REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 168 of 2009

BETWEEN

MIRIAM NJOKI MUTURI.....……..... APPELLANT

AND

BILHA WAHITO MUTURI.....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nyeri (**Kasango, J**.) dated 14th May, 2009*

in

H.C. Succ Cause No. 76 OF 2004)

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JUDGMENT OF THE COURT

1. The late **S.M.M** (deceased) died on 11th December, 2002 at the Nyeri Provincial General Hospital at the age of 50 years. On 13th February 2004, B.W.M (respondent) while describing herself as the widow of the deceased, petitioned for the letters of administration intestate of the deceased's estate. The respondent named herself and her four children, three daughters and one son as the persons surviving and entitled to the estate of the deceased. She also gave the inventory of the assets of the deceased as land parcel No. Tetu/Karatina/865, Tetu/Karahu/568 and Nyeri Municipal Council plot No. 2 Githakwa and death gratuity.

2. Almost simultaneously with filing the petition for letters of administration, the respondent swore an affidavit stating that she had requested the chief of Tetu location where the deceased hailed from to issue her with a letter of introduction but the chief had refused to do so. After the petition was filed, the Deputy Registrar of the High Court was directed by the Judge (**Okwengu, J.)** (as she then was) to write and he indeed wrote to the chief of Tetu location requesting him to furnish the court with name(s) of the deceased wife/wives and the children of the deceased as well as whether any other relative(s) were interested in the deceased's estate.

3. On 23rd August 2004, the chief of Tetu wrote to the Deputy Registrar indicating that the deceased was married to two wives namely, **B.W.M** and **M.N.K** alias **M**. According to the chief's letter, the deceased was survived by the respondent and her 4 children and M.N.K alias M (appellant) the second wife with her 8 children. Following that letter by the chief, the respondent issued a citation to accept or refuse letters of administration intestate under Rule 21 of the Probate & Administration Rules to the appellant.

4. Meanwhile, the grant of letters of administration was issued to the respondent, but the appellant objected to the making of the grant and also cross-petitioned for the letters of administration claiming to be entitled as a widow of the deceased. The appellant also protested to the confirmation of the grant and that is the pleading that seems to have proceeded for trial. Parties appeared before court on numerous occasions and on 12th March, 2009 when the hearing of the protest commenced, the advocates for both parties informed the court that they had agreed by consent the only issue for trial was whether the protester (appellant) was the wife of the deceased.

5. The appellant gave evidence that she started cohabiting with the deceased in 1994 and was married to the deceased according to Kikuyu customary law. Some dowry was taken to her family by the deceased and his elder brother, J.M.M, who testified as PW2 confirmed that he was aware the deceased paid dowry to the appellant's family. The appellant said they had eight children with the deceased although during cross-examination it transpired that her first child was born in 1979, before the cohabitation while the last born was born in 2002. She confirmed that when she married the deceased, he acknowledged some of the children who were born before the cohabitation and treated them as his own. The appellant was also aware that the deceased was married to the respondent but by the time she moved in to live with the deceased, the deceased had separated with the respondent. The respondent only returned to the matrimonial home four days after the deceased had passed away.

6. The deceased's brother [PW2] testified that the respondent was the first wife of the deceased while the appellant was the second wife married customarily. The deceased started cohabiting with the appellant from 1994 while they were staying together in Nakuru. Sometimes in 2008, the daughter of the appellant was getting married but because the appellant's own dowry was not fully paid, PW2 told the court that his late brother took dowry to the appellant's parents. During cross-examination he reiterated that the deceased's wives live together but as at the time the deceased passed away, the 1st wife had separated from the deceased and the respondent returned to the deceased's home after his death.

7. The respondent also gave evidence in support of her petition and also relied on the evidence of her son, **J.M.M.** According to the respondent, she married the deceased in 1976 under the Kikuyu customs and later they solemnized their marriage in church in 1984. They were blessed with four children. The family was residing at K.G. However, in 1997 the respondent moved out of her matrimonial home because the appellant purported to move to the same home. There was domestic disharmony between her and the deceased who was a habitual drunkard and used to subject the respondent to regular beatings. When the respondent left the matrimonial home, her four children remained behind but they were also chased away by the deceased. She denied that the respondent was married to the deceased because even her children are not named according to the Kikuyu nomenclature of naming children after their parents.

8. J.M also testified in support of the respondent. He told the Court that his father was a drunkard and used to subject the respondent and the children to violence. The deceased was also in the habit of bringing different women friends to their home thereby forcing their mother to return to her parents, leaving him and his siblings with the deceased. According to J, the appellant was one of the many female friends who at first came with one child but others followed her. He denied that the appellant was a wife of the deceased.

9. After analyzing the evidence, **Kasango, J.** made the following conclusions:-

"As I stated previously, the only issue the parties require determination upon is whether M was a wife of the deceased. Neither she nor her witness was able to state clearly the customary rights [sic] that were undertaken. They both mentioned dowry being paid but they did not state the amount. PW2 talked about his family paying the balance of the dowry in 2002 but failed to state how much it was. There is no evidence of marriage. Accordingly the protesters claim is rejected. She also failed to prove that her children were the children of the deceased. For that reason, the affidavit of protest dated 29th May 2006 is dismissed with costs to B.W.M. A confirmed grant shall issue as follows:

(a) Tetu/Karaihu/865 to B.W.M for her lifetime and thereafter to her children.

(b) Tetu/Karaihu/932 and 933 to B.W.M for her lifetime and thereafter to her children.

(c) Nyeri Municipal Council Plot No. 2 Githakwa to B.W.M for her lifetime and thereafter to her children.

(d) Death gratuity to B.W.M absolutely."

10. Being aggrieved by that judgment the appellant appealed on three main grounds:

"(i) That the Honourable Judge erred in law and facts in failing to appreciate the weight and the evidential value of the appellant's facts thus reaching a decision that the appellant was not a wife to the late S.M.M.

(ii) **That the Honourable Judge erred in law and fact and in making a finding that the appellant and her children were not beneficiaries to the estate of the late S.M.M.**

(iii) **The Honourable Judge misdirected herself in law and facts in granting the respondent land parcels numbers Tetu/Karaihu/932 and 933 whereas the same did not form part of the estate of the deceased."**

11. **Mr. Mwaura**, learned counsel for the appellant, submitted that there was sufficient evidence that supported the existence of a marriage by cohabitation as confirmed by the letter from the chief of Tetu location. The contents of that letter which was written to court at the request of the Deputy Registrar confirmed that the deceased had two wives and he listed their names and those of the children. The brother of the deceased also confirmed the deceased cohabited with the appellant from 1994 and the deceased paid some dowry to the appellant's family. Also the respondent admitted that the appellant was brought to her matrimonial home and that is what forced her to move out. The respondent only returned a few days after the death of the deceased.

12. Although the deceased had contracted a statutory marriage, the deceased's relationship with the appellant is acknowledged under **section 3(5)** of the Law of Succession Act which provides:

"Notwithstanding the provisions of any written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act ."

13. According to Mr. Mwaura, the appellant was treated as a wife by the community, she had gained that reputation and even the respondent recognized that; the appellant's children were left out of the deceased's estate; although some dowry was paid, there is no fixed sum that ought to have been paid and the Judge erred when she observed that the amount of dowry paid to the appellant's parents was not stated in court; what was important was that the deceased treated the appellant as his wife. However, the learned Judge misapprehended that evidence. Lastly, the learned Judge included properties that belonged to other persons and distributed Plot No. Tetu/Kariahu/933 as part of the deceased's estate, counsel submitted.

14. On the part of the respondent, **Mr Theuri,** learned counsel, put up a spirited defence of the judgment. He pointed out that the only issue that fell for determination was whether the appellant was a wife and there was no evidence to support a marriage. All the personal documents of the appellant did not have the name of the deceased. The appellant produced an identity card that bore her name as **'M.N.K'** while she was also known as '**M**' which proved she was lying to court that she was not married to another man prior to her cohabitation with the deceased; although the appellant contended that she was married under Kikuyu customs, she did not say what ceremonies were conducted to constitute a marriage; the respondent was never divorced by the deceased; finally, the appellant did not adduce any evidence that

her children were sired by the deceased. Mr. Theuri therefore urged us to dismiss the appeal.

15. The main issue in this appeal is whether the appellant is a widow of the deceased and whether the learned Judge misapprehended the evidence on record and arrived at an erroneous conclusion that there was no evidence to support the existence of a marriage. In answering the above issues, and this being a first appeal, we are mandated by law to re-evaluate the evidence and arrive at our own conclusion, but with the usual caution that we never saw or heard the witnesses and give due allowance for that. See the case of **Peters v Sunday Post Limited [1958] EA at 429**:

"It is a strong thing for an appellate court to differ from the findings, on question of fact, of the Judge who tried the case, and who had the advantage of seeing the witnesses".

16. The appellant gave evidence that she started cohabiting with the deceased in 1994. This was confirmed by the deceased's elder brother and also the respondent admitted that she was forced to leave her matrimonial home because the deceased brought the appellant to the same home. Apart from the deceased's son who said the appellant was visiting the deceased just like any other woman friend, the evidence is clear that the appellant was living with the deceased continuously from 1994 up to the time of his demise. This cohabitation was also recognized by the chief and he referred to the appellant as a second wife. Against this evidence was the contention by the respondent that the appellant was not married to the deceased because he lacked capacity to enter into another union. Secondly, the appellant or her children did not bear the name of the deceased.

17. Our courts have been faced with legal problems of this nature for many years. They have had to sort out the issues of persons who contract monogamous statutory marriages and subsequently contract other unions under customary law which involve children as well as the women who have been brought into the union. This problem is the one that led the Legislature to amend the Law of Succession Act, introducing **section 3(5) (supra) vide Act No. 10 of 1995**.

18. The application of section 3(5) of the Law of Succession Act was aptly explained by this Court in the case of **Irene Njeri Macharia vs. Margaret Wairimu Njomo & Another, CA No. 139 of 1994.** Referring to the case of **In the matter of the Estate of Reuben Nzioka Mutua (Deceased), P&A Cause No. 843 of 1986, the Court said**:

"Our understanding of section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine had contracted a monogamous marriage which remained undissolved up to the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba Customary law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy. Parliament in its wisdom and whatever it might have intended to do prescribe that..."

19. There is also a long line of authorities by which our courts have presumed the existence of a marriage due to cohabitation of parties in circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage finds justification in the provisions of section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides as follows:

"119. 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."

20. The evidence on record can be construed in two ways: that by reputation the appellant was perceived as a wife of the deceased as demonstrated by the evidence on record and the letter by the chief; secondly, there was dowry that was paid to the appellant's family, the amount notwithstanding. We respectfully disagree with the learned judge when she observed that the amount paid for dowry was not stated. This is because there is no standard set amount that is payable for dowry. See the case of **Mary**

Wanjiru Githatu v. Esther Wanjiru Kiarie, CA No. 20 of 2009, in the majority decision of Tunoi and Bosire JJA, posited as follows:

"....cohabitation is one of the essentials of a Kikuyu customary marriage. Likewise providing residence and maintenance for a wife are among other essentials of a Kikuyu marriage. The main component lacking here is dowry. There is no fixed time for paying dowry. Cotran, in his works 'The Restatement of Africa Law (Kenya) Vol. 1 (The law of marriage and divorce)' states that dowry may be paid in installments and may even be paid after one of the parties to a relationship is dead."

21. As stated earlier, the evidence that the appellant used to cohabit with the deceased and that some dowry was paid towards a customary kikuyu marriage is not controverted. Even though the respondent was married to the deceased under the statute, the appellant's relationship with the deceased falls under the provisions of section 3(5) of the Law of Succession Act. Had the learned judge of the High Court addressed herself to the law, the evidence on record as pointed out in the letter addressed to the court by the local chief, the evidence of the deceased's own brother, the citation issued by the respondent to the appellant calling upon her to take out the grant of letters of administration, the totality of that evidence proves on a balance of probabilities that the appellant was the 2nd wife of the deceased and in that case the leaned Judge would have arrived at the same conclusion as we have.

22. Matters were of course not helped when both counsel for the appellant and the respondent recorded a consent confining the issue for determination to only one, that is, whether the appellant was married to the deceased. They left out important matters such as dependency of the appellant and her children. Since the issue of children was not raised at the trial and there is very scanty evidence on the number of the appellant's children who belonged to the deceased; it is also obvious some of the appellants' children did not belong to the deceased as they were born before cohabitation. The appellant however contended during cross examination that the deceased had accepted all the children as his own. We think this is a matter that can be verified by the High Court before the grant is confirmed.

23. The orders that commend themselves to us in the circumstances of this case, is to allow the appeal, which we hereby do, set aside the orders of 14th May, 2009 and substitute it with an order that the grant of letters of administration be issued jointly to the respondent and the appellant. Both parties are at liberty to apply for confirmation of the grant, either jointly or severally. The appellant shall provide a list of the children sired by the deceased and each party to prepare an inventory of the deceased's assets. The deceased's estate shall be distributed in accordance with the provisions of section 40 of the Law of Succession Act that deals with polygamous household.

This being a family matter, each party to bear their own costs of this appeal and the suit in the High Court.

Dated and delivered at Nyeri this 16th day of May, 2013.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

….....

JUDGE OF APPEAL

W. OUKO

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR