



REPUBLIC OF KENYA



**In re Estate of Rodah Mumo Muema (Probate & Administration
25 of 2018) [2024] KEHC 17189 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
PROBATE & ADMINISTRATION 25 OF 2018**

TM MATHEKA, J

AUGUST 20, 2024

JUDGMENT

1. Rhoda/Roda Mumo Muema died on 8/6/2018 at Bishop Kioko Hospital. Her death triggered a burial dispute between the objector who said he was her husband by customary law, and the petitioners; her mother and elder sister who said that he was simply a boyfriend; and if he was a husband, that the deceased had, before she died - instructed that the customary goat (mbui ya ulee) that symbolizes divorce among the Akamba be delivered to his home.
2. The burial dispute culminated in the suit Machakos CMCC No. 368/2018 wherein, the learned magistrate found that there was a sustaining customary marriage between the deceased and the objector and that he had the priority to bury his wife - and released the body to him for burial vide judgment delivered on 23/8/2018.
3. On 25/10/2019, the petitioners filed this cause as sister and mother of the deceased. They presented a letter from the chief Wote Location dated 5/9/2018 to the effect that Rodah Mumo Muema was a single mother of the sole survivor - Shadrack Muema Mumo aged 14 years then at that time.
4. They also set out in form P & A 5 the assets of the estate which included a 13.8 Acres from Makueni/Kikumini/265 a share from the Estate of one James Kisyula Kauta alias Kisyula Kauta (deceased) in Machakos High Court Succession Cause 522/10 (certificate of confirmation of grant made on 23/10/2015.)
5. Grant of letters of Administration Intestate was made on 6/9/2019 to Josephine Munyiva Kasyeki and Luis Kavindu Muema.
6. On 7/1/2020 the objector filed summons for revocation of the grant on the ground that it was obtained fraudulently by making of a false statement, misrepresentation of concealment of material facts and in that through Machakos CMCC 365/2018 his status as the lawful husband of deceased was confirmed; that the chief's letter saying that deceased was unmarried was an illegality.
7. There was a response vide the replying affidavit of Josephine Munyiva Kasyeki filed on 16/2/2021 to the effect that they had come to this court seeking to secure the interest of the sole surviving child of the



- deceased. She deponed that at the material time the child was 16 years old, in class 8 at Tala Township Primary School, and was living with her; that the objector/applicant was not the biological father of the child and upon the demise of his mother, the objector had not bothered with the child hence their move to secure his interests. She annexed a certificate of birth showing that the objector was not the child's father.
8. The objector filed a further affidavit on 30/8/2021 where he confirmed that deceased had three children - two of whom were deceased leaving Shadrack Muema. He annexed another certificate of birth with an entry showing himself to be the father of the child.
 9. That the 1st petitioner/respondent had transferred the child to an unknown school from ACK Boarding School without his knowledge after the demise of the child's mother, and that he had been denied access to the child/any communication with the child.
 10. That he was married to the deceased in 2007, that they established a home at Westland in Wote which home became inaccessible due to the frustration of the 1st petitioner/respondent.
 11. That at the same time the child was born in Kikumini, that the letter from the chief Wote location was an illegality because the letter from the chief Kikumini which indicated that he and the deceased's son were the only beneficiaries of her estate was the correct one.
 12. The objection was heard by way of oral evidence. The matter was part heard by the Hon Dulu J, who heard three of the objectors 4 witnesses and I heard one witness for the objector and the petitioners and their witnesses. Thereafter, parties filed written submissions.
 13. The only issue for determination is whether the grant herein is up for revocation on the grounds set out by the objector – fraud and concealment of material facts.
 14. Section 76 of the *Law of Succession Act* sets out the grounds upon which a grant ought to be revoked. It is submitted for objector that he was recognized as the husband of the deceased in Machakos CMCC 368/2018 a judgment which the petitioners never appealed against; that he has never refused to take care of his children and that the grant be revoked and issued in his name. He relies on Estate of L.A.K(deceased) [2014] eKLR on the application of Section 76 of the Laws of Succession Act and Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succ Cause 158/2000 - on the fact that revocation of grant is a discretion power to be exercised judiciously.
 15. For the 1st & 2nd Petitioners it is submitted that the deceased had instructed her relatives to deliver the goat signifying her divorce from the objector because she could not do it personally due to illness and that if indeed Akamba customary law did not allow for the alternative where a person out of disability could not deliver the goat personally, and that any other form of delivery was unacceptable that position would be contrary to Article 45(2) of *the Constitution* and going by Article 2(5) of *the Constitution*. That to that end that that custom is contra *the Constitution* and calls for its invalidation.
 16. It was also submitted that the letter from the chief that the deceased was single mother, survived by her son Shadrack Muema who was left in the guardianship of the petitioners, was the true position. The petitioners also relied on Albert Imbuga Kigwa.
 17. The matter presents a peculiar set of facts.
 18. The deceased was married to someone else, with whom she had children - and only one survived - Shadrack Muema.



19. Her marriage to the objector was denied by the family of the deceased. There is evidence that a goat - Mbui ya ulee was delivered by a relative to the home of the objector albeit in her life time , while she was ailing.
20. Upon her demise her son was taken up by her maternal aunt the 1st petitioner - and the objector never followed up on child.
21. I have to spend sometime on this issue - because it is at the center of the petitioner's petition - that the reasons they filed this cause was to take care of the interest of their sisters and daughter's son respectively. The objector presented himself as the father of the Shadrack during the burial dispute, and even presented certificates of birth bearing his name as the father. He presented other documents where he had indicated that the deceased was his wife and her children , his children . But it was evident during the hearing of the protest that after he got to bury Rhoda's body, he never fought for Rhodah's child Shadrack. He never fought for his custody, or maintenance, never did anything at all for the child as would be expected with the same vigour he fought for the body of Rodah. Why?
22. If, as he stated in burial dispute, he had taken over Rodah's children to be his, why is it that there is not a single demand letter, or summon to the chief, or the children's office, or report to the police or anything at all to demonstrate that after the demise of Rodah, and her burial he still valued her child?. To that end and to the fact that one year after the burial he had not followed up on the child , and to date - 6 years after her demise - he has not taken any responsibility over the child, the petitioners cannot be faulted for filing this cause and stating that the said shadrack was the sole beneficiary of his mother's estate. The picture drawn by the objector's failure is that he had no interest in Rodah's child and may have fought for her body on the belief that Kenyans hold albeit mistakenly, when you bury the body the deceased's property is yours. That the child is now an adult having been born on 3/12/2004.
23. The other peculiar factor is that the dispute as to whether the deceased was married to the respondent – despite the findings of the subordinate court – has arisen in this cause.
24. It is true that the petitioners did not appeal against the finding that the deceased was married to the objector, hence the release of the body to him.
25. The petitioner's contend before this court that it is not denied in the proceedings before me that a goat - Mbui ya ulee was taken to the home of the objector by a member of the family - The objector did state -

“ A goat was brought but not by the deceased - she was very sick.”
26. The 1st petitioner/respondent testified that to her knowledge the deceased was not married to the objector - but during her sickness she told them to take a goat - Mbui ya ulee to the home of the objector and they took the goat.
27. Evidently the deceased was aware of her relationship with objector. She gave instruction that Mbui ya Ulee be taken to the objector. The goat was taken there – hence there is no question about it that - Mbui ya ulee was delivered but not by the deceased herself.
28. It's submitted that the deceased expressed the intention not to remain married to the objector through that act and that intention ought to be respected because she had a constitutional right to do so – and by the Akamba customs denying her that right - simply because she could not herself deliver the goat personally - then it is inconsistent with *the Constitution*. Article 2(5) of *the Constitution* states; Any law including customary law that is inconsistent with this Constitution is void to the extent of that inconsistency and any act or omission of this Constitution is invalid.



29. It is my view the issue has been raised here as an issue of a custom that violates the deceased's right to choose her partner in marriage and whether or not denying her that right just because the custom says the goat must be delivered in person, is a violation of that right. It is my considered view that both parties need to address the court substantially on the same to enable the court make a proper determination. Right now other than counsel's submission there is no other submission. This being an Akamba customary law issue - the court will require substantive submissions on the issue and the the input of experts on Akamba Customary Law on the issue of Mbui ya ulee- on the significant if at , of who delivers it .
- It would not be proper for this court to proceed on the single submissions to declare that alleged requirement invalid.
30. Back to the grant. The objector is saying that because the court recognized him as the husband of the deceased , then he is entitled to the administration of the estate.
31. Section 66 of the Law of the *law of Succession Act* provides the court with a guide as to who ought to have priority in the administration of the estate of a deceased who died intestate:
- a. surviving spouse/spouses without the association of other beneficiaries
 - b. Other beneficiaries entitled on intestacy with priority according to their respective beneficial interest as per part V.
 - c. Public trustee
 - d. creditors
32. The law however recognizes that circumstances may arise where those persons with priority may not represent the best interests of all the beneficiaries of the estate. It states that that the court shall have a final discretion as to the person/persons to whom a grant of letters of administration shall be made – in the best interest of all those concerned.
33. The objector has told this court that he has another family with whom he lives. Evidently the deceased's son is not considered by himself as part of his family. I would be reluctant to put him in charge of the estate of the deceased because of these facts.
34. But more importantly the petitioners proceeded on the ground that their nephew was the sole survivor of his mother. The Chief Wote knew her as such and that how he presented her to this court. The petitioners knew of the existence of the objector but did not consider him a beneficiary of the deceased's estate. However, they did not present themselves as beneficiaries and hence there was no fraud. They ought to have let the court decide whether or not the objector was beneficially entitled to the estate especially after the decision of the subordinate court.
35. The purpose of this court is to distribute the estate of a deceased person and where the deceased died intestate to appoint the administrators and ensure they act in compliance with the law; they ought to identify the proper beneficiaries and their shares and distribute the estate accordingly. To achieve this court is required to have personal representatives of the estate.
36. In this case the deceased left a minor child who is now an adult. Her "estranged" husband is the step father of that child. He has no relationship with the said child. He has his own wife and children and grandchildren. There appears to be a dispute as to whether he bought the property or deceased bought the property issues for another court.



37. The petitioners brought this cause to secure the interests of the only child of the deceased and they have said so in their papers. They do not trust the objector, and he has not acted towards the boy in a manner to draw any trust towards him. In the circumstances - and in the exercise of the inherent powers of this court under Rule 73 of the P & A - to ensure the ends of justice :The grant made on to the petitioners be and is hereby revoked and a fresh grant to issue jointly to ;
1. The objector Sylvester Kilatya Nzinguli
 2. Shadrack Muema Mumo and
 3. The 1st petitioner/respondent: Josephine Munyiva Kasyeki
38. The administrators to; within 21 days of issuance of the grant file summons for confirmation of grant either jointly/individually.
39. Upon filing, if not filed jointly ; to serve upon the others within 7 days of filing.
40. Upon service; The administrator who is not satisfied with the proposed distribution to file and serve their affidavit of protest within 14 days of service.
41. Mention for compliance of the first step before Deputy Registrar on 10th September 2024
42. No orders as to costs.

DATED, SIGNED AND DELIVERED VIA CTS 20/8/ 2024

MUMBUA T MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-08-20 20:44:39

