



**Kisine v Kisine (Succession Cause 91 of 2003)
[2023] KEHC 19519 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 91 OF 2003**

MW MUIGAI, J

JUNE 30, 2023

**IN THE MATTER OF THE ESTATE OF SAMSON KISINE
NTHIWASON (DECEASED)**

BETWEEN

CHARLES KIKUVI KISINE PETITIONER

AND

BEATRICE NDUNGE KISINE OBJECTOR

JUDGMENT

1. Vide a petition filed on April 2, 2003, in which the petitioners Ngundu Kisine and Charles Kikuvi Kisine petitioned this Court for grant of Letters of Administration intestate of the estate of SAMson Kisine Nthiwason (deceased) who died on March 7, 2001 as per death certificate and domiciled in Kenya.
2. Pursuant to the Affidavit in support of Petition for Letters of Administration Intestate, the deceased died intestate and left the following surviving him; -
 - a. Ngundu Kisine Widow
 - b. Charles Kikuvi Kisine Son
 - c. Peter Mumo Kisine Son
 - d. Felix Muia Kisine Son
 - e. Henry Kyalo Kisine Son
 - f. Joseph Itumo Kisine Son
 - g. Simon Muasa Kisine Son



- h. Margaret Nduume Kisine Daughter
3. The Affidavit in support of Petition for Letters of Administration Intestate mentioned properties left by the deceased at the date of his death as follows.
- a. Ndalani/ndalani/block1/275 3.24 Ha
 - b. Kangundo/isinga/352 0.09 Ha
 - c. Kangundo/isinga/279 0.46 Ha
 - d. Ndalani/mavoloni/block 1/928
 - e. Tala Market Plot No. 9
 - F. Tala Market Plot No. 240
 - G. Mavoloni Co. Ltd 1 Share
4. Vide the Assistant Chief's letter undated confirmed that Samson Kisine Nthiwason left heirs named in the affidavit in support of petition for letters of administration intestate.
5. Vide the Gazette notice dated May 16, 2003, Ngundu Kisine and Charles Kikui Kisine of P.O Box 1030 Kangundo in Kenya the deceased's widow and son was gazetted for grant of Letters of Administration intestate to the estate of Samson Kisine Nthiwason, late of Kangundo Location who died at St. Michael Centre on March 7, 2001.
7. *Vide* a notice of objection dated June 11, 2003, Beatrice Ndunge Kisine objected the making of a grant of representation to the estate of SAMSON Kisine Nthiwason (deceased) as sought in the Petition of Ngundu Kisine and Charles Kikui Kisine. She objected inter alia on grounds that: she is a lawful wife of the deceased having been married to the deceased as his 3rd and last wife under customary laws in January 1971 and all Kamba rites relating to customary marriages were wholly performed and had an issue one James Muinde Kisine born 1973, who has a wife and 2 children of his own; that the deceased was staying with the objector his 3rd wife at the home he established for her at Sengani Sub location; that at the time of Objector's marriage to the deceased.
8. The deceased was already married to the 1st Petitioner as the 2nd wife and Elizabeth Mulimi Kisine as 1st wife all co-existed peacefully; stating that petitioners deliberately concealed the fact that deceased was polygamous man; that application for grant of representation to the deceased estate was made secretly without family deliberations; that prior to the deceased death his farm lands and plots were distributed to each of the 3 wives who got a share deceased farm and plots. That the objector and the petitioner shared out Plot numbers 9 and 240 Tala market each getting ½ of each plot; that the deceased left the unshared properties which must be shared out equally amongst his 3 wives; she stated that any grant of letters of administration to the exclusion of the objector will spell doom to the objector and her household. Finally, grant if any should be issued to the joint names of the Petitioner and the Objector.
9. Pursuant to the Notice by Registry to Objector to application of grant dated November 17, 2004, 30 days were given to the objector within which to file an answer to the application for such grant together with petition and supporting affidavit by way of cross-application for grant of representation.
10. Vide Petition by way of cross application for grant, answer to Petition for Grant and Affidavit in Support of Petition by way of cross-application for grant both dated December 14, 2004.
11. In the said Petition by way of cross application for grant, the objector stated inter alia that she is the 3rd wife to the deceased married under Kamba Customary laws in 1971; that at the time the deceased had



- 1st and 2nd wife each having their separate homes; that she had son with the deceased now married with 2 children; that the petitioners failed to disclose that deceased was polygamous with 3 wives; stating that the deceased prior to his death he had distributed had distributed his assets amongst the households each having equal shares of the assets the 1st wife being satisfied hence her silence on the issue; stating that she was given plot number 9 and 240 Tala market in which she has ½ share on the two plots; that the Petitioners have not included her and her son in the petition as being entitled to assets namely plot No.9 and 240 Tala to which she is entitled to ½ share being given jointly by the deceased to her and the 1st Petitioner to share out equally which according to clan members confirmed the wishes of the deceased as to the distribution of the said plots.
12. As to the answer to Petition for a Grant, the Objector indicated that the application for grant made by the petitioners be dismissed for reasons that the applicants failed to disclose that the deceased had 3 wives each with children, herself having a son hence has an interest as a widow of the deceased to 1/3 share of the deceased's estate; that she intended to file contemporaneously within the filing of this answer a petition by way of cross application for grant of representation to the estate of the deceased to be made to her or jointly with the 1st Petitioner.
13. Vide the Affidavit in Support of Petition by way of cross-application for grant, Objector herein deposed inter alia that: the deceased died intestate living the following surviving him.
- a. Elizabeth Mulimi Kisine Deceased's 1st wife and her children
1. Mutwota Kisine son adult
 2. Emmy Kisine daughter adult married
 3. Muteti Kisine son adult
 4. Nthenge Kisine son
 5. Kinako Kisine daughter adult married
 6. Ngao Kisine son adult
 7. Nthambi Kisine Daughter adult married
 8. Muthike Kisine son Adult
 9. Ngina Kisine daughter adult married
- b. Ngondu Kisine Deceased's 2nd wife (petitioner and her children.
1. Peter Mumo Kisine son adult
 2. Charles Kikuvi Kisine son adult
 3. Felix Muai Kisine son adult
 4. Henry Kyalo Kisine son adult
 5. Joseph Itumo Kisine son adult
 6. Simon muasa Kisine son adult
 7. Margaret Nduume Kisine daughter married
14. Depositing that the 1st Petitioner as well as one Elizabeth Mulimi Kisine are both widows of the deceased with children as listed; that she married the deceased under Kamba customary law in 1971 all Kamba



customary rites having dully carried out and established her home with her husband at Sengani sub location with the 1st wife having her home at Kauthulini Village in Yatta Division, and the 2nd wife Ngondu's home is at Unyuani village Kangundo Location and each wife was staying in her home separately; that at the time of deceased death he was staying at her home and died on admission; deposing that all her co-wives and her husband's entire family and clan members know that she is lawful widow of the deceased and that he had 3 households.

15. That prior to the deceased's death he had personally distributed all his assets to each of his 3 wives each to retain the assets so given; further that she was given her shares of plot No. 9 at Tala Market which is developed and plot No. 240 Tala Market (Undeveloped) which plots she was given jointly with the 1st petitioner to share equally i.e. ½ share each; deposing that she is entitled to a ½ share of plots No. 9 and 240 Tala Market and ½ share of the proceeds; that there are other assets left undivided by the deceased to be shared amongst three widows namely:-
 - a. Share at the Kenya Commercial Bank Ltd and at deceased's death, they were 800, but they have since increased and each wife is entitled to 1/3 share of the same.
 - b. Peugeot 404 pickup Registration KPZ 754 each wife entitled to 1/3 share therein which the 1st Petitioner secretly and wrongfully sold without consulting her
 - c. Cash at Post Bank – Tala at the date of the deceased's death in region of Kshs 82,000/= to his credit and the 1st Petitioner who is in possession of the bank pass book has refused to inform her of the fate of money
 - d. A posho mill that the 1st Petitioner has secretly and illegally sold and has not accounted for the proceeds to her.
16. Finally, it was deposed that the Petition as filed be rejected and grant be taken or issued to her or to herself and the 1st Petitioner so as to secure her interest to the assets she has stated her interest in.
17. *Vide* a Notice of Preliminary Objection dated December 16, 2005, the Petitioners herein indicated that they will raise a preliminary objection on points of law and call for the Objector's Memorandum of Appearance, Notice of Objection, answer to Petition and petition by way of cross- Application for Grant to be struck off with costs on the grounds that: the purported Memorandum of Appearance is legally invalid and a nullity; the answer to Petition and Petition by way of cross-application for Grant are filed out of time and without leave of the court, the same are improperly before the court and therefore a nullity; that the notice objection dated 11/6/2003 was filed out of time and without leave of court hence incompetent and therefore a nullity.
18. Pursuant to affidavit in Reply to Cross Application for Grant dated 31st July, 2006 the second Petitioner deposed *inter alia* that the Objector has never been married to the deceased under any known system of law and cannot purport to object to the petition for grant of letters of Administration Intestate. Indeed the objector has no interest, legal or otherwise in the deceased estate; deposing that the best of his knowledge and believe the objector is validly married under statute to one Philip Mutune Kavita whom he has personally met and talked to after the institution of the objector's documents herein.
19. The said marriage has never been dissolved under any law relating to the dissolution of the marriage; that he will file in court lists of documents in support of the averments; it was his case that the deceased did not have a 3rd wife as alluded by the Objector; it was deposed that the Objector is a stranger to



- himself and the rest of the deceased family and has never lived in the deceased home; that the Objector's objection should be dismissed with cost.
20. *Vide* the 2nd Petitioner's List of Documents dated August 10, 2006 a certified copy of an entry of marriage (17/12/1960) between Philip Mutune Kavita and Beatrice Ndunge Kiilu was issued by the registrar of marriages on 7/8/2006.
 21. Pursuant to Objector's Supplementary Affidavit dated September 5, 2006, the Objector in reply to the 2nd Petitioner's affidavit in reply to cross application for grant dated 31/7/2006 and the list of documents dated 10/8/2006 deposed that she is deceased's lawful 3rd wife under customary law and the 2nd petitioner has no lawful basis to dispute that fact which members of the deceased family is fully aware; it was the case of the objector that she stayed with her husband had established their matrimonial home at Sengani and that she fully participated in the funeral of the deceased; that she had sworn an affidavit of marriage with the deceased dated 30/1/1989 (copy attached B N K A (1) and (2);
 22. That the 2nd petitioner is not competent to dispute her marriage to his father and has no right in customary law to involve himself in such issue-it is his mother the 1st petitioner and the 1st wife Mulimi Kisine who are competent to do so; it was desposed that in her pleading in Kangundo Srmcc Miscellaneous Civil Suit No.1 of 2001 the said 1st wife dully admitted her marriage to the deceased (copy of the pleadings marked 'BNK B'); that the funeral programme confirms that the deceased was survived by 3 wives and 12 sons and 6 daughters: that the herself together with the 1st and 2nd Petitioner participated in family clan meeting after deceased death at which they agreed on the distribution of the deceased properties (copy of clan records annexed and marked BNK 'D'); that the 1st petitioner had confirmed in her pleadings in Srmcc No. 1 of 2001 that she is the 1st petitioner's co-wife under oath.
 23. The Objector further in her List of Documents dated May 9, 2007 listed among others: copy of funeral programme for the deceased burial, copy of decree absolute (Divorce) in Machakos Resident Magistrates Divorce Cause No. 1 of 1978, copy of clan meetings held on diverse dates, copy of the 1st petitioner's plaint and affidavit forming part of the court documents filed in Kangundo Resident Magistrates Court civil Suit No. 1 of 2001 on marital status of both 1st petitioner and objector and copy of affidavit by the deceased sworn on 30/1/1989.
 24. Objector yet again filed her Supplementary lists of documents dated 18th February,2009, in which she listed and annexed: copy of clan records of 4/8/ 2001 and translation; copy of letter from AmuteI clan dated 15/9/09; copy of letter from chief, Tala location dated 27/1/09; copy of the deceased's death certificate issued on 22/6/2001; copy of birth certificate for deceased's son James Muinde Kisine; three photos copies taken during the deceased's burial and one photo of deceased with the objector and son.
 25. *Vide* an order issued by this Honorable Court on February 24, 2009, the said order directed that the Objector be stood down for further hearing on 4/5/2009 and the Kangundo court file SRMCC No 1 of 2001-Ngondou Kisine v Beatrice Kisine and 2 others be produced to this court forthwith before the hearing date.
 26. *Vide* a court order dated May 24, 2017, the order was to the effect that court proceedings be typed supplied to the parties perusal. Which proceedings are on the court record.

Hearing

27. The Objector, Beatrice Ndunge Kisine testified on 24/2/2009, that the deceased was her husband and she was the 3rd wife and lived with the deceased at Kyakutulu village, 1st wife was Elizabeth Mulimi Kisin and she lived in Kathuleni village Kithimani Yatta District and 2nd wife lived at Unyuani Village, Ndundune, Kangundo.



28. The deceased bought land and built her home Title No 977 with title in her name. The deceased and OW1 met in 1971 while she taught at Kathekakai Primary School and was in the Armed forces as Captain and Director of music. In 1973 their relationship was public and she was pregnant with child a son, James Muinde Kisine born in 1973. They went to her home to acknowledge that he was father to her son, and they found her mother, Naomi Kiilu as her father died but there were uncles Joel Mutiso, Kitavi and sibling Reuben Mumo Kiilu.
29. In April, 1984, the deceased returned and paid to her parent 'ntheo'-dowry and confirmed the Kamba customary marriage. OW1 also visited the deceased's parents at Yatta and his father died in 1985. Kitavi slaughtered the goat but she did not know how much was paid for dowry.
30. OW1 stated that she was married to Phillip Mutune Kavita they did not get children and divorced in 1966 and she produced decree-absolute Exh 2. With the deceased she got son James Muinde Kisine and she produced birth certificate Exh1. The 1st & 2nd wives of deceased knew her and they interacted in family functions. They all participated in the burial of the deceased. The Funeral Program-MFI-3 and Photographs-MFI-4. The letter from the Chief Exh-7 & letter from D.O. of 24/1/2006 refer to her as wife of deceased.
31. OW2 Matheka Mutua cousin to deceased confirmed OW1 was wife to the deceased as 3rd wife, he lived with her, he was hospitalized from OW1's house and was buried at 2nd wife's home was his wish. The deceased paid dowry for the Objector and she was introduced to the clan.
32. OW3 Reuben Mulwa Kiilu brother to the Objector, confirmed Beatrice his sister was married in Church to Phillip Kavita Mutune and they parted ways as she was unable to get children. She came back home. Later she was married to Samson Kisine Nthiwa under Kamba customary laws, they came home in 1984, the deceased brought 3 goats, blanket, beddings, rice, pigeon, peas, muthokoi, sugar and money for mukwa. One he-goat was slaughtered by Samson and meat was cooked and they ate. They negotiated dowry and it was paid over time, he started with Ksh 2,500/- Their mother was given Ksh 1000/- they took traditional alcohol I crate beer and I crate soda. He attended the deceased's funeral as brother in law.
33. OW4 Kitana Makumbi, was introduced to the deceased by his wife, the Objector, he had 3 wives and she was the 3rd wife. He knew Objector and her father. He explained to the Court the conduct of Kamba customary marriage.
34. PW1 Ngondu Kisine testified that the deceased had only 2 wives, 1st wife Mulimi and herself and they were both married under Kamba customary law She named her 7 children and stated she resides in Kangundo and 1st wife resides in Yatta. The deceased was buried at/in her homestead. There was no 3rd House. The deceased worked in Army and was in Nanyuki and with Co -wife visited him and was abroad for 3 years. Some of their children joined the Army, Nthenge and Peter Mumo.
35. When deceased retired he came home to her and 1st wife. There was no 3rd home she did not know the Objector. She could not clearly see the Funeral Program and photos as she had eye problems.
36. Dorothy Ngondu Kisine stated that Kisine had 2 wives and he did not tell them of the 3rd wife. When 2 clansmen and Objector tried to distribute the deceased's estate in 2001, she sued them in Kangundo Case 1/2001. Charles Kisine attached a Marriage Certificate of the Objector and one Phillip Kavita, so the Objector was married and could not be married to the deceased. She confirmed that the Funeral Program referred to 3 wives /widows of the deceased, the letter from the Chief showed 3 wives and the Photos also showed 3 women in white lowering the coffin of the deceased. She confirmed she did not know of the ceremony at Objector's home.



37. PW2 Charles Kisine, objected to Beatrice Ndunge as 3rd wife/widow of the deceased and produced marriage certificate of the Objector married to Phillip Mutune Kavita as per Marriage Certificate No 052355 -MFI-I

The matter was canvassed by way of written Submissions

Submissions

Objector's Written Submissions

38. The Objectors herein *vide* her submissions dated 9th February, 2023, contended on among other issues the substance of the objection and the Petitioners Response in which it was submitted that the Objector is the 3rd wife of the deceased lawfully and validly married to the deceased in accordance to the prevailing and applicable dictates and practice of the Kamba customary law on marriage. Urging that she had a child with the deceased, who was maintain them and who actually died at the Objector's home established by the deceased for the Objector where they lived as husband and wife.
39. Contending that the Petitioner's contention that the Objector was married to another man statutorily has been ably and unequivocally controverted by the Objector *vide* her supplementary Affidavit in response thereto sworn on 5/9/2006 to the effect that the said marriage was legally and validly terminated by Decree Absolute (Divorce) issued by court on 2/10/1980 in Machakos Resident Magistrates Divorce Cause No. 1 of 1978 between *Beatrice Ndunge v Philip Mutune Kavita*, that confirmed the Decree Nisi issued on 31/1/1980, dissolving the said marriage. Urging that Petitioners did not controvert this evidence of the divorce by affidavit or calling the purported husband as witness to dispute the divorce.
40. It was the position of the Objector that the petitioner has no basis to deny the fact of the Objector being lawfully married to the deceased at the time she was so married as she had already dissolved the previous unhappy marriage and so had a requisite capacity to contract the customary marriage subsequently as she did.
41. As to what the question/ issue for determination it was submitted that what court is required to determine under the instant *viva voce* hearing and the instant submissions, is one issue only. Reliance was placed on Hon. Justice Lenaola, J (as he then was) in his order made on 24/2/2009 as follows "Since Beatrice Ndunge Kisine is said to be a wife of the deceased, let evidence on that issue be taken in the first instance and directions given upon it being determined" urging that the evidence on that issue is now on record and this court is now poised to determine it and give further directions accordingly.
42. It was averred that Kangundo Court file SRMCC No. 1 of 2001-Ngondou Kisine v Beatrice Kisine and 2 Others which was brought up pursuant this court order made on 14/2/2009 and joined to this court file confirms that the Objector was a valid lawful wife of the deceased under Kamba Customary Law contracted under the requisite ceremonies and rites particularly the all-important 'NTHEO' ceremony involving the goats and other gifts, long after dissolution of her previous statutory marriage.
43. Averring that PW1 & PW3, the deceased clan elder and the Objector's eldest brother respectively gave credible uncontroverted evidence proving that the Objector was the deceased's 3rd wife in accordance with the Kamba Customary Law, evidence that was never controverted in any material particulars. Urging that PW4 a Kamba elder, member of the deceased's Amutei Clan and an expert in Kamba Customary Law and an educated professional engineer gave clear account of the Objector's valid marriage to the deceased whom he knew.



44. It was the position of the Objector that the record in the Kangundo SRMCC No.1 of 2001 called up to this Court confirms that the 1st Petitioner's own voluntary and unsolicited admission in her own plaint, as confirmed on oath by her own verifying affidavit as far back in 2001 that the Objector is her Co-wife that both are wives of the deceased and he had previously shared out his Agricultural lands to each of the three wives. Submitting that the funeral programme and photos taken at the deceased burial undoubtedly shows that the deceased had three (3) wives which are in evidence as Objector's Exhibits, which were not the work of the Objector but the deceased family and funeral committee.
45. Urging that other than bare demands and ungrounded allegations that the Objector was not a wife of the deceased, no cogent, credible evidence was adduced by the petitioners to controvert the objector's evidence. They did not proof their allegations that the Objector was not a wife of the deceased. Submitting that contrary to Petitioner's allegations, there is no requirement in Kamba Customary Law, and petitioners called no expert evidence that an adult Kamba man must get Consent of previous wife before marrying another wife.
46. It was prayed that the Objection should be allowed with cost to the Objector payable personally from their own pocket and not from the Estate.

Petitioners Submissions

47. Petitioners vide their submissions dated February 27, 2023 submitted on an issue whether the Objector is a dependant of the deceased, on which it was contended that the [Law of Succession Act](#) at section 29 accords a definition of the dependants of a deceased person which forms the basis of priority in so far as administration of the free property of a deceased person is concerned. It provides:
- “For the purposes of this Part, “dependant” means—
- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
48. It was the Petitioners case that the Petitioners herein identified as being 2nd wife to the deceased and a son to the deceased respectively while the Objector has identified herself as being 3rd wife to the deceased, averring that the Objector cannot be a wife to the deceased as the time she alleges to have married the deceased, she had protracted a statutory marriage to one Philip Mutune Kavita and the marriage had not yet been dissolved.
49. It was contended by the Petitioner that Objector provided decree absolute issued on 31/1/1980 while it was the Objector's testimony that she married the deceased sometimes in 1971 approximately 9 years before her marriage was dissolved. Urging that the Objector asserts that she had her son in 1973 still



before her marriage had been dissolved. Reliance was placed on Section 171 of the Penal Code which dictates that:

“Any person who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of the husband or wife, is guilty of a felony and is liable to imprisonment for five years:

Provided that this section shall not extend to any person whose marriage with the husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if the husband or wife, at the time of the subsequent marriage, has been continually absent from such person for the space of seven years, and has not been heard of by such person as being alive within that time.”

50. It was the position of the Petitioners that the benefits granted to a lawful marriage are not available to cohabitantes who are deemed never to have been married at all. As they would say in Latin in the days of old, *nihil fit ex nihilo* (out of nothing, nothing comes). Reliance was made in the case of *Macfoy v United Africa Co. Ltd* (1961) 3 All E.R. 1169, where Lord Denning observed that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”

51. It was contended by the Petitioner that the Objector from what she has deposed in her affidavit as a 3rd wife to the deceased, she claims to be a dependant. Urging that the Objector has the burden to prove that she was the wife to the deceased and was being maintained by the deceased prior to his death. Contending that no Chief's Letter has been placed before this Honorable Court recognizing her as such. Submitting that the Objector herein seeks to frustrate administration of the estate. Averring that This honorable court take cognizance of section 109 of the Evidence Act which Provides;

“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.”

52. Finally, it was the position of the Petitioners that the Objector failed to bring forth evidence to show that the issue arising from the alleged marriage between her and the deceased is indeed a son to the deceased. No birth Certificate, no receipts to support the assertion that the deceased maintained the issue. Contending that the marriage to the deceased under customary law was not corroborated as no clan elder or the purported participants or witnesses to the customary rites were called upon to give evidence.

Determination

53. The Court considered the evidence on record and submissions by Counsel on behalf of parties and the single issue for determination is whether or not the Objector was /is wife/widow of the deceased or not.
54. The Objector testified in detail of her relationship with the deceased as early as 1971 which blossomed into marriage under Kamba customary law conducted in 1984 in the presence of both families and clan members. The various steps taken to form a Kamba customary law are espoused In Restatement of



African Law: The Law of Marriage & Divorce by Eugene Cotran which prescribes a Kamba Customary Marriage entails;

‘Capacity- The Parties must have capacity to marry and capacity to marry each other

Consent- The parties to the marriage and their respective families must consent to the Union

Slaughter of Ram-No marriage is valid unless the nthenge ya kwitia mbui nthamake nthi is slaughtered

Marriage Consideration- There can be no valid marriage unless a part of the marriage consideration has been paid.

Commencement of Cohabitation- The time at which a man and woman become husband and wife legally, is when they begin cohabitation, when the bride comes to the bridegroom’s home.’

55. The all-important ‘Ntheo’ ceremony involving the slaughtering of a goat by the groom and other goats for the feast and other gifts as outlined by OW3, that 3 goats, blanket, beddings, rice, pigeon, peas, muthokoi, sugar and money for mukwa were presented by Samson. One he-goat was slaughtered by Samson and meat was cooked and they ate. They negotiated dowry and it was paid over time, he started with Ksh 2,500/- Their mother was given Ksh 1000/- they took traditional alcohol I crate beer and I crate soda. OW4 confirmed Kamba customary marriage as outlined above.
56. The Objector and deceased cohabited from 1971 and in 1973 were blessed with son James Muinde Kisine and she produced birth certificate Exh1. The deceased bought land and built her home and had the title document. The Objector was introduced to the clan, visited deceased’s parents/family and lived with the deceased upto the time he got sick and he was hospitalized from her home.
57. On whether the Objector was legally married to the deceased, the Objector relied on the case of *Hortensia Wanjiku Yawe v The Public Trustee* Court of Appeal Civil Appeal Number 13 of 1976 on presumption of marriage and *In the Matter of the Estate of John G. Kinyanjui* Nairobi HCP&A No 317 of 1984 where it was held that cohabitation can be evidence from where the presumption of marriage maybe inferred. *Mary Wanjiku Gitbatu v Esther Wanjiru Kiarie*, Civil Appeal No. 20 of 2009, Court of Appeal at Eldoret and recently, in *John Gitau Githongo v Victoria Mwihaki* (2014) eKLR all point to ‘... .. the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises.’
58. The Objector from the above outlined evidence submitted she was one of the legal wives to the deceased and is therefore entitled to a share of the deceased estate together with her child/son.
59. The Petitioners objected to the Objector’s claim as wife /widow of the deceased as she was married to Phillip Mutune Kavita as per marriage certificate no 0xx -MFI-I. The Objector tendered evidence and documents that the said marriage was legally and validly terminated by Decree Absolute (Divorce) issued by court on 2/10/1980 in Machakos Resident Magistrates Divorce Cause No 1 of 1978 between *Beatrice Ndunge v Philip Mutune Kavita*, that confirmed the Decree Nisi issued on 31/1/1980, dissolving the said marriage. The Objector was married under Kamba customary law in 1984.
60. The Petitioners denied knowledge or acceptance that the Objector was married to the deceased and he lived with her upto his death as he was hospitalized from their home.
61. The Court has considered the evidence on record taken by different Judges Since 2009 to date namely Lenaola J Makhandia J Kemei J and now this Court with typed proceedings and the documentary exhibits produced; The Eulogy of the deceased indicates the deceased had 3 wives 12 sons, 6 daughters,



44 grandchildren and 4 great grandchildren. The photos at the funeral next to the casket are 3 widows in white and a photo of the Objector, deceased and son, letter of Chief of Tala 24/1/2006 confirms the deceased had 3 wives.

62. This Court heard and considered evidence on record. The totality of the evidence on record confirms the Objector Beatrice Ndunge Kisine was /is wife/widow of the deceased and with her son are part of the list of beneficiaries of the estate of the deceased's estate.

58. The Petitioners denial was not followed by evidence to controvert the Objector's case/evidence.

Disposition

1. The Objection is upheld and the Objector Beatrice Ndunge Kisine is appointed Co administrator to the deceased's estate.
2. The Petitioner's Opposition is dismissed
3. The estate of the deceased is hereby preserved under section 45 LSA pending Summons for Confirmation of Grant for distribution of the deceased's Estate among all beneficiaries.
4. Each beneficiary or Family shall remain in situ pending Summons for Confirmation filed for beneficiaries' consent(s) or Protest(s).
5. Each Party to bear own Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 30TH JUNE 2023.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

