

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB-REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PROBATE AND ADMINISTRATION CAUSE NO. 101 OF 2022

In the matter of the estate of the Late

ALFRED LAURENT TIBENDERANA.....DECEASED

BETWEEN

In the matter of application for letters of administration by

EDMUND LAURENT TUMAINIPETITIONER

AND

In the matter of a caveat by

ROSEMARY FLORIAN KIMARIO.....CAVEATOR

JUDGMENT

16/09/2022 & 05/10/2022

I.C. MUGETA, J

It is a settled principle of law that it is not a duty of the probate court to determine who are the heirs of the deceased. That is the duty of the administrator (after appointment) and the family of the deceased (before the petition is filed). However, when the family members do not agree on the status of a person claiming to be a heir such a person, depending on the nature of the claim, can join the proceedings by caveat to assert her status

in relation to the estate. That is what the caveator has done. She is the mother of a child who is listed in the petition as surviving the deceased. In that regard, she claims to be his wife. However, the family of the deceased, who died intestate, gives her a status of a concubine. Consequently, she is not listed in the petition as surviving him which is the basis of her caveat. She prays the court to recognize her as a wife of the deceased, hence, entitled to inheritance. She has no objection to the petitioner being appointed administrator of the estate. As a result, there is only one issue for determination.

i. Whether the caveator was married to the deceased.

The deceased is a son of Melania Yohana Batist (PW1) and husband of Getrude Francis Mkenda (PW3). They married since 2006 under customary marriage. PW1 and PW3 testified that they know the deceased have a child with the caveator but never as his second wife. They were unfamiliar with her because the deceased had not introduced the caveator to anyone of them as a wife. While Melania (PW1) testified that she saw the child at the funeral for the first time and she does not know who brought her, Getrude (PW3) said her husband had introduced the child to her. Their relationship went through a turmoil due to this event but it returned to normal after the deceased confirmed that he no longer had conjugal relationship with the

caveator. However, they have never met each other before. Edmund Laurent Tumaini (PW3) is a brother of the deceased. He is also the petitioner in this case. He testified that he does not recognize the caveator as a wife of the deceased and they had never met before. However, on cross examination he admitted to have met her in court in Mwanza where she appeared to object his petition for letters of administration which was dismissed for want of jurisdiction.

In her evidence, Rosemary Florian Kimario (the caveator) who testified as DW1 said that she cohabited with the deceased from 2016 to his death. They rented a house at Ubungo Kibangu, he paid rent and provided all family domestic needs like food and he visited at least twice per week. She tendered a lease agreement for their residence as exhibit D1. The landlord, Erasto Msaki (DW2) acknowledged the lease and added that he knew the deceased and the caveator as husband and wife due to the type of life they lived even though the deceased was not staying permanently. The caveator admitted that the deceased had neither paid the bride wealth nor introduced her as wife to his parents and relatives. That upon death, she attended the funeral at the first wife's residence and in Mwanza together with the child. Thereat, she further testified, she did not attend the family meeting because the petitioner said it did not matter.

The foregoing, is the material evidence on record. From this evidence it is apparently clear that the caveator's claim of existence of marriage between her and the deceased is based on the presumption of marriage under section 160 of the Law of Marriage Act [Cap 29 R.E 2019] (the LMA). That section reads:

'When it is proved that a man and woman have lived together for two years or more, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were dully married'.

Therefore, I ought to determine if their relationship amounted to that status. The wife of the deceased (PW3) testified that despite solemnizing customary marriage with the deceased, he could not have married another woman because their agreement before marriage was that theirs was monogamous marriage. This evidence is uncontroverted. While there is a general presumption that customary marriages are polygamous, that presumption is, however, rebuttable if there exists an agreement to the contrary. I tend to believe PW3 that their marriage was monogamous because the deceased avoided to make public his relationship with the caveator. It might be for the same reason he failed to officialize the marriage from 2016 up to 2022 when he died nor introduced the caveator to his wife or his parents.

It is a settled principle of contract that men ought to honour their contractual obligations. This is the holding in **Lulu Victor Kayombo V. Oceanic Bay Limited & Another**, Consolidated Civil Appeal No. 22 and 115 of 2022, Court of Appeal - Mtwara (unreported). In that regard, a man who solemnize a customary marriage on condition that the same is monogamous must observe the terms of that contract. In case of breach the subsequent marriage is void ab initio. His conjugal relationship with another woman shall be nothing than concubinage and adultery.

The caveator testified that the deceased was recognized by her family as her husband and he participated in all family joy and sorrow events. She is supported by her sister Sophia Floriana Kimario (DW3). Despite admitting that the deceased had not introduced himself to their parents as husband of the caveator, she testified that she knew him as a brother in law married to the caveator. Her knowledge is from the fact that when the caveator gave birth to the child, she nursed her and for the whole period she stayed with the caveator, the deceased was there to support her. The fact that the deceased visited the caveator regularly and rented a house for their residence is supported by Erasto Msaki (PW3) who is the landlord.

While the deceased's wife (PW3) testified that the deceased stayed with her always and at no time deserted her on one hand, I have no reasons to doubt the caveator's evidence that he visited her at least twice a week and sometimes slept over on the other hand. I take this fact as proved. Such a relationship in the eye of a reasonable man paints the presumption of marriage picture.

However, in my view, such a presumption is protected by law when it involves an unmarried man. The word "man" in section 160 of the LMA does not include a married man as, in my view, that provision was not intended to protect concubinage. The rule of the thumb is, when a woman, consciously or unconsciously, engages in sexual relationship with a married man in a manner that amount to a presumption of marriage, that relationship is not protected by the law. As her act interferes with the family life of another woman, that is concubinage until when it is officiated. This is what the relationship between the caveator and the deceased was, concubinage.

In view of the foregoing, the above issue is answered in the negative. Consequently, I dismiss the caveat without costs. I proceed to appoint the petitioner as administrator of the deceased's estate.



Mugeta
I.C. MUGETA

JUDGE

05/10/2022

Court: - Judgement delivered in chambers in the presence of Method Nestory, advocate for the petitioner who is absent and the caveator in person.

Sgd: I.C. MUGETA

JUDGE

05/10/2022