

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
FAMILY CIVIL SUIT NO. 0007 OF 2022
NAKIGANDA JAMILAH SSONKO:..... PLAINTIFF
VERSUS
NAMUKWAYA HADIJAH :..... DEFENDANT
BEFORE: HON. JUSTICE LUBEGA FAROUQ

JUDGMENT

1. Introduction

2. The Plaintiff brought this suit against the Defendant that the caveat lodged on her petition for letters of administration by the Defendant be removed, lifted and vacated, letters of administration for the estate of late Bashir Cheboi be granted to her as the widow, a declaration that the defendant is intermeddling with the estate of late Bashir Cheboi, general damages, permanent injunction and costs of the suit.

3. Background

4. The Plaintiff's claim is that she got married to late Bashir Cheboi on 19th July, 2011 and sired four children who at the point of the death of her husband were all minors. That on 9th of February, 2022 she petitioned for letters of administration in this honorable court vide Administration Cause No. 010 of 2022 and a notice was published in the newspapers. However, the same was caveated by the Defendant. The Plaintiff further alleged that the Defendant is intermeddling with deceased's estate claiming to be a widow yet not.
5. The Defendant in her written statement of defence averred that she is also a widow of late Bashir Cheboi and that granting letters of administration without joining her as the co-administratrix to the estate will be unjust since she has two issues with the deceased. The Defendant further averred that it is the Plaintiff intermeddling with the deceased's estate since she is the one collecting rent from all rented properties to her own benefit. The Defendant also contended that the marriage certificate attached to the Plaintiff is a forgery.

6. Issues for this court's resolution

7. In the Joint Scheduling Memorandum, both counsel agreed to the following issues-
- (a) Whether the Defendant was married to the deceased?
 - (b) Who is the rightful party to be granted letters of administration?

(c) What are the remedies available to the parties?

8. I will however rephrase the 1st issue to read; Whether the Defendant and the Plaintiff were legally married to the deceased or not?

9. Legal Representation

10. Counsel Ntuyo Shafic together with Counsel Watila Luxe represented the Plaintiff whereas Counsel Kalule Nasser represented the Defendant.

11. Submission

12. At the end of the hearing of this matter, parties were allowed to file written submissions and they are on the court record. I will refer to them when necessary in the body of the judgment.

13. Exhibits tendered in court

Plaintiff's exhibits

- (a) Plaintiff's marriage certificate----- PEXH.1
- (b) Petition for letters of administration and Notice -PEXH.2
- (c) Death certificate for late Cheboi-----PEXH.3
- (d) Copies of the Childrens' health cards-----PEXH.4
- (e) Copy of the Advert in Daily Monitor-----PEXH.5
- (f) Minutes of the family meeting -----PEXH.6

Defendant's exhibits

- (a) Defendant's marriage certificate----- DEXH.1
- (b) Children Health Cards -----DEXH.2
- (c) Police letter dated -----DEXH.3

Issue No. 1: Whether the Defendant and the Plaintiff were legally married to the deceased or not?

14. **Section.2 of the Marriage and Divorce of Mohammedans Act Cap.252** provides that-

"All marriages between persons professing the Mohammedan religion, and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as provided in this Act"

15. In the case of **Mist. Momtaz Begum vs. Anowar Hossain, Supreme Court of Bangladesh SCCA 139/2003 Pg 11-12.** It was stated that-



"The Mohammedan law does not insist upon any particular form in which the contractual performance should be effected or that the union should be evidenced by any writing, nor is the presence of witnesses essential for its validity".

16. **Chhavi Tripath CSMJ University Kanpur "Definition, Objectives and Nature of Nikah (Muslim Marriage)" Published by Admin on October 25, 2023**, said that; In Islam, marriage is commenced by way of a ceremony known as "*Nikah*". The Arabic word "*Nikah*" means the union of sexes and in law it means 'marriage'. In Islam, "*Nikah*" is a contract between the two people. Both the groom and the bride who must give consent to the marriage and their will to marry must be free. For a valid Islamic marriage, a formal binding contract either verbal or on paper is considered integral.
17. The above principles are going to guide this court in determining whether the Defendant and the Plaintiff were legally married to late Cheboi Bashir or not.
18. PW1 the Plaintiff through her testimony referred to the Defendant as a girlfriend of her late husband. However, in in cross examination she admitted that the defendant had two children with her late hasband.
19. DW1 (the Defendant) told court that she is a widow of late Cheboi Bashir and bore two children with him. She adduced in court DEXH.1 as proof of her marriage. She added that she lodged the caveat because she is the lawful wife of late Cheboi Bashir having got married to him in 2012. Her evidence was corroborated by PW2 Swalleh Sharif a brother to late Cheboi Bashir who in cross-examination told court that the Defendant is her in law who was married to his late brother Cheboi and his brother had constructed for her a house at Namabasa. He added that the Defendant and the Plaintiff were both his brother's wives.
20. Upon examination by court, PW2 further said that his late brother married both women (Plaintiff and Defendant) under sharia law and he attended both marriages.
21. Following the evidence of PW2 who attended the marriage ceremonies of both parties, it is evident that the plaintiff and the Defendant were both married to late Cheboi Bashir and therefore widows to the estate.
22. I will now handle the issue of whether the Plaintiff was late Cheboi Bashir's wife. From the evidence of the Defendant and her written statement of defence, I note that she lamented to the fact that the Plaintiff's marriage certificate is a forgery but in her evidence, she admitted that the Plaintiff is her co-wife. She said that; *"The plaintiff herein is my co-wife and at the time of our husband's death, the Plaintiff was not legally married to the deceased. After the death of my husband, the plaintiff forged a married*

certificate so as to deceive this honorable court in favoring her with a grant of letters of administration."

23. According to PW1's evidence quoted above, the late Cheboi Bashir had two families the one for the Plaintiff inclusive. PW2 Swalleh Sharif told court that he knew the Plaintiff as her sister in law and that she was the first wife to his late brother whom they begot four children with. And upon examination by court, PW2 added that both parties were married under sharia law and he attended the marriage ceremonies of both parties when they were getting married to his late brother Cheboi Bashir.
24. It is worth noting in Islamic marriages do not require parties to possess a marriage certificate as proof of marriage, since marriage in Islam can be proved even without a marriage certificate following the norms and practices of Islamic marriages. See: **Shabnam Hashmi v. Union India (2014), Supreme Court of India**, where court upheld Nikah as a valid marriage contract.
25. Also in the case of **Ali s/o Pazi vs. Hamisi Mohamed [1968] EA 111 at P.1 P2**, it was stated that-

"There was evidence that the Appellant and deceased had lived together as husband and wife for several decades, but no marriage certificate was produced. Hamlyn J held that; it is the law of the Shafi Sect of Islam, as of many codes, that there is a presumption of marriage where a man and woman have lived together as husband and wife for a considerable period of time".

26. Possession of a certificate of marriage in Islam is just prudent practice but not a mandatory requirement and hence not possessing the same doesn't affect the validity of such a marriage.
27. In the present case, it is not in dispute that the Plaintiff lived together with the late Cheboi Bashir as husband and wife and they bore four children. That fact was corroborated by the evidence of DW1 who admitted that the Plaintiff is her co-wife and PW2 who said that he attended the Plaintiff's marriage ceremony. Therefore, the issue of a forged marriage certificate though not proved to the standard required by law, it cannot invalidate an Islamic marriage.
28. In the premises, it is found that the Defendant and the Plaintiff were legal wives to late Cheboi Bashir since it's a known fact that Islamic marriages are highly polygamous. Therefore, the Plaintiff and the Defendant are both widows to the deceased.
29. ***Issue No.2: Who is the rightful party to be granted letters of administration?***



30. **Section 201 of the Succession Act Cap.162** provides that-

“When the deceased has died intestate, those who are connected with the deceased either by marriage or by consanguinity are entitled to obtain letters of administration of his or her estate and effects in the order and according to the provisions hereafter contained.”

31. **Section 201A (1) of the Succession Act** provides that-

“The surviving spouse shall have preference over any other person in the administration of the estate of a deceased intestate.”

32. According to the above provisions of the law, a person connected with the deceased person by marriage is given priority to obtain letters of administration of the estate. In the instant case, the children who are also beneficiaries to the estate are all of tender age and their interests in the estate are better protected by their respective mothers who are the surviving spouses.

33. Counsel for the Plaintiff submitted that in the Plaintiff's un rebutted evidence, she indicated how the Defendant refused to attend the family meeting with the help of a one Faisal Mayamba Cheboi and started intermeddling with the estate of the deceased by withdrawing the money and using the property to the extent of wanting to sell the same.

34. Counsel cited that case of **Sarah Ssebowa & 5 others V. Peter Ssebowa (1991) HCB 95** to submit that the Defendant will give the Plaintiff hard time to take decisions regarding the administration of the estate.

35. I have looked at PEXH.6 and noted that under Minute 5, the Plaintiff was appointed by the family members as the single administrator for the estate of late Cheboi Bashir and the meeting was attended by 8 people. The Plaintiff alleges that the Defendant boycotted the meeting but she did not tender in court proof to show that the Defendant was informed or invited to the meeting and she refused to attend.

36. The Plaintiff to further concrete her claim why letters of administration should be granted to her alone, in her evidence further said that; *“after the death of their husband, the Defendant remarried to another man”* which is to her, another reason why the Defendant should not be appointed the administrator of the estate of late Cheboi Bashir's estate.

37. **Section 27 (7) of the Succession Act** provides that-

“A spouse who remarries before the estate of the deceased is distributed shall be entitled to the share he or she would be entitled to under subsection (1).”

38. Reading the above section which was introduced during the amendment of the Act, together with section 201 of the Succession Act, there is no

doubt that even if a widow remarries, she remains a beneficiary of the deceased's estate and entitled to all the benefits as a widow of the deceased. For that reason, it is my view that even in the circumstance that the Defendant remarried as it is alleged, she still qualifies to be appointed an administrator of late Cheboi Bashir's estate since she is a beneficiary to the estate.

39. In the circumstance, having found under issue No.1 that both the Plaintiff and the Defendant were married to late Cheboi Bashir, the law allows them both to apply for letters of administration. The widows should therefore, follow the procedure laid in the law to apply for the same.

40. ***Issue No. 3: Remedies entitled to the parties?***

41. In the pleadings, the Plaintiff prayed that the caveat lodged on her petition for letters of administration by the Defendant to be vacated. However, having directed both the Plaintiff and the Defendant to apply for letters of administration of late Cheboi Bashir's estate, the Plaintiff's petition automatically has no legal effect and it is accordingly struck out.

42. Following the above finding, the alleged caveat is accordingly overtaken by events.

43. The Plaintiff further in her pleadings prayed that it should be declared by court that the Defendant intermeddled with the estate of late Cheboi Bashir.

44. **Section 101 (1) of the Evidence Act Cap 6** provides that-

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."

45. **Section 101 (2) of the Evidence Act** provides that -

"When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

46. **Section 103 of the Evidence Act** provides that-

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

47. In **Miller Vs. Minister of Pensions (1947) 2 ALLER 372**, Lord Denning held that-

"The degree is well settled. It must carry a reasonable degree of probability but not too high as required in a criminal case. If the

evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged, but if the probabilities are equal it is not."

48. In the instant case, the Plaintiff told court that the Defendant intermeddled with late Cheboi Bashir's estate by withdrawing money from the bank accounts but she did not adduce any evidence to prove the same to court. Hence, the Plaintiff failed to dispense her burden on the balance of probabilities.
49. Before I take leave of this matter, it should be noted that where letters of administration are granted to two or more persons, they are all entitled to administer the estate of the deceased jointly. Each of them is under no duty to make any decision affecting the property of the estate without the consent of the other.
50. Secondly, it should also be noted that following the amendment of the Succession Act under section 259 (2), letters of administration are effective for the period of two years. However, considering the circumstance of this case, the children are all minors the oldest being 9 years, which means even after 2 years, they will still be minors. In such circumstances, the same section under subsection 3 provides for extension of that period upon application to court.
51. In the circumstances, this suit is accordingly dismissed and court makes the following orders;
- (a) It is declared that the Defendant and the Plaintiff were legally married to late Cheboi Bashir and therefore both are widows.
 - (b) The Plaintiff and the Defendant are both directed to apply for letters of administration to administer the estate of late Cheboi Bashir.
 - (c) Administration Cause No. 010 of 2022 is struck out.
 - (d) Each party shall meet its own costs.

I so order

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LUBEGA FAROUQ
JUDGE

DATE: 20th/03/2024