



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 132 OF 2017

BETWEEN

EVA NAIMA KAAKA.....1<sup>ST</sup> APPELLANT

STELLA SEIYAN KAAKA.....2<sup>ND</sup> APPELLANT

VERSUS

TABITHA WAITHERA MARARO.....RESPONDENT

*(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Nyakundi, J), dated and delivered on 13<sup>th</sup> March, 2017)*

in

HCSC NO. 19 OF 2016

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JUDGMENT OF THE COURT

This appeal is concerned with the revocation of a grant of letters of administration of the Estate of Nicholas Kaaka Kapore (*deceased*) issued to *the appellants, Eva Naima Kaaka (Naima) and Stella Seiyon Kaaka (Seiyon)*.

By a Summons dated 17<sup>th</sup> October 2016, *Tabitha Waithera Mararo (Waithera), the respondent* filed an application for revocation or annulment of the Grant of letters of administration of the deceased's estate issued to Naima and Seiyon on 19<sup>th</sup> September 2016 following the filing of a Petition on 25<sup>th</sup> July 2016. The application was premised on the grounds that the proceedings to obtain the grant were defective; that the grant was obtained fraudulently as it was based on false statements and concealment from the court of material facts and untrue allegations.

In the supporting affidavit of even date, Waithera averred that she was the second wife of the deceased who died on 22<sup>nd</sup> September 2014; that she had a daughter with the deceased TNK, a minor, and that a DNA test had confirmed that the deceased was her father; that the appellants had initially filed a Petition on 7<sup>th</sup> April 2006 for Grant of letters of administration, where they had listed her daughter as a dependant, but in an amended Petition dated 29<sup>th</sup> June 2016, her daughter's name had been omitted.

She went on to aver that her own name was conspicuously missing from the Petition, whether as a petitioner, an administratrix or as a beneficiary, and that she had not consented to its filing. Waithera's concern was that, if the appellants were allowed to confirm the Grant, both herself and her daughter risked being disinherited as beneficiaries of the deceased's estate.

In her replying affidavit of 26<sup>th</sup> November 2016, Naima stated that she was the widow of the deceased who had one daughter, JNK. She was not aware that Waithera was the deceased's wife, or that a marriage ceremony with the deceased had taken place. She was also not convinced that TNK was the deceased's child. She further averred that Waithera had not at any time lived with the deceased as husband and wife, and that she was merely a tenant residing in the deceased's premises, who had taken advantage of the tenancy arrangement to claim the property. Naima acknowledged that some time in 2013, Waithera had left the child at her home for no justifiable reason, but soon thereafter returned to collect her. She concluded by stating that she had not consented to the deceased marrying a second wife.

On 31<sup>st</sup> October 2016, the court ordered that the matter proceed by way of *viva voce* evidence. During the hearing, Waithera and two other witnesses testified in support of the application while Naima opposed it. The main thrust of Waithera's testimony was that some time in 2008, the deceased visited her parents and introduced himself as the man who had married her, and that later in 2011, a Kikuyu-Masai marriage ceremony took place between her and the deceased, where dowry was paid to Waithera's parents, but no wedding took place. She also testified that she had cohabited with the deceased since 2008 and were blessed with one child. It was her testimony that she lived in Ngong in a rental house comprising 20 houses, in a flat, which the deceased had been constructing since 2006. She added that Stella had disputed the deceased's ability to have children whereupon, DNA tests were conducted to establish whether the deceased was TNK's father. Waithera admitted that she had other children besides TNK.

**John Kimani Mungai (PW2)**, a government analyst based at Government Chemist at Nairobi testified that on 7<sup>th</sup> November 2013, he conducted a DNA test on the deceased, Waithera and TNK to ascertain the minor's paternity, which test established that the deceased was her biological father. There was also the evidence and sworn affidavits of **Stephen Mbuthia PW3 (Stephen)** and **Elizabeth Wanjiru Mararo PW4 (Elizabeth)** which sought to affirm that Waithera was married to the deceased under Kikuyu Customary Law.

Another affidavit was sworn by **Joseph Maikai Ole Koitee** on 4<sup>th</sup> November 2016 wherein it was deponed that in 2011, he met the deceased in the company of Waithera. And that she was introduced as his girlfriend. In 2012, he travelled to Nyeri together with the deceased to meet Waithera's parents and to initiate a Masai/Kikuyu customary marriage. They gave her parents a gourd, a sword, and gifts together with Kshs. 50,000 to purchase various items. Her parents blessed the couple and concluded the marriage. He further stated that the couple lived together thereafter as husband and wife until the deceased passed on. He concluded by stating that he had visited him prior to his death, and the deceased had informed him that he had released Waithera to go to Nyeri to attend to her ailing mother; that shortly thereafter he had passed on.

The learned judge relied on this evidence, but we would doubt its veracity for reasons that on 31<sup>st</sup> October 2016, the court ordered that the matter proceed by way of *viva voce* evidence. Since the deponent did not testify, he was not cross-examined so as to enable the court to test his evidence. We therefore consider it to be inconclusive and unreliable.

Opposing the application, Naima denied the existence of a marriage between the deceased and Waithera, or that they lived together. But she confirmed that she was aware of TNK, as the deceased had informed her about the child. She indicated that she had omitted TNK's name from the second petition as Waithera had filed several cases against her.

In her testimony, she reiterated the averments of her affidavit, and added that Waithera was not her co-wife, as she was not aware of her marriage to the deceased. She was categorical that the deceased did not live with her during his lifetime and she came to know Waithera after the deceased had died, when she dropped off a child in her compound. She confirmed that she became aware of TNK as, during his life time, the deceased had informed her about the child, who also visited her home.

On the application for letters of administration, Naima stated that she obtained a letter from the Assistant Chief of Lower Matasia to enable her petition for letters of administration; that the letter indicated the names of Stella Kaaka, her granddaughter, whom deceased had cared for during his life time, and TNK who was also a dependant to the deceased. She further asserted that she lived with the deceased at Nkoroi and had obtained a second letter from the assistant Chief at Nkoroi. She denied that she intended to disinherit the minor.

It was her position that the deceased entered the current house in 2014, that when the deceased died, Waithera was in Nyeri, and was not involved in the deceased's burial. She was not aware that the deceased had purchased properties in Nyeri. She stated that the investigations she conducted confirmed Waithera worked in a bar.

Based on the evidence, the learned judge found that, Waithera was a wife of the deceased and TNK, his daughter, and as such, concluded that they were entitled to be included as dependants of the deceased. The learned judge further revoked the Grant of letters of administration issued on 19<sup>th</sup> September 2016 and directed the appellants to apply for fresh letters of administration and this time, to include Waithera as a co-administrator.

The appellants were displeased with the trial court's decision and filed an appeal to this Court on grounds that the learned judge fell into error when he found that the respondent was a wife of the deceased without evidence; in holding that the respondent and her child were dependants; and in revoking the Grant without evidence to support its revocation.

**Mr. Nyatika**, learned counsel for Naima and Seiyon holding brief for Mr. Nyangito had filed written submissions which he highlighted. Counsel submitted that on the issue that the respondent was married to the deceased, the learned judge found that the respondent had proved that she was married under Kikuyu customary law, yet no evidence was produced to support this

contention; that no witnesses from the deceased's family or any expert witness on Kikuyu customary law was called to testify. It was pointed out that the respondent came from a different community from the deceased, and no elders or witnesses from the Maasai community attended the marriage ceremony.

On the issue of cohabitation and presumption of marriage, counsel submitted, a partys' must demonstrate a presumption of marriage, but there was no evidence in support of such presumption. It was argued that up to the time the deceased died, the respondent was a rent paying tenant, so that any cohabitation or presumption was negated. If indeed she was the deceased's wife, she would not have been paying rent. Regarding TNK, it was conceded that there was no dispute that she was the deceased's child.

On his part, learned counsel for Waithera **Mr. Nzaku**, also had filed written submissions which he adopted in their entirety. In reply, counsel submitted that a Kikuyu customary marriage was conducted. The affidavits showed that dowry was paid, that one Joseph Maikai ole Koitee accompanied the deceased to pay dowry, and that this evidence was not at any time challenged.

On the presumption of marriage, it was submitted that Waithera had cohabited with the deceased from 2008. They moved to Kamkunu near Ngong, where they resided together as husband and wife until the deceased

passed on. Counsel argued that the allegation that the respondent was a tenant was coming up for the first time, but he pointed out that the receipts produced belonged to another tenant, one Mrs. Kamau.

Counsel finally submitted that the learned judge rightly revoked the grant on the basis that the appellants failed to list the respondent and the minor among the beneficiaries and to obtain their consent prior to petitioning for letters of administration; that this resulted in a defective grant as material information was concealed from the court.

This being a first appeal, the duty of this Court is to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that an appellate court would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching such conclusion. (See *Sumaria and Another vs Allied Industries Ltd* [2007] eKLR).

We have considered the pleadings, evidence and the parties' submissions, and are of the view that three issues fall for our consideration which are; first, whether the evidence showed that the respondent was married to the deceased under Maasai/Kikuyu customary law; second, whether there was cohabitation and a presumption of marriage and; third, whether both Waithera and TNK were dependants within the meaning of *section 29* of the *Law of Succession Act*.

Beginning with whether there was sufficient evidence to support the contention that Waithera was married to the deceased under Maasai/Kikuyu customary law, the learned judge stated thus;

***“Additionally, from the evidence adduced before this court and the affidavits sworn by Stephen Mbutu Mbutia (PW 3), Elizabeth Wanjiru mararo (PW 4) and Joseph Maikai Ole Koitee on 4<sup>th</sup> November, 2016 it is evident that the Applicant was married to the deceased under the Kikuyu-Maasai Customary Law.***

***According to PW 3 and PW 4 evidence each of them participated in witnessing the deceased agree my (sic) formalizing the marriage with PW 1 – Tabitha Mararo the applicant by providing a traditional Maasai/Kikuyu sword “njora’ (traditional sword) a suit for the father to the applicant (instead of the blanket), a skirt suit for PW 4 (instead of kanga and cash Kshs. 50,000/=).***

***It is also clear from the evidence of PW 1, PW 3 and PW 4 that the Kshs. 50,000/= was appropriated to solemnize the customary marriage thus: Kshs. 10,000 for purpose of a she-goat and ewe (in Kikuyu known as mwati and harika). Kshs. 10,000 for a tin of honey, Kshs. 10,000 for two bundles of firewood and Kshs. 20,000 to be later spent on heads of animals known as mirigo.***

***According to PW 1, PW3 and PW4 the parents gave a nod to the marriage between PW 1 and the deceased following the substantial fulfillment of the requirements of Maasai/Kikuyu Customary Law.***

***As supported by the evidence in these proceedings, the marriage between the applicant and the deceased was never annulled during the lifetime of the deceased. The respondents have not brought any cogent evidence in rebuttal of this fact”.***

Eugene Cotran's “Casebook on Kenya Customary Law” at page 30 sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;

1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.
2. Consent; the parties to the marriage and their respective families must consent to the union
3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
5. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home”.

In the case of *Gituanja vs Gituanja* [1983] KLR 575 the Court held inter-alia that;

***“The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario.”***

Waithera's evidence is that the deceased came to her home with one Joseph Maikai Ole Koitee, where they met Stephen and Elizabeth, following which a Maasai/Kikuyu marriage ceremony was conducted. When the particulars of the alleged ceremony are compared with “the essentials of a Kikuyu Customary marriage” as described by Eugene Cotran, and *Gituanja vs Gituanja* (supra) it is plain to see that certain basic elements necessary for a Kikuyu customary marriage were absent.

For instance, the *ngurario* is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage. But our

reevaluation of the evidence, does not point to a *ngurario* having taken place. This is because a fundamental component of a *ngurario* is the slaughtering of a ram or goat.

During the visit to Nyeri in 2011, no slaughter of a *ngurario* ram was evident. The closest evidence alluding to the slaughter of a goat was to be found in Stephen Mbutia's affidavit where it was deponed that;

***“...finally, the suitor requested that a he goat be slaughtered in accordance to traditional ritual called, “ngoima”. The family/clan however declined to offer him his noble request...”***

This averment was repeated in Elizabeth Mararo's affidavit.

From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the *ngurario* ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased.

It is also worth noting that Waithara did not provide any description or particulars of the alleged ceremony; her evidence is clear, “... *there was no marriage...*”. Essentially, her testimony was limited to 2008 when the deceased, together with one Joseph and Karanja, who are elders and his friends, visited her parents to introduce the deceased as the person who intended to marry her. It would seem that it remained just that: an intention, to marry. The learned judge erroneously concluded that Waithera was married to the deceased under the Kikuyu-Maasai Customary Law, despite the cogent evidence that the essentials of such a marriage were not satisfied. In our view, this omission negated the existence of a Kikuyu customary marriage, and we so find.

In the alternative, did the deceased cohabit with Waithera, and was there a presumption of marriage? In finding that there was such presumption, the learned judge stated thus;

***“In the present case, the applicant testified that she cohabited with the deceased husband at Ongata Rongai town from the year 2008 and later at the time of the husband's demise at one of the decedent's asset LR No. Ngong/Ngong/[particulars withheld]. The applicant also testified and produced evidence that out of their union an issued was born. This court was presented with results for a DNA test confirming the paternity of the deceased. The respondents have not brought in evidence to rebut the presumption of this marriage as per the principle in *Hottensia Yahwe*.”***

In reaching a finding that Waithera cohabited with the deceased, the trial court relied on her evidence to the effect that she lived with the deceased in Ongata Rongai town, until his demise at his property known as LR No. Ngong/Ngong/[particulars withheld]. Also relied on was the evidence that, they were blessed with a child. The evidence led the learned judge to conclude that since Naima did not rebut the evidence of cohabitation, a presumption of marriage was found to exist.

This Court in the case of *Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another [2009] eKLR* in holding that the presumption of marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute. It stated 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.”*** (emphasis ours)

In the case of *Mary Njoki vs John Kinyanjui Muthuru [1985] eKLR, Njarangi JA* underscored factors that would rebut a presumption of marriage when he stated that;

***“...The fact that the appellant and the deceased together visited the deceased father's home or that she attended the funeral of the deceased's father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity. That is how friends treat one another. And on account of the cohabitation the appellant could not help meeting and knowing and even assisting the relatives of the deceased including the respondents. The appellant's own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant's father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage”.***

Despite the learned judge's assertions that Naima failed to rebut the fact of cohabitation with the deceased, there is succinct evidence to the contrary. Naima stated that at all times, the deceased had one matrimonial home at Nkoroi where he lived with her until the time of his demise. She was aware that Waithera was “...*a tenant residing in the deceased's premises...*”; that she worked as a barmaid at Base 3 pub, a bar often frequented by the deceased; that she had not at any time lived with him as husband and wife. It was her evidence that the deceased's family did not know Waithera as the deceased's wife.

But that is not all, despite the unsupported assertion that she lived with the deceased in Ongata Rongai and Ngong, there is nothing that goes to establish a prolonged period of cohabitation and neither were there acts of general repute that gave rise to a presumption of marriage. Of significance, and it cannot be overlooked, is Waithera's evidence that she lived in a rental house. When cross examined by Mr. Itaya for the appellants, she stated;

***“I stay at Ngong in a rental house comprising 20 (twenty) houses in a flat. Three of the houses are commercial while 17 of them***

*are used as residential. It was built for a long time. The deceased started to build on or about 2006.”*

It is not contested that Waithera resided in a rental flat in **LR Ngong/Ngong**[particulars withheld] It is not also in dispute that the property belonged to the deceased. Waithera’s position is that the rental flat was her matrimonial home, and it is there that she resided with the deceased. If indeed she lived in a rented flat in the deceaseds’ property, as the counsel for the appellants rightly queried, would a person renting her husband’s property be considered a wife? We think not. Our view is that, such an arrangement would effectively defeat the very basic tenets of a presumed marriage, as it would negate the existence of a marital relationship, and instead suggest that their relationship was merely one of, landlord and tenant. Such an arrangement would in our view strongly rebut any presumption of marriage.

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.

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.

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.

Finally, we turn to the matter of the minor’s relationship with the deceased. Waithera’s evidence was that the child was the deceased’s daughter which fact was confirmed by a DNA test. Naima did not deny that she was aware of TNK, and that the child visited her home. There is evidence to show that Naima acknowledged that she was the deceased’s daughter, and further, in the submissions before us, the appellants conceded that she was the deceased’s daughter. We would therefore conclude that the minor was indeed the deceased’s child.

We have found that Waithera was not the deceased’s wife, either through a customary marriage, or by presumption of marriage. This being the case, for the purposes of succession, Waithera was not the deceased’s dependant within the meaning of **section 29 (a) of the Law of Succession Act**, which specifies that, *“the wife or wives...and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”* She is therefore not entitled to be included as one of the beneficiaries of the deceased’s estate.

By virtue of being the deceased’s daughter, we order that TNK, be included as a dependant and beneficiary in the petition for letters of administration of the deceased’s estate. For this reason, we are satisfied that the court below rightly ordered the revocation of the letters of administration of 19<sup>th</sup> September 2016.

**Section 48 of the Law of Succession Act** provides that the court shall have final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned be made. In this regard the lower court ordered that Waithera be included as a co administrator of the deceased’s estate together with Naima and Stella Seiyen, the appellants. Whilst we agree with the appointment of Waithera as co administrator herein, the appointment shall be with the caveat that it is for purposes of representation of the minor child’s interest and to act as the child’s trustee.

In view of the foregoing, save for the finding that the respondent is not the deceased’s wife, and that Waithera’s appointment as co administrator is in order to represent the minor TNK’s interest, the appeal succeeds, albeit partially. We order that each party bear their own costs.

***It is so ordered.***

***Dated and Delivered at Nairobi this 2<sup>nd</sup> day of March, 2018.***

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**