



Ndurya & another (As personal representatives of the Estate Of Charles Ndurya Chimoni) v Kidai & another (Succession Cause 477 of 2011) [2024] KEHC 15346 (KLR) (12 August 2024) (Judgment)

Neutral citation: [2024] KEHC 15346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 477 OF 2011
G MUTAI, J
AUGUST 12, 2024**

IN THE MATTER OF THE ESTATE OF THE PRISCILLA KIDAI MWAMIDI (DECEASED)

BETWEEN

**RONALD WANGONI NDURYA 1ST APPLICANT
GIDEON CHIMONI NDURYA 2ND APPLICANT
AS PERSONAL REPRESENTATIVES OF THE ESTATE OF CHARLES NDURYA
CHIMONI**

AND

**BRAYSON MWAMIDI KIDAI 1ST RESPONDENT
CHRISPUS MWAKAMBA NYAMBU 2ND RESPONDENT**

JUDGMENT

1. The deceased herein died on 16th June 2011. She was survived by her siblings, namely, Preston Mwachoti Kidai, Chrispus Mwakamba Nyambu (Deceased), Sophie Waleghwa Mkala (Deceased), Catherine Mghoi Kidai (Deceased), Gertrude Malemba Kidai (Deceased) and Bryson Mwamidi Kidai. She also left a piece of land, Title Number Mgumo/Patsa/Mazeras/191, and money in an account with the Kenya Commercial Bank.
2. Grant of letters of administration was issued on 18th May 2012 and confirmed on 14th December 2012. According to the certificate of confirmation of grant, the estate was to be distributed equally to all the beneficiaries.
3. The original applicant (Charles Ndurya Chimoni) filed a Summons for Revocation of the Grant dated 18th March 2015 on the grounds that the administrators used fraud and deceit to obtain the same. He averred that he was married to the deceased herein and lived together for over eighteen years. The



same was opposed by the Respondents via a Replying Affidavit sworn by the 1st Respondent on 28th September 2015.

4. In the Replying Affidavit, the 1st Respondent stated that the Applicant (the deceased) had not provided enough evidence to warrant the orders sought. He termed the application as bad in law and an abuse of the court process. Further, he alleged that the deceased Applicant was guilty of laches as the estate had already been distributed and that nothing was left for distribution.
5. He further stated that Priscilla Kidai was not married to the original applicant and was unaware of any dowry negotiations or dowry payments. He deposed that the original Applicant was not present when the deceased was ill and that he assumed occupation of her house while she was away in the hospital. It was his evidence that the original Applicant was a tenant of the deceased. He thus urged the court to dismiss the application.
6. The matter proceeded via viva voce evidence, with the deceased Applicant testifying on 4th October 2016. However, during the pendency of the proceedings and before any other witness could testify, the Applicant died in June 2018. He was then substituted by his two children, Ronald Wangani Ndurya and Gideon Chimoni Ndurya, via a ruling of this court delivered on 22nd April 2022 by Onyiego, J.
7. The hearing of this matter resumed on 26th October 2022, with the Applicants testifying as witnesses numbers 2 and 3. I will set out the evidence of all the applicants' witnesses below.
8. As stated above, AW1, Charles Ndurya Chimoni (deceased), testified on 4th October 2016 before her ladyship, Mugure Thande, J. He stated that he met the deceased herein in 1972 at St. Luke's Hospital Kaloleni, became friends and made a promise to marry; however, in 1983, the deceased got married to Eli Mango while he got married to Agnes Nyaru, with whom they were blessed with seven children. In 1992, he married the deceased as a second wife as she had parted ways with her husband. On 9th February 1992, an agreement for customary marriage took place at the deceased's rental home in Port Reitz with Dalton Kidai (cousin to deceased), Preston Mwachoti (elder brother to deceased) and Lawrence Ndurya (his cousin), Anthony Chibare (his neighbour) and Joyce Deborah (his aunt) acting as witnesses to the negotiations. That their marriage was not blessed with children.
9. It was his evidence that the two purchased Plot No.191/Mugumo/Patsa Mazeras in Kilifi County, which was registered in the deceased's name as a gift, as other plots were in his name. He lived on the same plot with the deceased as husband and wife. He averred that he identified the plot, negotiated and signed the agreement and pledged his posho mill as security. The said property has a one-bedroom building and three commercial rooms.
10. He further stated that they used to stay with two children of Brayson Kidai, whom they enrolled at Mazeras Primary School, and that they used to attend each other's functions.
11. Further, the deceased became ill, resigned from her employment, and established the Upendo Clinic at Mazeras, which she was unable to operate due to ill health. Before her death, she went to live with her sister Sophie at KPA headquarters in Makupa, where she died. The in-laws hid the deceased's death from him and even buried the body without his knowledge. They then sued him before court over the house, accusing him of having been a tenant of the deceased. In cross-examination, he told the court that he did not have proof that the deceased was divorced from her husband and that they did not sign any dowry agreement.
12. The second witness for the Applicant was Chimoni Ndurya. He testified that the deceased was his stepmother and that when she fell sick, her people took care of her. He also stated that the deceased and his father, Charles Ndurya Chimoni (Deceased), built the house in question together.



13. AW3 was Wangoni Ndurya, a son of Charles. He testified that his father had two wives, Agnes, his mother and Priscilla, his stepmother. It was his evidence that his stepmother took care of him when he was in class three.
14. Leonard further testified that he did not witness any dowry payment between his father and the deceased or the purchase of the suit property. He conceded that the deceased died while staying with her sister Sophie at Makupa in Mombasa.
15. AW4 was Joyce Maseka. Ms Maseka is a retired teacher. She testified that the deceased herein was a wife to the late Charles Ndurya and that she got to know them when they started staying together and witnessed their dowry payment. It was her oral evidence that Charles paid Kes.6,000/- as bride price.
16. AW5 was Leonard Kai Mali. Mr Mali works for the Ministry of Education in its Quality Assurance Department. He testified that the deceased and Charles had two pupils, Herman Kidai and Priscillah Mkamba, at Mazeras Primary School, where he was the head teacher. Herman was later transferred.
17. It was his evidence that the deceased and Charles were husband and wife, as he knew them very well. He further testified that Charles lived in a plot with three houses.
18. The witnesses of the Respondent testified on 13th July 2023
19. The first witness for the Respondents (who I shall refer to as “RW1”) was Brayson Mwamidi Kidai. Mr Brayson relied on his witness statement dated 7th July 2023 and affidavit by his co-respondent (now deceased) dated 28th September 2015. He testified that his son Herman Kidai used to visit the deceased herein. The letter from the chief dated 17th November 2011 indicated that the deceased was single with no children. The deceased’s husband died in 2009, and she did not have children. He further testified that he had never seen Mr. Ndurya or his children. The deceased was ill for a long time and stayed alone until it got worse when their sister took her to Makupa. It was his further evidence that the deceased had rental houses.
20. The Respondents did not call further witnesses and closed their case.
21. The court directed the parties to file written submissions.
22. The Objectors/Applicants did not file written submissions.
23. The respondents, through their advocates, Mwashushe & Company Advocates, filed their written submissions dated 17th November 2023. Counsel submitted on four issues, namely, whether the deceased Applicant was married to the late Priscilla Kidai Mwamidi, whether the deceased Applicant contributed to the acquisition of the estate property, whether the grant should be revoked, and who ought to bear the costs of the suit.
24. On the first issue, counsel submitted that the deceased Applicant tendered no evidence to prove the alleged customary marriage between him and the deceased herein. In his evidence in chief, he conceded that he was aware that the deceased was married under statutory law to Eli Mwailengo and thus did not have the capacity to enter into any other marriage. Counsel for the Respondents submitted that the deceased Applicant was a tenant to the deceased and not a husband.
25. On the second issue, counsel submitted that the deceased Applicant did not tender any evidence to prove his contribution to the acquisition and development of the properties owned by the deceased person whose estate is the subject of these proceedings.
26. Regarding the third issue, counsel for the Respondents relied on section 76 of the *Law of Succession Act* and submitted that no evidence was tendered to warrant the same and urged the court to find that



the deceased herein was survived by her siblings who are her lawful beneficiaries under Section 39 of the Law Succession Act and urged the court to dismiss the Summons for Revocation of Grant.

27. On the fourth issue, the counsel submitted that costs follow the event and urged the court to dismiss the application with costs to the Respondents.

28. Section 76 of the *Law of Succession Act* provides for grounds of revocation as follows: -

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. To proceed diligently with the administration of the estate; or
 - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. That the grant has become useless and inoperative through subsequent circumstances.

29. On the court’s power to revoke a grant the court in the case of *In Albert Imbuga Kisigwa v Recho Kawai Kisigwa* [2016] stated,

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

30. The deceased Applicant asserted that he was the husband of Priscilla Kidai Mwamidi (deceased). As the Applicant, he bore the burden of proof as his claim would fail if he failed to show that that was indeed the case.

31. Sections 107 and 109 of the *Evidence Act* provides as follows:-

Sections 107



- “1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 109:

“The burden of proof as to any particular fact lies on the 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.”

32. Since Priscilla Kidai Mwamidi was previously married the deceased Applicant had the burden of proof that Priscilla’s previous marriage had been dissolved and that a new marriage with him was subsequently contracted. No evidence of the termination of the previous marriage was produced. In the circumstances, I am unable to agree that Priscilla could have contracted another marriage to the deceased Applicant or that she had the capacity. Since Priscillah Kidai Mwamidi was married under statutory law to Eli Mwailengo, it would not have been possible for her to enter into a customary marriage to Charles Ndurya Chimoni.
33. No evidence was provided as to what customary law governed the marriage, considering that Priscillah and the late Charles came from different cultural backgrounds. In the circumstances, I find and hold that no customary marriage was proved.
34. I am guided by the decision of Thande, J in the In re Estate of Fares Michael Kuindwa (Deceased) [2019] KEHC 11254 (KLR) where she stated that:-
 - “23. A person who seeks to propound customary law must call evidence to prove that customary law. In Sakina Sote Kaityany & another v Mary Wamaitha [1995] eKLR, Gicheru, J.A. (as he then was had this to say concerning proof of customary law and practices:

...the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case. call evidence to prove that customary law, as would prove the relevant facts of his case.”
35. It is evident that before her death, Priscilla lived with her sister, Sophie. If they were indeed married, why would Priscilla have been cared for by Sophie rather than by the alleged husband? Why was he not present during the funeral?
36. I am persuaded, as was stated by the 2nd Respondent in his testimony that the deceased Applicant was a tenant in the premises of the deceased. Tenancy grants him no rights to the estate.
37. Regarding the alleged contribution, this court is of the view that no evidence was presented to show that this was indeed the case. In any case, the submissions in this respect are irrelevant. This is a Probate and Administration Court, not a court sitting to consider a matrimonial dispute.
38. In the circumstances, I find and hold that the summons dated 18th March 2015 has no merit.
39. As this is a succession matter, the parties will bear their own costs.
40. Orders accordingly.



DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF AUGUST 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Mwashushe, for the Petitioners/Respondents;

Mr Lijoodi for the Objectors/Applicants; and

Arthur – Court Assistant.

