



REPUBLIC OF KENYA



**In re Estate of Geoffrey Mugwe Kamau (Succession Cause 113 of 2015)
[2023] KEHC 21814 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 113 OF 2015
RN NYAKUNDI, J
AUGUST 10, 2023**

BETWEEN

**EDWARD KAMAU MWATHI (ACTING AS A PERSONAL REPRESENTATIVE
OF THE LATE CHRISTINE MUGWE MWATHI) PETITIONER**

AND

TABITHA WANJIRU KIMOTHO 1ST OBJECTOR

JOSEPH NJOROGE 2ND OBJECTOR

TABITHA WANJIRU 3RD OBJECTOR

JUDGMENT

1. The petition for grant of letters of administration in this cause was instituted by the late Christine Mugwe Mwathi on 25th march 2015. The cause was gazetted on 26th June 2015 and the 1st objector filed an objection to the making of the grant on July 24th 2015. The objection is premised on the following grounds;
 - a. That the petitioner has tendered a forged consent to the making of a grant of administration of letters of administration intestate of the deceased's estate.
 - b. That the objectors have priority in terms of petitioning for grant being the widow, son and daughter as opposed to the petitioner who is a sister to the deceased and reference can be made to the consanguinity table.
 - c. That the petitioner has no beneficial interest in the estate of the deceased being a married woman with her own family in Githunguri
 - d. That the petitioner has included false particulars in the application for grant such as alleging that Mary Wangoi Mwangi is dead while she is alive.



- e. That the petitioner has included persons not beneficially entitled to the estate in the petition for grant such as Jacinta Njeri, Dennis Mwangi Wangui, Beatrice Wanjiku Wangoi and Samuel Kiiru Wangui.
 - f. That the petitioner has relied on a fake death certificate that alleges that the deceased was aged 64 years while the age at death was 67 years.
 - g. That the petitioner has undervalued the estate by alleging it is worth Kshs. 10,000,000/- while it is over 17,000,000/-.
 - h. That the petitioner has irregularly obtained a second certificate of death in respect of the same death and deceased person.
 - i. That the petitioner has failed to disclose all the assets such as the omission of 1 acre of land at Kinangop.
2. The 1st objector then filed an answer to Petition for grant made by the petitioner and a petition by way of cross application for the grant dated 14th September 2015. The application was premised on the grounds that she is a widow to the deceased and that every person having an equal or prior right to a grant of representation has consented to her petition.
 3. The petitioner died and was substituted by her son vide an application for substitution dated 22nd August 2017.
 4. What is before this court is pending before this court is the objection proceedings against the petition for grant of letters of administration. The objection is premised on the grounds that the objectors are children of the deceased and thus had the priority to apply for the grant of letters of administration over the petitioner.

1st Objector's case

5. The 1st objector submitted that she is a widow to the deceased, a fact supported by the affidavit in support of the petition. Further, that the petitioner as a sister cannot take priority over a wife, citing section 66 of the *Law of Succession Act* in support of this submission. She also relied on the case of *In Re estate of George Muriithi Gitahi* (2019) eKLR and prayed that the letters of administration be made to the 1st objector. The 1st objector maintained that only the widow and the children of the deceased should benefit from the estate. The objector urged the court to dismiss the petition and allow the cross application by the 1st objector with costs.

2nd & 3rd Objector's case

6. The objector's case is that they are the biological children of the deceased and further, that the petitioner obtained the grant of letters of administration through fraud.
7. The objectors disputed that the 1st objector was a wife to the deceased as she did not produce any evidence to prove the same. on this basis, the objectors submitted that her cross application to be considered as an administrator be dismissed.
8. The objectors submitted that the dispute could be resolved by examining the degree of consanguinity and affinity so as to determine whether the petitioner or the objectors were the nearest to the deceased by blood. The objectors cited the case of *Immaculate Wangari Munyaga v Zachary Waweru Ireri* (2016) eKLR and sections 29 and 3 of the *Law of Succession Act*, submitting that the persons entitled to inherit the intestate property fall within the ranking of the immediate family members and dependants



in the second and third degree of consanguinity, thereafter followed with dependants who can prove they were maintained by the deceased during his lifetime as buttressed in section 29 of the [Law of Succession Act](#).

9. The objectors submitted that it is without doubt that the petitioner is a son to the sister of the deceased who came into these proceedings after the demise of his mother and as such falls under the third degree of consanguinity. The objectors reiterated that the 1st objector had not provided any proof that she was a wife to the deceased. The objectors submitted that they are children to the deceased and they produced documents showing their mother was married to him. They urged that they are in the 1st degree of consanguinity and have a higher ranking than any other persons in these proceedings. They concluded by urging that only the 2nd and 3rd objectors are entitled to benefit from the estate.

Analysis & Determination

10. Upon considering the objection and the petition by way of cross application, the following issues emerge for determination;
 - a. Who has priority to apply for a Petition of grant of letters of administration?
 - a. Whether the 1st objector was a wife to the deceased
 - b. Who should be appointed the administrator to the estate?

Whether the 1st objector was a wife to the deceased

11. It is trite law that he who alleges must prove. For one to prove a civil marriage, production of a marriage certificate shall suffice. If one claims to have been married via customary law, the onus is upon them to prove the same. In *Njoki -vs- Mathara and Others* Civil Appeal No. 71 of 1989 (UR), Kneller J. A held that:
 - “(i) The onus of proving a customary marriage is on the party who claims it.
 - (ii) The standard of proof is the usual one for civil action, balance of probabilities.
 - (iii) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”
12. I note that the objector did not state how she was married to the deceased.
13. The evidence that the 1st objector was a wife to the deceased was vide the testimony of one John Murira Mwaura who was a neighbour to the deceased. It was his testimony that the deceased introduced the 1st objector as his wife to him in 2012. Further, that he had informed him he had two more wives but one was dead. The 1st objector testified that she was married to the deceased and took care of him by taking him for treatment at Moi teaching and referral hospital. She maintained that the general public was aware of their marriage including their assistant chief for Kapsaos Sub Location where they resided. She referred to a letter dated 29th August 2014 as evidence of the same.
14. It is my considered view that the 1st objector failed to prove that she was married to the deceased to the required standard.



Who has priority to apply for grant of letters of administration?

15. Section 66 of the *Law of Succession Act* provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate. It provides that;

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, 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

Section 29 of the *Law of Succession Act* provides;

- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
 - (a) father; or if dead
 - (b) mother; or if dead
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

16. It follows that the priority begins from the surviving spouse or children, followed by the father; mother; brothers and sisters, half brothers and sisters and finally relatives in the nearest degree of consanguinity.

Who should be appointed the administrator of the estate?

17. The 2nd and 3rd objectors produced the marriage certificate between the deceased and their mother as evidence that they had priority to be appointed as administrators of the estate by virtue of the fact that they are children of the deceased.
18. The initial petitioner was a sister to the deceased and her estate is currently represented by her son therefore he shall be considered at the same level of consanguinity as the sister of the deceased.
19. From the provisions of section 66 as read with section 29 of the *Law of Succession Act*, it is clear that the spouse and the children of the deceased take priority over a sister. The 1st objector having failed to prove that she was married to the deceased, it follows that the 2nd and 3rd objectors have priority to petition for the grant of letters of administration of estate.
20. The objectors are the children of the deceased as the petitioner as they were included by the petitioner in the affidavit in support for the petition for grant of letters of administration of the estate and their



status as beneficiaries is not disputed. Further, given that the petitioner passed on, it is my considered view that it is prudent and in the interests of conflict resolution to have the daughters of the deceased administer the estate.

21. In the premises, the objection succeeds to the extent that the 2nd and 3rd objectors are appointed administrators of the estate. They are directed to file a proposal for the mode of distribution of the estate and further, that if there are any properties they allege were left out by the petitioner, provide evidence of the same in order for consideration during distribution.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 10TH DAY OF AUGUST 2023

R. NYAKUNDI

JUDGE

