



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1197 of 2008

IN THE MATTER OF THE ESTATE OF HAMMERTON WAKONGU MWANGI-(DECEASED)

JUDGEMENT

The grant in this matter was made on 14th August 2007 to Ann Wanjiku Wakongu by the Senior Principal Magistrate's Court at Murang'a in **Succession Cause Number 158 of 2007**. The administrators had identified Ann Wanjiku Wakongu as the surviving widow and seven (7) children. The grant was confirmed on 25th April 2008; the property devolved entirely on the widow, Ann Wanjiku Wakongu.

It is this grant that Esther Waruguru Wakongu seeks to have revoked by two summons for revocation or annulment filed in court on 9th June 2008. She says that she was left out of the list of survivors although she was a wife of deceased.

The respondent has filed several affidavits to support her case. There are also affidavits by other members of her family who support her case. Her position is that she was the only wife of the deceased and she was not aware of the applicant having been married by the deceased at any time.

Directions were given that the application be disposed of by way of affidavit and *viva voce* evidence. At the hearing on 14th January 2013, both parties appeared, but counsel for the applicant was not present. It was directed that the matter would proceed. Hearing commenced at 1.04p.m.

The applicant testified as PW1. She told the court that the deceased, Hammerton Wakongu, was her husband, and that they had three children between them. When he died she attended the funeral meeting, but she was excluded at the funeral. Although she attended the funeral, she and her children were excluded from the photograph taking sessions and was not altogether recognized as a wife. She stated that when her own mother died, the Wakongu family participated in the burial. She obtained a national identity card which bears the name of the deceased, Wakongu. She has also obtained a copy of the deceased's death certificate, which she says she could not possibly have obtained if she was not his wife. She also said that she had photographs of her children taken together with Wakongu's parents and some with Wakongu himself.

On cross-examination, the applicant denied that her children were born outside wedlock. She asserted that they were born within wedlock with the late Wakongu. She said that one child was named after Wakongu's mother. She did not produce birth certificates of the said children with the deceased, and explained that her house at one time burnt down and documents were destroyed. She also said that she visited the deceased while he was in hospital. She conceded that her photograph was not taken at the funeral, and that she was not mentioned in the funeral programme as a wife, as the eulogy only recognized Ann Wanjiku as the wife of the deceased. She explained that those who drew up the

programme excluded her. She stated that she married Wakongu in 1980, they got their first child in 1982 and she constructed the family ancestral home where Ann Wanjiku is now residing. They cohabited at Dandora Phase 2 between 2004 and 2006 when Wakongu died. She did not object to the grant being made as she was not informed by the administrators when they sought the letters as they were at Murang'a and she was at Karatina. She also mentioned that she did not know of the money due to the deceased's family from his former employer, Telkom Kenya and that she was not aware that her lawyer wrote to Telkom Kenya asking them not to pay Ann Wanjiku. She was also unaware that court orders had been made stopping payment by Telkom Kenya pending hearing and disposal of this application.

The 1st administrator, Ann Wanjiku, testified as DW1. She was the widow of the deceased, having married him in 1986 and they had seven (7) children. She explained that she did not know the applicant until 2008, when the latter she approached the chief of Gaturi Location seeking a letter to confirm that she was a widow of the late Wakongu. The chief summoned DW1 and that is when she met the applicant, PW1 for the first time. The chief asked them to meet him on an appointed day with elders. She had earlier obtained a letter from the chief confirming her as the widow of the deceased and a grant of letters of administration intestate had already been made to her. They were not able to agree on anything and the chief recommended that the matter be resolved in court. When Wakongu was in hospital, DW1 used to visit him, in the company of her brother-in-law's and she used to stay at the brother in law residence at Githurai. She never used to visit the deceased with the applicant. She did not see the applicant at the funeral and no one told her that another wife of Wakongu attended the funeral. She explained that the eulogy was prepared in Nairobi by her brothers-in-law while she was at Murang'a. Regarding the photographs, she stated that she did not stop the applicant from participating in the photograph taking session. She stated that her mother-in-law was called Anna Waruguru and not Ann Muthoni. She said that when she was married she found a house at the deceased's home and the deceased gave it to her. She confirmed that the deceased was an employee of Telkom Kenya, and that his terminal benefits were stuck there as the applicant had challenged there being released to her. She asserted that she was all through with her deceased husband, and that the applicant only came in after the deceased died. She asserted that the applicant was not her co-wife.

DW1 called DW2 and DW3 as her witnesses. DW2 is a brother of the deceased and a brother-in-law of DW1. He testified that DW1 was the only wife of the deceased. They had seven (7) children. He stated that he met the applicant for the first time in court when she filed this application in this cause seeking to stop the deceased's dues at Telkom from being paid to DW1. He also testified that the applicant was not at the funeral and was not present at the meeting where the eulogy was prepared. She could not be mentioned in the eulogy as she was not the wife of the deceased. Dowry was never paid for her, but had been paid for DW1, Ann Wanjiku. He said that he escorted his father when he went to pay the dowry for Ann Wanjiku. On cross-examination by the applicant, DW2 stated that he met the applicant for the first time in 2008. He said he was not aware that she had taken a national identity card using the name of the deceased and did not know how she got the certificate of death with respect to the deceased's death. He asserted that he was not aware that she was Wakongu's wife as nobody ever told him that she was his wife.

DW3 is a cousin of the deceased. He testified that the deceased had only one wife, and they had seven (7) children. They married in 1986 and dowry was paid, and he was at the ceremony where this happened. He confirmed that the deceased used to work for Telkom Kenya and was based at Nairobi, while DW1, was a housewife at Murang'a. He said that he did not know the applicant, and that he met her for the very first time on 2nd June 2008 at the chief's office when she came claiming to be wife of Wakongu. He was there as an elder at a meeting called by the chief. He later met her in court. He asked the court to do justice to DW1, the lawful wife of the deceased.

The issue that I have to determine here is whether the applicant, Esther Waruguru Wakongu, is a widow of the deceased – that is whether there was a marriage between the deceased and the said Esther Waruguru Wakongu.

In her evidence, the applicant said that she married the deceased in 1980. She did not, however, mention whether she married the deceased formally or informally, or whether there was a ceremony of any

sort. She did not produce any marriage certificate, nor lead evidence that dowry was paid or any of the customary law rites of marriage were performed to constitute her the wife of Wakongu. In the absence of such evidence I can only conclude that she did not marry the deceased under either customary law or statutory law.

She alluded to a period of cohabitation with the deceased. She said she got three children with the deceased, constructed a matrimonial home at Gakurwe, named a child after the deceased's mother, visited the deceased in hospital and was present at his burial. From this evidence she seemed to suggest that there was cohabitation from which the court could presume a marriage.

The law on presumption of marriage is now fairly clear. This principle was first stated in **Hortensia Wanjiku Yawe –vs- The Public Trustee** Court of **Appeal Appeal Case Number 13 OF 1976**. It was concluded in that matter that the fact of a long co-habitation as between a man and a woman can give rise to a presumption of marriage in favour of the woman. In **Mary Njoki –vs- John Kinyanjui Muthuru (1982-88) 1KLR**, it was said that for the presumption to arise, a promise to marry or performance of some customary law ceremony need not be proved. **In in the matter of the estate of John G. Kinyanjui HC P&A No. 317 of 1984** it was said that cohabitation can be evidence from which it may be presumed that the parties to the cohabitation did in fact marry. **In in the matter of the estate of the late Evanson Kiragu Mureithi Nakuru HC P&A No: 163 of 1995**, it was said that the cohabitation should be considered alongside other circumstances. In the matter, the court took into account the fact the children born between the parties were named after the parents of both parties as required under Kikuyu customs, the man's parents had visited the woman's parents to inform them that the man was cohabiting with their daughter, and that some gifts were presented to the woman's parents. In **Sylvester Kongo Mukono & another –vs- Geoffrey Ndungu Muigai & another HC P&A No. 163 of 1995**, the court considered that the couple had a child between them, both constructed a house and that both sides of the family recognized them as husband and wife.

The issue then that arises is whether there is material upon which this court can presume marriage between the applicant and the deceased. The most important consideration when it comes to presumption of marriage is whether there was a cohabitation, whether the parties lived together. The applicant in her testimony in chief did not allude at all to having had co-habited or lived with the deceased anywhere, not in Nairobi and not at Gakurwe, Murang'a. She only mentioned the matter during cross-examination. She said she used to live with the deceased at Dandora Phase 2 between 2004 and 2006 when the latter died. Yet she said they married in 1980 and got their first child in 1982 and two others thereafter. There is a gap in the evidence on this point. What happened between 1980 and 2004? Why is it that cohabitation only happened between 2004 and 2006? I have not found any concrete evidence on cohabitation from what was placed before me. The applicant did not call any witnesses to support her allegation that she lived with the deceased.

The applicant did refer to circumstances that the court would consider alongside cohabitation to determine whether a presumption should be made or not. She says she had children with the deceased. She, however, did not produce their birth certificates, and therefore there is no iota of evidence connecting the deceased to these children. She said her daughter, Ann Muthoni, is named after the deceased's mother. It however transpired that the deceased's mother was not called Muthoni, but Waruguru. She said that she was issued with an identification card with the name of the deceased. She did not produce the said identity card, nor state whether this was done with the concurrence of the deceased or not. There is also no evidence as to when the said identity card was obtained. She did not adduce any evidence on whether she had been accepted or recognized by the family of the deceased as a wife of the latter. The evidence of the witnesses who testified in court appear to militate against any such recognition.

Having come to the conclusion that there is insufficient evidence to prove cohabitation, there is no foundation upon which the alleged circumstances can be placed. I am led to the inevitable conclusion that there is insufficient material upon which I can presume marriage between the deceased and the applicant. She was therefore not a wife of the deceased for the purposes of succession, neither were her children for purposes of succession.

The application before me calls for revocation of the grant made on 14th August 2007. **Section 76** of Law of Succession Act, which provides for revocation which provides for revocation of grants, empowers the court to revoke a grant where there are issues on the point of its making at the grounds:-

- (a) That the proceedings to obtain the grant were defective in substance.
- (b) That the grant was obtained fraudulently by the making of false statement or concealment from court of something material.
- (c) That the grant was obtained by means of an untrue allegation.

The reasons advanced by the applicant in seeking revocation of the grant is that she was left out despite being a widow of the deceased. I have arrived at the conclusion that the applicant was not a wife of the deceased. Consequently, the ground that she was omitted from the list of persons who survived the deceased does not hold. The application does not therefore meet the threshold set in **Section 76** of the Law of Succession Act and must fail. I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 7th DAY OF MARCH, 2013.

W.M. MUSYOKA

JUDGE