Ndunda v Mutunge (Civil Appeal 47 of 2018)
[2022] KECA 1308 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1308 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 47 OF 2018

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

DECEMBER 2, 2022

BETWEEN

JEDIDAH MATHEMBO NDUNDA ..... APPELLANT

AND

RAEL MUTUNGE ..... RESPONDENT

(Being an appeal against the Ruling and Order of the High Court of Kenya at Kitui, (L. N. Mutende, J.) delivered on 16th December 2015 in High Court Succession Case No. 319 of 2015)

JUDGMENT

1. To form a family is a free decision. This means that, ideally, when a person dies there should be no fight whether the person had this or that family as one's family or families should be a fact and not a contest. However, the litany of cases in our courts show that that is not the position. Courts are often called upon to determine whether a deceased person had one or more families. This is the question that will form the crux of this appeal.

2. The appeal arises from a succession dispute concerning the estate of the late Gibson Kinuka Ndunda (the deceased), who died intestate on the March 14, 2009. A dispute concerning the status of the respondent, Rael Mutunge, the objector therein, was resolved by a judgment of the High Court in which it was declared that she was a widow of the deceased by virtue of long cohabitation and presumption of marriage. It is not disputed that the deceased's first widow, Jedidah Mathembo Ndunda, the appellant, had eight children while Rael Mutunge, the respondent, had five children.

3. The appellant petitioned for letters of administration intestate and listed herself and her seven children as the only beneficiaries. The properties that were alleged to have been acquired by the deceased, which the appellant lay claim to were:

    i. Nzambani/Kyanika/1752;

ii. Kyangwithya/Tungutu/792;

(iii) Plot Nos Mulongo/Kavisuni/978, 776, 975, 974, 973, 972, 971;

(iv) Plot Nos Kisasi/Kimuuni/796, 975, 794, 793, 792, 791, 720, 719, 274, 237, 216, 216, 103, 113;

(v) LR Nos Kitui/Township/4096/255, 4096/360;

vi. Plot Nos Kisasi/Nguuni/1214, 1213 & 1209;

vii. A half share of Plot No Kaluva Adjudication Section No 2181;

(viii) Plot Nos Kanuva 1780, 1792, 1799, 1800, 1801;

(ix) Plot No Manzini 2688.

4. The letters of administration intestate were issued to the appellant on November 7, 2011 and the same was dated December 9, 2011. On August 18, 2012, the appellant filed for summons for confirmation of grant and averred that she was the only wife with seven children as dependents of the deceased.

   In the application for confirmation of the grant, the appellant added some properties, to wit: land parcel No 1799 – Kaluva Adjudication Section, a plot within Kitui Town LR 4096/360 that was undeveloped and Katwala Market Plot No 5, 6 and 11.

5. The respondent became aware of this chain of events, which triggered the filing of an affidavit of protest dated February 4, 2013. The respondent deponed that she was married to the deceased under customary law, and they had five children in the marriage, who had all been excluded from the list of beneficiaries, and that some properties had been omitted, to wit: the house in Athi River that stands on LR 337/498 on which the appellant resides.

6. The appellant fought back quickly and filed an application dated May 20, 2013 seeking an order restraining the respondent from intermeddling with the deceased's estate until the proceedings before the court were fully determined. The respondent opposed the application vide a replying affidavit sworn on December 10, 2013.

7. On April 3, 2014 the court delivered a ruling to the effect that the respondent was restrained from interfering with the estate of the deceased without any authorization from the court. The court noted the complexity of the matter and opined that it would be in the interest of justice to hear the parties and have the grant of administration intestate confirmed as soon as possible. The court thus directed that parties fix the summons for confirmation for hearing within 21 days from delivery of the ruling. The relevant part of the ruling states as follows:

   > ' Having noted the complexity of this matter, justice would call upon the court to hear the applicant and protestor (objector) as soon as possible and have the grant of administration intestate confirmed as soon as possible. I will direct that the application be fixed for hearing within 21 days.
   >
   > In the meantime, the objector/ respondent is hereby restrained from interfering with the estate of the deceased without any authorization from the court.'

8. On June 19, 2014 the hearing commenced by way of oral evidence. The appellant testified that: she was married to the deceased in 1972 and was blessed with eight (8) children, however, one died leaving seven (7) as beneficiaries; she was entitled to the whole estate to hold in trust for her children; LR 337/498, belonged to and it was registered in the name of Nicholas Ndolo Ndambuki. She denied

the allegation that her marriage to the deceased was dissolved and added that if it had, the clan could not have allowed her to bury the deceased; and that she lived with the deceased up to the time of his demise. On cross-examination, she stated that she disagreed with the deceased when she blocked sale of the house in South B. According to her, the deceased swore an affidavit in anger stating that he had divorced her and married the objector.

9. The appellant called three (3) witnesses. PW2, Nthenge wa Ndunda, the elder brother of the deceased testified that the appellant was married to the deceased under Kamba customary law and that they did not divorce nor separate. The witness acknowledged seeing the respondent at the deceased's house, but denied witnessing a marriage ceremony. PW3, Julius Mulwa Ndunda, the deceased's younger brother recognized the appellant and denied knowledge of the respondent. He added that the appellant and deceased married under Kamba customary law and did not divorce at any time. PW4, Jackson Nzou Ndunda, the last witness was the appellant's son who stated that he saw the respondent for the first time after his father's burial.

10. On October 9, 2014, the respondents' case commenced. She testified that: she married the deceased in 1975 under the Kamba customary law and were blessed with five (5) children; that at the time of their marriage she was aware the deceased had a first family; that they cohabited in Nairobi until 1994 when they moved to stay at Kitui Katwala where she had a home; when the deceased fell ill she took him to Kitui District Hospital where he was admitted for six (6) days but thereafter the appellant took him away. She further informed the court that: she was barred from going to Nairobi to visit the deceased in hospital and participating in the burial ceremony; and thereafter the clan presided over a meeting that was attended by both families where they signed a document to co-exist with each other. It was her case that the deceased told her, that all properties that were in Kitui belonged to her, while what was in Nairobi belonged to the appellant.

11. The respondents called three (3) witnesses. The first witness, Patrick Musyoka Kinuka, her son who stated that they resided in Kayole, Nairobi until 1994 when they moved to stay at Katwala, Kitui. He identified with his paternal uncles, one of them, Nthenge who escorted him to pay dowry. The second witness, Jackson Mulu Isika was the former chief who stated that: the deceased had two (2) wives; that after the burial he summoned both families to his office with the clan chairman, and they promised to live peacefully; and the agreement was signed by both the appellant and the respondent.

12. The last witness, Joel Muasya Mulu was the chairman of the deceased's clan who stated that: both the appellant and respondent were married to the deceased and had children with him; that there was an altercation between them at the funeral and that, on April 3, 2009 he attended a meeting called by the chief in an endeavor to resolve the problem between the two (2) families.

13. Upon hearing the parties, the learned judge had to first determine the status of the respondent and whether she was the deceased's widow. On this issue, the learned judge found that cohabitation with the deceased for thirty-four (34) years was a very long time and, coupled with the letter dated April 3, 2009 where both the appellant and the respondent signed as wives of the deceased, a presumption of marriage existed.

14. On whether the respondent's children were the deceased's beneficiaries, the court held that the respondent's children having grown up at the deceased's home, it could not be alleged with certainty that he never participated in their life, growth, and education. The court found that it did not matter whether or not the deceased was maintaining the respondent's children and held that they were beneficiaries of the estate.

15. The court found that, the deceased having been polygamous, section 40 of the *Law of Succession Act* came into play. The learned judge noted that the first household consisted of eight (8) members while

the second household consisted of six (6) members. Consequently, the learned judge held that all children in the matter are now adults, the deceased estate will be divided amongst them equally, and that their mothers (appellant and respondent) will be added as units of each household. The learned judge upon making this finding noted that the acreage of each parcel of land had not been established. The court therefore directed the administrators of the estate to file a schedule of distribution of the estate in tandem with the order of the court within 60 days for endorsement.

16. On April 20, 2016, the respondent filed summons seeking to be included as an administratix of the estate of the deceased and the court to endorse the schedule of distribution as set out by the supporting affidavit. The grounds relied on were that, by the court's ruling delivered on December 16, 2015, the appellant was directed to file a schedule of distribution of the estate of the deceased within sixty (60) days thereof, but had failed, refused and/ or neglected to abide by the direction of the court and the respondent intended to have the deceased's estate distributed as ordered by the court.

17. The appellant, in response, averred that: she was dissatisfied with the ruling and intended to file an appeal; that if she proceeded to file the schedule of distribution in tandem with the court order, her intended appeal would be rendered nugatory since the respondent would proceed to dispose of the assets of the estate before the intended appeal could be heard and determined; that the respondent and her children had entered into agreements with third parties to dispose of several parcels and that, even if the respondent was to be appointed as an administrator, there had to be consent from all the beneficiaries of the estate, which had not been attached to the application.

18. The court delivered a ruling on February 14, 2017 and directed as follows:

> ' i. The applicant be and is hereby appointed as a co – administratix of the estate therein;
>
> ii. A fresh grant shall issue to include her name as such;
>
> iii. Each administratix shall file a list of beneficiaries, their entitlement and acreage of assets mentioned as forming the estate of the deceased for purposes of confirmation of the grant within 60 days;
>
> iv. Mention on May 16, 2017;
>
> v. Each party shall bear their own costs.'

19. The ruling delivered on December 16, 2015 provoked the current appeal which is predicated on the grounds that the learned judge erred in law and fact in holding that: the deceased's estate be divided equally amongst the deceased's children including the respondent's children; there was no evidence that the deceased was the biological father of the respondent's five children; in holding that long cohabitation between the deceased and the respondent had created a presumption of marriage in the absence of any evidence; in holding that the respondent's children grew up at the deceased's home; and that the deceased participated in their growth and education whereas there was no such evidence.

20. The appellant filed written submissions dated May 13, 2022 and condensed the 9 grounds of appeal into three issues, to wit: whether there was in existence a valid marriage between the respondent and the deceased to entitle her and her children to benefit from the deceased's estate; whether the respondent's children are dependents within the meaning of section 26 of the *Law of Succession Act*, Cap 160 of the Laws of Kenya; whether the learned judge erred by ordering that the deceased's estate be shared equally between the appellant and the respondent. The respondent did not file any written submissions.

21. Although the appellant has raised 9 grounds in their memorandum of appeal dated February 27, 2018, in our view this appeal succeeds or fails on only two issues: whether the respondent was married to the deceased, or whether a marriage can be presumed out of the long cohabitation; and whether the mode of distribution of the estate of the deceased, as ordered by the learned judge, was done in accordance with the law.

22. This being a first appeal, we are required to analyze the evidence afresh and reach our own conclusions, but also warning ourselves that we did not have the advantage of seeing the witnesses. It is thus the duty of the court to analyze and re-assess the evidence on record. In *Selle vs Associated Motor Boat Co. [1968] EA 123,* it was expressed as follows:

> ' An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs Ali Mohamed Sholan (1955), 22 EACA 270.

23. It is old hat that for the presumption of marriage to arise, the parties need not to have gone through all the cultural rites expected in a customary marriage. This position was buttressed by the Court of Appeal in *Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another [2009] eKLR*, where it held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. The court held that:

> ' Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage, and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.'

24. On whether there was a valid marriage between the respondent and the deceased to enable her children benefit from the estate, the appellant disputed the evidence adduced by the respondent and her witnesses. The appellant further submitted that the respondent was never married to the deceased and that, according to her, she was just a concubine.

25. According to the appellant, particulars of the alleged marriage were never adduced and were scanty in details, none of the respondent's witnesses testified to having personally attended the alleged customary marriage between the deceased and the respondent; that the deceased cohabited with the respondent in a building in one of his plots in Kitui town merely as his mistress or concubine and, if the deceased ever sired children with the respondent, there was no documentary evidence either in the form of notification of birth documents or birth certificates; that there was nothing to show that the deceased educated and/or maintained the children, or that he accepted them as his own. She added that the fact that the respondent's children bore the deceased's surname could not make them children of the deceased in the absence of baptismal cards, birth notifications documents or birth certificates.

26. On the presumption of marriage, the appellant submitted that the same was not proved as the respondent may have been accorded accommodation by the deceased in one of his properties within

Katwala in Kitui where she currently resided; that the deceased was an advocate of the high court of Kenya and would not have allowed his 'wife and five children' to reside on a plot at a shopping centre; that there was no evidence that the deceased had built for the respondent a rural house; that the deceased died on March 14, 2009 and as at the time of delivering the ruling of the superior court in December, 2015, the respondent was still residing on the said plot within Katwala in Kitui; and that the burden of proof lay strongly upon the respondent to prove the ingredients of long cohabitation which she did not discharge.

27. It was the appellant's contention that whilst she gave evidence that she was married to the deceased in 1972 the respondent claimed that she was married in 1975, a gap of only three years, there was no reason why the deceased did not introduce the respondent to the appellant and vice versa.

28. According to the appellant, the fact that the respondent was living in a house owned by the deceased did not ipso facto create a marriage relationship; that the deceased did not write a will and therefore any evidence that he had written a document recognizing the respondent as his wife could not be considered as credible evidence. According to the appellant, the deceased's two brothers gave credible evidence that the respondent was not married to the deceased, and that she was merely living as a tenant in a plot owned by the deceased.

29. We have carefully analyzed the evidence and the documents adduced in court. There is ample evidence that the deceased and the respondent cohabited for a long time, and that they had five children. The children adopted the name of the deceased as their father. Accordingly, there is sufficient evidence to support the trial court's conclusion that the respondent and the deceased cohabited to the extent that a marriage would be presumed. The court thus did not err in that regard, and we agree with the sentiments expressed by the learned judge that:

> ' Evidence adduced however reveals that the objector had children, five in number that she stated were sired by the deceased. Patrick Musyoka Kinuka the third born testified. His evidence that he was the deceased's son was not challenged.
>
> Further, evidence proves the fact that the objector cohabited with the deceased. To date she occupies houses constructed by the deceased. Although PW2 Nthenge the elder brother of the deceased refused to acknowledge the objector as the wife of the deceased, he admitted the fact that the objector cohabited with the deceased but alleged that his brother never told him that the objector was his wife as required by the customary law. Evidence was adduced that he was the one who would negotiate on behalf of the objector's family in case the need arose. Evidence of a photograph in which he appears with the objector, her son and other family members was adduced in evidence.
>
> Cohabitation with the deceased for thirty-four (34) years was a very long time. They have grandchildren therefore a presumption of marriage should be drawn. In evidence we have a letter dated April 3, 2009 where both the petitioner and the protester/objector signed as wives of the deceased. The petitioner admitted having signed it in that capacity but still denied the suggestion that indeed the protester/objector was the wife of the deceased. The letter was signed after the burial of the deceased. This was in the course of the two (2) families being reconciled.
>
> The long cohabitation coupled with such evidence was proof of the existence of the presumption of marriage. The fact that specific ceremonies or rituals may have not been done cannot invalidate the relationship that is presumed to be a marriage.'

30. We agree with the judgment of this court in *Beth Nyandwa Kimani vs Joyce Nyakinywa Kimani & others (2006) eKLR* where the court held as follows:

> ' For it matters not whether statutory or customary marriage requirements are strictly proved in marriage. The court must go further and consider whether, on the facts and circumstances available on record, the principles of presumption of marriage was applicable in the appellant's favour. Such was the situation following the predecessor of this court in Hortenesiah Wanjiku Yaweh vs Public Trustee, Civil Appeal No 13 of 1976 where Mustafa JA in his leading judgment stated:
>
> 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 the 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.'

31. The doctrine of presumption of marriage has its genesis in section 119 of the *Evidence Act* (Cap 80 of the Laws of Kenya), which states that:

> ' The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case'.

32. Adding its voice on the doctrine, the former Court of Appeal for Eastern Africa in the case of *Hortensiah Wanjiku Yawe vs The Public Trustee, Civil Appeal No 13 of 1976* (unreported) stated as follows:

> ' The presumption does not depend on the law or a system of marriage. The presumption is simply an assumption based on very long cohabitation and repute that the parties are husband and wife.'

33. This court in *Joseph Gitau Githongo vs Victoria Mwihaki (2014) eKLR* stated as follows:

> ' The rationale behind the presumption of marriage was succinctly explained by the court as follows:
>
> It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the 'husband', or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of 'wife' upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased 'husband'

34. Again in *Joseis Wanjiru vs Kabui Ndegwa & Ano (2014) eKLR* this court expressed itself thus:

> ' The existence or absence of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except whereby reason of a written law it is excluded. For instance, a marriage can't be presumed in favour of any party in a relationship in which one of them is married under a statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if

the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.'

35. It is our finding that the learned judge did not err in relying on evidence of the long cohabitation, and the fact that there were five children out of that relationship, in holding that a presumption of marriage had been established.

36. The evidence on record establishes on a balance of probabilities that the respondent's children are the deceased's children. We agree with the finding of the superior court that the respondent's children grew up at the deceased's home. Further, it could not be alleged with certainty that he never participated in their growth life and education and thus whether or not the deceased was maintaining the respondent's children, they remained beneficiaries of the estate.

37. On the mode of distribution, the appellant is aggrieved with the findings of the High Court. One of her grounds in the memorandum of appeal is that the learned judge erred by ordering that the deceased's estate be shared equally between her and the respondent.

38. It is clear by now that we are convinced that the deceased was polygamous, and also died intestate. The deceased having died intestate, his estate should be administered in accordance with section 40 of the *law of succession Act*.

39. The trial court held:

> ' The deceased was polygamous. Section 40 of the *Law of Succession Act* provides:
>
> 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
>
> 2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.'
>
> This will be the law applicable in the instant case. All children in the matter are now adults. The deceased's estate will be divided amongst them equally. Their mothers (petitioner and protester) will be added as units of each household.
>
> The first household consisting of eight members while the second household consists of six (6) members.
>
> The acreage of each parcel of land having not been provided, the administratix of the estate is hereby directed to file a schedule of distribution of the estate in tandem with the order of the court within 60 days for endorsement.'

40. Taking into account our conclusions on the issue of presumption of marriage and the dependents of the estate of the deceased, it is our holding that the ruling of the learned judge was fair and just as it is tandem with the law.

41. In conclusion, we find that this appeal has no merit and there are no reasons for us to disturb the ruling of the learned judge. We therefore dismiss the appeal and, this being a family dispute, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

HA OMONDI

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JUDGE OF APPEAL

DR KI LAIBUTA

.....

JUDGE OF APPEAL

M GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR