



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Succession Cause 271 of 2001

IN THE MATTER OF THE ESTATE OF

WINSTONE ONYANGO ORWENYO DECEASED

BETWEEN

MONICA KERUBO MOGIRE OBJECTOR/PLAINTIFF

VERSUS

MARTHA KEMUMA ONYANGO PETITIONER/DEFENDANT

RULING:

WINSTON ONYANGO ORWENYO (herein after referred to as the deceased) died on 26th August 2001 at Mater Hospital Nairobi. At the time of his death he was Municipal Engineer with Mombasa Municipal Council. He was later buried at his Botori home in Kisii.

On 12th November 2001 Martha Kemuma Onyango filed this succession cause. She listed herself and her five children as the only heirs of the deceased. Record shows that a grant was issued on 7th January 2001 though it seems this was a typing error and the correct date was 7th January 2002. On 23rd January 2001 MONICAH KERUBO MOGIRE filed an objection to the making of the grant. This objection was however withdrawn on 31st January 2002.

On 6th February 2002 she filed another application under s.76 Law of succession and order rule 44(1) of Probate and Administration rules seeking for the grant issued to Martha to be annulled or revoked on the grounds that proceedings were defective, the grant was obtained fraudulently and that it was obtained by means of untrue allegations of facts. Monica filed her replying affidavit. Directions were taken and the objector was to be treated as plaintiff and petitioner as defendant. Viva voce evidence was to be called.

The plaintiff/objector called five witnesses. In her evidence she told court that she met the deceased in 1993 when he was working with Kisii Municipal council as an Engineer. They started living as man and wife. Later in 1994 he was transferred to Mombasa and they continued to live together in Nairobi. They had one child Brenda Kerubo. She said he married her under Kisii customary law. In 1998 he paid her father sh.40, 000/- as dowry. When he died she participated in his burial as a wife and threw soil in the grave. Later her brother in-law paid her father one cow to legalize the marriage. He built a house for her

in the deceased's farm in Nyansiongo.

STEPHEN NYACHIRO ORWENYO (PW2) said he was a brother to the deceased and knew that he had married the plaintiff. He said the plaintiff told him this in 1997 and told him he had paid sh.20, 000/- as dowry. He said after burial he paid one cow to the father of plaintiff.

PW3 BENSON MOSETI said he was an uncle to the deceased. He said he knew that deceased was married to plaintiff though he did not know when the marriage took place. He was not present when dowry was paid. After deceased died PW2 built a house for plaintiff. A cow was taken to her father.

PW4 was called as an expert in Gusii Customary Law. PW5 MOGIRE KENYANYA was the father of the plaintiff. He said the deceased married the plaintiff and paid him dowry of sh.40, 000/-.

The defendant/petitioner told court she got married to the deceased in 1975 under the Gusii Customary Law. Dowry was paid to her father. They later solemnized the marriage in 1987 under the African Christian Marriage and Divorce Act (Cap 151) in church. The marriage was blessed with five children. She said that the deceased was not married to anybody else. She came to know the plaintiff in the year 2002 when she objected after she was issued with a grant. She said she did not see the plaintiff even during the burial of the deceased.

There is no dispute that the deceased had married the defendant first under the Gusii Customary Law and later solemnized the same under Cap. 151. They had five children. The issue is whether he also married the plaintiff and if she can be taken as his wife.

S.37 of the Marriage Act (Cap 150) provides that a person married under that Act lacks capacity to contract any other marriage when the first one is still in force. Provisions of this section would apply to a marriage under Cap 151 such as the one between the deceased and the Defendant. However the court of appeal in the case of IRENE NJERI MACHARIA –VS- MAGRET WAIRIMU JOMO & ANOTHER Civil Appeal No.134 of 1994 ruled that under the provisions of s.3 (5) of the Law of succession Act a marriage under customary law will be recognized even if there was another monogamous marriage where polygamous marriage are allowed. In Kisii polygamy is recognized and as such if there is evidence that deceased had indeed married the plaintiff under the Gusii Customary law she will be taken as his wife for the purpose of Succession Act (s.29 and 40) inspite of his marriage in church to the defendant. The courts task therefore is to decide if there was a marriage between them.

Having considered the evidence on record and all other circumstances I find that there was no valid marriage between the deceased and the plaintiff either under Gusii customary law or under any other law or system.

There was no evidence that there were any marriage negotiations done for the marriage to take place. Before the deceased died the two families never met to negotiate about the marriage and all the witnesses called said it was the deceased who told them that he is married to the plaintiff. Even the plaintiff's father (PW5) said that the plaintiff and the deceased went there and told him that they were married. As a father well used in customary laws he did not seem to bother to inquire how the marriage could have taken place without any negotiations. It cannot even be said the two eloped since the plaintiff said that even when they met she was living in Nairobi. The deceased did not seem to have taken any steps which can be construed to show that she was his wife. He had never built a house to her and plaintiff herself said that she never even went to home of the defendant. She said that whenever they used to come to Kisii deceased would go to sleep in the house of the plaintiff while she the defendant would go to her brother's home. That was not a behaviour of married couple.

The plaintiff said they were staying together in Nairobi yet the deceased worked in Mombasa. Of course she had a house where she was living before they met. She was a businesswoman. She did not prove in any way that the deceased was supporting her either in paying house rent or in any other way. Court was not told if he was paying school fees for F.K. whom the plaintiff deposed was her daughter but later admitted was her sister's child. The two did not have a child of their own from the alleged marriage though this is not a requisite. She said she visited him only twice in Mombasa for those four years.

The other issue was that of dowry. Court was told that deceased paid sh.40, 000/- as dowry. PW2 said he told him he paid sh.20, 000/- and PW3 said they were not sure about payment of the sh.40, 000/-. It was only PW5 the plaintiff's father who said he was paid the sh.40, 000/-. Though it was said that one Ombati was present he was not called. Infact PW5 said he did not know the name of the deceased's companion. Court was not told how the figure of sh.40, 000/- was arrived at. It was quite doubtful if this amount was paid. Even if it was paid I don't think it was paid as dowry as no negotiations had taken place. If the deceased was paying dowry he would have at least gone to do so in company of relatives or elders. Equally the plaintiff's father would have had elders to witness the same. PW4 said dowry was a family issue and negotiations are done before it was paid. In this case no negotiations were ever made and the two families had not met before the death of the deceased. Even his own elder brother (PW2) and uncle (PW3) did not take part in payment of the alleged dowry.

The deceased could have been cohabiting with the plaintiff but certainly not as man and wife. Plaintiff may also have attended the funeral and her name appeared in the obituary in the papers but that did not make her relationship with him that of man and wife.

As for the child F.K. she was not the deceased's child. Plaintiff and her father said she was a child of plaintiff's sister, who is alive and married. There was no evidence that the plaintiff had adopted her and that in turn the deceased adopted her. There was no evidence that deceased was supporting her during his lifetime. There are procedures followed for adoptions. There was no evidence that they were followed or why the deceased would have adopted her when her mother was still alive.

It seems that there was a desperate effort by PW2 to 'legalize' the alleged marriage between plaintiff and the deceased after the deceased's death but still this did not make it a marriage. He paid a cow and the plaintiff said he was built a thatched hut at Nyansiongo. However the court was told that there were no negotiations. Court was further told that the "Obokima rite" which is essential for any marriage was not done during the deceased's lifetime. It was agreed that this rite is very necessary. If the deceased really wanted to marry the plaintiff this rite would have been carried out. In fact none of the 15 steps narrated by PW4 were ever taken. Thus if the deceased and the plaintiff were not married or seen to be married during his lifetime it was pointless to have him marry her in his death unless someone had ulterior motives.

I therefore find the plaintiff's/objector's application to have the grant issued on 7th January 2002 annulled or revoked has not been proved. The petitioner did not fail to disclose any material facts when she petitioned for the grant as she and her five children are the only heirs of the deceased. The objector should be content with what, if any, she enjoyed from the deceased when he was alive.

I therefore dismiss the objector's application with costs.

Dated 14th day of April 2005.

KABURU BAUNI

JUDGE.

Mr. Nyatundo H/B for Ombachi for Objector.

Mr. Ogutu for Petitioner.

KABURU BAUNI

JUDGE



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