dowry or customary marriage negotiations; The evidence that the 1st wife, Wanjiru (deceased) and Joyce, 1st respondent, visited Beth when she was admitted at Thika Maternity Hospital; and the reluctance by the children of the 1st wife... to testify against the appellant is a tacit acknowledgment that she was their father’s third wife. We think with respect those were weighty matters of fact which would have made all the difference if they were considered the burden of proof is

not on the appellant but on the respondent to show that the appellant was not the deceased's wife or put another way, to rebut the presumption of marriage”

39. The quote speaks for itself. It lays down the weighty matters the objector in that case lay before the court and from which the court could draw the presumption of marriage. It was upon the objector to lay down the facts from which the court could draw the presumption of marriage. It is these facts that the Petitioner would be at task to rebut. Without those the mere statement that she was a wife was not and could not have been sufficient. The objector has not placed before the court any evidence to demonstrate that she cohabited with the deceased as a wife or that they conducted their affairs as husband and wife. Not a single photograph was taken of the two, or as a family, not a single document to support any financial transactions between them or any documentary or other evidence of doing anything together and in my considered view the construction of the 2 houses simultaneously is not proof of that.

40. That brings us to the question of the payment of the deceased benefits to the three; that is the petitioner, Elena and the objector. Can the objector on this fact alone lay claim to being the deceased’s wife?

41. It is evident that each of them each had children with the deceased. At the time of his death it was common knowledge in the family and outside the family that Elena had left the deceased and married another man. Yet, she was paid given part of the benefits. The deceased had also been apart with the Petitioner since his return with Elena from Russia they were co- parenting. She too was paid. It appears to me that the deceased being aware of the fact that each of them despite their differences had his children had made provision for them through their mothers. In my view the issue as to who among them was a spouse for purposes of succession would depend on the evidence available. This is because if it is true that Elena had left and married elsewhere her claim would have depended on what sort of claim she would have been making against the estate. But that is neither here nor there. What is clear to me is that the said payment could not in any way be proof that the objector was a wife of the deceased.

42. In rebuttal the petitioner has demonstrated that she was married through customary law a fact accepted by the objector. She has demonstrated that his family recognized her as the wife of the deceased, and even though they had separated, when he came back he continued to relate with her in taking care of the children , when he was sick and dying she was there with the rest of the family to nurse him. When he died, she was present, and attended the funeral rites while the objector was absent. This the Petitioner highlighted as proof that the objector was nowhere near the position she could be presumed to be a wife, **see Ruth Wanjira Njoroge vs Veronica Njeri Njoroge and another [2004]eKLR John Omondi OLENG & ANOTHER VS Sneflan Radal [2012] eKLR** on the place of the spouse with respect to the burial of a deceased spouse. The petitioner has clearly demonstrated that the objector took no part in the deceased’s last days, and was not recognized to warrant her appearance at the funeral despite, according to her, spending the longest time with the deceased.

43. Clearly therefore the presumption of marriage cannot arise in her case. The objector has not proved that she was a wife of the deceased

44. On the 2nd issue ***how should the estate be distributed?***

45. It is the objector’s position that the estate comprises of 15 acres, that taking into consideration the number of children, and widows from each house, it is argued that the children of the petitioner are 35 and 36 years, those of objector 20, 22 years old. That the latter still need support. That none of the children of the petitioner laid to claim to the house in Ngata but those of the objector did.

46. The objector, on the basis that the deceased was a polygamous man relied on section 40 of the Law Of Succession Act which states

40. Where intestate was polygamous

(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) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

47. She proposed that the house of the petitioner gets 5 acres and her house 10 acres plus the house in Ngata. She also relied on of **Rono vs Rono Civil Appeal no. 66 of 2002, Estate of Francis Kambo Ndirangu** (above) that the purpose of that section in that there be equity in the distribution of the estate, as it is not about each child getting an equal share or each house getting an equal share, it is about equitable distribution depending on the status of the children in the family.

48. The petitioner on her part proposes that the estate be shared among the 5 beneficiaries, i.e. herself, her 2 children, the 2 children of the objector at 3 acres each and the petitioner’s portion to comprise the home stead.

49. The applicable law is section 35 of the Law of Succession Act which states.

Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

50. The Petitioner is entitled to a life interest to the residue of the whole the estate of the deceased. However she has in her proposal forfeited that and proposed that the estate be distributed to herself and the other beneficiaries in equal measures.

51. All the children of the deceased are adults. True some are younger than the others but they are all adults. They may be from different mothers but they remains siblings and children of the deceased. I am certain that the one thing may bring them together is having a place they can call their father's home where if they desired to meet to remember him or just to get together they could do so, at home.

52. It is in this in mind that and in the interests of justice that I find it necessary to make certain orders with regard to the house the deceased built. The Petitioner only lived in that house while the deceased was unwell, the objector lived there briefly but moved to her house. Clearly the house means different things to different parties but in my view it cannot belong to one person. Remembering that there are two other children of the deceased thought not interested in the estate may in future wish to visit their father's home.

53. To that end I make the following orders:

a. That the estate of the deceased comprised of Ngata LR 13287 (IR 78212) be distributed among the petitioner and the deceased's children as proposed by the Petitioner.

b. The petitioner to hold a life interest on the house and one acre on which the house will stand and in trust for all the six children of the deceased. Upon her demise the house and the one acre it will stand on to devolve to the six children of the deceased, two of the Petitioner, two of Elena and two of the objector in equal shares. The children to have reasonable access to the home.

c. The balance of 14 acres to be shared into 5 equal shares of 2.8 acres each to the Petitioner, her two children and the two children of the objector.

54. Each party to bear its own costs

Orders accordingly.

Mumbua T Matheka J

Dated, Signed and delivered via email this 13th day of September 2021

Robert Ndubi & Co Advocates for the Petitioner

Githui & Company Advocates