Naniwet v Tum (Civil Appeal 215 of 2016)
[2021] KECA 336 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 336 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 215 OF 2016

AK MURGOR, M NGUGI & JW LESSIT, JJA

DECEMBER 17, 2021

BETWEEN

RHODA CHEPKORIR NANIWET .... APPELLANT

AND

MARY CHEMUTAI TUM .... RESPONDENT

(An appeal arising from the judgement and decree of the High Court of Kenya at Kericho (J.K. Sergon J.) dated 30th May, 2014 in Succession Cause No. 182 of 2003)

JUDGMENT

1. This appeal relates to the estate of Kiptum arap Naniwet (deceased), who died intestate on 14th December, 2002. Grant of Letters of Administration Intestate was made to Kimalit arap Tum (now deceased) and the respondent, Mary Chemutai Tum, on 24th February 2004.

2. By an application dated 8th April 2005 supported by her affidavit sworn on 2nd April 2004, the appellant sought revocation and annulment of the said Grant of Letters of Administration Intestate. The application was based on the grounds that the grant had been obtained fraudulently by the concealment of material facts from the court, and was obtained by an untrue allegation of fact.

3. The appellant's case was that she was married to the deceased in 1967 as a second wife under Kipsigis customary law. At the time she got married, she already had her four daughters, Lucy Chepkoech, Emily Chepngetich, Mary Chepkirui and Catherine Chepwogen. She had cohabited with the deceased until 1977 when she was chased away by Kimalit arap Tum, a son of the deceased and the second administrator of the estate of the deceased.

4. It was the appellant's case that she lived with the deceased and her children during their cohabitation. She did not go back to the deceased's homestead after she was chased away by Kimalit arap Tum. The appellant contended that she was entitled to a half share of the deceased's property, Kericho/Sosiot/46 measuring 9.8 hectares.

5. The respondent denied knowledge of the appellant's marriage to the deceased. Her case before the trial court was that the appellant had come to the deceased's home with her daughters and had cohabited with the deceased from 1967 until 1977, when she left. Further, that the appellant was initially married to another man, one arap Mitei.

6. It was contended by Kimalit arap Tum that the appellant had come to the home of the deceased as a tea plucker in 1967. She had been given a place to reside with her children. She had never been married to the deceased and he was aware that she was married to one arap Mitei. The appellant's children had never been maintained by the deceased.

7. The matter was heard by way of oral evidence, partly by Justices Musinga and GBM Kariuki (then sitting in the High Court) and finally by Sergon J. who determined the matter by his judgment dated 30th May 2014.

8. In his decision, Sergon J. held that there was no clear or cogent evidence to prove that a traditional Kipsigis marriage was conducted to solemnise the marriage between the appellant and the deceased. The trial court found, however, that the deceased and the appellant cohabited for over 10 years and held themselves out to the rest of the world as man and wife. Their cohabitation was, however, interrupted by Kimalit arap Tum who forcefully removed the appellant from the deceased's home.

9. The court therefore held that a presumption of marriage should be made between the appellant and the deceased, which it proceeded to do. It further held that the appellant was entitled to benefit from the deceased's estate; that if she was regarded as a widow of the deceased, then she is entitled to a life interest pursuant to section 37 of the *Law of Succession Act*. It was the court's finding, however, that the appellant's four daughters were not entitled to benefit from the deceased's estate as they were not his biological nor adopted children, nor were they supported or maintained by the deceased during his lifetime.

10. Finally, the court concluded that the grant issued to the respondent should be revoked. It ruled that the evidence before it proved on a balance of probabilities that the respondent obtained the grant by failing to disclose the objector's relationship with the deceased and the fact that she was entitled to a life interest in the deceased's estate. The court found that the respondent and her co-administrator were guilty of material non-disclosure. It directed that the grant issued to them be revoked and a fresh grant issued in the joint names of the respondent and the appellant.

11. The appellant was dissatisfied with the decision of the court and has filed the present appeal in which she raises six grounds of appeal. She faults the trial court, first, for finding that she had not formally married the deceased under Kipsigis customary law and for making a presumption of marriage between her and the deceased. She argues, secondly, that the trial court failed in its analysis of the evidence on record and in relying on the evidence of Kimalit arap Tum when the said evidence was not subjected to cross-examination.

12. Her third ground of appeal is that the court erred in law and fact in finding that the appellant's daughters were not dependants of the deceased when there was material evidence that they were accepted by the deceased as his dependants. The fourth ground is a replica of the second ground, faulting the trial court for relying on the evidence of Kimalit arap Tum to buttress the case of the administrators when such evidence was not subjected to cross examination.

13. In her fifth ground of appeal, the appellant charges the trial court with misdirecting itself in applying section 37 of The *Law of Succession Act* and in determining that the appellant was merely entitled to a life interest in the estate of the deceased. In her final ground, the appellant faults the trial court for failing to allocate her a share in the estate of the deceased when it was apparent from the entire proceedings

that the respondent and her family would not allow her to enjoy the life interest assigned to her by the court.

14. The respondent opposes the appeal and has filed Grounds of Opposition dated 28th June 2017. We observe that there is no provision in the Court of Appeal Rules for filing of Grounds of Opposition to an appeal. That notwithstanding, we note that the essence of these grounds is that there is no error of law or fact in the decision of the trial court to justify interference with the decision of the trial court.

15. This is a first appeal and under the provisions of Rule 29(1) of the *Court of Appeal Rules*, we are under a duty to re-appraise the evidence and to draw inferences of fact, a duty that is also encapsulated in the case of *Selle & Another v Associated Motor Boat Co. Limited [1986] EA 123.*

16. The appellant's objection before the trial court proceeded by way of oral evidence, and was, regrettably, heard in a period spanning a decade by no less than three judges of the High Court. It was her evidence that she was the second wife of the deceased, married under Kipsigis customary law in 1967. The deceased's first wife, the mother-in-law of the respondent, had left the deceased by the time the appellant married him in 1967. Dowry had been paid to her parents, and she and the deceased had undergone the grass-tying ceremony that symbolised a Kipsigis customary marriage. At the time of her marriage to the deceased, she already had her four daughters, the youngest of whom was six months old.

17. The appellant testified further that the deceased had built a house for her on his land. She had stayed with him until 1976 when she was chased away by her step-son, Kimalit arap Tum. All her daughters were married by the time she was chased away from the home of the deceased. As she did not have sons, she had entered into a woman to woman marriage with a woman who already had two sons, and she and the deceased had paid the dowry for the said woman. She denied that she had been married to anyone else. She had not attended the deceased's funeral as no-one informed her of his death.

18. The evidence of her second witness, Joseph Kipkirui arap Mutai, was that the deceased had two wives, the appellant and one Chebomoroma. He had not witnessed the wedding between the deceased and the appellant but he was aware that she was staying in a house build for her by the deceased. He testified that he was the best man at the wedding between the appellant and one Mary which was held in the appellant's and deceased's house in the presence of many people. Joseph Kirui (PW3) also supported the appellant's case that she was married to the deceased. His testimony was that the appellant was his grandmother and the deceased his grandfather. He had seen the appellant for the first time in 1967. She had stayed in the home of the deceased since 1967.

19. The respondent and her co-administrator testified in support of their case and called one witness. The testimony of the respondent, who testified as DW1, was that the deceased was her father in law, while her co-administrator was her brother– in-law. That the deceased had never married the appellant and that she used to come and go from the deceased's home; that she had first come in 1967 and left in 1977, and she already had her four daughters by the time she came to the deceased's home. The respondent conceded in cross-examination that the appellant and the deceased were cohabiting between 1967 and 1977. She further conceded that the appellant's daughters had attended Cheptenye Primary School and that when the appellant's daughters were initiated, they stayed in the deceased's house.

20. The respondent's third witness, James arap Keino, did not add any value to the case as he denied knowing either the deceased or the appellant and was stood down. The respondent's co-administrator, Kimalit arap Tum (DW3) testified that the appellant had gone to the deceased's home in 1967 to work as a tea plucker. She had thereafter requested the deceased for a house and the deceased had agreed. She had come to the deceased's home with her four children. She was not married to the deceased having been married in the home of one arap Mitei of Masarian. She and her children had not been maintained

by the deceased, and she had left his home after the initiation of her daughters. DW3 denied that he had chased away the appellant from the deceased's home.

21. The record of the trial court indicates that on 26th July 2011, Kimalit arap Tum started feeling unwell in the course of cross-examination. He was stood down and the matter was adjourned.When the matter next came up for hearing on 11th March 2014, the court was informed that the witness had passed away, and the respondent's case was closed.

22. The appellant filed written submissions in support of her case. We have perused the record of the court and have been unable to find any submissions filed by or on behalf of the respondent.

23. We have read and considered the appellant's submissions, as well as the proceedings before and the decision of the trial court. We have also considered the appellant's grounds of appeal against the said decision.

24. In her written submissions, the appellant invites us to determine three issues. First, whether the trial court had erred in fact in holding that the appellant had not proved her assertion that she had contracted a Kipsigis customary marriage to the deceased; secondly, whether the trial court had erred in fact and law in finding that her daughters were not dependants of the deceased when there was material evidence that they were accepted by the deceased as such; and finally, whether the trial court erred in law and fact in finding that the appellant was only entitled to a life interest when it was apparent from the entire proceedings that the respondent and her family would not allow her to enjoy it.

25. Regarding the first issue, the appellant submits that her evidence and that of her witnesses that she had married the deceased under Kipsigis customary law was not controverted.

    Her witness, Joseph Kipkirui arap Mutai, had testified that he was the best man at her wedding; and the deceased had paid dowry to her parents and the grass-tying ceremony had taken place. She submits that the respondent denied that such a marriage took place, with one witness insisting that she came as a tea plucker while the other testified that she came on and off to the home of the deceased between 1967 and 1977. She invites the court to find that the respondent did not controvert her oral evidence regarding her marriage.

26. We have considered the appellant's submissions on this issue. As she was basing her claim to the estate of the deceased on the existence of a customary marriage between herself and the deceased, she was under a duty to present evidence to show that the customary rites necessary for a valid marriage under Kipsigis customary law had been performed. In considering a similar claim with respect to a customary marriage, the court in *Kimani v. Gikanga [1965] EA 735* 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."

27. In this case, the appellant testified that she and the deceased had eloped; that the grass-tying ceremony had taken place, and that she and the deceased were therefore married under Kipsigis customary law. Her witness, PW2, testified that she was married to the deceased, but that he did not attend the wedding

ceremony between her and the deceased. Contrary to the appellant's submission, he did not testify that he was a 'best man' at the appellant's marriage ceremony to the deceased. Rather, his testimony, which is not very clear, appears to be a reference to the woman to woman marriage between the appellant and one Mary, which the witness testified took place in the house of the appellant and the deceased. In any event, no evidence was led to show what the essentials of a Kipsigis customary marriage were, and that they had been fulfilled in the marriage between the appellant and the deceased.

28. Having considered the evidence presented before the trial court, we are persuaded that the court was correct in its finding that there was no evidence to show the existence of a customary marriage between the appellant and the deceased. It was also, in our view, correct in reaching the conclusion that a marriage between the appellant and the deceased could be presumed. The appellant's own evidence and that of her witnesses, as well as the concessions in cross-examination by the respondent, shows that the deceased and the appellant cohabited as husband and wife between 1967 and 1977 when the appellant was forcibly removed from the home by the deceased's son. She and the deceased had held themselves out as man and wife, and the court properly came to the conclusion that a presumption of marriage could be made in favour of the appellant.

29. The appellant asks us to find in the affirmative regarding the question whether the trial court erred in fact and law in finding that her daughters were not dependants of the deceased when there was material evidence that he had accepted them as such. She submits that the children were fairly young when she started cohabiting with the deceased, and at the time, her last born child was six months old; that the respondent had admitted that while she was cohabiting with the deceased, her children went to Cheptenye Primary School and had stayed in the deceased's house during their initiation. These facts, in the appellant's view, lead to the implication that the deceased had taken her daughters as his own.

30. In considering this issue, the trial court observed that the appellant's daughters were not the biological or adopted children of the deceased; that the evidence of the respondent was clear that the said daughters were not supported nor maintained by the deceased during his lifetime; and they cannot therefore be categorised as dependants under the *Law of Succession Act*.

31. Section 29 of the *Law of Succession Act* defines dependants in the following terms:

> " For the purposes of this Part, "dependant" means—
>
> (a) ...
>
> b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; (Emphasis added)

32. From the evidence before the trial court, we are satisfied that for the period that the appellant cohabited with the deceased, he had taken the children as his own. While the ages of the other children did not emerge from the witness testimony, the evidence shows that the appellant started cohabiting with the deceased when her last born daughter was six months old. The initiation rites of the appellant's daughters took place in the deceased's home. The respondent conceded that the children attended Cheptenye Primary School, which appears to have been the school nearest to the place where the deceased and the appellant lived together.

33. However, from the evidence before the trial court, the appellant's children were not "being maintained by the deceased immediately prior to his death" as required under section 29 of the *Law of Succession Act*

in order to qualify as dependants. From the appellant's own evidence, the children were all married by 1976 and were not living with her and the deceased when she was removed from the deceased's home.

They were therefore not being maintained by the deceased at the time he died in 2002, and no attempt was made to lead evidence to show that they were maintained by the deceased. Accordingly, it is our finding and we so hold that the trial court correctly came to the conclusion that the appellant's daughters were not dependants of the deceased as defined under section 29 of the *Law of Succession Act*.

34. The final issue to consider is whether the order of the trial court that the appellant was only entitled to a life interest was largely untenable given the circumstances of the case. The appellant submitted that the respondent would not allow her to enjoy the life interest. Since the deceased had died intestate leaving two spouses, the appellant and the respondent's mother in law, his estate should be distributed in accordance with section 40 of the *Law of Succession Act*. A distribution under the said provisions, however, would leave her in a quagmire as she would be allocated an amorphous interest which could not be enforced given that, as the trial court had found, she had been evicted from the matrimonial home by Kimalit arap Tum. The appellant submits that she should be allocated an unencumbered portion of the deceased's estate, support for this submission being sought in the case of *Stephen Gitonga M'Murithi v Faith Ngira Murithi [2015] eKLR*.

35. We have considered the appellant's submissions on this issue. We observe, first, that the deceased did not leave two spouses surviving him. It appears from the proceedings before the trial court that the deceased's first wife, from whom he was estranged at the time he started cohabiting with the appellant,had predeceased him. Which then left the appellant as the sole widow surviving the deceased.

36. We note also that the respondent and her co-administrator had left the appellant out entirely when they applied for Grant of Letters of Administration Intestate to the estate of the deceased. It was the respondent's co-administrator who had removed her from the home of the deceased during the lifetime of the deceased. Even though Kimalit arap Tum passed away during the hearing of the appellant's objection proceedings, there is nothing to suggest that the surviving beneficiaries of the estate would allow her to have peaceful enjoyment of the life interest that the trial court held she was entitled to.

37. In its decision in Stephen Gitonga M'Murithi v Faith Ngira Murithi (supra) this court held that:

> " As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or temper (Sic) with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased's estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest."

38. We are satisfied that the circumstances of this case call for a specific interest, as opposed to a life interest in the estate of the deceased, to be allocated to the appellant. We accordingly resolve this issue in favour of the appellant. We direct that in the distribution of the estate of the deceased comprising land parcel number Kericho/Sosiot /46, the High Court seized of the succession cause in respect of the estate of the deceased shall vest a specific interest in the appellant.

39. As this is a family matter, we direct that the parties shall bear their own costs of the appeal.

DATED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

J. LESIIT

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR