



REPUBLIC OF KENYA

IN THE COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 4 OF 2008

IN THE MATTER OF THE ESTATE OF CHRISPIN MUNJAL NDEGE(DECEASED)

BETWEEN

ROSEMARY AOKO MUNJAL.....PETITIONER

VERSUS

NOEL NAMENYA MUNJAL.....OBJECTOR

R U L I N G

1. The dispute herein revolves around the Estate of Chrispin Munjal Ndege (Deceased) who died on 28th December 2007 at Busia District Hospital. The dispute is between Rosemary Aoko Munjal (herein after referred to as Rosemary) and Noel Namenya Munjal (hereinafter referred to as Noel).
2. In a petition presented to this court on 23rd of January 2008, Rosemary sought for Grant of Letters of Administration to the Estate of the Deceased. In the Petition she named the following as surviving the deceased;
 - a. Allan Ndege Munjal
 - b. Kevin Mala Munjal
 - c. John Ololo Munjal
3. On discovering the existence of this cause, Noel filed an objection to making of Grant on 6th of March 2008. Subsequently, on 31st March 2008, she presented an Answer to Petition of Grant and contemporaneously filed a Petition by way of Cross Application for a Grant. In those pleadings, Noel claims to be a wife of the Deceased and a Beneficiary to the Estate. She complains that Rosemary secretly filed this cause without her consent. The intention being to disinherit her.
4. This matter proceeded by way of *Viva voce* evidence which was preceded by filing of Affidavit Evidence. The evidence of Noel is that she was married to the Deceased on 6th October 2004 under Luo Customary Law and that the requisite dowry of two cows and two goats paid to her parents in the year 2006. That the Deceased left the following properties;
 - a. S. TESO/ANGOROMO/3530
 - b. BUKHAYO/MUNDIKA/6440
 - c. BUKHAYO/MUNDIKA/2710
 - d. BUKHAYO/MUNDIKA/5670

It was her further evidence that upon their marriage, the Deceased and herself established a matrimonial home at BUKHAYO/MUNDIKA/2710 (hereinafter also referred to as plot No. 2710). That she has

invested heavily in the matrimonial home by continuing with the construction of the buildings thereon with the full knowledge of Rosemary.

5. Under Cross Examination, she stated that she started to cohabit with the Deceased sometime in 2002 before formalizing the marriage in 2006. She was well aware that at the time of cohabiting with the Deceased, there existed a statutory marriage between the Deceased and Rosemary which had been blessed with four children. She acknowledges that Rosemary and her children deserve to inherit part of the Deceased's property. That at time when she met the Deceased they resided together in the house of Rosemary as Rosemary had separated with the Deceased and moved out. Later the two (the Deceased and Noel) begun to develop plot No. 2710 and moved there when the ground floor was complete. That the Deceased met his death while residing in plot No. 2710. It was her further testimony that the Deceased constructed for her a house on land belonging to her father-in-law.
6. In a bid to prove her marriage to the Deceased, Noel produced an Affidavit of Marriage sworn on 26th July 2006 (Objector's exhibit 3). The Affidavit was sworn jointly by the Deceased and Noel in confirmation that they were married on 6th October 2004 under Luo Customary Law. She also produced a copy of the burial programme of the burial of the Deceased in which she was named as a second wife to the Deceased.
7. Noel denied that she was merely a tenant of Rosemary in a house said to belong to Rosemary. She denied having signed a tenancy agreement (Petitioner's exhibit 1) between herself and Rosemary. She denied any knowledge of electricity bills that were produced by the Petitioner. She further denied receipt of a demand letter dated 21st July 2006 (Petitioners exhibit 4) drawn by Ouma Okuta and Associate Advocates on behalf of Rosemary requiring Noel to vacate a house allegedly belonging to Rosemary.
8. Gilbert Ndege Onyango(OW2) is the father of the Deceased. It is his testimony that his son had two wives namely Rosemary and Noel. It was his testimony that he paid two cows and two goats as dowry to the family of Noel in the year 2006. He recognizes Noel as a wife to the Deceased. It was his testimony that Rosemary abandoned his son when he fell ill.
9. It was the testimony of Mzee Onyango that he blessed the foundation of a house built jointly by his son and Noel. It was his wish that the house should go to Noel while Rosemary should inherit the other properties.
10. The Petitioner gave evidence on 28th of January 2014. It was her evidence that she was the only wife to the Deceased having contracted a statutory marriage on 5th January 1996. It was her claim that she constructed a storied building on plot 2710 together with her husband. That sometime at the end of 2003 she was transferred to Kisumu on promotion, she however visited her husband frequently at Busia. That sometime in 2006, she came home on a weekend and found Noel in her house but she chased her away. That she instructed her lawyer Ouma Okuta to warn Noel against interfering with her monogamous marriage. She was emphatic that her marriage to the Deceased was never dissolved.
11. In cross examination she acknowledged that sometime in 2006 she learnt that Noel had a relationship with the Deceased. She however denied that the relationship was that of marriage. That the Deceased died in her hands at Busia District Hospital although she stated that while admitted at the hospital Noel and herself took turns to care for him. That at this time Noel was occupying a building on plot 2710 and that at the time of the Deceased's death he was living with Noel but as a friend. She further stated that both she and Noel were present at the burial of the Deceased and that Noel spoke before her during the funeral. It was her testimony however that Noel did not participate in the construction of the ground floor of the building standing on plot 2710. That property belonged to her last born son. Noel was merely a tenant in the premises as evidenced by a tenancy agreement prepared by her husband and signed by him on behalf of both herself and Noel.
12. Linus Onyango Ndege (PW2) is the brother to the Deceased. He recognizes Rosemary as the only wife of the Deceased. That he participated in the purchase of Plot 2710 as he accompanied the Deceased and Rosemary during the purchase of that Plot from a Mr. Okongo Otota. It was his testimony that Noel was merely a tenant to the Deceased at his premises in Burumba and that although a friendship between the Deceased and Noel developed in the cause of the tenancy he is not aware that the Deceased married Noel. That Noel participated at the burial of the Deceased

only as a friend of the Deceased. He is aware about the burial programme of the Deceased funeral where, in part, the Deceased was eulogized as being married to Noel in the year 2006. That before the burial, the body of the Deceased was removed from the mortuary and taken to the house of Rosemary at Burumba Estate after which it was taken for a short stop over at Noel's residence. He however maintained that Noel was just a friend to the Deceased. He further testified that sometime after the death of the Deceased, his father attempted to pay dowry to Noel's Mother but this was against Luo Custom.

13. The last witness for Rosemary was Annah Agutu Omondi (PW3). She is the Grandmother to the Deceased. She recognizes Rosemary as the only wife of the Deceased. That Noel was merely a tenant to her grandchild. She also stated that Noel was not present at the time of the Deceased's death.

14. This court was asked by Mr. Bogonko appearing for the Objector to find that Noel was a second wife to the Deceased having contracted a Luo Customary Law marriage with him in the year 2006. The court was asked to uphold that marriage for purposes of succession in terms of section 3(5) of the Law of Succession Act which provides;

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has 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”.

That Rosemary concealed the fact that the Noel was a beneficiary and Counsel invited the Court to revoke the Grant made to the Petitioner for concealment of material facts.

15. For the Petitioner, it was argued that there was no proper Luo Traditional Marriage and that Noel had bought the loyalty of the Deceased's father by sending money to him for his upkeep. That this explains the reason why there was an attempt by the father to formalize the relationship between the Deceased and Noel after his death.

16. It was urged that it would be overtly unfair to allow Noel to keep plot No. 2710 when she had not made any contribution to its acquisition and had made minimal contribution to its development. Counsel further submitted;

“Your Honour, the fact that the relationship between the objector and the deceased was stealth and not public cannot be gainsaid. That it did not graduate to a marriage is a fact open to debate; and for this reason the objector must suffer the consequences of her actions; she purported to engage in a relationship with a man married under the Marriage Act; she knew that this marriage solemnized in the statutory manner was still subsisting; she took no heed; she cannot expect to benefit from this arrangement, much as she tried to clothe it in legalities;

It was submitted that she should live with the consequences of her actions.

17. As I turn to determine this dispute it ought to be remembered that what is before Court for determination is whether Noel's objection, Answer to Petition and Petition by way of Cross Application should succeed. When counsels were invited to submit, at the end of taking of evidence, Noel's Advocate sought for an annulment and revocation of Grant. That could not be a viable request because Noel commenced Objection proceedings before Grant had been issued in favour of Rosemary. In answering the Objection proceedings before Court, this court proposes a single issue for determination. Whether Noel is a wife for purposes of Succession in terms of Section 3(5) of the Law of Succession Act.

18. Undoubtedly, the Deceased contracted a statutory marriage with Rosemary under the provisions of The Marriage Act (Cap 150) (now repealed). That marriage subsisted and remained valid until the death of the Deceased. Even though the provisions of The Marriage Act and in particular section 37 thereof would have made the Deceased incapable of contracting another valid marriage during the continuance of his marriage to Rosemary, such subsequent union maybe recognized for purposes of the Law of Succession because of the provisions of section 3(5) of The Law of

Succession Act. That section provides 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 has 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”.

19.The effect of the provisions of section 3(5) of The Laws of Succession has been the subject of several Court decisions. In the decision of **Irene Njeri Macharia v Margaret Wairimu Njomo & another [1996] eKLR**, the Court of Appeal interpreted the section as follows;

“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...”

20.Noel sought to persuade this Court that she had contracted a marriage with the Deceased under Luo Customary Law. Her evidence and that of Mzee Onyango the father of the Deceased was that the requisite dowry for the marriage had been paid to the parents of Noel. The view of Rosemary is that the Noel did not prove that all the prerequisites of Luo Customary marriages had been met. Her Advocate submitted thus;

“Your Lordship, the S. M. Otieno Case, is a classic example; we enumerate the following as prerequisites towards fulfilling demands of a Luo Customary Marriages,

1. **Payment of “Ayie” – (I have accepted her)**
2. **Payment of dowry”**
3. **Luo marriage ceremony (Introduction of parties to parents and amongst family/relatives of both sides”.**

21.Noel sought to prove the existence of a Luo Customary marriage. The procedure of proving Customary Law generally and more particularly in proceedings under The Law of Succession was discussed by the Court of Appeal in **Eluid Maina Mwangi V Margaret Wanjiru Gachangi [2013] eKLR**. The Court of Appeal stated;-

Since this appeal revolves around a woman-to-woman marriage under Kikuyu customary law, it is opportune to consider at this stage also the legal position pertaining to proof of customary law and practices. In KIMANI VS GIKANGA, [1965] EA 735, at page 739, Duffus JA expressed himself as follows on proof of customary law:

“To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to the book or document or reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”

See also SAKINA SOTE KAITTANY & ANOTHER VS MARY WAMAITHA, CA NO. 108 OF 1995 and ATEMO VS IMUJARO (2003) KLR 435.

Specifically on proof of a customary marriage, this court in GITUANJA VS GITUANJA (1983) KLR 575, held that the existence of such a marriage is a matter of fact which is proved with evidence. In that case the court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the “ngurario”.

Under section 51 of the Evidence Act, Cap 80 Laws of Kenya, opinions of persons who are likely to know of the existence of any general custom or right are admissible where the court is required to form an opinion of the existence of such custom or right. The phrase “general custom or right” is defined in section 52(2) to include customs or rights common to any considerable class of persons.

Lastly, Rule 64 of the Probate and Administration Rules makes provision for the application of African Customary Law in the following terms:-

“Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African Customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross-examination.”

The effect of the above provisions of the Evidence Act and the Probate and Administration Rules had been to make admissible, among others, the works of Dr. Eugene Cotran pertaining to the Customary Laws and practices of many Kenyan Communities.

What the Court of Appeal is saying is that where it is necessary to prove customary law in a cause under The Law of Succession Act, a party desiring to do so must produce oral evidence or refer to any recognized Treatise or other Publication dealing with the subject. And generally, Eugene Cotran’s Restatement of African Law has been accepted by our courts as a recognized Treatise dealing with the Customary Law of Succession, and Marriage and Divorce for many communities in Kenya.

22. So did Noel prove a Customary Marriage? She made no attempt to produce oral evidence of what constituted a valid Luo Customary Marriage nor did she make any reference to any Treatise or other Publication pertaining to Luo Customary marriage. I take the view that Noel was rather casual about her responsibility of proving Luo Customary Law in respect to marriage. This court would without hesitation reach a decision that Noel did not prove a customary marriage with the Deceased.

23. This Court would still reach that decision even if it went out of its way to refer to Eugene Contran’s Restatement of African Law in respect to the essentials of a valid marriage under Luo Law. At page 175, Contran restates the following as the essentials of a valid marriage under Luo Law:-

“The following are the essentials of a valid marriage under Luo Law

- a. **CAPACITY.** The parties must have the capacity to marry and also the capacity to marry each other.
- b. **CONSENT.** The parties to the marriage and their respective families must consent to the union.
- c. **DHO I KENY.** There can be no valid marriage under Luo law unless a part of the *dho i keny* has been paid.
- d. **COMMENCEMENT OF COHABITATION.** The moment at which a man and woman become husband and wife legally is when the man and woman commence cohabitation i.e. when the bride is deflowered after *meko*”.

Payment of *Dho I keny*, even partly, is essential to the validity of a marriage under Luo law.

24. On this important aspect, the evidence of Noel and her witness was not without difficulty. In her affidavit evidence of 13th December 2012, Noel states that Dowry was paid to her parents in 2006. The Deceased’s father seems to confirm this in his affidavit of the same day. However, in her oral

evidence Noel says;-

“Dowry was paid to my home after the death of the Deceased in 2007 “.

That seems to be more aligned with the evidence of Linus Onyango Ndege (PW2) that there was an attempt to make the payment after the death of the Deceased. On this crucially important aspect the evidence of Noel and her witness is not consistent. This Court is unable to tell when, if indeed, dowry was paid.

25. That said this Court is obliged to examine whether on the evidence on record it can be presumed that the Deceased was married to Noel. In the decision of **VRM V MRM & another [2006] eKLR** the Court of Appeal reiterated that the evidence of long cohabitation and general repute can form a basis for a presumption of marriage. Once such a presumption is made the onus is on the person alleging that there was no such marriage to prove otherwise.
26. In resolving this all important question this Court relies substantially on Rosemary's own evidence. On her evidence, Rosemary acknowledged that prior to May 2006 when she found the Noel living in her house, she was aware that a relationship existed between Noel and her Husband. And while in his sunset days at Busia District Hospital, she and Noel took turns to care for the bed ridden Deceased. And as she did so, Noel was occupying the Deceased's house on Plot 2710. What would be more telling are the events after the death of the Deceased. The Deceased's own brother Linus Onyango Ndege (PW2) acknowledged that after the death of the Deceased his body was taken first to his residence with Rosemary and later there was a stopover at the house of Noel.
27. At the funeral of the Deceased, both Rosemary and Noel spoke as the wives of the Deceased. In the funeral programme, the Deceased is eulogized, partly, as having married Noel in 2006. Although at the hearing, Rosemary insisted that Noel was merely a friend of the Deceased she did not explain why a casual friend would be referred to as a wife in such an important occasion as of the taking of the Deceased's final rites.
28. Noel gave conflicting evidence as to when she started to cohabit with the Deceased. In her oral evidence to Court she talks about the year 2002. In her Affidavit evidence she stated that she began to live together with the Deceased as Husband and Wife from 6th October 2004. That inconsistency notwithstanding there is evidence from Rosemary herself that in May 2006 she found Noel in the house standing on Plot 6440 whereupon she threw away all her belongings. Although Noel's position is that her cohabitation with the Deceased started much earlier, the cogent evidence is that, at least by May 2006, she was living with the Deceased. That would be a period of one and half years prior to his death. The Court must take this, perhaps not long period, together with the fact that generally Noel was reputed and acknowledged as the second wife of the Deceased in determining whether or not a marriage could be presumed. Why else would friends and relatives of the Deceased including Rosemary herself allow Noel to take care of the Deceased when hospitalized as though she was his Wife. Would the family of the Deceased including Rosemary allow the body of the Deceased to make a stopover at the house of a mere friend? How does one explain that Noel was allowed to speak as a wife of the Deceased during his funeral? Why would she be given such prominence? How come there was no resistance from members of the family and in particular Rosemary for Noel to be named as a wife to the Deceased in the funeral programme. In addition, why would the Deceased and Noel swear a joint Affidavit on 25th July 2006 as proof that the two were married? The irresistible conclusion this Court reaches is that the cohabitation of the Deceased and Noel taken together with the general repute of their relationship is a basis for this Court to presume that there was indeed a marriage between the Deceased and Noel. Further this Court has not seen any cogent evidence by Rosemary to rebut this presumption.
29. What I must then decide is whether arising from that presumption, Noel is a wife for purposes of the Succession Act. It is necessary for me to again reproduce the provision of section 3(5) of the Act:-

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has 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”.

In determining this this Court finds assistance in the passage of Judgment of **Mustafa J. A in Hortensia Wanjiku Yaweh V Public Trustee, Civil Appeal No. 13 of 1976** quoted with approval in VRM (Supra). The Judge stated that:-

“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.”

It has not been suggested to this Court that there cannot arise a presumption of marriage under Luo Customary Law. The Deceased and Noel cohabited and held themselves out to be Husband and Wife. The Deceased was well aware that he had a subsisting statutory marriage with Rosemary. Although there is no proof that the requisite rites of marriage required by Luo Custom had been performed, the Deceased in the Affidavit sworn on 25th July 2006 referred to his marriage with Noel as one under Luo Customary Law. The Deceased saw himself as married to Noel under a system of Custom that allowed polygamy. I take the view and hold that the Deceased and Noel could be presumed to be in a union of marriage that permitted polygamy. For that reason I would further hold that Noel is a wife for purposes of the Act as contemplated by the provisions of section 3(5).

30) Being of that persuasion, I allow the prayers of the Objector to the extent that both her and Rosemary shall be joint Administratrix to the Estate of the Deceased. For now I consider the task of this Court done given that I was required to determine an Objection, an Answer to Petition to Grant and a Petition by Way of Cross Application of grant. Rosemary and Noel shall jointly within 30 days hereof apply for Confirmation of the Grant. But if any differences on the mode of distribution exist then the parties will be at liberty to present their proposed modes for the Court’s final determination.

31. There shall be no order on costs

DATED, DELIVERED AND SIGNED AT BUSIA THIS 21ST DAY OF APRIL 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

KADENYICOURT ASSISTANT

.....FOR PETITIONER

.....FOR OBJECTOR