



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Succession Cause 1510 of 1994
IN THE MATTER OF THE ESTATE OF JOSEPH THUO IKUMBI (DECEASED)

IKUMBI THUO WAMUTUA OBJECTOR

VERSUS

NELIUS NYAGUTHII MWANGI 1ST RESPONDENT

PETER WANJOHI MWANGI 2ND RESPONDENT

MARY WANJIRU MWAURA 3RD RESPONDENT

JUDGMENT

Nelius Nyaguthi Mwangi along with one Peter Wanjohi Mwangi filed this Petition. Only Nelius and her minor daughter Joan Wangui Thuo were mentioned as survivors of the estate as widow and daughter.

The mother of the deceased Regina Wangui filed summons to annul the grant of representation issued to these said Petitioners on 4th October 1994. She sought a fresh grant to be issued in her names and those of the Petitioners.

In her supporting affidavit Regina has conceded that Nelius was married to the deceased. (See Paragraph 3 of her affidavit sworn on 20th February 1995). However she has alleged that she has paid to the deceased Shs. 50,000/= out of the Purchase price of Shs. 75,000/= in respect of purchase of the Land Kiini/Rukanga/1564.

In response to the said averments Nelius, in her replying affidavit sworn on 4th April 1995, has shown that the deceased applied for loan for Shs. 75,000/= from Kenya Commercial Bank, his employer, and the said loan was being re-paid through deductions from his monthly salaries. She has annexed letter of offer for loan and pay-slip of the deceased showing deductions of Shs. 1,780/= from his Salary (Annexure NNM-1).

She has also shown a further charge of 11th May, 1990 over the same property executed between the deceased and the said Bank.

Regina left this world during pendency of this cause and her daughter Mary Wanjiru Mwaura was substituted as a Co-Administratrix along with the initial two Petitioners.

In the meantime the father of the deceased Ikundu Thuo Wamutua filed Summons of 18th January 2006 to revoke the joint grant of representation issued.

It is not in dispute that Ikumbi and Regina were parents of the deceased and Mary was his sister.

As Ikumbi has challenged and denied that Nelius is widow of the deceased, the issue was directed to be determined.

Nelius in her evidence has shown that she married the deceased as per Kikuyu Customary law and his mother Regina, his deceased uncle Kimani Mwaura and Aunt Wanjiku were present at the ceremony. I have already stated earlier that Regina in her affidavit has conceded that Nelius was married to the deceased. The marriage lasted for seven years before his death. She has produced the birth certificate of her daughter showing the deceased and herself as her parents. The document nominating her as next of kin as a wife by the deceased addressed to the Kenya Commercial Bank and an affidavit sworn on 20th February 1990 by the deceased declaring that Nelius is his wife. These documents are simply challenged or denied by Mary and Ikumbi without any substantiation.

She has also explained that she had two mis-carriages prior to the death of their daughter, who was 2 years of age at the time the deceased died.

It is also conceded by her that she has not changed her ID Card and that in eulogy for the deceased she was not mentioned as a wife. But she responded that the eulogy was prepared at Nairobi by Mary while she was preparing for funeral at Loitoktok. When she came to check on the funeral date, she was attacked by Mary and in the Church she did not object to omission of her name as she did not want to create chaos in the Church.

She said she did not know Ikumbi as the deceased told her that his parents have been separated since long time.

She denied that she has married after the death of the deceased and that she has a son from the man she is alleged to have re-married. She explained that the child belong to her sister and the man alleged to be her present husband is her brother-in-law. When the sister died she took over the care of her son. I may also note here that Mary who has made the allegation of re-marriage did concede that she was told so by a lady who is neighbour of Nelius. Thus it is a hearsay evidence which is totally inadmissible in absence of the evidence produced from the lady who is alleged to have informed her. I may also add here that Mary has, in her evidence conceded that Nelius was wife of the deceased but stated that their relation was off and on. She stated in any event that she would consider her as a wife of the deceased.

Ikumbi simply stated that he does not recognize Nelius as a widow of the deceased, and that he was not present at the marriage. That fact only, in view of overwhelming evidence to the effect that he has not been staying with Regina and his family, cannot refute the evidence that Nelius was married to the deceased.

From the evidence before me, I do find that Nelius has proved on balance of probability that she was married to the deceased and that her daughter is the daughter of the deceased.

I would have also dealt with the issue of distribution of the estate but due to the fact that only issue to be determined was the status of Nelius as a wife, I will hesitate to proceed further.

I shall thus mention this matter for further directions as to finalise the distribution on a date suitable to the parties.

I shall not make any order on costs.

Dated, Signed and Delivered at Nairobi this **3rd November 2009.**

K.H. RAWAL

JUDGE

3.11.2009