REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 25 OF 2019

IN THE MATTER OF THE ESTATE OF DA…..... DECEASED

RO AND CM…….....APPELLANT

VERSUS

EKN…….....RESPONDENT

(Appeal from the Ruling of Hon. S.K. Onjoro SRM in Kisii Succession Cause No. 270 of 2016 dated the 22nd February 2019)

JUDGMENT

1. On the 26th February 2019, the appellants **RO** and **CM**, hereinafter referred to as the appellants filed a memorandum of appeal dated the 22nd February 2019. The appellant's grounds of appeal are;

i. That the learned Magistrate erred in law by not considering the requirements of customary law.

ii. That the learned Magistrate erred in law by not considering the evidence of the witnesses of the Petitioners who are brother and sister of the deceased.

iii. That the learned Magistrate erred in law by admitting photocopies of the documents as evidence whose originals were not produced during the hearing of the objection.

2. The appellants seek to have the Ruling quashed and to allow the appeal. The Record of Appeal was filed on the 9th April 2019.

3. The appeal was admitted for hearing on the 3rdMay 2019. Parties canvassed the appeal by way of written submissions.

4. The first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126***).

5. The background to this appeal is that the appellants petitioned for letters of grant intestate for the estate of the deceased DA in Succession Cause No. 270 of 2016 as widow and son of the deceased. The Respondent filed a Notice of Objection stating that she was a widow of the deceased and that the petitioners whilst filing the petition failed to obtain her consent and that as a widow of the deceased she had the same legal rights as the petitioners/appellants under the Law of Succession Act Cap 160. In her objection she sought to be enjoined as an administrator of the deceased's estate.

6. Following the filing of the said objection, parties filed statements and the matter proceeded to hearing and the learned Magistrate delivered the Ruling dated the 22nd February 2019 the subject of this appeal. In the said Ruling, the trial court held as follows, "***Although* the *respondent and her witnesses denied that they knew the objector, there is strong and sufficient evidence from the documents presented and objector witnesses that the deceased lived with the objector as husband and wife. The deceased indeed cohabited with the objector since 2001 and evidence suggests in 2008 they were still living together. That is a long time cohabitation that this court finds a presumption of marriage. The deceased and the objector also carried out as a married couple by living together and siring 2 children together. In the premises having found that a presumption of marriage. I make an order to the effect that the objector and her 2 children be included in the petition for grant of letters of succession to the estate of DA.***

7. The trial court arrived at the above decision after considering the evidence adduced. The Respondent and her witnesses testified and relied on their statements filed. The Respondent's case was that she moved in with the deceased in 2002, she introduced him to her parents and that they moved in together. They had 2 children with the deceased in 2006 and 2008. She had a child from a previous relationship whom the deceased also took care of after they started living together. In 2008 the deceased introduced her to his wife the 1st appellant. That sometime

in 2009 the deceased stopped providing for the children and she had to file a case in court and obtained maintenance orders. That when the deceased died she was in Kitale and she attended the burial with her family members but they were not recognised. Her witnesses TKN was her brother and LO a neighbour testified that the deceased and the Respondent lived together as husband and wife from 2002 and that in 2009 the Respondent had to seek maintenance for the children from the children's court.

8. The 1st appellants testified that she was the deceased's only wife and that the Respondent was a stranger to them. That she only learnt of the Respondent when she was informed by the Chief. The 1st appellant testified that they have 4 children with the deceased. KMA, brother of the deceased and ABA sister of the deceased testified that their brother the deceased had only one wife the 1st appellant, and their 4 children. That they are surprised that there is a second woman who claims to be the deceased's wife. That the Respondent did not attend the deceased's burial.

9. Parties canvassed the appeal by way of written submissions. The appellants analyses the evidence adduced by the parties during the hearing and submits that from the evidence adduced it is clear that the Respondent was not the wife of the deceased and prays that the appeal be allowed. The Respondent in her submissions filed on the 8th August 2019 submits that the appeal has been brought in bad faith and should be dismissed. It was submitted that the appellants failed to tender evidence rebutting the presumption of marriage between the respondent and the deceased. That the respondent qualifies as a wife and is a dependent as provided in section 3 (5) as read with sections 29 and 40 of the Law Succession Act Cap 160 (the act). Reliance was made on section 66 of the Act for the argument that the said section enumerates the order of preference in administering the estate. On the issue of whether the evidence adduced met the threshold of the Evidence Act Cap.80, it was submitted that the parties took directions in the lower court to proceed by adducing oral evidence in court. That as such witness statements as well as list of documents to be relied on during the trial were filed by the parties and that during the trial original copies of all documents were duly produced by the Respondent for verification by court as envisaged in section 35 (1)(a) of the Evidence Act.

10. There are 3 grounds of appeal; the first ground is that the learned magistrate erred in law by not considering the requirements of the customary law. The court gave a short ruling, the portions that touches on customary law states as follow;

> "*That according to Kisii customary laws dowry must be paid for a marriage to be considered to exist and there being no evidence of such payment of dowry or any ceremony the applicant herein could not have been marriage to the late DA.*
>
> On *cross examination the objector admitted there was no dowry paid but they lived in a manner of husband and wife".*

The learned magistrate thereafter proceeded to state there was evidence that the deceased and the Respondent cohabited from 2001 and that the evidence suggested that in 2008 they were still living together, that from the long-time of cohabitation the court found that there was a presumption of marriage. It is apparent that the learned magistrate had in mind that there was need to prove a customary marriage. He noted that dowry was not paid and there after he considered the evidence adduced and made a finding that there a presumption of marriage from the long cohabitation.

The marriage between the respondent and the deceased was not a customary marriage. It was important for the trial Magistrate to analyse the customs of Kisii customary marriage. No dowry was paid by the deceased. Dowry in any customary marriage is an important element that has to be established.

According to Reinstatement of African Law Vol.1in this book the essential of a valid marriage under Kisii law are stated as follows;

> (a) CAPACITY. The parties must have the capacity to marry and the capacity to marry each other (see pp. 60-61).
>
> (b) CONSENT. The parties to the marriage and their respective families must consent to the union (see p.60).
>
> (c) CHIOMBE CHO OBOKO. There can be no valid marriage under Kisii law unless a part of the Chiombe cho oboko has been paid.
>
> (d) COMMENCEMENT OF COHABITATION. The moment at which a man and woman become husband and wife legally is when the man and woman commence cohabitation, i.e. when the marriage is consummated at the beginning of the honeymoon period.

The trial court held that from the long cohabitation there was presumption of marriage. The Respondent's evidence was that she got to know the deceased in 2001, that he asked her to move with him which she did in 2002 and that she was introduced to her co- wife in 2008. It is not clear from her evidence whether they continued to live together after 2008 until the demise of the deceased. She testified that in 2009 she had to move to court because the deceased stopped providing for the children. The court proceedings from the children's court were not exhibited. It is not clear whether they continued to live together. I find it strange that she would claim that they were living together and at the same time sue the deceased for maintenance. She further stated that the deceased used to send money through Mpesa and that when he failed to do so she was given a letter by his company directing attachment of his salary. She further indicated that when he died she was in Kitale in 2016 to visit her brother and that she got a call about his death from one of his colleague's wife. Thomas (Pw2) and L (Pw3) too testified that the respondent had to seek legal assistance from FIDA and later got a court order for attachment of his salary after the deceased decline to take up his parental responsibility.

11. In the case of ***Hortensian Wanjiku Yawe v. Public Trustee EACA C. A. No. 13 of 1976*** the court held that *"…long cohabitation as man and wife gives rise to presumption of marriage .. only cogent evidence to the contrary can rebut such a presumption*. From the evidence adduced the alleged cohabitation was not continuous until the death of the deceased. It is apparent that the Respondent and the deceased had a relationship between 2002 and 2008 and they sired 2 children, but something happened in 2009 and she had to move to the children's court. Her evidence on what happened before she moved to the children's court is rather scanty and there is gap on what happened to their

relationship with the deceased before he died. She did not expressly state in her evidence that they were still staying together. They could have had a relationship but not a marriage. She admitted that the deceased did not pay dowry to her parents. Pw2 admitted that the deceased did not pay dowry and he was aware that the respondent had to move to the children's court in 2009. Pw3 who was a neighbour stated that she knew the respondent and the deceased from 2008 when she got married to her late husband. Pw3 evidence does not prove any long cohabitation between her and the deceased. I am constrained to fault the trial court's finding that there was a presumption of marriage, in my view the evidence was insufficient to make to find that the respondent was the deceased's wife. I find the Respondent was not the wife of the deceased and is also not a dependent of the deceased's estate.

12. On the issue of the 2 children. There are 2 birth certificates show that the 2 children were sired by the deceased. The birth certificates were obtained in 2006 and 2008. However, birth certificates are not conclusive evidence to prove paternity. From the evidence adduced the respondent attached a court order that the deceased and the respondent had a case before the children's court in Kisumu Children Court case no. 29 of 2010 and the court made an order that the deceased's salary be attached. The birth certificates were not challenged by the appellants' during the trial before the lower. They were marked as exhibits with no objection. Based on this evidence though it is not conclusive proof the respondent's evidence that the 2 children were sired by the deceased stands. The parties are at liberty to take a DNA test which will give the parties a final result of the paternity of the 2 children. I will not disturb the trial court's finding that the 2 children are dependents of the deceased's estate. The appellants shall include them in the petition as beneficiaries of the deceased's estate.

13. The 2nd ground is that the learned Magistrate erred in law by not considering that the evidence of the witnesses of the petitioners who were brother and sister. The trial court stated as follows in the Ruling;

> *"Although the Respondent and her witnesses denied that they knew the objector, there is strong and sufficient evidence from the documents presented and objector witnesses that the deceased lived the objector as husband and wife."*

The trial court from the above finding chose to believe the evidence of the Respondent over that of the appellants' evidence. The court found the Respondent's evidence was strong and sufficient from the documents produced and the witnesses that the 2 lived as husband and wife. The documents referred to were not mentioned. The trial magistrate failed to indicate why he did not believe the evidence of the appellants' witnesses. They were the deceased's siblings and claim that they did not know the respondent. I did not have the benefit of seeing the witnesses, the evidence of the 2 witnesses called by the appellants' was equally strong being the deceased's siblings. Some consideration was made of the appellant's evidence the trial court however did not go deeper to analyse their evidence.

14. On the 3rd ground, I have perused the court record and find as follows; The court proceedings show that when the respondent testified she produced Pext1 to 9. No objection was raised by the appellants at the time of production of the said documents. It is therefore presumed that being a civil matter the documents were produced by consent of both parties and my view is that the appellants cannot challenge the said document at appeal stage. This ground fails.

15. The appeal succeeds on only one ground. I quash the trial magistrate's finding that the respondent was a wife of the deceased. She did not prove she is a wife. The deceased appears to have acknowledged the 2 children as his children, there are birth certificates obtained during his life time and he maintained them. The 2 children **PA** and **RN** will be included by the appellants as the deceased's dependants, unless otherwise proved. The respondent EKN is not a dependant of the deceased. Each party to bear its own costs.

Dated signed and delivered at Kisii this 6th day of December 2019

R.E.OUGO

JUDGE

In the presence of;

Mr. Nyagwencha for the Appellant

Appellant Present

Respondent In person

Ms. Rael Court clerk