



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 511 OF 2013
IN THE MATTER OF THE ESTATE OF MARGARET WANJIRU KARENJU (DECEASED)

BERNARD MWANGI MURIITHI.....APPLICANT

VERSUS

VIRGINIA MUTHONI KARENJU.....RESPONDENT

JUDGMENT

Margaret Wanjiru Karenju (Hereinafter deceased) died on the 25th February, 2013. Virginia Muthoni Karenju (hereinafter the Respondent) applied for and obtained letters of administration in respect of the estate of the deceased. The said letters were issued on the 16th January, 2014.

By way of a summons for annulment of a grant dated 27th March, 2014, Bernard Mwangi Muriithi (hereinafter the applicant) seeks orders:

1. That the grant of letters of administration issued to VIRGINIA MUTHONI KARENJU on 16th January, 2014 be annulled.
2. That costs be in the cause.

The said application is supported by grounds particularised and the face of the application and by the affidavit of the applicant sworn on the same date. I reproduce the grounds here below:

- a) That the proceedings to obtain the grant were defective in substance.
- b) That the grant was obtained by making of false statement or by concealment from the court of material facts.
- c) That the grant was obtained by means of untrue allegations of a fact or point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
- d) That the application be allowed in the interest of Justice.

In his affidavit, the applicant depones *inter alia* that he was the husband to the deceased. They were not blessed with any children.

It is the applicant's case that after the death of the deceased he instructed his Advocate to apply for letters

of administration only to learn that the Respondent who is the mother to the deceased had already applied for and obtained letters of administration to the estate of the deceased. It is alleged that the Respondent forged a death certificate and a letter from the chief to enable her obtain the said letters.

The Respondent, it is added gave false information that the deceased was single. She opted to annex a copy of the death and funeral announcement to confirm that fact.

It is urged that the grant was obtained fraudulently and should therefore be annulled.

The application is opposed and in the Replying Affidavit the Respondent depones that at the time of the death of the deceased, she was not married to the Applicant. No valid Kikuyu Customary Law Marriage existed as no dowry was paid.

She denies any forgery. She adds that due process was followed in the succession. Relevant notices were made in the Kenya Gazette and no objections were received.

The applicant filed a supplementary list of documents on the 23rd September, 2014. These are:

1. A copy of NHIF card recognizing the deceased as the spouse of the applicant.
2. A copy of Burial Permit issued to the applicant
3. Copies of NAKURU WAR MEMORIAL HOSPITAL receipts in the name of the applicant
4. A copy of receipt from NGARI WORKSHOP & HEARSE SERVICES in the name of the applicant.
5. A copy of the funeral programme of the deceased recognizing the applicant as the husband to the deceased
6. A copy of an affidavit sworn by the applicant requesting to be issued with a death certificate.
7. A copy of letter from the Parish Ministry P.C.E.A. DR. ARTHUR PARISH recognizing the applicant as the husband to the deceased.
8. A copy of Kenya Police Permit funeral gathering permit issued to the applicant.

The Directions were given that the matter be disposed off by way of *viva voce* evidence.

The applicant testified that he married the deceased on August, 1993. They cohabited till February, 2013 when she died. At the time of the marriage, the deceased was a housewife. They lived at Naivasha then. The applicant resigned from his job at Naivasha and the two moved to Nakuru where he put the deceased into business. He added that they lived at Ojuka Estate Nakuru. The Respondent was aware of the relationship and used to visit them.

When he was working at Naivasha, he registered the deceased as his spouse as seen in the NHIF card exhibited. He produced a burial permit issued on his name.

During the burial, he was not excluded from the Eulogy. The body was released to him. He took it to War Memorial Hospital and arranged for burial.

He said he was issued with a Death Certificate on the strength of an affidavit and burial permit. He was also issued with a letter from the chief. The Respondent also got a letter from the area chief Naivasha indicating deceased was not married.

On her part, the Respondent testified that the applicant never paid dowry for her daughter. The applicant

had never stepped in her house. She knew him generally.

On cross-examination, she stated that she was not involved in the burial arrangements. That is why the applicant's name was in the eulogy. She couldn't recall who paid the hospital bills because she was sick.

Both parties filed written submissions.

I have heard occasion to consider the pleadings, the affidavits, the oral evidence and submissions on record.

Section 76a-c of the Law of Succession Act (Cap 160 Laws of Kenya) provides as follows:

“A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

(a) That the proceedings to obtain the grant were defective in substance;

(b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either:

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

In our instant case the issues for determination are:

i. Whether the applicant was the husband to the deceased.

ii. Whether the grant was obtained by making a false statement or by concealment of the material facts.

iii. Was there fraud in the obtaining of the death certificate and chief's letter on the part of the applicant?

On issue No.(i), the facts on record show that the applicant claims to have married the deceased in 1993. He produced a NHIF card indicating the deceased was a spouse. In the funeral programme, the applicant was recognised as the husband to the deceased. In the death announcement, the applicant is recognised as the husband to the deceased. It is the applicant who was issued with a burial permit in his name.

It is clear from the record that no marriage ceremony is discernible from the evidence. But there is

evidence of a long cohabitation dating back to 1993 and evidence of very close association as emerges from the special standing the applicant gets during the funeral rites of the deceased in the eulogy, death announcement, programme and even the NHIF card details and the issued burial permit and the released of the deceased's body to him.

I agree with counsel for the applicant on the submission that the facts of this case given rise to a presumption of a marriage between the applicant and the deceased.

The definition of a presumption of marriage is defined in **Bromley Family Law, 5th Edition 64** as follows:

“If a man and a woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it prove that there was in fact no marriage, and upon those who rely on it to prove that it was solemnized.”

The applicant lived with the deceased for twenty (20) years. The East African Court of Appeal pronounces itself on a similar situation in the case of Hortensiah Wanjiku Yawe Vs. Public Trustee, E.A.C.A.C.C.NO.13 of 1976 (UR). Mustafa J.A. Said:

“The position seems to me to be this. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebutt such presumption..... such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into balance into the appellant's favour the scale must tilt in the direction..... Even if the proper ceremonial rituals were not carried out that would not invalidated the marriage.”

Again in Civil Appeal No.313 of 2001 Phylis Njoki Karanja and another Vs. Rosemary Mueni Karanja and another, the court stated:

“The presumption is nothing more than an assumption that the parties must be married irrespective of the nature of the marriage actually contracted. 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.”

Looking at the evidence on record in this matter including the length of cohabitation, the description of the applicant in relation to the deceased in very crucial documents, the conduct of parties (noting that no objections were ever raised as to the description of the applicant as husband to the deceased), one cannot help but reach the finding in the words of Mustafa J. (Supra) that the cohabitation and other factors above gives rise to a presumption of a marriage between the applicant and the deceased and there exists no cogent evidence on record to rebutt such presumption. Even if the proper ceremonial rituals were not carried out, that would not invalidate the marriage between the applicant and the deceased.

Having so found, it follows that issue No.(ii) answers in affirmative. The Respondent applied for a grant of letters of administration in respect of the deceased and failed to disclose that the applicant was an interested beneficiary or survivor of the deceased.

As to whether there was fraud in the obtaining of the death certificate and the chief's letter on the part of the applicant, I am persuaded that there was none. The applicant has demonstrated that he took charge of the funeral arrangements, paid necessary bills and applied for and obtained the necessary documents to enable him bury his wife. I see no element of fraud on his part.

With the result that for the reasons above stated, the application herein has achieved the threshold for the

annulment of the grant issued to the respondent. The same is hereby annulled.

The issue grant is hereby recalled and is ordered that a fresh one be issue in the names of Bernard Mwangi Muriithi, the applicant herein.

Dated, Signed and Delivered at Nakuru this 11th day of May, 2016.

A. K. NDUNG'U

JUDGE