REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 313 OF 2001

PHYLLIS NJOKI KARANJA

PETER MWAURA KARANJA (*Administrator of the estate of*

***MARGARET WAMBUI KARANJA* (DECEASED)**

LOICE NJOKI NGUGI.....APPELLANTS

AND

ROSEMARY MUENI KARANJA

PHYLLIS NJOKI MWAURA .....RESPONDENTS

(*An appeal from the judgment of the High Court of Kenya at Nairobi (Aluoch, J.) dated 23rd March, 2000*

in

H.C.Succ.Cause No. 2195 of 1994)

****

JUDGMENT OF THE COURT

James Karanja Mwaura, (*deceased*) died intestate on 4th September and was survived by his wife Margaret Wambui Karanja (*widow*), now deceased, and four children, namely Phyllis Njoki Karanja, Peter Mwaura, Beth Karungari and Monicah Nyambura then all minors; and Phyllis Njoki Mwaura, his mother. After the deceased's burial, his widow, now deceased, and her sister, Loice Njoki Ngugi, applied for and were granted letters of administration to his estate. It comprised of one plot number 2R at Kitengela and one motor vehicle registration number KQD 816. But soon after this grant was obtained but before it was confirmed, ***Rose Mueni Karanja*** and ***Phyllis Njoki Mwaura*** (*deceased's mother*) the respondents herein, filed an application dated 11th June 1998 under ***section 26*** of the Law of Succession Act (*Chapter 160 Laws of Kenya*) for orders that provision or reasonable provision be made to:

"***(i) Rose Mueni Karanja – wife of deceased***

(ii) Phyllis Njoki Mwaura – mother of the deceased

(iii) Michael Muya Karanja – son

(iv) Peter Mwaura Karanja – son

(v) Mathew Wambua Karanja – son"

out the deceased's estate aforesaid and that costs of the application be provided for. The application was supported by the affidavit deponed to by the said Phyllis Njoki Mwaura on 15th June 1995 in which she stated that she was the mother of the deceased while the 1st respondent and the deceased 2nd appellant, were her daughters-in-law, they being wives of the deceased. She deponed further that the deceased 2nd appellant had petitioned for letters of administration intestate with her sister Lois Njoki Ngugi (*3rd appellant*) as co-administrix of his estate and left the 1st respondent and her children whose names she listed, out of the picture; that the deceased 2nd appellant had applied for the confirmation of the letters of administration in which she had indicated the deceased dependants as only herself and her own children but left out the respondents and the 1st respondent's children with the intention to deprive them of their rightful share in the estate and that it was only mete and just that the deceased's net estate be ascertained and distributed to all the dependants of the deceased without discrimination; and that if an order for provision was not made for the rest of the deceased's dependants, the appellants would disposses the respondents of their rightful share of the deceased's estate

A further affidavit by the 1st respondent herein and deponed to in November 1995 described her as the deceased's widow who got married to him in the year 1986 under Kikuyu customary law; that she had three children with him; that at the time of his death she was living with the deceased at his matrimonial house at Athi River where he was working at the East African Portland Cement Factory; that during the years 1990 to 1992 this deponent lived together with the deceased 2nd appellant as her co-wife with the deceased under the same roof at Portland Cement Factory Senior Staff quarters at Athi River; that it was the deceased who took care of the children, made provision for them, took and collected them from school; that during 1992 the petitioner – deceased 2nd appellant deserted the matrimonial home with one of her own children but left the 1st respondent with the deceased and the rest of the children. It was in Nairobi Hospital the deponent met the deceased 2nd appellant in 1994 before the deceased died.

The 1st respondent further swore that after the burial of the deceased she and the deceased 2nd appellant went together and lived at the deceased's Athi River house for a week and then they both went to their late husband's rural home where they stayed for one week during the funeral and burial ceremony before going back to Athi River where they stayed for another two weeks. She added that in fact that before going back to Athi River the 2nd respondent gave both of them Kshs.10,000/= to go and attempt to revive the deceased's business at Athi River whose stock had been exhausted during the deceased's funeral arrangements. According to the 1st respondent's affidavit, while at Molo, a family meeting was held on 11th September, 1994 in which various resolutions were made as to how the family of the deceased would proceed in his absence but that after two weeks' stay at Athi River the deceased 2nd appellant went to Nairobi promising to come back and live at the Athi River home permanently in 1995 after her daughter Monica Nyambura completed her school in Nairobi but that she did not go back, instead she and her sister applied for letters of administration to the deceased's estate as aforesaid. According to the affidavit it was dishonest on the part of the deceased 2nd appellant to deny that the 1st respondent was married to the deceased. The 1st respondent further deponed that the business she tried to revive at Athi River did not do well and she closed it down altogether in 1995 and has been unemployed thereafter. She reverted to small scale farming at Kilimambogo where she plants maize and beans with low returns; that she was suffering with her children who were all in school and that the respondents were intent on disinheriting her and her children and this is why she had made the application for provision to be made for her, her mother-in-law and her children from the deceased's estate.

A replying affidavit by the deceased 2nd appellant stated that the application by the respondents had been filed in bad faith and as an afterthought after they had failed in their application for revocation of grant.

They were not dependants of the deceased, neither were the children named in paragraph 4 of the supporting affidavit. She deponed further that the 1st respondent was not a wife of the deceased but was merely employed as a waiter in the deceased's bar at Athi River. As regards the 2nd respondent the deceased 2nd appellant deponed that she had taken more than enough share of the estate when she remained with the deceased's motor vehicle registration number KQD 816, all the household goods and personal effects of the deceased; that she was still running the deceased's bar in Athi River but had never accounted for the proceeds she derived therefrom to the deceased 2nd appellant or to the deceased's sons, hence she should not ask for more share; that she had four children in school who constantly required fees and upkeep and it was only mete and just to have the application dismissed so that her grant can be confirmed. A further affidavit by David Kariuki Mwaura, a brother to the deceased recognized that the 1st respondent was married to two wives at the time of his death, namely the deceased 2nd appellant and the 1st respondent herein.

All the parties testified in the case before the superior court and were cross-examined on their affidavits. Thereafter counsel for the parties filed written submissions which concentrated on Kikuyu customary law marriages. The learned Judge (***Aluoch, J*** *as she was then*) considered all the material before her before she wrote and delivered what she called a "*Judgment*" but ought to be a "*Ruling"*, on 23rd March, 2000, in which she concluded:-

"***I find that there is sufficient evidence on record to warrant me to find that reasonable provision should be made to the deceased's mother, and wife Rosemary Mueni and her children. The mother admitted openly that the deceased's vehicle was brought to her farm in Molo and she was willing to give it to the deceased's children. That vehicle would form part of the deceased's estate. It is not clear what other properties are in the deceased's estate and without that information, it is difficult to make provision for the dependants. As I have found from evidence that Rosemary was a wife of the deceased which means that the deceased had two wives perhaps succession to his estate should be by way of consideration of houses, taking into account the number of children in each household, and then making some one time token payment to the mother of the deceased. All this may not be possible unless it is known what is in the deceased's estate."***

Arising from that decision, this appeal was filed through a Memorandum of Appeal dated 5th December, 2001 which listed 8 grounds of appeal, namely that:-

"1. ***The learned trial Judge erred in fact and law by allowing new evidence to be introduced by the applicant after the respondent (****now appellant****) had finished giving evidence thus prejudicing the respondent's case.***

2. The learned trial Judge erred in fact when she found that the deceased had cohabited with Rosemary from 1984 to 1994 while the evidence before the court was unclear on when Rosemary's employment ceased and cohabitation commenced.

3. The learned Judge erred in law by the way she weighed the evidence particularly the announcement after the death of the deceased while the evidence showed clearly that *(sic)* ***all the annexures in question were generated by the mother of the deceased 2nd respondent herein who literally took over the affairs of her deceased's*** *(sic)* ***son.***

4. The learned trial Judge erred by presuming a marriage between Rosemary and the deceased while Rosemary's case, evidenced by her sworn affidavit and oral evidence was of a Kikuyu customary marriage which marriage was not proved.

5. The learned trial Judge erred by allowing the application for adequate provision without ascertaining the nature and extent of the 1st respondent's dependency on the deceased if any.

6. The learned trial Judge erred in fact by finding that the deceased mother, 2nd respondent was

entitled to be provided for by the deceased estate while there was clear evidence that the 2nd respondent owned a 35 acre farm in Molo and was even the one financing the 1st respondent to keep the deceased's business afloat and hence did not need to be provided for as a dependant.

7. The learned trial Judge erred by failing to dismiss the application for dependency for absence of full tabulation of the deceased's assets which would have enabled her to determine the provision for each dependant.

8. The learned trial Judge erred in law by giving an inconclusive judgment which did not totally resolve the dispute before her."

Counsel for the parties submitted on the appeal before us on 15th January 2009. ***Mr. Mbigi***, learned counsel for the appellant stated that without making known their dependency and tabulating the deceased's full estate the superior court did not give proper directions and guidelines on the way forward and that the Judge's "*judgment*" was inconclusive. According to counsel, since on the evidence adduced the 2nd respondent was shown to be able financially she did not qualify to ask for provision from the deceased's estate. As regards the 1st respondent the counsel submitted that she was an employee as a bar maid in the deceased's bar at Athi River up to the time of his death and it was not shown when she ceased to be a bar maid to become a wife; that there was no evidence that the deceased catered for the expenses of the 1st respondent or fees for her children or that she was married to the deceased and that the court fell into an error to presume that a marriage existed between the 1st respondent and the deceased. Counsel submitted further that the onus was upon the 1st respondent to prove that she was married to the deceased under Kikuyu customary law and that Kikuyu customary marriage ceremonies were performed, however but that she never showed any. According to counsel it was unprocedural for the superior court to allow further evidence by the respondents after the 2nd deceased appellant had completed testifying and that this error prejudiced the appellants' case.

Mr. Munyalo, learned counsel for the respondent submitted that the onus to disclose the deceased's assets fell on the deceased 2nd appellant but it was the 1st respondent who disclosed part of the deceased's assets in form of terminal dues from East African Portland Cement Limited and proceeds of Alico and Kenya National Assurance Companies which the appellant did not disclose. He stated that the judgment of the superior court was conclusive and that it was upon the parties to conclude and distribute the assets. In his view, a decree having been drawn, the appeal against "*judgment*" was incompetent since there was no proper order to be appealed against. He submitted that in view of the fact that the 1st respondent and the deceased 2nd appellant lived under the same roof at Athi River during the life time of and after the deceased's death and as this was supported by the evidence of the mother and brother of the deceased, there was confirmation that the 1st respondent was one of the deceased widows. That the deceased and the 1st respondent had a child and that the elders had met at Molo during the burial ceremony and discussed how the widows and 2nd respondent should share the deceased property; a presumption of marriage between the deceased and the 1st respondent arose even if none was shown to exist under Kikuyu customary law. Counsel submitted further that the evidence of David Mwaura was introduced into the proceedings before the appellant's case was closed and that this did not prejudice the appellant's case in the superior court.

The application, the subject of the proceedings in the superior court was made under ***section 26*** of the Law of Succession Act – Chapter 160 Laws of Kenya and ***rule 49*** of the Probate and Administration Rules under the same Act. ***Section 26*** quoted provides as follows:-

"***Where a person dies after the commencement of this Act, and so far as Succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased estate effected by his will or by gift in contemplation of death, or the law relating to intestacy, or combination of the will gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased net estate."***

The marginal notes of the section talks of "*provision for dependants not adequately provided for by the will or on intestacy*." Conditions to be taken into account by the court in making the order are provided for in ***section 28.*** They are:

(a) the nature and amount of the deceased property;

(b) any past, present or future capital or income from any source of the dependant;

(c) the existing and future means and needs of the dependant;

(d) the conduct of the dependant in relation to the deceased;

(e) the situation and circumstances of the deceased's other dependants and the beneficiaries under the will.

(f) ***the general circumstances of the case; including so far as can be ascertained the testator's reasons for not making provision for the dependan***t.

Section 29 describes who dependants are and they include a wife or wives ... and the children of the deceased whether or not maintained by the deceased immediately prior to his death. They also include parents ... and <u>*children whom the deceased had taken into his family as his own*</u>.... (***Emphasis supplied***). ***Section 30*** of the Act specifically bars the filing of this type of application after the grant of representation in respect of the estate to which the application refers has been confirmed. ***Rule 49*** only prescribes the form in which the application under ***section 26*** should be made. According to the rule the application should be by chamber summons.

The respondents filed the application subject to this appeal within time because up to the time this appeal was being heard, the grant of letters of administration issued to the appellants had not been confirmed. This appeal is actually against the learned Judges order for the presumption of marriage between the deceased and the 1st respondent. In coming to the decision on the presumption of marriage, the learned Judge considered, amongst other factors, that the 1st respondent and the deceased had lived together at the matrimonial home at Athi River Cement Factory; that they had a child out of that union and the annexures to the affidavit of David Mwaura, a brother of the deceased, which was believed by the learned Judge and confirmed the deceased 2nd appellant and 1st respondent as the widows of the deceased. Of course there was uncontroverted evidence from the 1st respondent that before the deceased 2nd appellant left the matrimonial home to her parents' home in 1992 due to a dispute with the deceased, the two were living in the matrimonial home at Athi River with the deceased and that the 1st respondent had brought the two children fathered by another man who were also living in the matrimonial home.

As ***Madan, J.A*** (*as he then was*) said in ***<u>Njoki v. Mutheru [1985] KLR</u>*** at page 882

"***The concept of presumption of marriage is not new in Kenya. It was recognized by the former Court of Appeal in*** <u>*Hortensiah Wanjiku Yawe v. Public Trustee*</u> ***in Civil Appeal No. 13 of 1976 and by this Court in*** <u>*Mbithi Mulu & Another v. Mitwa Mutunga*</u> ***in Civil Application No. Nai 17 of 1983."***

This presumption arises from long cohabitation and repute between the man and the woman who have capacity to marry and have consented to do so – see ***Yawe*** *(supra).* We consider that the deceased and 1st respondent in this appeal had capacity to marry while the deceased was married to the deceased 2nd appellant under Kikuyu customary law but this was not a bar to him marrying any other woman since customary law of marriages under Kikuyu customs are potentially polygamous. In Volume 1 of Restatement of African Law (***Marriage &Divorce***) by ***Eugene Cotran*** at page 10 under "***Marital Status***" it is stated:-

"***A man may enter into any number of marriages, provided that the subsequent marriage is otherwise valid."***

Here ***Cotran*** was discussing marriage and divorce under Kikuyu customary law. But for such a marriage to be considered as valid certain essentials must be performed including the slaughtering of a goat – otherwise known as '***Ngurario'*** and part payment of dowry otherwise known as '***ruracio'*** being made. But as ***Mustafa, J.A***. (*as he then was*) said in ***Yawe*** *(supra);*

"***There is nothing under Kikuyu customary law opposed to the concept of presumption of marriage arising from long cohabitation ... and which is applicable to all marriages howsoever celebrated."***

In the same case ***Wambuzi P*** (*as he was then in the former Court of Appeal)* said:-

"***The presumption is nothing more than an assumption that the parties must be married irrespective of the nature of the marriage actually contracted."***

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. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed: see ***Gachege v. Wanjugu [1991] KLR 147***.

In the case giving rise to this appeal, the deceased's cohabitation with the 1st respondent gave rise to one child, Mathew Wambua Karanja. They lived in the same matrimonial home at Athi River since 1986 with the deceased 2nd appellant. The 1st respondent even brought the two children whom she had given birth to with another man to the matrimonial home to which neither the deceased nor the deceased 2nd appellant objected. In addition, other family members of the deceased, including his mother and brother, accepted the 1st respondent as the deceased's wife and recognized her as such both during the advertisement for and at the deceased's burial. She was also properly dressed for that occasion. The deceased 2nd appellant accepted this in her evidence before the superior court. This goes to support the learned Judge's invocation of the doctrine of presumption of marriage between the deceased and the 1st respondent and her rejection of the deceased 2nd appellant's evidence that the 1st respondent was only a maid in the deceased's bar business at Athi River. The learned Judge properly made an order for provision to be made for the 1st respondent from the deceased's estate on the basis that the deceased had two wives.

The appellants' arguments that the deceased estate was not ascertained or that the learned Judges "*Judgment*" is inconclusive are not tenable. The record shows that apart from the motor vehicle which is with the 2nd respondent at Molo and the plot at Kitengela there are the deceased's dues from East African Portland Cement Factory Limited where he was working before he died and insurance benefits from Alico and Kenya National Assurance Companies which all must form part of the deceased's estate and which should be reflected on the letters of administration at the confirmation stage. All the assets put together should form a reasonable estate of the deceased to which the deceased 2nd appellant and 1st respondent should succeed on the basis that the deceased had two wives. We are not however persuaded that the 2nd respondent adduced sufficient evidence of dependence on the estate of the deceased to entitle her to an order of provision from his estate. She was said to be living on some 35 acres of land at Molo which was not included in the deceased's estate and from which we draw the inference that this land belongs her solely. In the circumstances we are satisfied she is well provided for and should not be included in the list of dependants to the deceased's estate. This is why the learned Judge used the phrase "*token payment to the mother of the deceased."*

Having considered the arguments advanced by counsel for both parties and also after perusing the superior court record we find no merit in this appeal which we order to be dismissed with no order for costs.

Delivered and dated at Nairobi this 20th day of February, 2009

R. S. C. OMOLO

.....

JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR