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| Case Number: | Civil Appeal 274 of 2004 |
| Date Delivered: | 20 Dec 2013 |
| Case Class: | Civil |
| Court: | Court of Appeal at Nairobi |
| Case Action: | Judgment |
| Judge: | David Kenani Maraga, John Wycliffe Mwera, Philomena Mbete Mwilu |
| Citation: | Anastasia Mumbi Kibunja & 4 others v Njihia Mucina [2013] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nairobi |
| Docket Number: | - |
| History Docket Number: | H.C. SUCC. 1154 OF 1988 |
| Case Outcome: | Appeal dismissed. |
| History County: | Nairobi |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MARAGA, MWERA & MWILU, JJ.A.)**

**CIVIL APPEAL NO. 274 OF 2004**

**BETWEEN**

**ANASTASIA MUMBI KIBUNJA**

**KINUTHIA KIBUNJA**

**ANTHONY NJOROGE**

**PETER MBIYU KIBUNJA**

**THETU KIBUNJ……..……APPELLANTS**

**(Being the Legal Representatives of the Estate of the**

**late Elizabeth Nyambura Kibunja)**

**AND**

**NJIHIA MUCINA……..……..……1ST RESPONDENT**

**KAMAU NJIHIA…….……. 2ND RESPONDENT**

**ANTHONY KIBUNJA KINUTHIA…..3RD RESPONDENT**

***(Being an appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Kalpana Rawal, J.) dated 10th December, 2003***

***in***

**H.C. SUCC. NO.1154 OF 1988)**

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**JUDGMENT OF THE COURT**

The appeal we are about to determine was provoked by the ruling of ***Rawal J***. (as she then was), by which the learned Judge dismissed a summons dated 13th March, 1990. By that summons the five appellants, children of the late ***Elizabeth Nyambura Kibunja,*** sought orders to annul the confirmed grant issued on 16th December, 1990 in favour of the respondents, executors of the estate of ***Kibunja Kinuthia*** (the deceased). The deceased left a large estate with a written will. As it shall presently

unfold, the late ***Elizabeth Nyambura*** was not included in the will and so when she learned that it had been confirmed, she filed the summons aforesaid, to annul the same under ***section 76, the Laws of Succession Act*** (***Cap 160, Laws of Kenya***), the ***Act***. When she died, her children, the appellants, substituted her and not only pursued the determination of their mother's summons, but also challenged that determination by filing this appeal.

The grounds stated on the face of the summons were:

i. ***that the confirmed grant was obtained fraudulently when the affidavit in support of confirmation falsely stated that the deceased was only survived by persons named in the will;***

ii. ***that the confirmed grant was obtained fraudulently when the affidavit in support of the summons for grant stated that the deceased was not survived by another dependant as per section 29 of the Act and that no other application was pending;***

iii. ***that the grant was obtained by concealment from the court of particular material facts; and***

iv. ***that it was concealed from the court that the applicants were the wives of the deceased and had objected to the grant in*** *HC Succ. Cause No. 428/1988****.***

Regarding grounds (iii) and (iv) above it should be clarified that the summons to annul the grant was initially filed by ***Elizabeth***, the mother of the appellants along with one ***Stella Njeri Kibunja*** who later withdrew her claim, leaving ***Elizabeth*** alone. After her death the appellants substituted her on 29th February, 2000. The summons to annul the grant was supported by an affidavit, part of which stated that the pleadings in Succession Cause No. 428 of 1988 had been served on the executor/respondents. ***Rawal, J***. found that no such service was effected and accordingly struck out the paragraph that had stated so.

The brief history of this case is that the deceased died testate on 16th December, 1985. He had appointed Kenya Commercial Bank as the executors and trustees of his estate. The bank renounced that role and the respondents came in and filed the petition for grant of probate of a written will. The affidavit in support of the petition referred to other relevant issues but said nothing about the deceased's wives and children. The deceased did not name ***Elizabeth*** or any of her children in the will.

After the petition was gazetted, ***Elizabeth***, ***Stella*** and their children lodged an objection under ***Rule***

***17(1) of the Probate and Administration Rules***, (hereinafter ***the Rules)*** on 24th January, 1989. The Registrar issued a notice under ***Rule 17(5)*** on 15th February 1989. There was no response to that notice within the stipulated time and on 24th April 1989 the lawyers acting for the respondents requested the Registrar to issue a grant and one was issued on 12th June 1989. The grant was confirmed on 9th February, 1990. Then the present application followed. ***Elizabeth*** died on 6th September 1996 and as stated earlier, ***Stella***, who had described herself as a co-wife, withdrew her claim.

At the hearing of the summons to annul, the learned judge had to determine whether ***Elizabeth Nyambura Kibunja*** was a widow wife of the deceased or not. The appellant/objectors called four witnesses to prove that ***Elizabeth*** was indeed a wife of the deceased. The executors, also with witnesses, challenged the claim. They mainly spoke of the deceased's six wives named in the will, ***Elizabeth*** not included. Those six with their children only, were considered the family of the deceased. At the end of the hearing the learned judge concluded that there had been no evidence to lead her to find that Elizabeth was the wife of the deceased. And with that the application to annul the grant was dismissed with costs on 10th December, 2003.

Being dissatisfied with that decision, the appellants filed this appeal on eight grounds. Both sides filed written submissions and were accorded opportunity to make oral highlights. As per all these grounds seen together, and as per the submissions, both in writing and oral highlights, the appellants hold the view that the learned judge did not fully appreciate the evidence presented. If she had, she could have found that there existed a customary marriage or marriage by cohabitation and repute, between ***Elizabeth*** and the deceased. Further, she should have found that the subject grant was obtained fraudulently and by concealment of material facts.

***Ms. F. Githinji***, learned counsel for the appellants told us that evidence was presented to prove that there was a presumption of marriage between ***Elizabeth*** and the deceased. They had children between them who were given names according to the Gikuyu customary law, namely, giving children names from either side of the parents. Two of the wives of the deceased (***Lois, Stella***) testified that ***Elizabeth*** was their co-wife. ***Elizabeth's*** children ***Anastasia Mumbi Kibunja*** (PW1) testified that ***Elizabeth*** was her mother, while one ***Augustine Mwaura*** (PW3) had told the learned Judge that the deceased was his father. Counsel's position was that that evidence was credible and sufficient to find that there was a marriage between the deceased and ***Elizabeth***. The learned Judge should have therefore found for the appellants.

On her part ***Ms. N. Gachihi***, learned counsel for the respondents maintained that there was no evidence adduced either to establish a customary marriage or marriage by presumption after long cohabitation. And that even ***Lois Wanjiru Kibunja*** (interested party) was married 3 years after the alleged marriage of ***Elizabeth*** and the deceased.

As for the authorities the appellants cited two cases: ***Mbogo vs. Muthoni & Another*** ***CA No. 311/2002*** and ***M.W.G. vs. E.W.K. CA No. 20/2009***. On the basis of the former we were urged to find that it did not matter whether a statutory or customary marriage requirements were strictly proven. In that case the High Court had to go further and consider whether on the facts and instances available, the principle of presumption of marriage was applicable. Relying on the latter case, the position taken by the appellants was that needs and realities get a man and a woman to cohabit for a long time without solemnizing or going through a form of marriage. Then a presumption of marriage arises, subject to the requisite proof, bestowing the status of "wife" upon the woman to enable her to qualify for maintenance or a share of the estate of her deceased husband. And that the learned Judge should have so found.

The respondents on their part placed 3 cases before us: ***Mary Njoki vs. Kinyanjui Mutheru & Others***

***[2008] 1 KLR 288***, ***Mwagiru Mumbi [1967] EA 639*** and ***Hortensiah Wanjiru vs. Public Trustee CA 13 of 1976***. All in all we were urged to agree with the learned Judge that there was no evidence to warrant a finding that there was a customary marriage. And further, that it had not been proved in the High Court that the deceased and ***Elizabeth*** had lived through a long period of cohabitation so as to be recognized as husband and wife.

On this appeal, and we keep this clearly in mind, the learned Judge framed the issue for determination as his brother, ***Githinji, J.*** (as he then was) had done. The question was ***whether Elizabeth Nyambura Kibunja*** was wife of the deceased.

On 11th October, 1995 ***Githinji, J***. had stated:

***"Order: Issue whether or not Elizabeth Nyambura was a wife of Kibunja Kinuthia to be heard and determined on a day to be fixed at the registry."***

In this appeal the appellants faulted the learned Judge for failing to determine that issue. They contended:

***"5. That the Learned Judge erred in law and in fact and misdirected herself by failing to consider the elements necessary for existence of a customary marriage or marriage by cohabitation and repute."***

To determine whether the learned judge misdirected herself as contended, we will have to acquaint ourselves with the elements that must be shown to exist in order to conclude that either a customary marriage or one by presumption was proved; and then examine how the learned Judge treated them and whether that treatment or appreciation was misdirected leading her to come to a wrong conclusion.

This being the first appeal, we are enjoined to follow and apply the principle as stated in ***Njoki vs. Mutheru [1985] KLR 487***:

***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide." (as per*** *Madan, JA****.)."***

We begin with whether there was evidence from the appellants' side that indeed there existed a Kikuyu customary law marriage between ***Elizabeth*** and the deceased. Before we consider that evidence, we need to understand the rites of a Kikuyu Customary Law Marriage. This is because customary marriages in any community have rites and ceremonies at every stage, on the way to contracting a valid marriage. All the rites may not be accomplished but significant ones must be.

In ***Mwagiru vs. Mumbi [1967] EA 63***. It was held that:

***"(i) the signifying consent by the bride is necessary at two stages of the ceremonies which are vital to a regular Kikuyu customary marriage."***

In that case the plaintiff, ***Mwagiru***, was claiming that he married the defendant, ***Mumbi***, under Kikuyu

customary law. She denied such a marriage saying that she was present on the day the plaintiff visited her home to meet her relatives and offer the traditional liquor (***njurio***) so that he could get the consent to marry the defendant. But she did not herself sip any of that beer as was required by custom and she did not herself give consent to marry the plaintiff. Such a consent was also required of her as per custom, on the day of the fourth ceremony when the plaintiff presented beer with other gifts. On such a day the groom (plaintiff) brought a ram to be slaughtered and eaten to signify that dowry (***ruracio***) had been accepted. The defendant, ***Mumbi*** was not present and did not consent to the dowry paid for her to be accepted.

The Judge (***Miller, J.***) then concluded that on the evidence, the defendant (***Mumbi***) was present and consented to the assembled people to take beer the plaintiff brought on the first visit, but she did not partake of it herself. On the fourth occasion when beer was drunk and a ram slaughtered and eaten, the defendant was not present and so she did not give her consent. On that occasion custom required that the bride be present and also take part in the slaughter of the ram. The Judge then concluded that ***Mwagiru***, the plaintiff, had not proved his case.

In the present case, the appellants called four (4) witnesses to answer the issue whether ***Elizabeth Nyambura*** was the wife of the deceased, ***Kibunja. Anastasia Mumbi*** (PW1), the daughter of ***Elizabeth*** and the deceased told the court that the deceased had seven wives in all, including her mother, ***Elizabeth***:

***"The deceased was living in Githunguri. My mother was married at Githunguri but later started living in Makadara. Then my father used to maintain us…. At all times, I knew him as the husband of my mother."***

In cross-examination, PW1 said that ***Elizabeth*** started living at Makadara in 1965. She had gone back to her parents' home. When she died in 1996 she was buried in her own plot in a settlement scheme at Nyahururu. Further in cross-examination, PW1asserted that her mother ***Elizabeth*** married the deceased in 1940, and was wife number three to the deceased.

***"The marriage was as per Kikuyu custom. As per my believe (sic) they performed full rites."***

***Stella Njeri Kibunja*** (PW2), the 4th wife of the deceased said that she married him in 1943. PW2 named other co-wives, ***Gathoni Kibunja*** and ***Elizabeth Nyambura***, the subject, included:

***"But*** *Gathoni* ***and*** *Nyambura* ***were chased away."***

The witness confirmed ***Nyambura*** went to stay at Makadara in Nairobi. She died while still the wife of the deceased, with whom she had had children.

***"I do not know how*** *Nyambura* ***got married…****Elizabeth* ***was staying at Makadara but her other house was at Ol-Jororok."***

***Augustine Mwaura Mbugua*** (PW3), told the court about the deceased and ***Elizabeth Nyambura*** as per the story he got from ***Anastasia*** (PW1):

***"I was shown the deceased and Elizabeth by Anastasia as her father and mother."***

***Peter Mbiyu Kibunja*** (PW4) spoke last. He claimed that:

***"The deceased Kibunja Kinuthia was my father. Elizabeth Nyambura Kibunja is my mother."***

PW4 with his four siblings were entitled to a share in the deceased's estate, he claimed. The deceased used to support them financially when they lived at Makadara, Nairobi. But after the deceased's death PW4 and his siblings have been disowned for no reason. When their mother died, she was buried at Nyahururu and not Githunguri on the deceased's land. That closed the appellants' case.

The executor's case was opened by ***Njehia Muchina*** (DW1) [not PW1]. He was appointed by the deceased's six wives (named, excluding ***Elizabeth***) as an executor. DW1, aged 82 years, knew the deceased the whole of his life, having lived with him in the same homestead. He did not know ***Elizabeth Nyambura***. DW1, claimed that he was involved in the marriage of all the six wives of the deceased, all contracted under Kikuyu customary law. He narrated to the court the rites/ceremonies involved beginning with the groom visiting the bride's home with beer (***njurio***) to indicate his interest in her; payment of dowry (goats, cash), slaughtering of a ram (***nguracio***), then ending with being given the bride. As regards where ***Elizabeth*** lived with her children the witness said:

***"Elizabeth did not live with the deceased at Githunguri… I do not know her children."***

***Gathenji Ngari*** (DW2) aged 90 years and married to 3 wives, took the witness stand. To his knowledge, Kikuyu customary law, in particular on marriage, involved several rites at different stages. DW2 stated the rites to be followed from first taking beer to the home of the bride and if accepted, taking dowry (***ruracio***). There follows a ram for slaughter, more beer, the performing ***ngurario*** and snatching the bride. She is taken to the groom's home, shown a shamba to cultivate and so becomes a family member there – a wife. Performing ***ngurario*** is imperative and acts as a marriage certificate, to seal a customary marriage. DW2 knew the deceased's six wives, not ***Elizabeth***. ***Elizabeth*** stayed at a shop at Githunguri, where she was a charcoal trader. She was not a wife of the deceased and she did not live in his premise. He asserted:

***"I did not see Elizabeth at Kibunja's house."***

***John Kinuthia*** (DW3), a retired army officer, was the son of the late ***Kibunja with Gathoni***. The witness stated the names of all his step-mothers with their children but as regards ***Elizabeth***, DW3 said:

***"****Elizabeth Nyambura* ***– I have not seen her at our home, my late father's home. Now I know she claims to be my father's wife."***

His late father never mentioned her as a step- mother or her children. They only started laying claims to the estate several months after the deceased's death. He said the deceased, was a hard working man who provided for all his family members:

***"Out of six houses nobody had complained on (sic) the Will except Elizabeth."***

That closed the whole trial. The judge rose to pen her decision, now under review. After commenting on the witnesses on both sides, those of the objectors for being interested and therefore giving questionable evidence and those of the executors as being independent and forthright, the learned Judge delivered herself thus:

***"I am considering a marriage which is alleged to have been performed in early 40's when customs were strictly adhered to. I have no evidence as performance of the customary rites in respect of the alleged marriage. I also do not have any sufficient evidence as to continuous***

***cohabitation or reputation or acceptance by the society of their relation as husband and wife."***

And with that the Judge dismissed the appellant's above-mentioned summons which had sought to annul the subject grant as having no leg to stand on. She was satisfied that ***Elizabeth's*** side had failed to prove that she was a wife of the late ***Kibunja*** by which she could have been warranted to file such summons.

We have reviewed the evidence taken down by ***Rawal J***. with due caution and have concluded that the appellants did not place any evidence before the learned judge as to whether a Kikuyu customary marriage was celebrated between the deceased and the late ***Elizabeth Nyambura***, the mother of the appellants. We find that not even the rudiments of the rites and ceremonies in that regard, were placed by any of the four objector/appellants' witnesses before the learned Judge. We have already set out the relevant parts of their evidence and we, too, are satisfied that no Kikuyu customary law marriage existed between the deceased and Elizabeth. As the High Court said in ***Mwagiru's*** case there was no evidence that the signifying consent was ever obtained at two stages of the ceremonies, vital for a regular Kikuyu customary marriage. Indeed there was no evidence whatsoever of such a marriage.

And as to whether there was evidence upon which the learned Judge could have found that there was a marriage by presumption, we will revert to ***Njoki's*** case (above) in which ***Madan, JA***. said the following:

***"It is a concept born from an appreciation of needs and realities of life when a man and woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage, then a presumption of marriage arises. If the women is left stranded either by being cast away by the "husband", or because he dies, occurrences 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".***

In the same case ***Nyarangi JA***. stated as follows:

***"In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute."***

***Nyarangi, JA*** then went on to give examples of acts to establish such a marriage including having a child or children together or jointly acquiring valuable property and paying for it over a long period. This case, among many others on presumption of marriage, refers to long cohabitation together so that by general repute the community takes the two as husband and wife, even if the two did not solemnize their marriage in any recognized from. It is the asserting party, here the appellants, to prove that such a marriage existed between the deceased ***Kibunja*** and their late mother by tendering evidence.

The evidence laid before the learned judge and which we have reviewed, does not prove such a marriage. No witness told the High Court that the deceased and ***Elizabeth*** lived together for so long as to gain general repute that indeed the deceased and ***Elizabeth Nyambura*** were husband and wife. Evidence has it by the appellants' witnesses that while he lived at Githunguri, she lived at Makadara, Nairobi. And when she died she was buried on her own plot at Ol-jororok – not on ***Kibunja's*** land. Having children and naming them after some man's relatives is not itself proof of marriage of any sort. In this case we are unable even to verify that bit by the appellants who claimed that the deceased was their father and he provided for them when he was alive – only to disown them in his will.

In sum, there was no evidence placed before the High Court, and on our own review of the same, none established a Kikuyu customary marriage or marriage by cohabitation and repute between deceased and

***Elizabeth***. This appeal therefore lacks merit and we dismiss it with costs to the respondents.

***Dated and delivered at Nairobi this 20th day of December, 2013***

**D. K. MARAGA**

**……..**

**JUDGE OF APPEAL**

**J. W. MWERA**

**……**

**JUDGE OF APPEAL**

**P. M. MWILU**

**……**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

*/jkc*