



In re Estate of George Kamwanga (Deceased) (Succession Cause 23 of 2016) [2023] KEHC 19418 (KLR) (30 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 23 OF 2016**

**A MSHILA, J
JUNE 30, 2023**

BETWEEN

SARAH MBULA KIMULU APPLICANT

AND

PETER MUTISO DAVID RESPONDENT

RULING

1. Sarah Mbula Kimulu filed summons for revocation of grant dated May 28, 2013 and brought under sections 76 of the [Law of Succession Act](#) and rule 44 of the [Probate & Administration Rules](#) for orders;-
 - a. spent
 - b. That the grant of letters of administration issued to Peter Mutiso David the respondent herein on the November 13, 2012 in Thika succession cause No 294 of 2012 be revoked.
 - c. That this court be pleased to issue an order to restrain the bank manager, Eco Bank Kenya Limited, Muindi Mbingu Branch from dealing and or operating in any manner or releasing or paying out money in account No 0xxxx4 in the name of the deceased herein George Kamwanga Maingi alias George Kamwanga to the respondent or any other person or at all pending the hearing and determination of this application.
 - d. That this court do issue an injunction to restrain the administrator of the estate of the deceased, the respondent herein his agents, servants or by whomsoever from evicting, removing, interfering and or in any other manner, the applicant and her children from her matrimonial home situated at Matheini sub



location, Matungulu District, Machakos county pending the hearing and determination of this application and or further orders of the court.

2. The application is premised on the grounds that the grant of letters of administration issued to the respondent on November 13, 2012 was fraudulently obtained by concealing material facts from the court, as the applicant being the deceased's wife was left out and all the assets of the deceased were not disclosed. Further that the respondent has applied for release of monies and is denying the applicant access to her matrimonial home.

Applicants Affidavit Evidence

3. In her affidavit, Sarah Mbula Kimulu, stated that she is the wife to the deceased who died on December 14, 2012. That the grant of letters administration issued to the respondent on November 13, 2013 was obtained fraudulently as the respondent indicated that the deceased was not married leaving out the applicant and her daughter. That she was married to the deceased since 2009. She contended that the respondent colluded with the chief to write a false letter whereas she lived in the area with her children and the deceased. The respondent failed to inform her of the succession cause. That together with the deceased they bought the plot where they built their matrimonial home. She contended that the respondent had requested the bank to release money from the deceased's bank account before the grant is confirmed and this will cause financial suffering to the family. Further, she averred that she was facing eviction from her matrimonial home as such the court should issue an injunction. That the respondent had no authority to apply for the letters of administration. That the bank account was deliberately left out of the assets of the deceased for the respondent's use only.
4. Sarah Mbula Kimulu filed a further affidavit dated December 10, 2013. She reiterated that she cohabited with the deceased. That being a teacher she was mostly at home supervising construction when the deceased was away as a tour operator. She averred that she was traditionally married in May 2011. She vehemently denied the allegation that the deceased's family did not know her. She produced photographs to show that she participated in the burial. She averred that the respondent was not truthful when obtaining letters of administration.
5. Tabitha Kimulu the applicant's mother testified to the fact that her daughter was married to the deceased's through kamba customary law.
6. Joseph Mwololo Mutune stated in his witness statement that he was working as a houseboy for both the deceased and the applicant for more than seven years. That they were living peacefully until the deceased's demise when the respondent started being malicious towards the applicant by ordering that she should be locked outside the house which was strange to him as the deceased and the applicant used to live peacefully. He contended that the respondent wants to disinherit the applicant.

Respondents Affidavit Evidence

7. Peter Mutiso David filed his replying affidavit on October 22, 2013. He stated that he is the deceased's brother and the guardian to the deceased's two surviving children. He denied the claim that the deceased was married to the applicant and or lived together or had any children together. That no Kamba rites were carried out to recognize the applicant as a wife as such she is a stranger who has never been involved in the lives of the deceased's children. That she did not even participate in the deceased's burial. He denied instructing the bank to release funds and that the consent sought to petition for letter of administration were not a forgery and that all assets were listed as such no concealment of material facts was done.



8. Gedion Kimulu the applicant's father filed his witness statement where he stated that his daughter was married to the deceased through Kamba customary law and they have one issue. That the deceased in the company of other family members visited his home in Masii for introduction purposes and dowry was paid. That during the burial he spoke on behalf of the in laws.
9. The summons were canvassed by way of *viva voce* evidence as well as written submissions.

Applicants Case

10. PW1 Sarah Mbula the applicant herein adopted her witness statement and further affidavit as her evidence. She testified that the deceased was her husband. She contended that she used to visit the deceased's children at school as the deceased was away. That she contributed to the construction of their house by buying materials and paying the fundis. She stated that no dowry was paid but the deceased, his father and 2 neighbors visited their home but she was not present as she was at work. She testified that she took care of the deceased when he fell ill and that she was involved in the burial arrangements. She testified that she learnt of the letters of administration through his brother. That the respondent did not include the bank account and motor vehicle as part of deceased's assets.
11. Joseph Mwololo Mutune adopted his witness statement as his evidence. He testified that Sarah was his employer where she was residing with the deceased. His testimony was mainly based on the fact that Sarah was the deceased's wife and that the respondent wanted to disinherit her.

Applicants Submissions

12. The applicant submitted that she was the deceased's wife having been married through Kamba Customary Law and that they cohabited together from 2009 until the deceased passed on. That an introductory ceremony (Theo) was carried out. Reliance was placed in the case in re estate of *Njeru Njagi (deceased)* (2019) eKLR. In any case, the applicant cohabited with the deceased hence creating a presumption of marriage. Reliance was placed in the case of *SWG v HMK* (2015) eKLR. It was submitted that the deceased took care of the applicant's child as his own during his lifetime as such a dependant of the deceased. Reliance was placed in the case of in re estate of *JMM (deceased) (2020)* eKLR. The respondent was accused of concealing deceased's assets as well as deceased's beneficiaries in obtaining the grant of letters of administration. Reliance was placed in the case of *in re estate of Prisca Ong'ayo Nande (deceased)* (2020) eKLR. The respondent was said to have failed in the diligent administration of the deceased's estate as he had made attempts to obtain funds from the deceased's bank account. In conclusion, it was submitted that the respondent was intermeddling with the deceased's estate and the concealment of assets as well as beneficiaries rendering the grant issued ripe for revocation.

Respondents Case

13. DW1 Peter Mutiso David testified that the deceased was his brother and as a family they agreed to petition for the grant. That he knew the applicant as a friend to the deceased and not his wife. He denied knowledge of any marriage ceremony. He contended that he was very close to the deceased. He explained how Kamba Traditional ceremonies are carried out and the same did not take place between the deceased and the applicant. He contended that no dowry was paid. He further denied that the applicant was cohabiting with the deceased.
14. DW2 Benson Mutua Kamwanga testified that the deceased was his uncle who took care of him after his father's demise. That he knew the applicant as a friend to the deceased. He indicated that he was not aware of any marriage ceremony between the deceased and the applicant.



15. DW3 Margaret Nduku testified that she lived with the deceased since the demise of his father. That Sarah was a friend to the deceased and has never lived with them. She denied knowing any marriage between Sarah and the deceased.

Respondents Submissions

16. The respondent submitted that the applicant was never married to the deceased through any form and no evidence had been tendered to prove that the applicant cohabited with the deceased. Presence in a burial ceremony was said to be nothing but a formality. Similarly, it was submitted that the statements of a neighbour cannot be relied upon to establish whether a marriage existed. The respondent denied concealing any material facts to his benefit. The respondent submitted that to establish a presumption of marriage the applicant needs to establish the same by facts and evidence. Reliance was placed on among other cases the case of *Joseph Gitau Githongo v Victoria Mwihaki* (2014) eKLR. Lastly it was submitted that the deceased's intentions or the nature of the visits by the applicant to the deceased's home over the weekends cannot be construed as marriage as the same would disinherit legitimate heirs of the deceased's estate.
17. The respondent submitted that he did not collude with the sub-chief who acted in utmost good faith as he did not know any other wife to the deceased besides Esther Ndunge. The consent were said to have been obtained devoid of any forgery, coercion or undue influence. In any case there was ample time to file an objection if any party was aggrieved. He contended that he was working within the powers conferred by the grant in administering the estate when requested for release of monies in the bank strictly for the purpose of administration of the estate. In conclusion, it was submitted that the applicant has not met the threshold to prove that she was a wife to the deceased as such her application should be dismissed.

Issues For Determination

18. Having considered the application, the replying affidavit, witness statements and written submissions, the main issues framed for determination are;
- i. whether the applicant was a wife to the deceased and
 - ii. whether the grant should be revoked.

Analysis

Whether the applicant was a wife to the deceased

19. The deceased herein died on December 14, 2012 wherein the respondent who is the deceased's brother petitioned for a grant of letters of administration and the same were issued on November 13, 2013. Thereafter, the applicant who claims to be the deceased's wife learnt of the same and has approached this court for revocation of the grant of letters of administration which she claims was fraudulently obtained by concealing material facts from the court, as the applicant being the deceased's wife was left out and all the assets of the deceased were not disclosed.
20. The applicant avers that she was married to the deceased in the year 2009 where they cohabited with the deceased and her daughter until his demise. That the deceased's family visited her home in Kanyui for the introduction ceremony together with other family members and neighbours. That the deceased passed away before paying the dowry. She contended that she assisted the deceased to construct their matrimonial home by buying building materials and paying the fundis.



21. It was her testimony that the respondent after the deceased death started causing her untold suffering by locking her out of the matrimonial home. That he also took away the deceased's motor vehicle and was also instructing the bank to release funds from the deceased's bank account.
22. She presented various witnesses to support her claim that she was a wife to the deceased and that they lived together having gone through the Kamba customary rites.
23. The respondent on the other hand, denied the allegations that the applicant was a wife to the deceased. He contended that the applicant was a friend to the deceased and had never lived with the deceased but used to visit the deceased occasionally during the weekends. He stated that no dowry was paid by the deceased towards marrying the applicant. He further stated that the deceased did not have a child with the applicant as he is the one who was taking care of the deceased's children with the deceased first wife.
24. The *Law of Succession Act* provides for revocation or annulment of grants under section 76, which states 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) 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.”
25. The applicant is seeking revocation of the grant of administration issued to the respondent on November 13, 2012 on the grounds that the same was fraudulently obtained by concealing material facts from the court, as the applicant being deceased's wife was left out and the respondent failed to disclose all the assets of the deceased.
26. The first question that arises is whether the applicant should be considered as the deceased's wife.



27. In the case of *In Re Estate of Fredrick Clavence Kittany* [2002] eKLR Nambuye J. had this to say:-

“before a man or woman is to be presumed to have been married by virtue of long cohabitation and repute there has to be a declaratory order from a court of competent jurisdiction declaring. There is no such a declaratory order exhibited herein. It is the finding of this court that Sally Kittany is not a wife of the deceased and she does not come within the ambit of the provisions of the amendment in section 3(5) of the *Law of Succession Act* and so she will not inherit the estate of the deceased. She cannot also administer the same save for purposes of safeguarding the interests of her children if they are found to be eligible to inherit the estate of the deceased.”

28. In the case herein, the applicant has not proved her marriage by either a marriage certificate or long cohabitation. She stated that the deceased passed on before the payment of dowry though an introduction ceremony had been conducted. She indicated that she cohabited with the deceased where she assisted with the construction of the matrimonial home but no evidence was advanced towards the same. In any case, she testified that she used to visit the deceased over the weekends as she was working as a teacher.

29. In the upshot, there lacks a validly constituted customary marriage as well as long cohabitation so as to establish presumption of marriage. Further no declaration has been made for a marriage to be presumed to exist between the deceased and the applicant.

30. In the circumstances and from the evidence adduced this court finds that the applicant has failed to prove her case on a balance of probabilities that she was a wife of the deceased or a beneficiary of the deceased estate together with her child as no evidence was produced to demonstrate that the deceased was taking care of the child before his death.

Whether the grant should be revoked

31. This then means that the respondent was not obligated to notify the applicant when he proceeded to file the petition for letters of administration intestate as this court is satisfied that the applicant was not a beneficiary to the deceased's estate the court nor was she a wife to the deceased.

32. This court is thus satisfied that the application as filed does not meet the threshold of revocation of the grant as stipulated in law as the applicant has not demonstrated the manner in which the grant was obtained as being unlawful.

Findings & Determination

33. The upshot is that this court finds the application dated June 3, 2022, to be devoid of merit.

34. It is hereby dismissed with no orders as to costs.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 30TH DAY OF JUNE, 2023

HON. A. MSHILA

JUDGE

In the presence of:

Mrs. Keya – for the Objector



N/a – for the Respondent

