



REPUBLIC OF KENYA



**Egesa v Adongo (Succession Appeal E026 of 2021)
[2024] KEHC 2956 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL E026 OF 2021
WM MUSYOKA, J
MARCH 22, 2024**

BETWEEN

JANE ODERO EGESA APPELLANT

AND

RISI AYUMA ADONGO RESPONDENT

*(An appeal arising from orders made in the ruling of Hon. Lucy Ambasi,
Chief Magistrate, CM, in Busia CMCS No. 226 of 2009, of 13th July 2021)*

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CMCS No. 226 of 2009, delivered on 13th July 2021. The grounds of appeal revolve around the trial court failing to find that the appellant was a widow of the deceased, Anaclet Adongo Adongo; the court failing to find that the appellant was married by way of wife inheritance in 1972; the court failing to give due consideration to the testimony of PW2; the trial court erring in placing the burden of proof of the alleged marriage on the appellant, and finding that she had failed to discharge that burden; the court erring in finding that DW2 and DW3 were expert witnesses; among other grounds. The appellant would like the said decision set aside, and an order be made that the grant of 13th May 2019 be revoked.
2. The impugned ruling, dated and delivered on 13th July 2021, was on an application, dated 17th July 2019, which principally turned on revocation of a grant, that had been made to the respondent in the cause before the trial court on 28th May 2019. The application was disposed of by way of viva voce evidence.
3. PW1, Felix Reuben Egesa, was a son of the deceased and the appellant. He stated that his mother, the appellant, became the wife of the deceased after her husband, Rubano, a brother of the deceased, died. She remained in the home of Rubano. He stated that he was listed in the petition as a survivor of the deceased, but the appellant was not. He also complained of an asset that was left out. He stated that



- the deceased had allocated some land to the appellant, Samia/Bukhulungu/138, but she was chased out of the land. He stated that his mother was inherited by the deceased, and that he considered Rubano, the late husband of his mother, as his uncle. He stated that the appellant resided on Samia/Bukhulungu/139, a property registered in the name of Rubano, her late husband. He stated that the appellant survived the late Rubano, but upon his demise she ceased to be his wife.
4. PW2, Fredrick Ogutu Alubala, was the Chief of Nangoso. He wrote the letter that was used to initiate the succession cause. He stated that the appellant was initially married to Rubano, but was inherited by the deceased upon the demise of her husband. He could not tell whether the estate of Rubano was subjected to succession. He explained that it was the man who moves into the home of the inherited woman, and not vice versa.
 5. DW1, Risi Ayuma Adongo, the respondent herein, said that she was 1 of the 2 wives of the deceased. She asserted that the appellant was not a wife of the deceased. She described her as a widow of her brother-in-law, Rubano. She testified that her husband, the deceased herein, had inherited the appellant, and that the 2 got a child together. She stated that the appellant utilised Samia/Bukhulungu/139, a parcel of land belonging to her late husband, Rubano, and not Samia/Bukhulungu/138, which belonged to the deceased. She denied chasing her out of Samia/Bukhulungu/138. She stated that her late husband, the deceased herein, fulfilled his customary law obligations, to his late brother, by taking care of the appellant, but asserted that there was no marriage between them, for the deceased never put up a home for her within his compound.
 6. DW2, Fredrick Wandera Oseno, was an elder within the Busia Council of Elders. He averred that the appellant had been inherited by the deceased. He asserted that she could not inherit from 2 husbands, as that would amount to inheriting twice. He asserted that the appellant was not inherited, but had a relationship with the deceased, after her husband died. He stated that she maintained her home, and the deceased never set up a home for her. DW3, John Okwomba Achila, stated that the appellant had not married the deceased, for the latter had only befriended her. He asserted that no ceremony for widow inheritance was conducted. He said that they were mere friends, out of which friendship they got a child.
 7. In the end, the trial court found and held that there was no proof that there had been wife inheritance for no experts on that aspect of Luhya customary law testified. It was also ruled that, although there was some cohabitation established, the same did not reach the threshold for presumption of a marriage.
 8. Directions were given, on 16th October 2023, for canvassing of the appeal by way of written submissions. Both sides have filed their respective written submissions. I have read through the said submissions, and noted the arguments made.
 9. The only issue for determination is whether the trial court erred in finding and holding that there was insufficient evidence to establish that the appellant was a spouse of the deceased.
 10. Should the trial court have held that the appellant was a spouse of the deceased? I have read and re-read the testimonies recorded by the trial court, from PW1 and PW2, and I do not find anything there that establishes marriage by way of widow inheritance. Such a marriage would be founded on custom. It is notorious that anyone who relies on a custom must prove its existence by way of evidence. Such proof can be either by way of testimony of persons who are repositories of knowledge of that custom, either by being scholars in that field, or individuals within that community who have some specialist knowledge of that custom. It could also be by way of reliance on treatises on the subject, written by scholars, or case law. See *Lydia Bunyali v. Medical Officer of Health Trans Nzoia County & another* [2021] eKLR (Kimaru, J) and *In re Estate of Paul Chore Imbisi (Deceased)* [2021] eKLR (Musyoka, J). PW1 and PW2 did not testify as such experts. They did not claim to be such experts, or to have



specialist knowledge of the said custom. PW1 testified as a son the appellant, born of the alleged liaison between the appellant and the deceased, in 1975, who, no doubt, could not claim any expertise on those matters. PW2 testified as the local Chief, who wrote the letter that was used for the purpose of initiating this succession cause. He did not claim to be an expert in that custom. No evidence was led on the prerequisites of a marriage by way of widow inheritance, and no attempt was made to establish that the liaison between the appellant and the deceased met those prerequisites. I am satisfied that the trial court properly analysed the material that was placed before it, and came to the correct conclusions.

11. There is not much case law on this, but *In re Estate of Gamaliel Otiemo Onyiego (Deceased)* [2018] eKLR (JA Makau, J) comes close, even though it is distinguishable. In that case, marriage was deemed between a man who had inherited a woman whose husband had died. The inheritor was not married to any other woman prior to starting to cohabit with the woman, and he did not marry any other woman thereafter. The question was whether such a woman could inherit from a man who had inherited her, and the court answered that question in the affirmative, on the basis that since he did not have any other wife, she could inherit his estate, in her presumed capacity as his widow. In the instant case, the deceased had his own wives and children, and there was no evidence that he lived exclusively with the appellant, as if he had no wives of his own.
12. Of course, there is a risk of misunderstanding the concept of widow inheritance. It was not about the inheritor taking the widow of his brother, or relative, as his wife. Widow inheritance was not marriage. The woman remained the wife of the dead person, for in African culture, marriage was for life, forever. Marriage was not terminated by the death of the husband. The widow remained as the wife of the departed. Widow inheritance was only meant to help the widow cope with life in the absence of her husband, it was not to make her the wife of the inheritor. She retained the home she shared with her husband, and the inheritor never took over the property. Her children remained the children of her dead husband, they did not become the children of the inheritor. In some cultures, any children begotten by the inheritor and the widow would not be the children of the inheritor, but of the departed husband. Things have changed for the younger generations, but the appellant and her generation, that was the practice.
13. On whether a marriage could be presumed from prolonged cohabitation, I note that the appellant did not herself testify in her own case. She was the only one who could give first-hand information on how she related with the deceased. The emerging evidence was that of a woman who was living in her own home, where her late husband had left her, when he died. Then her brother-in-law began to visit her there, and they even got a child together. The brother-in-law, the deceased herein, was himself married, to 2 wives. He only dealt with the appellant by way of fulfilling custom, and the liaison between him and the appellant could not, in the circumstances, reach the threshold of a cohabitation, upon which a presumption could arise that the 2 were married. Secondly, the appellant was the customary law wife of the late Rubano. It is notorious that, under customary law, the death of a husband does not terminate his marriage to his wife, unless the woman moves out of the home, and marries another man, for marriage is for life, under that law, The appellant herein did not move out of the home that her late husband had established for her, and her liaison with the deceased, apparently, happened at the home that her late husband had established for her, and not at a home that the deceased had put her in. Her cohabitation with the deceased, if at all there was any, at her late husband's home, could not bring forth a valid marriage, even by cohabitation and presumption. Under custom, a man cannot set up a home at the home of another man, whether that other man is alive or dead. He can only cohabit with the woman on the home that other man, but he cannot convert it to his home. There are ancestral ties to a home and land. Based on that, I find no foundation for holding that the trial court erred in finding and holding that there was no valid marriage between the appellant and the deceased, which could be presumed from cohabitation between them.



14. In view of the above, I find no merit in the appeal herein, and I consequently dismiss the said appeal, with no order as to costs. It is so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 22ND DAY OF MARCH 2024.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Jane Odera Egesa, the appellant, in person.

Advocates

Mr. Odera, instructed by Odhiambo Odera & Company, Advocates for the respondent.

