



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 146 OF 2018

CATHERINE JELAGAT KIPYEGO.....1ST APPELLANT

JACKSON KIPROP KIBOSS.....2ND APPELLANT

VERSUS

LIZAH CHEPCHUMBA CHEROMEI.....RESPONDENT

(Being an appeal from the Ruling of Principal Magistrate Hon. N. Barasa in Eldoret Succession Cause no. 249 of 2016 delivered on 25th October 2018)

JUDGMENT

1. The Appellants lodged an appeal challenging the decision of Hon. N Barasa delivered on 25th October 2018 in Eldoret Succession Cause No. 249 of 2016.

2. The Respondent filed a petition by way of a cross petition to be issued with a grant of letters of administration intestate of the estate of the deceased. The petition was based on the grounds that she was a wife to the deceased and that her children were dependants of the deceased. After considering the submissions and pleadings of the parties, the trial court found that the applicant was a presumed wife and her children were dependants. They were to be enjoined as Co-Administrators of the deceased.

3. The Appellants being aggrieved with the said ruling entirely appealed against it vide Memorandum of Appeal dated 21st November 2018. The grounds of appeal can be consolidated into two:

1. Whether the trial court erred in finding that there was a presumed marriage between the deceased and the Respondent.

2. Whether the Respondent and her two children are dependants under section 29 of the law of succession act.

APPELLANTS' CASE

4. The Appellants filed submissions on 25th May 2021. The Appellants submitted that the trial court erred in finding that the Respondent was a wife by virtue of cohabitation. They cited **Hortensiah Wanjiku Yawe vs Public Trustee (1976) eKLR** on the conditions that should be satisfied for presumption of marriage to arise, and submitted that the Respondent failed to prove that the conditions were satisfied.

5. The Appellants contended that the Respondent did not prove dependency as there is no proof that the deceased supported her and her children until his death as there are extended periods of time where evidence of provision was not given. They challenged the

finding of the court that the children were dependants based on the birth certificate. They cited section 12 of the Births and Death Registration Act on the same.

6. The Appellants submitted that the trial magistrate failed to appreciate that the Respondent supported her petition by relying on the Assistant Chief's letter from Kong'asis sub-location instead of the Chief's letter. They cited **re Estate of Stanley Mathenge Ruriga (Deceased) [2018] eKLR** and contended that the improper letters were used in making the petition and thus the Respondent was wrongfully made an administrator.

RESPONDENT'S CASE

7. The Respondent filed submissions on 15th September 2021. She submitted that she satisfied the trial court that there was long cohabitation and that she was married to the deceased. Further it was submitted that there was no reliance on the Chief's letter in determining the existence of marriage.

8. The Respondent cited article 53 (2) of the Constitution of Kenya and section 4 (2) and 3 (b) of the Children's' Act in support of the submission that the birth certificates before the court were proof that the deceased was the father of her children.

DETERMINATION

9. Upon consideration of the pleadings and the rival submissions of the parties herein, I identified the following issues for determination;

1. Whether there was a presumed marriage between the Respondent and the deceased.

2. Whether the Respondent and children were dependants under section 29 of the Law of Succession Act.

WHETHER THERE WAS A PRESUMED MARRIAGE

10. In the case of **Joseph Gitau Githongo vs Victoria Mwihaki (2014) eKLR**, the court stated as follows:

“It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either cast away by the “husband”, or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased “husband”

11. The principle of presumption of marriage as at the time of the trial court's decision was that cohabitation leads to the rise of a presumption of marriage for maintenance purposes in this instance.

15. In the premises an evaluation on what the threshold for a presumed marriage was at the time the court made its findings is necessary. The Court of Appeal in **Phylis Njoki Karanja & 2 Others vs Rosemary Mueni Karanja & Another NRB Civil Appeal No. 313 of 2001 [2009] eKLR**, sets out the threshold as follows;

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.

On the issue of the Chief's letter, I find that the Assistant Chief's letter is sufficient for the purpose of ensuring the right party files the succession.

WHETHER THE RESPONDENT AND CHILDREN ARE DEPENDANTS

16. The Respondent produced birth certificates as proof of the issues arising from the presumed marriage. Section 12 of the Births and Deaths Registration Act provides that no person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or in accordance to certain customs.

17. Courts have held that a birth certificate is not sufficient proof of paternity. The Appellants' position in the trial court was that the Respondents' children were not defendants thus the burden of proof was on them to rebut the evidence of the Respondent herein. A DNA test would have proven the same but none was requested by the Appellants. The burden of proof shifted to the Appellants and they failed to satisfy it.

18. Given that the Respondent proved that the children were the deceased's they fall under the definition of a dependant under section 29 of the Law of Succession Act. The wife having satisfied the court that she was a presumed wife to the deceased is also a dependant.

19. In the premises I find that the appeal lacks merit and is dismissed on all grounds.

Dated, Signed and Delivered at Eldoret this 20th day of December 2021.

E. O. OGOLA

JUDGE



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