IN THE COURT OF APPEAL FOR EAST AFRICA

(Coram: Wambuzi, P., Mustafa & Musoke, JJ. A.)

CIVIL APPEAL No. 13 OF 1976

HOTTENSIAH WANJIKU YAWE.....APPELLANT

AND

PUBLIC TRUSTEE.....RESPONDENT

(Appeal from the Judgment & decree

of the High Court of Kenya at Nairobi

(Kneller, J.) dated 19th September, 1975

in

High Court Miscellaneous Case No. 15 of 1973

JUDGMENT OF MUSTAFA, J.A.

Paul Makumbi Yawe, a Muganda by birth, and resident in Nairobi, was killed in a motor vehicle accident in Uganda on 2nd May, 1972. He was employed as a pilot by the East African Airways Corporation at the time of his death. He died intestate.

The Public Trustee of Kenya was granted letters of Administration to his estate in Kenya on 4th July, 1972.

The report of the death of the deceased to the Public Trustee was made by Hortensia, the appellant, who claimed that she was the deceased's widow and that she had four children by him. On enquiries being made by the Public Trustee, the Administrator General of Uganda supplied certain information about the Ugandan claimants to the estate. Then the Ugandan claimants, by their advocate, gave their particulars to the Public Trustee and also alleged that the appellant was not married to the deceased.

The Public Trustee, in January, 1973 by way of petition, applied to the High Court for directions to determine the following questions:

1. The domicile of the deceased at the time of death,
2. Was deceased properly married to the appellant,
3. Were the appellant's four children entitled to a share of the estate,
4. Which of his relatives should share in the estate,
5. The amounts to be paid to the rightful claimants.

The High Court (Kneller, J.) after a long hearing decided the questions as follows:

1. The deceased was domiciled in Uganda,
2. The appellant was not the deceased's wife.
3. The appellant's four children Joseph Makumbi, Mary Ann Yawe, Paul Bobby and Joy were the deceased's children and entitled to inherit.

4. The deceased's lineal descendants in Uganda namely Dorothy, Bukirwa, Pauline and Paul Joseph; his mother and his brother Leonard & Edward are all entitled to inherit. Something called a customary heir has to be appointed (Uganda Succession Act - section 28).

5. The estate to be divided according to the Uganda Succession Act as follows:

a) costs of the Public Trustees to came out of estate

b) the customary heir to get 1% of balance of estate

c) deceased's mother to get 5% of balance

d) Deceased's two brothers each to get 5% of balance

e) each child (lineal descendant) to get an equal proportion of residue.

The appellant is only appealing against the finding that she was not the deceased's wife, both parties before us having it agreed with the other findings of the High Court.

Kneller, J. dealt with the evidence adduced before him in a careful manner. He said:

> "I saw all these witnesses testify and I wrote down most of what they said, so, at the end of the trial, I had the feeling of the case. None spoke the whole truth whole time because of their bias and fading recollections and, sometimes, they refused to concede any point which they thought was in favour of the other side. I have tried to sort the wheat from the chaff. So much for credibility."

Then the trial judge went on to analyze the evidence adduced and came to the conclusions stated above. As regards the issue of the appellant's marriage to the deceased, he said,

> "Secondly was Hortensia Wanjiku his wife according to Kikuyu custom? She had to prove this and the standard of proof required was the usual one in a civil matter, namely, 'on the balance of probabilities.' The custom of Kikuyus for their marriages is documented in the Restatement of African Law, Kenya Marriage and Divorce, 1968 by Eugene Cotram Ch. 2 section iv, pp 15,16. It was agreed to be so. Evidence was led as to the consent of the parties and their respective families, the Nguraruo, the Rurachio and so on but was not proved to the standards required, of. Mwagiru v Mumbi (1967) EA 639,642. I answer the second question by saying that Mrs. Hortensia Wanjiku was not the wife of Mr. Paul Yawe, the deceased, by Kikuyu custom or at all."

Mr. Muite, for the appellant, has submitted before us that this finding by the trial judge was against the weight of evidence and based on misdirection as regards the onus of proof and that the trial judge had failed to consider the presumption of marriage in favour of the appellant arising from long cohabitation. Mr. Muite has asked us to re-assess the evidence on this point, as this is a first appeal. The appellant testified that she met the deceased in 1962, that they decided to marry, and in March, 1963 she went through a Kikuyu customary marriage with him, and had since lived with him as husband and wife until his death, and during that period bore him 4 children. They had a matrimonial home in Nairobi West. That she had lived for over 9 years with the deceased and bore him children was not challenged. A witness Mr. Christopher Malavu, one of the two witness, who, the judge found "told the truth as far as they are aware of it", and one of the deceased's friends, stated that the deceased used to call the appellant his wife and that the appellant was regarded as the deceased's wife for all purposes. Mary Rose Namwadu the mother of the deceased, a resident of Uganda and a witness for the Ugandan claimants, testified saying,

> "He (deceased) told me of his marriage to Wanjiku. I said "Never you showed me the mother of you children." That is why he showed me Wanjiku."

She visited the deceased's house many times in Nairobi and used to see the appellant there with her children. In fact she had two meals in that house. She also visited the appellant's parents accompanied by the deceased and one of her own daughters.

The evidence of these witnesses indicated that the appellant and the deceased were living together as a man and wife in a matrimonial home with the children of their union, and from uncontracted evidence, for a period of over 9 years.

A number at Kikuyu witnesses were called who testified to the performance of various ceremonies connected with the alleged Kikuyu marriage between the appellant and the deceased.

The deceased's mother Mary Rose Namwadu, who was alleged to have been present at some of the ceremonies, denied that any ceremonies took place. These witnesses were among those whom the trial judge found were biased and did not speak the whole truth. In support of the Kikuyu marriage, a little book (Exhibit 1) was produced by a witness alleged to contain certain payments of money made by the deceased in respect of the marriage and signed by the deceased. The trial judge found that the book was probably forged. The trial judge said:

> "there were discrepancies in the order and details of the ceremony and ritual outlined in the evidence of the Kikuyu witnesses. The impression they gave was that they were working backwards from the union of Paul Yawe and Hortensia Wanjiku through the book, as it were, and trying to prove the ingredients of a customary marriage, but because it never happened, they were unable or forgot to cover the essentials. The account……. in a little book (Exhibit l) ……. was probably a forgery…. witnesses feel there must be something in writing to support their testimony about a certain event so when litigation begins, they write out in some book a report

of what happened.……."

However, in Exhibit J, an application for employment dated 29th December, 1966 to the East African Airways, filled in and signed by the deceased, he had put down the appellant as his wife.

The position seems to me to be this. The appellant had testified that she was married to the deceased; the deceased had told Christopher Malavu that the appellant was his wife, and the deceased in an application in l966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died in an accident, and during that period the appellant bore him four children. Evidence was led on behalf of the appellant that a Kikuyu customary marriage between her and the deceased took place and that various ceremonies and rituals were duly performed. The deceased's mother appeared to deny that any such ceremonies took place in her presence as alleged by the appellant and her witnesses. Despite Mr. Muite's submission to the contrary, I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. 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 rebut such a presumption, see re: Taplin - Watson v Tate (1937) 3 ALLER 105. The trial judge did not consider this factor. The trial judge was not satisfied that the appellant had established, on a balance of probabilities, that the Kikuyu customary marriage was performed in accordance with all the necessary ceremonial rituals. It is not clear whether he found that the marriage was not valid because all the rituals were not performed, or that no marriage of any kind had taken place at all. However in considering whether there was a marriage the trial judge ought to have taken account of the presumption of marriage in the appellant's favour. Such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance in the appellant's favour, the scale must tilt in her direction.

In this case there was evidence of the deceased's oral and written declarations that the appellant was his wife, and the visit to the appellant's parents' home by the deceased's mother, which was probably of some matrimonial significance. If the trial judge had taken all these matters into consideration when he was assessing and evaluating the evidence, there can be little doubt that he would have come to a contrary finding on this issue. Even if the proper ceremonial rituals were not carried out, that would not invalidate the marriage, see Sastry Aranegary v Sembecutty Vaigalil (1880-1) 6 Appeal Cases 364, and re Shephard - George v Thyer (1904) 1 Ch. 456.

Mr. Oluoch for the Ugandan group of claimants, submitted that the trial judge had held that no marriage, Kikuyu customary or otherwise, had taken place at all. He referred to the Restatement of African Law 1 by Eugene Cotran, and contended that if no ram was slaughtered then no marriages could take place. He submitted that the appellant had taken on herself to prove a Kikuyu customary marriage, and had failed to do so. He appeared to doubt whether a presumption arising from long cohabitation based on English Common Law was an element in Kikuyu customary marriage, and in any event, he stated that it was for the appellant to establish that it was so applicable, which the appellant did not do. He suggested that perhaps the presumption in English Common Law arose because of the public concern regarding illegitimate issue and inheritance; in the Uganda Law of Succession, illegitimacy is no bar to inheritance. He also submitted that the appellant did not, in the High Court, rely on cohabitation as a factor in favour, and he doubted if this matter can now be raised before us. Mr. Kithyoma for the Public Trustee associated with Mr. Oluch's submissions.

I can find nothing in the Restatement of African Law to suggest that Kikuyu Customary Law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated. The evidence concerning cohabitation was adduced at the hearing, and formed part of the issue concerning the fact of marriage, and even if no specific submission on that point was made by Mr. Muite, I do not think that he is precluded from relying on it before us. It is directly concerned with the burden of proof to be discharged by the appellant, and this presumption enhances the quality of the evidence adduced on her behalf and weighs heavily in her favour. There was no evidence adduced in rebuttal of that presumption. The trial judge omitted to take this crucial matter into consideration: if he had, he would probably have held that the appellant was married to the deceased and was his wife.

I would allow the appeal and declare that the appellant was the deceased's wife. It follows that the appellant entitled to her share of the inheritance as the widow together with the other beneficiaries. I would set aside the decree of the High court (which incidentally does not appear to accord with the order made), and substitute there following:

"The Public Trustee of Kenya to distribute the assets of the deceased's estate in Kenya in accordance with the Law of Uganda."

I would order that the costs of the appellant and of the Public Trustee in this appeal be paid out of the estate, and that the costs of the Uganda claimants be paid by themselves. I would leave the order for costs in the High Court undisturbed.

DATED AT NAIROBI THIS 6TH DAY OF AUGUST ,1976.

A.MUSTAFA

JUSTICE OF APPEAL

IN THE COURT OF APPEAL FOR EAST AFRICA

(Coram: Wambuzi, P., Mustafa & Musoke, JJ.A)

CIVIL APPEAL No. 13 OF 1976

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AND

PUBLIC TRUSTEE……. RESPONDENT

(Appeal from the Judgment & decree

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(Kneller, J.) dated 19th September, 1975

in

High Court Miscellaneous Case No. 16 of 1973

JUDGMENT OF WAMBUZI, P.

I agree with the judgement of Mustafa, J.A which I had the opportunity to read in draft. The question before us is whether the appellant was lawfully married to the deceased. The learned trial judge quite properly in my views, directed himself on the burden of proof when he said that the appellant had to prove the marriage and that the burden "was the usual one in a civil matter, namely 'on the balance of probabilities'".

Evidence was led which was not disputed that the appellant lived with the deceased for over 9 years and had 4 children by him. To his employers, the deceased had declared the appellant as his wife and some friends of the deceased knew him as married to the appellant. On this evidence which was accepted by the learned trial judge, the appellant had shown long cohabitation and repute so as to give rise to a presumption in her favour that she was married to the deceased. Mr. Oluoch, for the Respondent, supported by Mr. Kithyoma, for the Public Trustee, submitted in effect that as the marriage claimed was under customary law, the presumption would not apply. I do not agree. In the first place, no authority was cited to us that the presumption does not apply to customary law marriage and secondly, the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. It may be shown that the parties are not married after all but then the burden is on the party who asserts that there was no marriage. It is at this stage that the nature of the marriage becomes relevant and the incidents thereof examined. The same kind of problem arose in Sastry Velinder Aronegary vs Sembecutty Vaigalie (1880-1) 6 AC 364 a case referred to in the judgement of Mustafa, J.A. A customary marriage was claimed and it was contended that the presumption of marriage from cohabitation with habit and repute did not apply to the parties who were Tamils and to the Country which was Ceylon. It appeared that according to Roman Dutch Law applicable in Ceylon there was a presumption in favour of marriage rather than concubinage. I accept Mr. Oluch's contention that section 3(2) of Judicature Act (Cap. 8) provides for the application of customary law in certain circumstances. However, the same section in sub-section (1) thereof provides for the application of the common law to Kenya. I would not say in the circumstances of this case that there is any conflict between the common law and the Kikuyu customary law of marriage as the presumption relates only to proof. In my view once the appellant proved that she was living with the deceased as man and wife over 9 years she was in law presumed to be married to the deceased unless the contrary be clearly proved. In other words, the burden is thrown on the respondent to show that she was not so married.

Evidence was called to show that a marriage did take place between the deceased and the appellant according to Kikuyu customary law on the one hand and on other hand that it did not take place. Of the witnesses the learned judge remarked;-

> "None spoke the whole truth the whole time because of their bias and fading recollections and sometimes, they refused to concede any point which they thought was in favour of the other side."

In view of this finding it cannot be said that there was any cogent evidence to rebut the presumption of marriage.

Of the marriage ceremony, the learned judge said,

> "There were discrepancies in the order and details of the ceremony and ritual outlined in the evidence of the Wakikuyu witnesses. The impression they gave was that they were working backwards from the union of Paul Yawe and Hortensia Wanjiku through the book as it were and trying to prove the ingredient of a customary marriage but because it never happened, they were unable or forgot to cover the essentials."

It may well be that the witnesses testified as they did because the alleged marriage never took place but it is equally possible that they so testified because of fading recollections of an event which happened 10 years or so back. In any case it was for the respondent to show by some cogent evidence that some essential element required for a valid Kikuyu marriage was not complied with not merely that anyone element or elements were not complied with. This learned trial judge did not consider and on the evidence as assessed by him the respondent quite clearly failed to do. In these circumstances, the learned trial judge should have found in favour of the appellant. As Musoke, J.A. agrees with the judgement of Mustafa, J.A. there will be an order in the terms proposed by Mustafa, J.A.

DATED AT NAIROBI THIS 6TH DAY OF AUGUST, 1976.

S.W.W. WAMBUZI

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PRESIDENT

IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi, P., Mustafa & Musoke, JJ. A)

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BETWEEN

HOTTENSIAH WANJIKU YAWE……..……..APPELLANT

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High Court Miscellaneous Case No. 16 of 1973

JUDGMENT OF MUSOKE, J.A.

I entirely agree with the judgment of Mustafa, J.A, and concur in the order proposed by him.

DATED AT NAIROBI THIS 6TH DAY OF AUGUST, 1976

S. MUSOKE

……..

JUSTICE OF APPEAL

I certify that this a true

copy of the original

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REGISTRAR