IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & OKWENGU, JJ.A)

CIVIL APPEAL NO. 90 OF 2014

BETWEEN

HANNAH NJERI MUKURU……..…..……...APPELLANT

AND

BETHUEL MBUTHIA KUTU (SUBSTITUTED

BY ELAINE NJERI MUKURU……RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (K.H. Rawal, J.), dated 25th June, 2008

in

Succession Cause No.18A of 2001)

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JUDGMENT OF THE COURT

[1] This appeal arises from a succession dispute concerning the estate of Apollo Mukuria Mbuthia (hereinafter referred to as deceased) who died on 2nd August 2000. A grant of probate of the Will of the deceased was issued to his brother Bethuel Mbuthia Kurutu, as the Executor of the Will. The grant was confirmed on 7th July 2002 and the deceased?s property distributed to the deceased?s wife Elaine Njeri Mukuru, who is the respondent herein, and her daughter Faith Wanjiru who were the only beneficiaries to the estate identified.

[2] Subsequently, the appellant Hannah Njeri Mukuru, sought to have the grant revoked claiming that the grant was fraudulently obtained without her knowledge, and that as a widow to the deceased she was entitled to a share of his estate. In particular, the appellant claimed she was entitled to land parcels numbers LAIKIPIA/LARIAK/301, 302, 303 and 329 (herein „disputed land?) where she was residing and which devolved to the respondent and her daughter by virtue of the grant issued by the Court.

[3] The appellant claimed to have entered into a customary union with the deceased and produced a declaration of customary marriage which she claimed was signed by the deceased by use of his thumb print. She also produced affidavits sworn by Samuel Gichohi Muhota and Antony Wanjau Mukuru. The former a neighbour and close friend to the deceased, claimed to have witnessed dowry being paid by the deceased to the family of the appellant on 3 occasions, while the latter was a son to the appellant whom

she claimed was the biological son of the deceased.

[4] The respondent opposed the appellant?s motion contending that the appellant was not a wife to the deceased but a worker who resided and worked on the disputed land; that the appellant did not make any contribution to the purchase of the disputed land; and that the balance of the purchase price was paid by the respondent using a loan which she had taken jointly with the deceased from the Agricultural Finance Corporation. The respondent produced documentary evidence in support of this contention.

[5] Affidavits sworn in support of the respondent?s contention, by the late Bethuel Mbuthia Kurutu who was brother to the deceased, Benson Muchemi Gachuhi who was the brother in law to the deceased, Joseph Muturi Kurutu who was an uncle to the deceased and Francis Mutitu Kamau who was the councillor of the ward where the deceased resided between 1992 to 1997 were produced in evidence. Ben Muchemi Gachuhi swore that he witnessed the deceased execute the Will, and that the deceased was of sound mind at the time of preparing and signing the Will.

[6] During the trial, the appellant testified and reiterated the contents of her affidavit sworn in support of her application. The appellant?s son, Antony Wanjau Mukuru also testified maintaining that he was a son to the deceased; that the deceased educated him; and that he used to visit him in Ng?arua Laikipia over the weekends.

[7] In his evidence, the respondent adopted the replying affidavit sworn by Bethuel Mukuru as well as her own affidavit sworn on 13th July, 2007. Bethuel had exhibited the certificate of marriage solemnized between the deceased and the respondent under the African Christian Marriage and Divorce Act, Cap 51. The respondent testified that the appellant was not her co-wife but had been employed as a worker on their land since September, 1998 replacing one William Kamau. She produced receipts in support of her claim that she paid the balance of the purchase price for the land to the vendor. She reiterated that the two beneficiaries of the deceased were her daughter and herself, and the deceased?s property had already devolved to them and was registered in their names. In regard to the payment of the school fees for the appellant?s son, the respondent explained that together with the deceased they had helped many needy students by paying school fees for them, and that the appellant?s son was just one of many such beneficiaries.

[8] Francis Mutitu Kamau, Joseph Muturu and Benson Muchemi, all supported the evidence of the respondent, reiterating that the respondent was the deceased?s only wife, and that he had made a Will in favour of the respondent and her daughter.

[9] Upon considering the evidence before her, the learned Judge found that the appellant had failed to prove her alleged marriage to the deceased as she had not established the performance of the customary rites or her recognition by the family of the deceased as a wife to the deceased; that the appellant failed to show any birth certificates of her children in support of her claim that they were fathered by the deceased; that the appellant failed to show evidence of payment for upkeep for herself and the children of the deceased; and that the appellant failed to explain why she did not object to the grant until she was asked to vacate the disputed land. Consequently, the learned judge rejected and dismissed the appellant?s application with costs; and entered judgment in favour of the respondent.

[10] It is that decision that has provoked the current appeal which is predicated on the grounds that the learned Judge erred in law and fact by finding that: the appellant was not a wife to the deceased; in failing to consider that the respondent acknowledged that the signature on the exhibit produced in court as a marriage certificate “looks like the late husband?s”; in not taking into account that the evidence of the appellant led to an irresistible conclusion that the appellant was married to the deceased and had lived on the disputed land as such; in failing to properly evaluate the evidence and failing to find that the appellant was a co-wife to the respondent and therefore entitled to have half share of the properties of the deceased.

[11] During the hearing of the appeal, Mr. Mahan appeared for the appellant while Mr. Mwangi appeared for the respondent. Following directions given by the court in consultation with the parties? advocates, written submissions were duly filed and exchanged between the parties.

[12] It was submitted on behalf of the appellant that she was indeed a wife to the deceased based on the evidence placed before the High Court including the declaration of marriage that was duly signed; that the appellant had been residing on the deceased?s land as evidenced by the consent entered into in court before the High Court on 15th March 2004; that the appellant had made developments on the said land; that the appellant and her children fathered by the deceased are entitled to a share of the estate as provided under Section 26 and 29 of the Law of Succession Act.

[13] In support of the foregoing **Phylis Njoki *Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR;*** and ***Irene Njeri Macharia v Margaret Wairimu Njomo & another [1996] eKLR***, were relied upon. It was reiterated that the learned judge came to an erroneous conclusion that the appellant was not a co-wife to the deceased as there was overwhelming evidence of a marriage and long cohabitation stretching from 1988 to 2000, and that the appellant ought to have been provided for.

[14] For the respondent it was submitted that the Judgment in the Superior Court was sound, well reasoned, cogent, and beyond reproach; that the consent entered into before the High Court was valid until the determination of the revocation of application for the grant, and therefore the appellant?s continued occupation of the disputed land after the dismissal of her application amounted to trespass; that there was ample evidence that the respondent was the sole bread winner after the deceased was rendered jobless in 1981, and that it was the respondent who contributed to the purchase of the suit property. The Court was urged to find that the learned judge was right in dismissing the application as no presumption of marriage was established nor the paternity of the children proved. The Court?s attention was drawn to the fact that the learned judge observed the demeanour of the witnesses and concluded that the appellant was untruthful.

[15] We have carefully considered this appeal and the evidence that was adduced before the learned judge as well as the submissions made before us and the authorities cited. This being a first appeal, we are enjoined to follow and apply the principle of law as stated in **Watt v Thomas [1947] AC 484** and adopted by Madan JA in ***Mary Njoki vs. John Kinyanjui Mutheru & Others [1985] eKLR*** as follows*:*

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide."***

[16] The issues that arise for determination in this appeal are: whether the appellant established that she was a wife for purposes of succession of the deceased?s estate, and if so, whether the grant issued in regard to the deceased?s estate was obtained fraudulently by concealment of material facts; and whether the learned judge erred in dismissing the application for revocation of the grant.

[17] The appellant contended that she should not have been excluded from the grant as she was a wife to the deceased and had equal rights with the respondent to the estate of the deceased. In this regard, the appellant alleged that she had a long cohabitation with the deceased. The following statement by Nyarangi JA in ***Mary Njoki vs. Kinyanjui Mutheru & Others supra,*** is instructive:

> ***"The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife in my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute."***

[18] In addition, under **section 109** of the Evidence Act, the appellant being the one who was alleging that there was a marriage between her and the deceased, the burden was upon her to establish this fact on a balance of probability. However, although she claimed to have been married to the deceased under Kikuyu customary law, and to have lived with him a long time, it was clear in her cross-examination that she was not familiar with the family of the deceased as she could not either recall the full names of the deceased?s parents or the names of the deceased?s siblings, nor did she know the deceased?s clan. In regard to the dowry payment, she could neither recall the dates when the same was made, nor the names

of the key individuals who were present during the negotiations. Bethuel whom she named as one of the persons who was present during the ceremony denied her claim through his sworn affidavit.

[19] Further, the appellant relied on what was described as a certificate of customary marriage. On the face of the document, it is clearly overwritten to show the date altered to January 1988 from 27th April, 1988. It is also evident that the particulars indicated on the purported certificate were not correct as the deceased was described as a widow, which was not the case. The learned Judge therefore rightly rejected that evidence.

[20] The appellant?s contention that she was a wife to the deceased was also contradicted by the fact that she does not appear to have participated in the funeral program for the deceased. Her explanation that she did not see the advertisement of the deceased?s death in the newspaper or the eulogy at the funeral only goes to confirm that she was not as close to the deceased as she would wish us to believe. The evidence of the appellant?s son that he witnessed the *ruracio* between his parents does not sound true given his admission that he does not know whom he was named after as the Kikuyu naming system is known to all members of the community. The only explanation for the appellant?s son not knowing the person he was named after is because his paternity was not known or was in doubt. In the absence of any birth certificate or document showing the deceased as the father of her son, and the said son not having been named after the deceased?s relatives in accordance with the Kikuyu customs, there was no evidence to support the allegation that the deceased fathered him.

[21] On the other hand, the respondent?s evidence was well supported by her witnesses that she was the deceased?s only wife.

It is instructive to note that the witnesses who testified for the respondent were persons who were close to the deceased and could therefore testify authoritatively about his marital status. Moreover, the respondent explained why the appellant was residing on the disputed land and why she entered into consent to allow her to remain on the land pending the determination of her complaint.

[22] We come to the conclusion that considering the evidence that was before the court, the learned judge cannot be faulted for dismissing the application for revocation of the grant, as the appellant failed to prove her contention that the grant to the estate of the deceased was fraudulently obtained. Accordingly, we find no merit in this appeal and dismiss it in its entirety. Given the circumstances of this matter, we order each party to bear their own costs in the appeal.

These shall be the orders of this Court.

Dated and delivered at Nairobi this 22nd day of September, 2017.

P.N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR