



REPUBLIC OF KENYA



**Nyaga v Mbogo & another (Civil Appeal 37 of 2020)
[2023] KEHC 20901 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 37 OF 2020
LM NJUGUNA, J
JULY 26, 2023**

BETWEEN

MARYETTA NJOKI NYAGA APPELLANT

AND

LUCY MUTHONI MBOGO 1ST RESPONDENT

EVANGELINE GICUKU MURIITHI 2ND RESPONDENT

JUDGMENT

1. The instant appeal was instituted vide a memorandum of appeal dated November 25, 2020 and the same being against the ruling by Hon TK Kwambai (SRM) delivered on November 11, 2020 in Embu Succession Cause No 105 of 2018. The appellant framed ten grounds of appeal to the effect that the trial court erred in fact and law by finding that strangers to the estate of the deceased were the wives and children of the deceased while totally ignoring the evidence tendered by the appellant proving contrary.
2. The crux of the appeal herein is hinged on the fact that the appellant's application for revocation of grant was dismissed by the trial court. The grounds upon which the said application was premised were that the same was obtained fraudulently by concealment of material particulars and that it was secretly issued without any notice to the appellant. The same was heard and via a ruling delivered on November 11, 2020, it was dismissed as the court found that the estate was properly distributed to the rightful heirs.
3. The appellant being dissatisfied with the determination, filed the appeal herein.
4. When the appeal came up for hearing, the parties took directions to dispose the same by way of written submissions and which directions were not complied with.
5. It's now settled that the role of the first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. [See *Selle & ANo v Associated Motor Boat Co Ltd* (1968)]



EA 123]. The first appellate court ought not to ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it, or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. [See *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348]. Further there is no set format which the first appellate court ought to conform to in its re-evaluation of the trial court's evidence but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and that what matters in the analysis is the substance and not its length. (See Supreme Court of Uganda's decision in *Uganda Breweries Ltd v Uganda Railways Corporation* [2002] 2 EA 634 and *Odongo and Another v Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR).

6. I have read through and considered the memorandum of appeal and further, I have re-evaluated the record and evidence adduced thereto by the parties. In my view, the only issue which this court is invited to determine are the rightful beneficiaries of the estate of the deceased herein.
7. The appellant stated that she was the only legally married wife of the deceased and that the other women alleging to have been married to the deceased were not legally recognized as the wives of the deceased. She produced a marriage certificate showing that the appellant and the deceased celebrated their marriage under the African Christian Marriage and Divorce Act (Cap 151) – [Repealed] and issued with a certificate with Serial Number: 399047 sometime on September 12, 2003. The respondents on the other hand stated that the deceased had four wives to wit Rosemary Njura, Lucy Muthoni Mbogo, the appellant and Lydia Kagendo (deceased) and though the appellant was the only one that was married legally, the same did not negate the reality that indeed the deceased married four women during his lifetime. That at the time of the demise of the deceased herein, he was staying with one Lydia Kagendo who subsequently passed on and that the appellant refused that the said Lydia be buried on the suit land.
8. Section 3 of the *LSA* recognizes a spouse to mean a husband or a wife or wives recognized under the *Marriage Act*. Section 6 of the *Marriage Act* of 2014 specifically provides as follows: 1. "A marriage may be registered under this Act if it is celebrated(a)in accordance with the rites of a Christian denomination;(b)as a civil marriage;(c)in accordance with the customary rites relating to any of the communities in Kenya;(d)in accordance with the Hindu rites and ceremonies; and(e)in accordance with Islamic law
 2. A Christian, Hindu or Civil marriage is monogamous.
 3. A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous. "
9. It therefore follows that the *Marriage Act* does not anticipate any other union save for the ones identified.
10. It is alleged that the deceased herein was married to four wives to wit: Rosemary Njura, the appellant herein, Lucy Muthoni and the Late Lydia Kagendo. That she maintained that the deceased herein had five children. It was further testified that at the time of the demise of the deceased herein, all the three wives had left him and therefore, he was staying with one Lydia Kagendo who subsequently passed on.
11. Section 3 (5) of the *LSA* provides that:

"Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the proposes



of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

12. The rationale for the enactment and application of the *Law of Succession Act* was well stated by the Court of Appeal in *MNM v DNMK & 13 others* (2017) eKLR.

“The Section was introduced in 1981 by the Statute Law (Repeals & Miscellaneous Amendments) Act, No 10 of 1981. The purpose of the amendment was to mitigate the rigours of decisions such as *Re Ruenji’s Estate* and *Re Ogola’s Estate*, which did not recognize as beneficiaries widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognized as a beneficiary of the deceased. See *Irene Njeri Macharia v M Wairimu Njomo & another*, CA No 139 of 1994 *Miriam Njoki Muturi v Bilha Wahito Muturi*, CA No 168 of 2009 and *Muigai v Muigai & another*) 1985 – 1998) I EA 206.”

13. It therefore follows that a person who had married more than one wife under customary marriage cannot later contract a statutory marriage with any of them or with any other woman before he has divorced them first. In this case, the fact that the appellant held a marriage certificate, that did not vitiate the other customary marriages with the other wives.
14. On whether the said grant therefore ought to be revoked, Section 76 of the *Law of Succession Act* and Rule 44 of the *Probate and Administration Rules 1980* indeed provides for the circumstances for revocation of a grant. Under the said provisions, a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion on the grounds either that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
15. Section 66 of the *Law of Succession Act* bestows this court with the discretion to as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The court in exercise of the said discretion is mandated to accept as a general guide the following order of preference;-
- a. surviving spouse or spouses, with or without association of other beneficiaries;
 - b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
 - c. the Public Trustee; and
 - d. creditors:
16. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.



17. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he/she must get consent from persons of equal or lower priority than him; but in this case, could the same be said to be true?
18. The appellant submitted that the grant issued to the respondents was made without her knowledge and/or consent, though the record shows otherwise. This court notes that the 1st respondent stated that the appellant was aware of the proceedings and the record shows that indeed, she was cited before the respondents herein were issued with the grant.
19. Having determined that the deceased was married to the appellant and the other three wives as already noted in this judgment, I now seek to address the issue whether the alleged children listed herein ought to benefit from the estate herein. From the record, the 1st respondent before the trial court stated that the deceased was blessed with five children from the four women to wit: Evangeline Gicuku, Dennis Githinji, Grace Valentine Wakio, Kelvin Githinji Muriithi and Issa Pauline Wawira. This court has proceeded to peruse the record and has noted birth certificates on the record pointing to the fact that the deceased had five children.
20. In the circumstances therefore, I find that the appeal herein is in want of merit and the same is hereby dismissed with no orders as to costs.
21. It is so ordered.

Conclusions

Delivered, dated and signed at Embu this 26th day of July, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

