Ndungu & 3 others v Githu & another (Civil Appeal 91 of 2015)
[2021] KECA 156 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 156 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 91 OF 2015

MSA MAKHANDIA, HA OMONDI & M NGUGI, JJA

NOVEMBER 19, 2021

BETWEEN

GRACE NJOKI NDUNGU ..... 1ST APPELLANT

GLADWELL WACHIRA ..... 2ND APPELLANT

GEOFFREY MUIGAI ..... 3RD APPELLANT

HENRY NDUNGU ..... 4TH APPELLANT

AND

MARY WAMAITHA GITHU ..... 1ST RESPONDENT

HANNAH GATHONI GITHU ..... 2ND RESPONDENT

(An Appeal against the Judgment and Decree of the High Court (L.A. Achode J.) dated 18th February 2015 in Succession Cause No. 2292 of 2011)

JUDGMENT

1. This appeal relates to the estate of Geoffrey Kahura Njoroge (deceased), who died intestate on 16th January 2010. The respondents were issued with letters of administration intestate on 21st July 2011 in Limuru Succession Cause No. 59 0f 2010. By an application for revocation of grant dated 11th October 2011 filed in the High Court in Nairobi, the appellants sought revocation of the grant on the grounds that the proceedings leading to the issuance of the grant were defective in substance ab initio; that the letters of administration were obtained fraudulently by the making of a false statement and by concealment of facts material to the case; and that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

2. In the affidavit in support of the summons for revocation of grant sworn by the 1st appellant, the appellants contended that the deceased was polygamous and had left two houses. That the first house

comprised the 1st respondent and her five children while the second comprised the 1st appellant and her children, the 2nd - 4th appellants. She was a widow of the deceased and had cohabited with him for 17 years.

3. In addition to her oral and affidavit evidence, the 1st appellant relied on an affidavit sworn by Anthony Kinyanjui Njoroge, a brother of the deceased, on 9th July 2012. The deponent averred that the 1st appellant was the deceased's second wife and that he had attended a Gikuyu customary rite, a 'ruracio', for her.

4. In a replying affidavit in opposition to the application sworn on 27th July 2012, the 1st respondent averred that at the time of his death, the deceased was only survived by the 1st respondent as his widow and by their five sons. Further, that the appellant was the widow of one Edward Waweru Muigai who was also the father of her children. She was therefore not the widow of the deceased.

5. The trial court heard the application by way of oral and affidavit evidence. In its decision, it found that there was no credible evidence to show that the 1st appellant and the deceased had contracted a marriage under Gikuyu customary law. Further, that an examination of the relationship between the 1st appellant and the deceased did not reveal any evidence on the basis of which a presumption of marriage between her and the deceased could be made. The court concluded therefore that there was no evidence on which it could find that a marriage of any kind between the 1st appellant and the deceased existed.

6. Accordingly, while the trial court allowed the application for revocation of grant, it did so solely on the basis that the Magistrate's Court in Limuru that had issued the grant on 23rd December 2010 lacked the pecuniary jurisdiction to do so. This was because the value of the estate of the deceased was much more than Kshs. 100,000/-, the limit of the pecuniary jurisdiction of that court.

7. The appellants were dissatisfied with the decision of the trial court and have filed the present appeal in which they fault the trial court for erring in both law and fact in failing to find that the appellants are persons beneficially entitled to the estate of the deceased. In their written submissions, the appellants condense the twenty grounds of appeal in their Memorandum of Appeal dated 10th April 2015 into four (4) issues as follows:

    1. Whether the 1st appellant was a widow of the deceased within the meaning of section 3(5) of the *Law of Succession Act*;

    2. Whether the appellants are persons beneficially entitled to the estate of the deceased;

    3. Whether the trial Judge misdirected herself in her analysis, interpretation and evaluation of the evidence adduced in court and thereby arrive at an erroneous conclusion;

    4. Whether the trial Judge wrongfully or without assigning any good reasons rejected or dismissed the evidence tendered by the appellants' witness and also ventured into matters of speculation and conjecture.

8. Under Rule 29 of the *Court of Appeal Rules,* this court is required, on a first appeal such as this from a decision of the High Court acting in its original jurisdiction, to re-evaluate the evidence and draw its own conclusions on the facts. It must in doing so, however, in the words of the court in *Selle & Another v Associated Motor Boat Company Limited & Others* [1968] EA 12 "bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

9. The evidence presented by the 1st appellant and her witness in support of her contention that she was a widow of the deceased was that she had lived with the deceased in Ruai for 17 years. She was in possession of title documents to his properties, and he had transferred his motor vehicle to her. He had also performed the 'ruracio' ceremony for her. She had been included in the burial programme for the deceased and had been involved when the Provincial Administration called her and the 1st respondent to determine who should be given the deceased's burial permit. A Chief had sent a letter to the Magistrate's Court in Limuru in which he had attached a photograph of the deceased, the 1st respondent and her children, and the 1st appellant and her children.

10. On her part, the 1st respondent denied that the 1st appellant was a widow of the deceased. Her evidence and that of her witness, one Ngige Gathuthu who swore an affidavit in support of her case on 27th July 2012, was that the deceased was married only to the 1st respondent and they had five sons. They had lived together in Limuru, and later, the deceased had moved the 1st respondent and her children to Ruai. He had not established a home for the 1st appellant in Limuru. The 1st appellant was a widow of one Edward Waweru Muigai, who was also the father of the 2nd -4th appellants.

11. The parties filed written submissions which they requested the court to rely on in making its determination on the appeal. In their submissions, the appellants challenge the finding of the court that the evidence given of the relationship between the appellant and deceased was not sufficient to give rise to a presumption of marriage. They contend that the 1st appellant, in her uncontroverted evidence, had placed evidence before the court on the basis of which the court should have found that a marriage existed between her and the deceased.

12. Further, that she had shown that she and the deceased had cohabited for 17 years between 1993 and 2010, and that he had spent the night in the residence he shared with the 1st appellant on the day of his death. They argued further that the 1st appellant testified that she regularly attended family functions with the deceased and she and the 1st respondent were recognized by the entire family, clan, friends and general public as wives of the deceased. It was also their submission that the 1st appellant had testified that the 1st respondent would visit the deceased in the 1st appellant's house in Ruai.

13. According to the appellants, there was evidence before the trial court which had emerged from the testimony of the 1st appellant and the deceased's brother of a customary marriage between the 1st appellant and the deceased. A 'ruracio' ceremony had been held on 27th December 2008 between the 1st appellant and the deceased.

14. The appellants further submit that events after the death of the deceased and during his internment demonstrated that the 1st appellant was held by society, the deceased's community and family at large as one of the deceased's widows. They support this contention by the 1st appellant's evidence that she was included in the burial plans of the deceased, and that she and her children were included as part of the family of the deceased in his eulogy.

15. They also submit that the evidence showed that the 1st appellant was summoned by the Provincial Administration regarding the determination of who, between her and the 1st respondent, would have custody of the burial permit; and that the permit was ultimately placed in the custody of the deceased's brother. It was their submission therefore that the trial court had erred in failing to hold that the 1st appellant was a widow of the deceased. The appellants place reliance on the decisions in *M.W.G vs. E.W.K* Eldoret CA No. 20 of 2009 and *Mbogoh vs. Muthoni & Another* CA No. 311 of 2002 and *Karanja & Others vs. Karanja* Nairobi CA No. 313 of 2001 with respect tothe presumption of marriage.

16. The appellants further submit that the trial court erred in holding that they are not entitled to the estate of the deceased. They had demonstrated that the 1st appellant was the deceased's widow and the 2nd -4th appellants were, for all practical legal purposes, children of the deceased. The deceased had brought up and educated them and had started cohabiting with the 1st appellant when they were 8, 7, and 5 years respectively. They rely in support on a letter sent by the Chief to the Limuru Senior Principal Magistrate dated 20th May 2010 in which he attached a family photo that showed the deceased, the 1st appellant and her 3 children and the 1st respondent and her 5 children. They submit that the Chief had also sent the deceased's funeral programme in which the 1st appellant had been listed as a widow of the deceased and her children as his children.

17. The appellants further submit that the trial Judge erred in her analysis of the evidence, and in holding that there was no evidence of payment of dowry.

    They submit that the deceased had embarked on a path to marry the 1st appellant and had started but not completed the payment of dowry.

18. Regarding the court's finding that the deceased had not established a home for the 1st appellant in his rural area, the appellants argue that she was in possession of the title deeds to his assets, including the title to the premises where the 1st respondent was residing. He had also entrusted her with his car, which he transferred to her before he died.

19. It is also the appellant's submission that even though no friends or neighbours of the deceased had come to testify that the manner in which the deceased and the 1st appellant had conducted themselves had led then to believe that they were husband and wife, the deceased's brother's evidence was sufficient as no number of witnesses was required to establish the fact of cohabitation. They also impugn the decision of the court with regard to this evidence, their position being that the trial Judge had erred in dismissing the evidence of Anthony Kinyanjui Njoroge, the deceased's brother, as partisan.

20. In their submissions in response, the respondents argue that the sole issue for consideration is whether the 1st appellant was a widow of the deceased. They submit that from the evidence placed before the court by the 1st appellant, she was not a widow of the deceased. She had not placed evidence to show who attended the ruracio ceremony, where the ceremony was held or which of the deceased's relatives attended the ceremony.

21. It was also the respondents' submission that the evidence had also shown thatthe deceased never established a home for the 1st appellant at his home in Limuru; that while she testified that he subdivided his land between her and the 1st respondent, she had also stated that he did not establish a home for her there as she did not want to live in Limuru.

22. It was also the respondents' submission that there was no evidence of a customary marriage between the deceased and the 1st appellant. They cite rule 64 of the Probate & Administration Rules which provides a guide on how a customary marriage may be proved, which is by production of oral evidence or by reference to a recognized treatise or other publication on the matter. What the 1st appellant and her witness had done is to make generalities with regard to the alleged customary marriage between the 1st appellant and the deceased.

23. The respondents further submit that the trial court was correct in reaching the conclusion that there was no evidence on the basis of which a presumption of marriage could be made. Their submission was that the 1st appellant was the deceased's concubine. She had been married to one Edward Waweru Muigai and her relationship with the deceased did not give rise to a presumption of marriage. The

respondents point out that had the appellant been cohabiting with the deceased, she would not have needed to get him to transfer his car to her while he was in hospital, prior to his death.

24. Regarding the 2nd, 3rd, and 4th appellants, the respondents submit that there was no evidence that the deceased had taken them as his own or supported them in any way. None of them testified to show that the deceased paid school or college fees for them or supported them in any way.

25. They ask this court to find that the 1st appellant was not a widow of the deceased; that the trial court came to the correct conclusion; and to dismiss the appeal with costs.

26. We have considered the judgment of the trial court, the evidence presented before it, and the submissions of the parties in this appeal. We believe that the sole issue for consideration is whether the trial court erred in reaching the conclusion that the 1st appellant was not a widow of the deceased. A corollary to that issue is whether the 2nd-4th appellants were children of the deceased and therefore entitled as beneficiaries to a share of his estate.

27. The 1st appellant based her claim to being a widow of the deceased on her assertion that she had been married to him under Gikuyu customary law. She was therefore required to present evidence before the court that the customary rites necessary for a valid marriage under Gikuyu customary law had been performed. In *Kimani v. Gikanga* [1965] EA 735 Duffus JA explained the position as follows:

> " 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 a book or document of 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."

28. In order to prove that a valid Gikuyu customary marriage between her and the deceased existed, the 1st appellant was under a duty to adduce evidence showing, on a balance of probabilities, that the essential rites and ceremonies for a valid Gikuyu customary marriage had been performed. The essentials of such a marriage were set out in Eugene Cotran's *Restatement of African Law: Kenya, Vol. 1*, *The Law on Marriage and Divorce*, Sweet & Maxwell, 1968.

    For a customary marriage under Gikuyu customary law to be valid, part of the 'ruracio' must be paid and the 'ngurario' ram slaughtered.

29. The only evidence presented to the court regarding the existence of a customary marriage between the 1st appellant and the deceased was by the deceased's brother, the 1st appellant's second witness, who testified that a 'ruracio' had taken place. There was no other witness who testified that such a rite had taken place. The appellants submitted that no number of witnesses was required to give evidence in order for the court to arrive at a presumption of marriage, and perhaps a similar argument could be made with regard to a customary rite like 'ruracio'.

30. However, the court takes judicial notice that customary marriage ceremonies are social events, attended by members of the family and clan. It is a rare event that would have only the brother of the deceased as the sole witness to testify that the event took place. Was there no-one from the 1st appellant's side, who would be expected to have received the 'ruracio', to testify to the fact that such a rite took place? In

our view, the trial court was correct in its finding that there was no evidence to support the appellant's contention that she had been married to the deceased under customary law.

31. The 1st appellant faults the trial court for not finding, in the alternative, that she was a wife of the deceased from long cohabitation. She invites us to find that a presumption of marriage from long cohabitation between her and the deceased arose and entitled her to be treated as a beneficiary of his estate.

32. It is correct that where the existence of a statutory or customary marriage has not been established and the issue of presumption of marriage has been raised, the court is required to consider whether, on the facts and circumstances on record, the principle of presumption of marriage was applicable – see *Mbogoh v. Muthoni & Another* [2006] 1 KLR 199.

33. The doctrine of presumption of marriage is not new to our jurisdiction-see

> *Hortensia Wanjiku Yawe v. Public Trustee*, CA No. 13 of 1976). In MWG v. EWK [2010] eKLR, this court differently constituted stated that:
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> "The existence or otherwise 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 where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under 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."

34. In determining whether a presumption of marriage could be made in the case before it, the court in *Eva Naima Kaaka & another v Tabitha Waithera Mararo* [2018] eKLR observed as follows:

> " Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their nature they are a determinant of whether a presumption of marriage can be found to exist. The only witnesses to testify as to the existence of a marital relationship were Waithera's mother, Elizabeth and uncle, Stephen. But it is instructive that their evidence was specifically focused on the visit or visits to their home of 2008 or 2011 where customary marriage was said to have taken place. Despite the fact of being close relatives, they did not provide any particular details or accounts on Waithera's alleged cohabitation with the deceased. No continuing interactions or further encounters with the deceased, his family, or his relatives were attested to."

35. The court went on to analyse the evidence in the case and observed as follows:

> " Similarly, Waithera's evidence was remarkably scanty on familial interrelationships. Nothing was mentioned of regular meetings with deceased or his family, nothing was said of family visits or outings. No evidence was led to demonstrate that Waithera and the deceased shared activities typical of married couples, and supportive of long cohabitation and that would give rise to acts of general repute. No family photographs, gifts or other memorabilia were produced as evidence, and there was no witness evidence from persons who might have regularly come into contact with the deceased and Waithera during the alleged period of cohabitation."

36. It concluded as follows:

> " Beyond the statements that Waithera resided with the deceased, there was nothing to show that there was long cohabitation or acts of general repute giving rise to a presumption of marriage. Given the absence of such manifestations that are illustrative of an extant marital relationship, unlike the learned judge, our view is that the available evidence is not supportive of a presumption of marriage through cohabitation. To the contrary, the evidence points to a casual affair between the deceased and Waithera that culminated in the birth of, TNK, and which relationship was to end rather abruptly upon his untimely demise."

37. In the present case, we observe that in declining to find that a presumption of marriage could be made, the trial judge analysed the evidence before her in the following words:

> " 12. I examined the relationship further to establish whether a presumption of marriage could be drawn from their relationship to qualify it for a common law marriage. No neighbour or friend of the family came forward to testify that the manner in which the Objector and the Deceased had carried on had led them to believe that the two were husband and wife. There was no evidence of joint ventures between the two. The Objector remained in the home which she had built for herself after her husband died and even when the Deceased acquired a plot and built a house in Nairobi he did not install the Objector in it. Instead he shifted the Respondent from the ancestral home in Limuru and settled her in it."

38. We have considered the facts on the basis of which the 1st appellant asked the trial court, and now asks us, to presume the existence of a marriage between her and the deceased. She testified that she had cohabited with the deceased for 17 years, between 1993 and his death in 2010. She was in possession of the title documents to his properties. He had transferred his motor vehicle to her before he died. She had been included in the funeral programmer after he died. She had been involved when the Provincial Administration called her and the 1st respondent to determine who should be given the burial permit in respect of the deceased. A Chief had sent a letter to the Magistrate's Court in Limuru in which he had attached a photograph of the deceased, the 1st respondent and her children, and the 1st appellant and her children.

39. The appellants contend that these events after the death of the deceased constitute 'facts' on the basis of which the court should have presumed the existence of a marriage between the 1st appellant and the deceased. They further argue that the evidence of Anthony Kinyanjui Njoroge, the sole witness to testify that the 1st appellant was a widow of the deceased and that a 'ruracio' ceremony had taken place with respect to her, was sufficient to lead to a presumption of marriage. No number of witnesses, they argue, is required to establish the existence of a marriage.

40. The trial court was not satisfied that the facts placed before it, were sufficient to lead to a presumption of marriage, and we find that we cannot fault the decision arrived at. A presumption of marriage arises from long cohabitation and general repute. The events that occurred after the death of the deceased such as inclusion in the funeral progamme or summons by the Provincial Administration on who should keep the deceased's burial permit are not sufficient evidence to give rise to a presumption of marriage. Neither does the testimony of the 1st appellant that the deceased transferred his motor vehicle to her on his death bed. The testimony of the deceased's brother, who, from the evidence before the trial court, had tried to remove the 1st respondent from the deceased's home, is not sufficient evidence of 'general repute' on the basis of which a presumption of marriage can be made.

41. Regarding the 2nd-4th appellants, the evidence before the court is that they were children of the 1st appellant from her first marriage to one Edward Waweru Muigai. There was no evidence placed before the court to show that the deceased had taken them into his home and treated them as his own. None of them testified before the trial court, and there was no oral or documentary evidence placed before the court to show that they were maintained by the deceased during his lifetime. There was no evidence on the basis of which the court could conclude that they were beneficiaries of the estate of the deceased.

41. In the result, we find that the present appeal has no merit, and it is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR