



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

P & A CAUSE NO. 12 OF 2018

IN THE MATTER OF THE ESTATE OF MOSES WERUNGA MASIBO-DECEASED

CHRISTINE NJERU.....1ST PETITIONER

EMMAH CHEROTICH.....2ND PETITIONER

VERSUS

JOSEPHINE MOMANYI.....OBJECTOR

RULING

The deceased Moses Werunga Masibo died on 3/10/2018 at Aga Khan Hospital Nairobi. Subsequently, Christine Njeri and Emmah Cherotich petitioned the court for grant of letters of administration intestate describing themselves as widows of the deceased.

The objector filed an objection to the making of the grant on the grounds that she is also the deceased's widow. That the petitioners have willfully failed to disclose to the court that she is the widow who was responsible for taking care and settling the deceased medical bills at Aga Khan. She is apprehensive that the petitioners will collect and waste the estate assets if they gain access.

The application was heard by way of viva voce evidence.

The 1st petitioner testified as PW-1. It is her testimony that she is the widow of the deceased having stayed with the deceased from the year 2007 and blessed with 2 children Amara and Prince aged 10 and 8 years respectively. That upon their marriage, the deceased met her parents on 16/8/2014 for dowry negotiations and gave her mother Kshs 25,000 and sent of Kshs 100,000/= to her father as dowry.

She stated that during the subsistence of the marriage and while staying with the deceased she met Christine Njeru whom she knew to be a former wife and had 1 child with the deceased.

She stated that she knew the objector as a contractor who sought roads work tenders from the deceased who did not attend neither the burial nor the clan meeting known as *Lufu*. That at the time the deceased was taken ill, they were staying together in Milimani estate Kisumu. She did not visit him in hospital as her son was ill and could not travel to Nairobi. That the bill at the hospital was Kshs 2.6 million, a fund raiser was conducted and 2.1 Million was then paid and the objector was one of the burial committee members as business partner.

In cross examination, she acknowledged meeting the objector during the lifetime of the deceased. That when the deceased was hospitalized, he was under the care of one Alice Nakacho, a cousin to the deceased and that she knew the objector gave her title deed as collateral for the release of the body which bill has finally been paid.

PW-2 Masibo Soita Nelson, the elder brother to the deceased hailing from the Nalonja clan stated that he knew the petitioners as the deceased widows. He confirmed visiting Emmah Cherotich's parents twice in the company of the deceased in the year 2007 and Christine Njeru's parents in 2004 in Nairobi and Runyenjes. He states that the petitioners were received at their rural home in Bungoma County.

He further confirms visiting the 2nd petitioner when she was staying with the deceased severally with his family both in Kitale and Kisumu. He states that the deceased did not have any child with the objector but was a business partner due to the nature of his work as a civil servant. He stated that he reasonably believed the objector is married to one James Nyakundi Ndege.

In cross examination he admitted having met the objector 2 times in the company of the deceased. He knew her to be the deceased's business partner. That he and the objector were the ones taking care of the deceased while in hospital and the 1st petitioner came to the hospital

visiting on 3 occasions the deceased but was barred from seeing him.

PW-3 Christine Gisuko Njeru adopted her affidavit sworn on 25/1/2019 where she deponed that she started living with the deceased in the year 2001 in Bungoma. That they later shifted houses in Bungoma and then to Eldoret in the year 2003 when the deceased got employed by the Municipal Council of Eldoret.

That when she started her university education in Nairobi in the year 2002 they would commute over the weekends to see each other and lived together over the school holidays. That while in Eldoret she hosted a number of the deceased relatives who were studying and even her deceased brother in law got to stay with her in the years 2003 and 2004.

She stated that she deferred school for one year between 2003 and 2004 and when she resumed school in the year 2004, the deceased rented a house for her and their daughter at Imara Daima estate Nairobi and the deceased continued to visit over the weekends and provide for them including paying the house help.

That in the year 2007, the deceased was transferred to Kitale where he met the Emmah and that she believed the deceased lived with her in Kitale and Kisumu and would occasionally meet the deceased whenever she visited Kisumu and its environs until she received a call from the objector 4/10/2018 that the deceased had died.

She disputes that the objector is the deceased's wife by the mere fact she is the one who took the deceased to the hospital. She stated that when the deceased died, the bill was paid by friends in Kisumu and the objector paid Kshs 500,000/= and does not know how the balance was paid.

In cross examination, she admitted that the objector whom she had not met before deposited her title deed so that the body could be released. She only met her at the airport when the body was being transported home for burial.

PW-4 Jack Mukhongo the chairman of the burial committee and former Clerk of the Bungoma County Council adopted his affidavit as his evidence in chief. He stated that the deceased served under him when he was employed by the Bungoma Municipal Council. That the 1st petitioner's mother complained to him severally about the deceased who had befriended and lived with her daughter.

That during *lufu*, the clan was told of the deceased's wives and children while the objector did not feature in the meeting and that when the deceased was ailing, money in excess of Kshs 2 M was raised by well wishers. He recognizes the petitioners as the deceased's widows.

On the objector's part, the objector Josephine Momanyi testified as DW-1. She adopted her affidavits sworn on 17/12/2018 and 23/5/2019 as her evidence in chief. She stated that she knows the deceased had been in relationships with the petitioners though he had not married to them, though he begot one daughter with Christine and 2 children with Emmah and the deceased maintained the children.

That at the time the deceased was sick, none of the petitioners supported or cared for the deceased and the body was released to her upon his demise. That to secure the release of the body, she surrendered her title deeds as collaterals against such release owing to medical bill worth Kshs 2.5 Million owed to Aga Khan Hospital and obtained the deceased's death certificate thereafter.

In cross examination, she stated that she lived in Maryland and Minnesota in the United States from 1996 and started cohabiting with the deceased in Nairobi in 2015 where she has a house in Kileleshwa. She stated that she did not have any child with the deceased but had 3 children with one James Nyakundi. That the said Nyakundi was her business partner and cohabited. She denied ever suing Barclays bank over money she sent to Nyakundi while she was in the United States. She stated that she wanted to be recognized in the proceedings the widow.

DW-2 Alice Naecho Nalianya, the deceased's first cousin adopted her affidavit sworn on 22/5/2018. She depones that the objector had been introduced to her by the deceased as his wife. That when the deceased fell ill, the objector took care of her at the hospital since the petitioners did not turn up and visited the hospital several times where she met the objector. That even after his demise, the objector mobilized a fund raiser from her house and managed to raise Kshs 1, 140,000/- while she raised Kshs 260,000/=. That even then, since the money so raised was not enough to cover the entire bill, the objector deposited her title deed for the properties. She stated that it was the objector who paid the air transport ticket for the body from Nairobi to Kisumu.

In cross examination, she confirmed that the objector did not have children with the deceased though the objector had her own children.

DW-3 Margaret Naliaka Wanyonyi, adopted her affidavit as well. She stated that she was the deceased's maternal aunt and had known the objector as she had been introduced by the deceased. That when she visited the deceased at Aga Khan Hospital in Nairobi, she was there together with the objector.

On cross examination, she stated that the petitioners had children with the deceased.

Counsel for the parties filed their written submissions. From the submissions, the parties agree that the only issue for determination is whether the objector Josephine Momanyi is a wife to the deceased.

The petitioners' contention is that even if the court were to consider the objector for purposes of succession by virtue of presumption marriage, the position is not supported by evidence since at the time the death of the deceased, he had no child with the deceased. A number of authorities have been cited in support of this proposition, that is; *MWK Vs AMW, Kiamb High Court Civil Case NO. 5 of 2015(O.S)*, *Mary Njoki Vs John Kinyanjui Muthuru & 3 others (1985)eKLR*, *Mbiti Mulu & anor Vs Miwa Mutunga Civil Application 17/1983-Nrb and Re Estate of Fredrick Clavence Kittany (Deceased)(2002)eKLR*.

The objector on her part submits that the evidence tendered by the witnesses on behalf of the objector points that the relationship existing between the deceased and the objector was that of a common wife. Reliance has been placed in the case of **Mary Njoki Vs John Kinyanjui Mutheru (1986)eKLR**.

From the above summary of the parties' respective case, the following facts emerge undisputed and or proved.

1. The deceased was married customarily to Christine Njeru in the year 2001 and begot 1 daughter.
2. Christine Njeru knew the deceased was married to Emmah Cherotich and had children and Emmah Cherotich knew the deceased was previously married to Christine Njeru.
3. The deceased married Emmah Cherotich around the year 2007 in Kitale, the deceased paid dowry and stayed with her till his death. They begot 2 children.
4. The deceased's family knew the deceased was in a relationship with the objector Josephine Momanyi.
5. The deceased had no child with the objector Josephine Momanyi.
6. Both Emmah Cherotich and Christine Njeru did not visit the deceased while sick in hospital.
7. Emmah Cherotich had met the objector Josephine Momanyi more than once.
8. When the deceased died, he was with the objector Josephine Momanyi and she organized a fund-raiser to offset the huge hospital bill.
9. The objector Josephine Momanyi paid part of the hospital bill and deposited her title deeds as collateral to secure the release of the body.
10. The deceased's body was released to the said Josephine Momanyi and she is the one who paid air fare for the body to Kisumu.
11. Some of the deceased's personal documents bear the objector as the wife.
12. That the marriage between the deceased and the petitioners Christine Njeru and Emmah Cherotich was customary marriage.

The petitioners submit that the objector Josephine Momanyi was not married to the deceased and that the mere fact that she took the deceased to the hospital does not qualify her to be a wife.

Section 29(a) of the Law of Succession Act which defines a dependant provides;

the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

The duty of the court in the instant case is to ascertain whether from the facts stated above that the objector falls within the legal provisions stated above. It is trite law that customary marriages are potentially polygamous. There also is marriage by presumption out of long standing stay and cohabitation. It is no doubt the petitioners are women married under customary law and therefore qualify to be wives by virtue that the petitioners' parents and relatives were aware of the relationship.

It is also a finding that the deceased initially related to the objector by virtue of business connections. However, the deceased indeed acknowledges in his declaration of income, assets and liabilities form dated 27/11/2017 that the objector is his wife. The same declaration form acknowledges both the petitioners' 3 children.

What the objector ought to prove in the circumstances is the existence of marriage by presumption is a question of fact. There are several authorities of this court in the issue.

In **Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR**, Bosire JA. summarized the position thus:

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 where by 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 a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

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 that:

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.

Applying the above authorities to the instant application, there is no doubt the objector cohabited with the deceased. He left in the objector's possession some confidential and personal documents which would not ordinarily be in her possession unless some intimate relations exists.

The acknowledgement by the deceased's relatives that they had met the objector in the company of the deceased, the deceased stayed in Kileleshwa with the objector, the fact she is the one who took him to hospital and stayed with him until he died while none of the petitioners visited him in hospital while ailing and generally her involvement in the burial all point to a more intimate relationship than a business partner as the petitioners want this court to believe.

Consequently, I issue the following order;

1. The objection is hereby allowed.
2. The objector is a wife for purposes of succession.
3. The grant be issued jointly in the names of Christine Njeru, Emmah Cherotich and Josephine Momanyi.
4. The petitioners to file summons for confirmation of grant within 60 days from the date of issue of the grant.
5. Each party to bear its own costs.

DATED AT BUNGOMA THIS 17TH DAY OF NOVEMBER, 2021.

S. N. RIECHI

JUDGE