



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

SUCCESSION CAUSE NO.1244 OF 2008

IRENE WAITHERA.....OBJECTOR/ APPLICANT

-VERSUS-

BRUNO AGONGA.....1ST PETITIONER/ RESPONDENT

CECILIA MUDONDO KUCHACHU.....2ND PETITIONER /RESPONDENT

RULING

1. Patrice Lumumba Otitima the deceased died on the 1st March 2007. On the 11th June 2008 **Bruno Oduory Agonga** (brother of the deceased) and **Cecilia Mudondo Kuchachu** (mother of the deceased) filed a petition for grant of letters of administration intestate. As per the affidavit in support of the petition the deceased was survived by the following; **Cecilia Mudondo Kuchachu and Alex Otitima Agonga** a son. The assets listed in the affidavit are;

i. L.R No. Njoro/Ngata Block 1/2278(New Kiambu)

ii. Motor vehicle KAN 475K

iii. Bank account with KCB

iv. Bank account with Barclays Bank

v. Saving and loans account

vi. Shares with Egerton Co-operative Sacco

vii. Pick up Registration Number Toyota KAK 154M

viii. Posho Mill

Total estimated value Kshs. 2,000,000.

The deceased had no liabilities.

2. On the **27th October 2008** a grant of letters of administration intestate was issued to Bruno Oduory Agonga ('Bruno') and Cecilia Mudondo Kuchachu ('Cecilia') as administrators of the deceased's estate.

3. On the 9th February 2009 Irene Waithera Wachira ('Irene') the objector/ applicant filed an application dated the 9th February 2009 seeking to have the grant of letters of administration issued to the administrators/ respondents on the 27th October 2008 revoked and or annulled. She sought to have the letters of administration issued to her and that costs of the application be borne by the respondents. The applicant filed an affidavit in support of her application. She also testified in court.

4. The objector/ applicant in her evidence and affidavit claims that she is the lawful widow of the deceased. That this is a fact known to the respondents and that they concealed this fact from the court, thus obtaining the grant in a fraudulent manner by making a false statement and concealment from the court by the respondent material facts. According to her she was married to Patrice Otitimah and they were blessed

with one issue. That after the death of the deceased the 1st respondent confiscated all his personal effects including his identity card and burial permit. He also drove away the deceased's motor vehicle registration number KAN 475. The respondents did not obtain her consent at the time of filing the petition, they did not disclose the bonafide beneficiaries. That the respondents have no priority over her in administration of the estate of the deceased, she is capable of administrating the estate.

5. The application was opposed. Bruno and Cecilia filed replying affidavits dated 26th March 2009. They depone similar facts as follows; the applicant is not the true widow of the deceased as there is no evidence of marriage. The newspaper advertisement and the eulogy annexed to the application is not proof of marriage. The applicant was one of the girlfriends of the deceased who was introduced to Bruno 4 months prior to his death in December 2006. That the applicant and the deceased had only cohabited with the applicant for 7 months. The applicant gave birth to a baby 8 months after the death of the deceased and that at the time of the deceased's death she alleged that she was 4 months pregnant and that her alleged delivery was 8 months later a fact which contradicts her allegations. That the child mentioned in the obituary was a child of the deceased with his former wife who moved to live in Canada. They as the deceased's brother and mother are therefore the bonafide administrators. That the deceased indicated that his mother as the sole beneficiary of his estate in a loan facility advanced to him 3 days prior to his death, if the applicant was his wife he would have indicated so. The applicant has no proof of customary, statutory or common law marriage to the deceased. The applicant was not a wife or widow of the deceased for purposes of succession hence her consent is not of essence. They are not intermeddling with the deceased's estate and the applicant's inventory of assets is not a true reflection of the deceased's estate.

6. After directions the parties proceeded by way of viva voce evidence. The applicant reiterated the contents her affidavit evidence adding that she began staying with the deceased in 2006 until his death. He was very sick before he died. She called Bruno who was present when the deceased died. They were staying in Kaloleni then. She went to the deceased's rural home for the burial. She spoke at the burial after her mother in law as the deceased's wife. She is aware of the deceased's former wife and his son by the said wife. One time the deceased visited their home with his friends but he did not return as he fell sick. She was paid the benefits by Egerton university deceased's employer. His employers committed to paying the children's fees. The deceased's 1st wife chose to go back to Canada and did not pursue succession. The respondent told her that they would keep the deceased's vehicle due to security. She was given the pickup registration number KAK 154. The mercedes was not returned to her. She has the log books. They had a plot at Njoro/Ngata Block 1/2278 New Kiambu a plot of 50 by 100. She has the original title deed. Bruno closed the KCB account and Barclays account too. The deceased had a posho mill in western and shares at Egerton.

7. The applicant produced a video showing what happened at the deceased's burial. The applicant was not cross-examined on the contents of the video as she fell sick as per counsel and did not return to court to be cross examined by the respondents.

8. During cross examination the applicant stated she lived with the deceased for 9 months but he had not been to their home. His mother and Bruno visited them. Bruno's siblings too visited them. Bruno was in charge of the funeral and burial arrangements. Patrice is the child of the deceased. The child's birth certificate was issued on the 26th August 2009. Bruno and her mother in law visited her after she delivered the baby. Her child is still educated as the deceased's child. She was mistreated after the burial.

9. Henry Mbuguah (PW2) testified that he knew the deceased Patrice Lumumba Otitima. He was his neighbour at Kaloleni 'C' for about five (5) years. He was the chairman of the funeral committee when the deceased died. Bruno joined them. The advert the committee placed in the papers indicated Irene was the wife. They visited the deceased's home 3 years before he died together with the wife. By the time of the deceased's death Irene was pregnant. As a neighbour they recognised Irene as the deceased's wife.

10. Bruno the 1st respondent adopted his replying affidavit and testified that after the death of his brother he relied on Irene a lot as he did not know the deceased's friends. Irene was the deceased's friend. The deceased had told him that they had started staying together in October 2006. The deceased had a wife but they had separated and she relocated to Canada. The deceased had a son called Alex with the said wife. He was not involved in making the funeral program and media advertisements. Irene told his sister that she was four months pregnant. He did not see any signs of a pregnancy. Irene spoke at the burial as per the program. As per their customs the deceased was taken to his mother house which means Irene was not married to the deceased. Irene left after the burial the next day and did not stay the mandatory 7 days, she did not return thereafter. Irene's father called him in 2007 and informed him that Irene had given birth. Later he went to Egerton and found that the deceased had written the name of his wife who had gone to Canada, their son and his mother as beneficiaries. In the Sacco file the deceased indicated his mother as his next of kin and the son who relocated to Canada. They never visited Irene's home to take dowry. They paid dowry at the home of the deceased's wife who relocated to Canada. The deceased called him and told him he was staying with a lady. This was the 3rd lady. He used to do things for the brother. The deceased was alcoholic. He saw PW2 at the burial. Irene had not visited their home before the burial. After the visitation at Egerton Irene moved out. He has never seen Irene's son. As a family they want a paternity test done. The child will benefit if the DNA shows that he is the deceased's son.

11. During cross-examination he admitted that the deceased and Irene cohabited but only for 4 months from October 2006 to March 2007 when the deceased died. That the funeral program was done by friends and Irene was not a wife. The deceased was his younger brother. The university recognised him as his guardian. That they heard that Irene had received pension from the deceased's employer.

12. Samuel Khondi (DW1) testified that he knew the deceased. The deceased was his nephew. He did not know that he had a wife. He heard of Irene and saw her at the burial. He has not seen her after the burial nor has he seen Patrice's child. Patrice's son is in Canada with the mother. The deceased lived with a woman in Nakuru who was taken as his wife at the burial. During cross examination he insisted that Irene lived with the deceased as a friend and was not a wife. That traditionally they don't recognise her as a wife. She escorted the deceased home as wife or friend. As a wife she was to stay at home 7 days after the burial.

13. Parties filed written submissions which I have considered together with the evidence and the law. The issues for determination are;

- i. Whether the objector applicant was the wife/ widow of the deceased

ii. Whether the grant issued on the 27th October 2008 should be revoked.

The issues which are not dispute are; that the applicant and the deceased stayed together from October 2006 to the month he died on the 1st March 2007. It also not in dispute that at the time of the deceased's death the applicant and the 1st respondent in one way or the other participated in the funeral arrangements and burial. The applicant attended the deceased's burial. It is also not in dispute that after the burial some monies were paid to the applicant by the employer of the deceased.

14. The applicant claims that she was a wife of the deceased and his widow and that she was not notified when the petition was filed. The respondent on the other hand claims that though the applicant cohabited with the deceased she was not a wife but a friend of the deceased and that she attended the burial as his friend and not a wife. The applicant claims that she was pregnant at the time the deceased died and that she gave birth to a son Patrice Lumumba Otitima on the 12th September 2007. This fact has been challenged by the respondents with a rider that if a paternity test is done and it is found that the child was the deceased's child they shall include him as a beneficiary of the deceased's estate.

15. He who alleges a fact has the duty to prove it. The applicant did admit that the deceased never paid any dowry to her parents and that he died before he could return to visit her parents. The essentials of a marriage was not done as per her evidence. The 1st respondent too testified that he did not accompany his brother to the home of the applicant for any ceremony and that his late brother who was younger than him told him that he was cohabiting with the applicant. The applicant's solely rests on her evidence that she had cohabited with the deceased and was recognised as his wife. To support her evidence she called PW2 Mbuguah who testified that the applicant and the deceased cohabited for 3 years, she also relied on the events which happened after the death of the deceased that the program indicated she was a wife and that she spoke at the burial as the wife of the deceased and the fact that Egerton paid her benefits of Kshs.1, 118,809.60. She also stated that the deceased's siblings and mother visited them in Nakuru and that they knew her. Mbuguah's evidence contradicts the applicant's evidence. He testified that he was a neighbour of the applicant and the deceased and that the two had cohabited for 3 years.

16. In the case of **Mary Njoki vs. John Kinjanjui Mutheru [1985] eKLR**, Justice Nyarangi stated as follows;

“...The fact that the appellant and the deceased together visited the deceased's father's home or that she attended the funeral of the deceased's father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity..... The appellant's own evidence proved that there had been no meeting between the family members and those of the deceased, and that there was no marriage ceremony of any kind or form..... This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married.”

The Court of Appeal held as follows in the case of M.W.G v E.W.K [2010] eKLR;

“There is a 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 as follows:-

“119. 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.”[Emphasis mine]

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.”

The applicant has raised the issue that they were perceived as a couple. To support her evidence on this she called PW2 whose evidence clearly contradicted her evidence. I am persuaded to agree with the respondents contention that there was no marriage between the deceased and the applicant and that she was merely his friend. In the case of **Eva Naima Kaaka & another vs. Tabitha Waitthera Mararo [2018]** the Court of Appeal held as follows ; ***Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends.***

The respondents knew Irene as a friend of the deceased and not the wife. The only neighbour who could have shed more light contradicted her evidence by stating that Irene had cohabited with the deceased for 3 years yet it was Irene's evidence that they lived together from October 2006 to March 2007. PW2 even stated that they had visited the deceased's home with Irene, a fact Irene never mentioned. There was no evidence adduced by Irene of a long cohabitation that could give raise to acts of general repute. An advert in the newspapers does not make one a wife. Nor does a visit to one's home and attendance of a burial make one a wife. I am therefore inclined to find that Irene was not a wife of the deceased, either through a customary marriage, or presumption of marriage. She is therefore not the deceased's widow. Irene was not the deceased's dependant within the meaning of dependant within the meaning of **section 29 (a) of the Law of Succession Act**, which provides that, ***“the wife or wives... and children of the deceased whether or not maintained by the deceased immediately prior to his death.”*** Irene is not entitled to be included as one of the beneficiaries of the estate of the deceased.

17. In **Succession cause no. 1642 of 2010 In the Matter of the Estate of Laurent Ntirampeba (Deceased)** cited by the applicant the court found that there was evidence covering a long span of time and that there was irrefutable legal presumption of marriage unlike this case. In Misc. Succession Appeal No. 39 of 2012 **In the Matter of the Estate of Mugo Njagi (Deceased)** the issue the court dealt with was that the married daughters of the deceased were not included in the petition and the grant was revoked. This is not the issue in this matter. The cases relied on by the applicant do not assist her allegation and case.

18. Having made a finding that the Irene was not the wife of the deceased and therefore not a beneficiary of the deceased's estate I find that

her application to revoke the grant fails. It has no merit. She cannot be an administrator of the estate of the deceased.

19. Before I conclude this matter there is the issue of the child Patrice Lumumba Otitima. Irene claims that the said child is the deceased's child. During the hearing the respondents indicated that they would want to have a DNA test done on the child and if it is established that the child was sired by the deceased he will be named as a beneficiary of the deceased's estate. The applicant after an adjournment never returned to court. Had she returned to be cross examined on the video cassette this issue would have been clarified. I am unable to make a finding that the said child is a beneficiary of the deceased's estate for the evidence adduced by the applicant was challenged. Only a DNA test can establish that the child belongs to the deceased. In the event it is established that the child Patrice Lumumba Otitima was sired by the deceased, he shall be included as one of the beneficiaries of the estate the deceased.

20. The application dated the 9th February 2009 is dismissed. The respondents shall file an application to confirm the grant within **45 days** from the date of this Ruling. Each party to bear its own costs. This file shall be returned to Milimani Courts Family Division forthwith by the Deputy Registrar Kisii court for further hearing and disposal.

Dated, signed and delivered at Kisii this 11th day of July 2019.

R.E.OUGO

JUDGE

In the presence of;

Absent For the Objector/ Applicant M/s Nyanaro For the Respondents

1st Respondent Bruno Agonga Present

2nd Respondent Absent

Ms. Rael Court clerk