IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 139 OF 1994

IRENE NJERI MACHARIA……………...............……………..APPELLANT

AND

MARGARET WAIRIMU NJOMO

PATRICK MURIITHI HARRISON………………..……..RESPONDENTS

(An appeal from the ruling of the High Court of Kenya at Nairobi

(Mbito J) dated 8th February, 1994

in

H.C.C.C. NO. 170 OF 1991

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JUDGMENT OF THE COURT

The appellant before us is Irene Njeri Macharia. She is aggrieved by the decision of the High Court (Mbito J) dated February, 10th 1994. The dispute between the appellant, on the one hand, and Margaret Wairimu Njomo, the first respondent and Patrick Muriithi Harrison, the second respondent, on the other hand, centres on the estate of one Jonah Njogu Njeru Macharia who died on or about 22nd July, 1990. We shall hereinafter refer to Jonah as "the deceased". The deceased died intestate and in the High Court, it was agreed by all sides that the appellant was the only lawful widow of the deceased and further that the deceased had died intestate.

On 31st December, 1978,the appellant and the deceased went through a Christian ceremony of marriage under the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya. The ceremony of marriage was conducted at Ndimaini Church in Nyeri. By section 4 of Cap 151, it is provided that:-

"Except as otherwise provided in this Act, the provisions of the Marriage Act, shall apply to all marriages celebrated under this Act,"

and by section 37 of the Marriage Act, Cap 150 Laws of Kenya, it is provided that:-

"Any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage

contracted under or in accordance with any native law or customs, or in any manner apply to marriages so contracted."

There is nothing in any of the provisions of Cap 151 to exclude the application of section 37 of Cap 150 so that section 37 applied to marriages contracted under and in accordance with the provisions of Cap 151. The deceased, having married the appellant under and in accordance with the provisions of Cap 151, lost the capacity to contract any other marriage as long as his marriage to the appellant remained valid and undissolved.

After their marriage, the deceased and the appellant cohabited together as man and wife until sometime in January, 1989 when they were legally separated. That separation must have occurred because their union was never blessed with any children. Soon after their separation and true to his African heritage, the deceased took on and started to cohabit with the first respondent. As far as the deceased and the first respondent were concerned, they were married though the evidence placed before the superior court did not show whether the two ever went through any ceremony of marriage, and if they did so, what form the ceremony took. It was, however, common ground that the deceased and the first respondent had a daughter, Jackline Wanjiru Njogu, who was undoubtedly an issue out of the union. Jackline was about three years old in 1992 and she must be approximately seven years old as at now.

The dispute in the superior court was how the property left behind by the deceased was to be shared out between the appellant and the infant Jackline. As we have said, counsel on both sides had agreed, apparently on the authority of RE RUENJI'S ESTATE (1977) K.L.R. 21, RE OGOLA'S ESTATE, (1978) K.L.R. 18 and the precendent-setting decision in IN THE MATTER OF THE ESTATE OF REUBEN NZIOKA MUTUA, Probate & Administration Cause No. 843 OF 1986 (Unreported), that for the purposes of the Law of Succession Act, Cap 160 Laws of Kenya, the first respondent was not a wife of the deceased and was not entitled to inherit anything from the estate of the deceased. We think that the view that was held by both counsel and apparently by the superior court, that the first respondent was not a wife for the purposes of the Law of Succession Act was erroneous and as the matter is obviously of great importance to the public, we have decided to take this opportunity to deal with it.

The decision in RE Ruenji's Estate and Re Ogola's Estate were, at the time when they were passed, namely 14th February,1977 and 6th February, 1978, respectively, correctly reflected the position of the law as it then stood. The Law of Succession Act,

Though enacted by Parliament in 1972, did not become operational until 1st July, 1981 vide Legal Notice No. 93 of 1981. So that in 1977 and 1978, the courts had to rely solely on section 37 of the Marriage Act in order to determine whether the deceased persons (Ruenji in Re Ruenji's Estate and Ogola in Re Ogola's Estate) were capable of having other wives in addition to their statutory wives. The courts correctly held that Ruenji and Ogola were incapable of contracting other marriages during the existence of their statutory marriages and that accordingly the two women who claimed to be entitled to a share in the men's estates were not wives in law and could not inherit. We repeat that those decisions were correct at the times when they were made.

But in 1981, the male-dominated Parliament intervened and added paragraph (5) to section 3 of the Law of Succession Act. Paragraph 5 of section 3 added by Act No. 10 of 1981 provided as follows:-

"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband had contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act."

Our understanding of this provision is that it was intended to reverse the position taken by the courts in the cases of Re Ruenji's Estate and Re Ogola's Estate. The section was, however, directly in issue in 1986 in the case of "IN THE MATTER OF THE ESTATE OF REUBEN NZIOKA MUTUA (DECEASED) to which we have referred earlier. The relevant facts in Mutua's case were that on 2nd September,1961, at the PCEA Church in Nyeri, he married Theresiah Mumbua Mutua and that marriage

was obviously under the African Christian Marriage and Divorce Act. That marriage was never dissolved until 26th May, 1986 when Mutua died in a road traffic accident. There were seven children of the marriage.

But in March 1980, Mutua, once again being true to his African manhood, purported to marry Josephine Mumbua Mutua and that marriage was said to have been conducted in accordance with Kamba Law he did not provide for Josephine and her three children. Josephine, on her own behalf and on behalf of her three children, applied to the High Court under section 26 of the Law of Succession Act, for reasonable provisions to be made for her and her children out of Mutua's estate. In a careful and detailed judgment from which no appeal was apparently preferred, Lady Justice Joyce Aluoch held that Josephine was not a wife for the purposes of the Law of Succession Act and was not entitled to receive anything from Mutua's estate. But she held further that Josephine's three children were Mutua's dependants and were entitled to reasonable provision for their maintenance out of Mutua's estate. Dealing specifically with section 3(5) of the Act which we have set out elsewhere in this judgment, the learned Judge held as follows:-

"I find the operative words of the amendment to be "a woman married under a system of law which permits polygamy…". Those are the words which give a woman a ticket to seek refuge under the amendment to section 3 of the Succession Act. I have read the provisions of the amendment carefully and my conclusion is that Mr. Situma misunderstood them completely. My understanding of the amendment is that it talks of or envisages a situation where for example, a man whom I will refer to as A married woman B under customary law and that marriage is valid and recognized under that custom. Subsequently he meets another lady C and the two contract a marriage under statute. Upon A's death and for purposes of inheritance to A's estate, B is considered a wife by the Succession Act, despite the fact that C is the one with a marriage certificate, having been married under statute law. The Succession Act will consider B a wife and, therefore, is entitled to inherit from the estate of the deceased. The amendment will come to B's aid because she will be "a woman married under a system of law which permits polygamy…". I see this amendment as having been brought in to cater for women married under customary law who were either neglected or abandoned by their husbands during his lifetime. To my mind, this amendment cannot be interpreted any other way, or least of all Mr. Situma's way because to do so would be to open "a Pandora's Box", so to speak, and would render useless any marriages under statute, if upon death of a husband any woman who believed the deceased "married" her was allowed under the Succession Act to inherit from his estate. I do not consider that that is what the legislature intended by this amendment…".

We find it somewhat difficult to appreciate the learned Judge's reasoning in this extract. To use her own example of a man A marrying a woman B under customary law, if it be taken that the marriage between A and B is valid and recognized under a particular customary law, A has lost the capacity to contract a statutory marriage under either Cap 150 or Cap 151. In the example given by the Judge it is the purported marriage of A to C Which would be invalid and all the marriage certificates in the world could never validate it. A valid customary law marriage is never dissolved by a statutory marriage and if it came to the question of who, as between B and C, is entitled to inherit from the estate of A, the obvious answer even before the passing of the amendment under consideration, would be B unless it be the law that a statutory marriage can never be declared to be invalid even when it is foisted or superimposed upon a subsisting valid customary law marriage. B would be entitled to the estate of A not because of section 3(5) but because she is the only lawful widow of A. C, on the other hand could not call in her aid section 3(5) because the statute under which she and A purported to marry is "a system of law which does not permit polygamy."

Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine, had contracted a statutory marriage which remained undissolved upto the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy. Parliament, in its wisdom, and whatever it might have intended to do, provided that:-

"Notwithstanding the provisions of section 37

of the Marriage Act…."

Josephine was, nevertheless, a wife for the purposes of the Law of Succession Act, and in particular sections 29 and 40 of the Act. We have unhesitatingly come to the conclusion that MUTUA'S case was wrongly decided and must now be treated as not correctly stating the position of law.

In the appeal before us, we have said we do not know whether the first respondent and the deceased ever went through any ceremony of marriage; we are also not certain if the concept of a presumed marriage could be applied to their circumstances. In the absence of such evidence, we are unable to say whether she could qualify as a "wife" under the provisions of section 3(5) of the Law of Succession Act. It must not be forgotten that in MUTUA'S case, Josephine went to very great lengths to prove that Mutua had married her under Kamba customary law. The learned Judge in MUTUA'S case was apparently of the very clear view that even if that evidence were to be treated as true, it did not matter because under section 37 of the Marriage Act, Mutua lacked the capacity to contract another marriage during the subsistence of the statutory marriage. Probably because of the decision in MUTUA, the first respondent in the appeal before us, did not place any evidence before Mr. Justice Mbito to explain what sort of marriage she had contracted with the deceased.

We must now consider the question of how the estate of the deceased ought to have been shared out between the appellant and the infant Jackline. During their marriage, the appellant and the deceased acquired landed property in Nairobi known as L.R. 96/254/297. That property was owned jointly by the appellant and the deceased and in 1994 when the learned Judge gave his judgment, the value of the property was put at KShs.800,000/=. Because the ownership of the property had been joint, the whole of it went to the appellant by operation of the law. The advocate for the parties told the Judge that the property was not available for distribution as part of the estate.

The assets remaining after the house was principally money. The deceased's pension benefits from his employer, the Teachers Service Commission, amounted to a total of $3,972 or KShs.79,440/=. There was a further Kshs.73,560/= due from Cannon Assurance (K) Ltd and a further KShs.33,086/= due to the estate from Tena Co-operative Savings and Credit Society Limited. That, according to our arithmetic comes to a total of KShs.186,086/=. While holding that the appellant was the only widow of the deceased and was entitled to inherit from his estate Mr. Justice Mbito thought that the appellant did not really need the money and that the infant Jackline needed it more. The Judge thought the appellant had got the valuable landed property and was in paid employment. Jackline on the other hand, was still a minor, would have to be fed, clothed and educated to whatever level here abilities may carry her. The learned Judge refused to give the appellant any of the money and left it all to Jackline. The appellant was not amused about that and hence her appeal to us. She told us through the mouth of her counsel, Mr. Nyariki, that the Judge was wrong because under section 35 of the Law of Succession Act, she was entitled to inherit the property of her deceased husband. The landed property was not part of the estate to be distributed as it had gone to her by operation of the law. In refusing to give her any part of the KShs.186,086/=,the Judge in effect disinherited her, contended the appellant.

For our part, we agree with the appellant that as the widow of the deceased, she was entitled to a share of her husband's estate available for distribution. We, however, disagree with her that her entitlement took away the Judge's power to weigh the conflicting needs of the heirs and determine how much should go to each heir according to those needs. Even if the appellant had acquired the landed property wholly by herself and without any contribution from the deceased, it was a property she possessed and in weighing her needs against those of Jackline, the Judge was entitled to take it into consideration, just as much as he was entitled to take into consideration any paid job or business bringing income to her. In the case of the landed property, the deceased had contributed towards its acquisition and that gave the Judge even more reason to take it into account. We can find absolutely nothing wrong in what the Judge did, but the appellant being the widow of the deceased and in order to forestall any allegations that the courts are disinheriting widows contrary to this Court's decision in ELIZABETH KAMENE NDOLO V GEORGE MATATA NDOLO, Civil Appeal No. 128 of 1995 (Unreported), we will agree with this appellant that

like shylock, she is entitled to her pound of flesh from the estate of the deceased. Only because we want to attain that objective, namely not to disinherit a widow, we order that out of the KShs.186,086/= available for distribution between the appellant and Jackline, the appellant be given Kshs.10/= and the rest be left to Jackline to be invested in the manner ordered by the Judge. We further order that each party to the appeal shall bear their own costs. Those shall be our final orders in this appeal.

Dated and delivered at Nairobi this 14th day of November,1996.

R. S. C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL