

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 911 OF 2003

IN THE MATTER OF THE ESTATE OF JAMES NZOMO MWELI (DECEASED)

RULING

1. The deceased died on 12th December 2002. Representation to his estate was sought herein by a petition filed in this cause on 10th April 2003 by Catherine Mutinda Nzomo and Beth Muthee Nzomo in their capacities as widow and daughter, respectively, of the deceased. He was expressed to have been survived by a widow, Catherine Mutinda Nzomo, and children, Beth Muthee, Alvin Musyoka, Joyce Mueni and Pamela Ndanu. He was said have died possessed of a property described as Plot No. 878 Greenfields, Nairobi. A grant of letters of administration intestate was made to them on 10th June 2003.
2. On 5th November 2003 an application for revocation of the grant was filed at the registry by Rose Mwikali Ndisya. In her affidavit in support sworn on 30th October 2003, she alleged that she had been married by the deceased under customary law and the two had a child between them, called Mishel Mbite Nzomo. She asserts that she was a second wife of the deceased.
3. It is not clear to me whether the administrator filed a reply to the application, as I have not come across an affidavit by her which purports to be a reply to the said application. What comes close to a reply is an affidavit of the administrator, sworn on 16th November 2003, headed 'Further Affidavit' purporting to be reacting to a 'Replying Affidavit' of the applicant without indicating when the affidavit being responded to was sworn. She asserts to be the widow of the deceased, having married him in 1975. She claims that the sole asset of the deceased is property that she contributed to its acquisition and development. She claims she occupies the house standing on the property with her four children, and she has been in occupation of the same for the last twenty-one (21) years. She alleges that the deceased could not have contracted a customary law marriage with the applicant in 2002 as no such rites were observed in that year. She says that the applicant had only been masquerading with the deceased. She further asserts that the applicant never had a child with the deceased. She alleges that the applicant has been cohabiting with some man who is alleged to be her husband.
4. Directions were given on 14th June 2005 that the application would be disposed of by way of *viva voce* evidence. Further directions were given on 26th June 2008 that the parties file and serve evidence affidavits of witnesses intended to be called. Several such affidavits have been filed all titled 'Supporting Affidavit.' Those filed to support the application were sworn by. Those sworn in opposition were by Catherine Mutinda Nzomo, George K. Kanyeke, Monica Nthenya Kilonzo, Joseph Musyoki Mweu, Paul Mutisya Kioko, Sarah W. Mweu, Tony Mutua Mweu and Lawrence Mbuvi. All these affidavits are geared to establishing that Catherine Mutinda Nzomo was a widow of the deceased. most of them claim that they saw the applicant at the funeral posing as a widow, while others allege that she had been a domestic worker at the deceased's rural home who was never married to the deceased.
5. I have scrupulously ploughed through the record and I have not come across any affidavits sworn by persons that the applicant proposes to call as witnesses. That is the witness affidavits sworn in compliance with the directions of 26th June 2008. The written submissions filed herein on 2nd December 2010 on behalf of the applicant indicate that the applicant did file witness affidavits sworn by David Muriungi Mbithya, Jackson Kimanga Munyu, John Ndeto Mweu, Jona Nthenge, Damaris Kivweya Ndisya and Mutua Mungati Makau. I would like to reiterate that these affidavits are not in the record before me.
6. I did deliver a short ruling in this matter on 31st July 2015, where I expressed my inability to prepare a

ruling on the application dated 5th October 2003 on the ground that the affidavits referred to in paragraph 6 hereabove. I decided to hold my hand on the matter to afford the applicant time to place the said affidavits on record. The matter was mentioned on 23rd November 2016 when I was told that those affidavits were on record. As stated above, I have not seen them.

7. It was directed that the said application be determined on the basis of the affidavits on record and written submissions.

8. It is not in dispute that Catherine Mutinda Nzomo was a wife of the deceased, even the applicant admits that she is widow of the deceased; and she, the applicant styles herself as a second wife. There certainly is no need for the administrator to prove that she was a wife of the deceased. The applicant's claim to be a widow of the deceased is contested by the administrator, her alleged co-widow, and by others. She is the one who alleges to have been a wife of the deceased. Accordingly she incurs a burden of proving that fact.

9. As stated above I had given the applicant opportunity to place those affidavits on record, which I presume seek to establish that she had been married by the deceased, but she did not avail herself of the opportunity. There is therefore no proof that the deceased had married her. She claimed to have had been married under customary law. Such a marriage must be proved as a matter of fact. The alternative would be to prove cohabitation of such duration has to raise a presumption that there was marriage. The applicant has not pleaded the same, but for such presumption to arise there must be facts presented to prove it. I do not have any facts before me which can form a basis for holding one way or the other that the deceased had a marital relationship with the applicant. Consequently, the application dated 5th November, 2003 is without merit and I do hereby dismiss the same with costs to the administrator.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE