



**In re Joseph Abok Kibuye Wadawi (Deceased) (Succession Cause 1685 of 2016)
[2024] KEHC 10378 (KLR) (Family) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1685 OF 2016
SN RIECHI, J
AUGUST 23, 2024**

BETWEEN

NELLY AWINO WADAWI 1ST PETITIONER

ALEX ADHIAMBO AWITI 2ND PETITIONER

AND

JANET CHEPNGENO KIMETO OBJECTOR

JUDGMENT

1. The deceased Joseph Abok Kibuye Wandwi in respect of whom the proceeding relates died on 8th June, 2016 at MP Shah Hospital Nairobi at the age of 48 years. By the Chief Kilimani Location, Nairobi's letter dated 13th June, 2016 the deceased was survived by: Nelly A Wadawi – Wife Carey K Wadawi – Son Cindy N Wadawi – Daughter
2. Nelly Awino Wadawi and Alex Odhiambo Awiti filed this petition for grant of letter of administration intestate on 5th October, 2016. On 20th February, 2017 a grant of letter of administration was issued to Nelly Awino Wadawi and Alex Odhiambo Owiti and rectified on 6th January, 2019 and issued to Nelly Awino and Carley Wadawi.
3. On 23rd May, 2017, the administrators filed for summons for confirmation. On 24th January, 2018 the grant was confirmed and later rectified on 29th April, 2019 and further rectified on 6th September, 2019 and further rectified on 28th July, 2021.
4. Janet Chepngeno Kimeto the objector, filed this summons for revocation of grant dated 20th February, 2020 seeking the following orders: -
 1. Spent



2. Pending the hearing and determination of this Summons, the Petitioners/Respondent are restrained from transferring, or making any further transfers, charging, alienating and or in any other way dealing with the assets listed in the Certificate of Confirmation of Grant dated 24/1/2018, rectified on 29/4/2019 and further rectified on 6/9/2019.
3. Respondents do render a true and detailed account of the estate of the deceased between the date of death of the deceased (8th June 2016) to date for purposes of determination of the total assets and redistribution to all the beneficiaries.
4. The Grant of Letters of Administration issued to the Administrators, Nelly Awino Wadawi and Alex Odhiambo Awiti and confirmed on 24th January 2018 is revoked and a fresh Grant of Letters of Administration of the estate of the late Joseph Abok Kibuye Wadawi is issued to in favour of the both the 1st Petitioner Nelly Awino Wadawi and the Objector/Applicant, Janet Chepngeno KIMETO being the widows of the deceased.

Alternatively, an be and is hereby made recognizing the Objector/Applicant Janet Chepngeno Kimeto, Ronnie Kibet Kibuye (a minor) and Rennie Chiwo Kibuye (a minor) as dependents of the deceased, Joseph Abok Kibuye Wadawi and hence entitled to a portion of the estate of the deceased.
5. Such other of further orders as the Court shall deem just and expedient.
6. The estate of the deceased to settle the costs of this application.
5. The application is supported by the affidavit of the objector sworn on 20th July, 2020. The applicant deponed that she is a widow of the deceased alongside Nelly Awino Wadawi who was the 1st wife of the deceased. She further deponed that the deceased was survived by herself and Ronnie Kibet Kibuye and Rennie Chiwo Kibuye whom he had adopted as his children during his lifetime. She deponed that the petitioner did not include them as dependants thereby concealing material facts. She, therefore prays that the grant be revoked.
6. Nelly Awino Wadawi the administrator opposed the summons and filed a replying affidavit stating that she was married to deceased under the African Christian marriage and Divorce Act and issued with a marriage certificate. The marriage was subsisting until his death. That the children Ronnie Kibet and Rennie Chiwo were not dependants of deceased at time of death.
7. The application was condensed by way of vivo voce evidence. Both parties agreed that the issue for determination by this court in this application are:
 - i. Whether Janet Chepngeno Kimeto is a wife of the deceased.
 - ii. Whether the child Ronnie Chiwo Kibuye is a child of the deceased and therefore a dependant.
8. OWI Janet Chepngeno Kimeto adopted her witness statement dated 20th July, 2022 as her evidence in Chief. She testified that she married the deceased under Kipsigis Customary law. She met the deceased when she was a student at Kenyatta University. He had told her that he was already married to Nelly under a Christian Marriage. When Nelly leant of the affair and deceased intended to marry her, Nelly wrote a letter to the objector's father Nathaniel Kiptanui Kimeto informing him that deceased was married to Nelly and had no capacity to marry her. At time of marriage she had Ronnie Kibet her biological child and she later adopted Rennie Chiwo. None of the two children are biological children of the deceased.



9. OW 2 Martina Akello Odera the Aunt of the deceased and sister of the deceased's mother testified that she knows Nelly as 1st wife of deceased and the objector as a 2nd wife. She adopted her witness statement dated 20th July, 2022. She confirmed that she knew Nelly had a church wedding with deceased but attended a traditional wedding in Kisumu.
10. On cross-examination by Mr. Masongo she stated she cannot remember the date as she was not there nor was she a witness to the wedding. The deceased had built a house for nelly but had not built for Janet but Janet's house was built during the funeral by the community. The deceased had introduced Janet to her as a second wife.
11. OW 3 Owiti Kibuye the Step-brother of the deceased adopted his witness statement dated 22nd July, 2022 as evidence in chief. He testified that the objector Janet married the deceased under traditional marriage. He stated that he was present when dowry was paid. He testified that he visited Janet's parents' home during a fundraising for her brother in which they gave their contribution.
12. OW 4 Freda Atieno Kibuye the sister of the deceased adopted her statement dated 22nd July, 2022 as her evidence in chief. She testified that she knows Janet the objector as the deceased's 2nd wife. She testified that she attended the church wedding for Nelly. She confirmed they were to go to Janet's home but it did not materialize. The deceased however told her that even if he dies his two wives have been provided for. He had, however, not built a house for Janet before he died.
13. Nelly Awino Wadawi the petitioner testified that the deceased was her husband as they had a church wedding on 31st December, 1994. She produced the Certificate of Marriage. They have two children Carey J Wadawi and Cindy Wadawi. She adopted her witness statement dated 16th December, 2022 as her evidence in chief.
14. Mr. Osungo for the Objector submitted that though the deceased was married to Nelly under the African Christian marriage act, he still had capacity to marry the objector. He submitted that Section 3(5) of the *Succession Act* envisages circumstances where the further marriage is recognized. Counsel further submitted that in any event the objector would be declared a wife under the doctrine of presumption of marriage due o the long cohabitation between the deceased and the objector. He referred this court to several authorities on the issue including *Mary Wanjiru Githata Vs Esther Wanjiru Kiarie* (2010) I KLR 159, *MNM Vs DMIC & 12 Others* (2017) eKLR and *Njoki Vs Mutheru* 2008(IKLR) 288.
15. On the issue whether the children of the objector Ronnie Kibet Kibuye and Rennie Chiwo Kibuye were children of the deceased, counsel submitted that Section 3(2) and 3 of the *law of Succession acts* defines a child and that they are dependants.
16. Mr. Musogo for Nelly Awino and the administrator submitted that the burden of proof that the objector was married to the deceased was on the objector. He submitted that the objector has not tendered proof of a customary marriage, there was no evidence of contracting a Kipsigis Customary marriage. Counsel submitted that no evidenced of dowry payment or negotiations, none of the witnesses who testified for the objector was present in ay negotiation and therefore, there was n proof of marriage either under Kipsigis or Luo Customary Law.
17. On whether the court can presume a marriage, cause counsel submitted that the relationship does not meet the criteria set out by Supreme Court in *MNK Vs POM Initiative for Strategic Litigation in Africa (Amicus Curiae)* (2023) KESC 2 (KLR).



18. On whether the objector's children Rennie Kibet and Rennie Chimo were accepted by the deceased and whether deceased assumed permanent parental responsibility, counsel submitted that it is not in dispute that they were not biological children of deceased.
19. He submitted that Rennie Chebet Chiwo were adopted after the death of deceased though objector alleges that the process started earlier. In respect of Ronnie, counsel submits that it has not been shown that deceased had assumed permanent parental responsibility. He, therefore, urged the court to find that they were not dependants of the deceased.

Analysis and Determination

20. From the evidence and submissions, the issues for determination are
 - i. Whether the objector is a wife of the deceased.
 - ii. Whether the children Rennie Kibet and Runnie Chiwo are children of the deceased and therefore dependants.
 - iii. Whether the grant issued and confirmed should be revoked.
21. On whether the objector Janet was a wife of the deceased, the objector gave evidence that she and the deceased were married in December, 2012 under the Kipsigis Traditional Marriage. On the marriage she stated in her statement:
 - “9. That we started doing more things together like travelling up country. I introduced Joe to my parents and my brother the day he dropped me home as a close friend. I also met his sisters, brothers and sisters-in-laws in Nyabondo when I attended a burial of their cousin In 2012, he told me it a high time we make this relationship official by coming home to ask my parents my hand for marriage since he wanted to move out of his Nairobi home and get himself a small house away from Nelly. The date was scheduled to be in early December for the ceremony but it had to be postponed because Nelly sent my Dad a letter through G4S attaching a marriage certificate to stop him from giving his daughter to her husband. Joe upon learning about it he requested my Dad to postpone to a later date, in the same December and we just quietly call few people for the occasion. The date was fixed for 29th December, 2012 where Joe with his friends Ndinya and Aduma came to meet my parents and the few relatives invited. The Ceremony took place according to Kipsigis tradition and after the agreement 'Mursik' was shared which signifies agreement and Joe and his
22. The objector called Martha Akelo Odera (OW 2). Martha testified that the deceased introduced Janet to her as a wife. However, on the day they were to go to Janet's home to visit the parents she did not go. She, therefore did not witness a traditional wedding.
23. Peter Owiti Kibuye (OW 3) the step brother of the deceased stated that the objector was deceased's 2nd wife. He then referred to a conversation with Janet's Father where he confirms that dowry had been paid. He was neither present nor participated in the dowry negotiations and or payment. The only time he was present is when he attended a fundraising together with the deceased at the home of Janet's father in aid of a sick brother on which occasion they were given Murisk (Milk).



24. Freda Atieno Kibuye (OW 4) testified that she knows Janet as deceased's wife but did not go to her parents' home. She confirmed that Janet and deceased did not have any wedding but she confirms attending a wedding between the deceased and Nelly.
25. The objector, therefore, wants this court to find that she was married to the deceased under Kipsigis Customary Law. In *Hotenisa Wanjiru Yawe Vs Public Trustee* the court stated:
- i. The onus of proving a customary marriage is to the party who claims it.
 - ii. The standard of proof is the usual one for civil actions i.e. on balance of probability.
 - iii. Evidence as to the formality required for a customary law marriage must be proved to the above standard.
26. The objector in this case called witnesses who all stated they did not witness a traditional Kipsigis Customary marriage between the deceased and objector. No witness was called to show the formalities of a Kipsigis Customary Marriage. No witness was called to testify as to the whether the formalities were complied with. The payment of dowry which is a necessary element of a customary marriage was not shown to have been paid. No witness was called who participated in the negotiations. No one was called to confirm receipt of dowry. The only evidence is by Peter who stated that the father of Janet had confirmed receipt. This aspect of the evidence was so important that it cannot be left to the hearsay evidence of Peter.
27. As the objector did not call any expert on Kipsigis Customary Law to state the formalities of Kipsigis Customary Marriage or evidence that all the formalities were complied with or any person who was present during the payment of dowry or marriage on 29th December, 2022, this court finds she had not proved a customary Kipsigis marriage between her and deceased to the required standard. I, therefore, find that the deceased was not married to the objector under Kipsigis Customary Law.
28. Mr. Onsongo for the objector submitted that there were circumstances in this case that would invite the presumption of a marriage between the objector and the deceased:
29. The concept of presumption of marriage in our jurisdiction is no longer in doubt. In fact, that concept has a statutory underpinning and this was recognized by the Court of Appeal *Mary Wanjiru Githatu* where it was held that:

“There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on Section 119 of the *Evidence Act*, Cap 80, Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

30. In *MNM v. DNMK & 13 Others* (2017) eKLR, it was held:

The presumption of marriage has been recognised in our jurisdiction for a long time. In *MWG v. EWK* [2010] eKLR, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact.



31. That the said presumption is not dependent upon the existence of a marriage was affirmed in *MNM vs. DNMK & 13 Others* where the Court held that:

As we understand it and contrary to what some of the respondents submitted, the presumption of marriage is not dependent on the parties who seek to be presumed husband and wife having first performed marriage rites and ceremonies, otherwise there would be no need for the presumption because performance of rites and ceremonies would possibly result in a customary, Mohammedan or statutory marriage. In the *Hortensia Wanjiku Yawe v. Public Trustee* (supra), Wambuzi, J. noted that the presumption of marriage has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary and that the presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. He emphasized that it may even be shown that the parties were not married under any system.

32. This rationale, as Madan, JA articulated in *Njoki vs. Muthuru* [2008] 1 KLR (G&F) 288:

“...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 their union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman 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.'”

33. It settled that once it is proved that there was long cohabitation between the deceased and the person claiming to be the wife, it was further held in *MNM vs. DNMK & 13 Others* that:

The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (*Mbogoh v. Muthoni & Another*, supra). Mustapha, JA added in *Hortensia Wanjiku Yawe v. Public Trustee* (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption.

34. It would also fail the test set out by Bosire JA in *Mary Wanjiku Gitbatu v Esther Wanjiru Kiarie* [2010] eKLR, where he held the position that:

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except whereby reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry. A marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

35. The Supreme Court set out the parameters the court can apply to determine a presumption of marriage in *MNK V POM; Initiative for Strategic litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) that:

“The strict parameters within which a presumption of marriage could be made were:



- a. The parties must have lived together for a long period of time.
- b. The parties must have the legal right or capacity to marry.
- c. The parties must have intended to marry.
- d. There must be consent by both parties.
- e. The parties must have held themselves out to the outside world as being a married couple.
- f. The onus of proving the presumption was on the party who alleged it.
- g. The evidence to rebut the presumption had to be strong, distinct, satisfactory, and conclusive.
- h. The standard of proof was a balance of probabilities.”

36. The Respondent both in her evidence and submissions stated that she was married to the deceased under the *African Christian Marriage Act* (now repealed) and a Certificate issued. She produced the certificate as exhibit. Respondent submitted that their statutory marriage was monogamous, that the same had not been dissolved and therefore, deceased lacked capacity to contract another marriage, statutory or customary. The witnesses called by Janet confirmed that indeed deceased was married in church to Nelly and the marriage was subsisting. Indeed, even the objector confirmed that she was aware of the fact that deceased was married in church. Indeed, the objector confirmed that Nelly wrote to her father a letter attaching the marriage certificate, and asked him not to give his daughter to deceased in marriage. In fact, Nelly went to all length to inform objector of lack of capacity of deceased to marry her. The objector in paragraph 8 of her statement stated:

“That I remember it was a Saturday when Nelly furiously called me as to why I shared with Joe. I told her the truth that Joe was the last person I could lie to and the moment he started the topic I opened up. She abused me of being such and hypocrite and that I should leave her husband alone. I told her, Nelly for the all years have known your husband I don't even know the taste of his saliva and here you are accusing me yet he is at the palm of my hand. Now I will go ahead to prove to you and others the accusation. And that is the day when I began seeing him differently.”

37. There is, therefore, evidence that the deceased was married under statutes. The objector was made aware of this lack of capacity. She indeed, confirmed the same in court. Did the deceased have the 2nd parameter stated by the Supreme Court?
38. As such, considering the evidence and submissions on the issue of presumption of marriage, I find that the deceased lacked capacity to contract a marriage, statutory customary or under the doctrine of Presumption of Marriage as long as the marriage with Nelly had not been dissolved.
39. On whether Ronnie Kibet Kibuye and Rennie Chiwo Kibuye were children of the deceased and therefore, dependants. Mr. Osongo relied on Section 3(2) and (3) of the *Law of Succession Act* on definition of a child.
40. In respect of Rennie Chiwo Kibuye the objector testified that she was adopted through a court process and produced the adoption order as exhibit. In the Adoption order, the name of the applicant is Janet Chepngeno Kimeto as is the one who was authorized to adopt the baby. This was in Respect of Kisumu High Court, Adoption Case No. 3 of 2016. The adoption order was issued on 27th February, 2017.



It is clear from the order, that it was by a single application. The deceased died on 8th June, 2016, the application for adoption was filed in 2016. The objector testified that there was delay in processing the adoption though they stayed with the child. From the records, therefore, it is clear that the child was formally adopted by the objector as a single applicant and order granted when deceased had already died. From this evidence, the date when the child became a child of the objector by virtue of this Adoption is on 27th February, 2017. Before then, she was not a child of the objector. I, therefore, find that Rennie Chiwo Kibuye was not a child of the deceased.

41. In respect of Ronnie Kibet, the objector informed this court that deceased was not the biological father. She however, stated that he should be declared a dependant. Under Section 29 of the [Law of Succession Act](#). Section 29 of the [Law of Succession Act](#) provides: -
42. Under Section 29 of the [Law of Succession Act](#), a child can be a dependant of the deceased by
 - i. Being a biological child of the deceased
 - ii. Not being a biological child of the deceased, the deceased had accepted him during his life time as his child and
 - iii. Assumed permanent parental responsibility of the child.
43. It is admitted by the objector that Ronnie Kibet is not a biological child of deceased and therefore, cannot be a dependant under (1) above. There, therefore, has to be evidence that the deceased accepted him and assumed permanent parental responsibility.
44. The evidence tendered by the objection to prove that the deceased had assumed permanent parental responsibility of Ronnie Kibet is a school admission form for Ronnie Kibet is a school admission form for Moi Primary School, Kabarak dated 7th January, 2013. In the form the particulars of the parents/guardian the father is indicated as Joy Waigwi Kibuye and the mother as Janet C Kimeto. There is also a letter dated 14th February, 2020 by the Head Teacher stating that the deceased was responsible of the child's fees.
45. The objector in evidence testified that she is the one who filled the information on the admission form. She confirmed the deceased was not present and therefore is not the one who filled the information. This was the only evidence adduced in support of the contention.
46. Assumption of parental responsibility on a permanent basis should be proved by evidence, it is evidence that the deceased though the child was not his biological child, but responsibility as a parent. This can be demonstrated by information in documents filed by the deceased. These would include statutory documents filled where the child is declared so. Such documents would include NHIF, Policy Documents, School and Educational documents or evidence of him taking responsibility as a parent.
47. It is admitted that the school admission documents relied on was not filled by the deceased but by the objector. It cannot without other documents show that the deceased assumed permanent parental responsibility of Ronnie. I, therefore find that Ronnie was not a dependant of the deceased.
48. After considering all the evidence and submissions. I find that the objector Jaent Chepngeno Kimeto was not a wife of the deceased Joseph Abok Kibuye. I also find that Ronnie Kibet and Rennie Chiwo were not dependents of the deceased under Section 29 of the [Law of Succession Act](#).
49. That being the case, I find no merit in this application for revocation which is hereby dismissed.
50. Each party to bear her own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF AUGUST, 2024.

S N RIECHI

JUDGE

