



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**P & A CAUSE NO. 367 OF 2011**

**IN THE MATTER OF THE ESTATE OF CHRISTOPHER GEOFFREY ONZELE INDURE-DECEASED**

**AGNES JEPNGETICH ONZELE INDURE....1<sup>ST</sup> PETITIONER**

**KENNEDY KIDIAVAI INDURE.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**VICTORIA NALIAKA WANYAMA.....OBJECTOR**

**JUDGEMENT**

The deceased Christopher Geoffrey Onzele Indure died on 6/7/1997. The petitioners filed this cause on 3/11/2011 stating that the deceased was survived by the 1<sup>st</sup> petitioner as the widow, Felix Ambatsa Insure, Kennedy Kidiavai Indure, Patricia Edesa Indure, Abigail Osagi Indure and Christine Muhonja Indure being their children.

A grant of representation was issued to them on 30/4/2012. Subsequently, the objector filed an application dated 28<sup>th</sup> August, 2012 seeking orders that the grant so issued be revoked and or annulled, or, in the alternative, she be made a co-administrator together with costs of the application.

The application is grounded on the fact that she is a widow of the deceased having married the deceased under Luhya customary law in the year 1987 and stayed with him up to his demise. She depones that the deceased had bought land parcel E. Bukusu/S. Kanduyi/4482 where she stays to date and at no time did she consent to the succession proceedings.

She further depones that the petitioners have not disclosed other properties left by the deceased *to wit* the ancestral land in Chavakali now occupied by the second petitioner, a parcel measuring 5 Acres in Ranje area occupied by the 1<sup>st</sup> petitioner and a parcel in Muteremuko-Mutomolo road bought from Samwel Magomere which is developed and occupied by rent-paying tenants being collected by the 1<sup>st</sup> petitioner.

The 1<sup>st</sup> petitioner filed her replying affidavit deponing that she got married to the deceased on 23/4/1977 under the provisions of African Christian Marriage and Divorce Act and was not aware that the deceased married the applicant. Neither did the objector turn up during the deceased's burial to assert her claim. She disputes existence of any other property allegedly owned by the deceased or the occupation of E. Bukusu/S. Kanduyi/4482 by the objector but asserts that being a retired teacher, she put her resources together with the deceased and bought the parcel.

The application was heard by way of oral evidence. The objector testified as PW-1. She stated that she was married to the deceased in 1990 and knew the deceased was married to the 1<sup>st</sup> petitioner who stays in Ranje while she stays on E. Bukusu/S. Kanduyi/4482 in a house built by the deceased. She did not get children with the deceased. She stated that the deceased paid her brother Kshs 10,000/= equivalent to the price of 1 cow as dowry. That the deceased already had the land when she joined him.

She testified that the 1<sup>st</sup> petitioner who is the first wife of the deceased knew of the relationship with the deceased and produced a picture of her, the petitioner and the deceased as Exh 4. She testified that the deceased died on 13/7/1997 and the body was removed from Webuye to her house for viewing by neighbours and to the first wife's home for burial. She testified that she attended the burial.

PW-2 Patrick Nyongesa Wanyama stated that he is the brother to the applicant. That he knew the deceased and the objector lived together in Musikoma in Bungoma County and did not get children. That the deceased gave him Kshs 10,000/= in 1994 for dowry and he attended his burial.

PW-3 Beatrice Nambila stated that she was the village elder Kamukunji within Malaba Ward and that she saw the deceased living with the

objector in Bondeni. She did not know the deceased had earlier married in church.

On being cross examined, she testified that that she had lived there since 1994 and found the objector Victoria living with the deceased as husband and wife. She confirmed that she viewed the deceased's body at the house in Bondeni but did not attend the burial in Ranje.

PW-4 Dismas Sebastian Kwoma stated that he stays in Ranje Village and did not witness any marriage between the deceased and the applicant. He was the master of ceremony during the deceased's burial in Ranje. He did not know the deceased had another wife. He also knew the 1<sup>st</sup> petitioner as the deceased's wife.

On being cross examined, he testified that he was the master of ceremony at the funeral in Ranje and that he knew the deceased kept a 2<sup>nd</sup> wife (objector) in Bondeni.

PW-5 Moses Nyongesa Wanakana stated that he was the chief Khalaba Location. He produced a letter dated 27/5/2013 confirming that the deceased was married to the objector. In cross examination, he stated that he knew the deceased had 2 wives but did not know how they got married or how dowry was paid.

The 1<sup>st</sup> petitioner testified as DW-1. She testified that she is from Nandi and the deceased was a Maragoli. She married the deceased in 1975 under customary law. On 23/4/1997, they solemnized the marriage at the District Commissioner's Office in Kapsabet and issued with a marriage Certificate produced as Dexh-1. That the deceased died on 6/7/1997 and knew that she was the only widow. She testified that they removed the deceased's body from Webuye mortuary and made several stop-overs before going to his home in Ranje for burial. She testified that she had never known the objector.

On being cross examined on the itinerary of the body on the day, she stated;

***It is true I have said that my husband's body was stopped at Mabanga road, Shop at Chepkube, Plot where Victoria resides in Bondeni, Ranje Primary and Ranje home. That Ranje Home is her matrimonial home and is 0.5 Hectares, one has a number and the other which I purchased recently did not have a number. That the deceased's body was also taken to Sinoko.***

On how the objector ended up staying on the plot belonging to the deceased, she explained;-

***After the house collapsed, my in-law said she needed to built in the year 2000 before the deceased died. Then I saw Victoria live in the house. My in-law built the house. I knew Victoria in 2002. I investigated and found that her in-law told her to stay there. I referred her to my in-law. I thought my in-law had allowed Victoria in the house. We bought the plot with my husband. I got money from one Habib, an Indian shylock. I paid the whole amount back and I had kept my ID. Title came in the name of my husband.***

On being shown the photograph provided by the objector as exhibit, she stated;

***The woman in a black blouse is me. The one in a flowered dress is Victoria. It is not true that victoria and my husband lived as man and wife though with no children.***

DW-2 Lincoln Philip Marengo who adopted his affidavit sworn on 12/11/2012 deponing that as the deceased's elder brother, he had known only the 1<sup>st</sup> petitioner as the deceased's wife. That he had not heard of the objector until when she filed the objection and had not featured anywhere during the preparation for the deceased's burial nor did she attend the burial.

On being cross examined, he stated that he did not know the deceased had a second wife but confirmed that he used to stay in Bondeni. He also confirmed that the deceased's body was taken to 3 parcels of land he owned.

The parties filed their respective submissions on the single agreed issue of whether the objector, Victoria, was a widow of the deceased.

Mr. Makali for the objector submits that the objector has demonstrated by evidence that she was the widow of the deceased. She has also established that she stayed with the deceased at Bondeni as the 2<sup>nd</sup> wife. Counsel submits that being a wife of the deceased, she is entitled to be enlisted as a co-administrator and a beneficiary of the estate. He refers this court to the decision in ***Esther Wanjiru Githatu Vs Mary Wanjiru Githatu (2019)eKLR*** in support of this proposition.

Mr. Bwonchiri for the petitioners submits that that the deceased having contracted a statutory marriage under the African Christian Marriage and Divorce Act, the deceased lacked the capacity to enter into another union with the objector. That being so, counsel submits that the objector was not a wife and cannot therefore qualify as dependant under Section 29 of the Law of Succession Act. He referred this court to the decision in ***Re estate of Giovanni Gremmo (deceased) (2019)eKLR***.

From the evidence and the submissions, it is not contested that the petitioner Agnes and the deceased converted their customary marriage to statutory marriage on 23/4/1997 under the African Christian Marriage and Divorce Act. It is also not in dispute that the deceased died intestate and therefore his estate is subject to the procedure of distribution according to the provisions of Section 29 of the law of succession act which defines a dependant as;

***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 objector Victoria submits that she is a wife and therefore a dependant having been married under customary law or presumed as a wife on the doctrine of presumption of marriage due to long stay and evidence showing that they lived as husband and wife. The basis of her claim for presumption are basically the following;

1. That she knew the deceased had a 1<sup>st</sup> wife but did not know the system of marriage.
2. That the 1s wife knew of the relationship between the deceased and herself and produced photographs Pexh 5 showing her, the 1<sup>st</sup> wife and the deceased together . she therefore contends that the 1<sup>st</sup> wife cannot say she had never known her.
3. That she stayed with the deceased at the deceased's plot at Bondeni where he built her a house where they stayed together until his death. They however did not have children.
4. That the deceased paid dowry to her brother as part of the customary marriage requirement.
5. The neighbours and relatives knew they were staying together as husband and wife and when he died, the body was brought to the house for viewing by neighbours and thereafter proceeded to the 1<sup>st</sup> wife's home for burial.
6. That since the death of the deceased, she has been staying in the house they stayed in.

The concept of presumption of marriage in our jurisdiction is no longer in doubt. In fact, that concept has a statutory underpinning and this was recognized by the Court of Appeal in *Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie (2010) 1 KLR 159* where it was held that:

*There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the Evidence Act, Cap 80, Laws of Kenya which provides that 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.*

In *M N M Vs. D N M K & 13 Others (2017)eKLR*, it was held:

*The presumption of marriage has been recognised in our jurisdiction for a long time. In MWG v. EWK [2010] eKLR, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact.*

That the said presumption is not dependent upon the existence of a marriage was affirmed in *M N M vs. D N M K & 13 Others* (supra) where the Court held that:

*As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the Hortensia Wanjiku Yawe v. Public Trustee (supra), Wambuzi, J. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.*

This rationale, as Madan, JA articulated in *Njoki vs. Mutheru [2008] 1 KLR (G&F) 288*:

*...is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by being cast away by the 'husband', or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestows the status of 'wife' upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased 'husband'.*

According to *Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie Civil Appeal No. 20 of 2009 (2010) 1 KLR 159*:

*The cases of Machani and Njoki above were based on the old thinking and it is noteworthy that Parliament realised that women who genuinely had been taken as wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnise the union and by Act No. 10 of 1981, Parliament added section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya to the effect that "notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of the Act.*

Once it is proved that there was long cohabitation between the deceased and the person claiming to be the wife, it was further held in *M N M vs. D N M K & 13 Others* (supra) that:

***The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (Mbogoh v. Muthoni & Another, (supra). Mustapha, JA added in Hortensia Wanjiku Yawe v. Public Trustee (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption.***

This court in a similar issue in *Re Estate of Adriano Welikhe Muliali (Deceased) [2020] eKLR* stated;-

***The legal position, therefore, is that the fact that a person who had married under statutory marriage and later married under any other law, the wife married under the other law is still a wife for the purposes of the law of Succession Act.***

***In this case, 1<sup>st</sup> petitioner admitted that the 2<sup>nd</sup> petitioner was staying with the deceased before his death. In paragraph 7 and 8 of his replying affidavit filed in court on 18<sup>th</sup> February, 2015 he depones that the 2<sup>nd</sup> petitioner married the deceased by late 1996 and on 2<sup>nd</sup> September, 1997 he passed away and did not have a child in their marriage. He admits that when the 2<sup>nd</sup> petitioner was marrying the deceased, the 1<sup>st</sup> petitioner had already constructed a permanent house on that parcel of land.***

***Having been married under Customary Law by the deceased before he died, I find that the 2<sup>nd</sup> petitioner was a wife for purposes of the Law of Succession Act.***

In this case, the deceased and Victoria, the objector were staying together at Bondeni in circumstances confirming to the public and neighbours that they were husband and wife. The fact that they did not have children is immaterial. The 1<sup>st</sup> wife saying that she does not know the objector is not truthful. There is evidence that she knew the objector and her relationship with the deceased. Her contention that she is a stranger is not supported by evidence.

Mr. Bwonchiri strenuously submits that the deceased having contracted the marriage under African Christian Marriages and Divorce Act in 1977 had no capacity to contract any other customary marriage, customary or presumed as he had no capacity.

Parliament however in its wisdom enacted Section 3(5) of the Law of Succession Act which provides;-

***Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.***

The provisions were given effect *In re Estate of Robert Ngundo Nyiva (Deceased) [2021] eKLR*, where it was held;

***From the foregoing, the succession Act under section 3(5) comes in to protect women or children in unions contracted with a man after statutory marriage. The woman in such a union who is able to prove marriage is considered as a wife for purposes of succession. In the case of Irene Njeri Macharia v. Margaret Wairimu Njomo and another Nairobi Court of Appeal Number 139 of 1994, Justices Omolo, Tunoi and Bosire held that section 3(5) of the Law of succession Act is meant to protect women who marry men under customary law, who are already married to or who subsequently marry another woman under statute. The woman married under customary law is regarded as a wife for succession purposes, notwithstanding that by virtue of Section 37 of the Marriage Act the man had no capacity to marry her.***

This provision is meant to protect women married under customary law or presumed marriage after the deceased had contracted a previous statutory marriage. This provision was meant to mitigate the sometimes harsh consequences of Section 37 of the Marriage Act that the man lacked capacity to marry. The law therefore recognizes the woman as the wife for purposes of the Law of Succession Act.

For these reasons, I find that the objector Victoria Naliaka Wanyama is a wife of the deceased Geoffrey Onzele Indure (Deceased) and therefore a dependant of the estate. The petitioners are hereby directed to file summons for confirmation of grant within 45 days from the date hereof factoring in the objector herein.

Each party to bear own costs.

**DATED AT BUNGOMA THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**S. N. RIECHI**

**JUDGE**