



REPUBLIC OF KENYA



**In re Estate of Kithome Mutyauvyu (Deceased) (Succession Cause 1844 of 1998)
[2023] KEHC 23248 (KLR) (Family) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1844 OF 1998
PM NYAUNDI, J
SEPTEMBER 29, 2023
IN THE MATTER OF THE ESTATE OF KITHOME MUTYAUUVYU (DECEASED)**

BETWEEN

DANIEL MATUU KITHOME 1ST ADMINISTRATOR

DAVID KILONZO KITHOME 2ND ADMINISTRATOR

AND

MUMBUA KITHOME 1ST OBJECTOR

MUTISYA KITHOME 2ND OBJECTOR

JUDGMENT

1. Vide Summons for Revocation of Grant of Letters of Administration dated 19th May 2017, presented under Section 76 (b) of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules* the Applicants seek for orders that-
 - a. The grant issued to the Respondents herein be revoked.
 - b. That Grant of Letters of Administration do issue to both the Applicants/ Objectors and Petitioners/ Respondents
 - c. That the costs of this application be borne by the Respondent.
2. The Application is supported by the Joint Affidavit of the Applicants sworn on 19th May 2017 and Joint Supplementary Affidavit sworn on the 25th September 2017. The Respondents oppose the Application and have filed affidavits in opposition sworn by Daniel Matuu Kithome on 7th August 2017 and Carol Mutyauvyu on 29th September 2017.



3. The matter proceeded by *viva voce* evidence in open Court on 13th June 2023.

Summary of the Applicants Case

4. OW1, Mutisya Kithome is the sole surviving objector. The basis of the objection is that the Respondents proceeded to administer the estate without his participation and yet he is a son of the deceased and his late mother was a wife of the deceased. He states that the deceased provided for him and educated him and they lived in the same house.
5. He testified that when his mother died she was buried on a farm that belongs to the deceased. There was no dispute to the burial of his mother on the land. He further testified that in an ELC matter initiated by the 1st Administrator/ Respondent, he had described the Objector and his mother as step brother and step mother respectively.
6. In cross examination he confirmed that he had declined to undertake a DNA test. He testified further that his mother was married under Kamba Customary law in the 1970s and he was present at the wedding.
7. Further his father had proposed him to be a member of the family clan. That his father bought and gifted his mother land in Kangundo. She had sold a parcel of land that the deceased gifted her and that was the trigger for the ELC matter.
8. In re-examination he asserted that he had established proof of paternity as he had presented his birth certificate, ID and a letter from a chief. He confirmed that he is staying on a parcel of land that belongs to the deceased.
9. RW1 is Lawrence Nzuki Kithomi. He is a son to the deceased. He does not recognise the Objector as a brother. He reiterated that they were insisting on a DNA test to be conducted.
10. In cross examination he stated that he was challenging the authenticity of the birth certificate. He stated he had not seen the pleadings filed in the ELC matter. He confirmed that the Objector lives on a parcel of land that was bought by the deceased. He stated further that his family (his siblings and him) did not attend the burial of the deceased's mother. He clarified that both he and the Objector hail from the same Location , Kangundo but they reside in different villages; Mayuni and Kanzokea. He stated that as a family they were not claiming the parcel of land in Kanzokea.
11. RW2- Mary Mbithe Kinyao. The deceased is her brother in law. She denied that there was any dowry meeting between the deceased and the mother of the objector, as given her position in the family she would have known about it.
12. She remembers seeing the Objector at the shops where he stayed with his mother. She did not observe any relationship between the mother of the Objector and the deceased. No ceremony was conducted under Kamba customary law to formalise the marriage between the Deceased and the mother of the objector.
13. On cross examination she reiterated that to her knowledge none of the family went to the home of the mother of the objector to negotiate dowry. She confirmed that the deceased and the Objector live on a parcel of land that belongs to deceased. She reiterated that payment of dowry involves the entire family and she would have known about it. She confirmed that she knew the Objector but had never confirmed whether or not he was a son to the deceased.
14. On re-examination she stated that she had never seen the deceased and the mother of the objector live as husband and wife. She testified that the deceased and his mother stayed at a rental house at the market.



Summary of the Objector's Submissions

15. The Objector identifies the following issues as falling for determination
 - a. Whether the Objector has proved his claims to the required standard?
 - b. Whether the Objector was a dependant/ beneficiary of the Estate?
 - c. Whether the Grant issued to the Respondents should be revoked and if so what order should the court make?
 - d. Who should bear the costs of this Application?
16. On the first issue, the Objector contends that the Court is vested with the mandate to revoke grants in appropriate cases and relies on the decision in *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa* [2016] eKLR and Section 76 of the *Law of Succession Act*.
17. It is his Submission that having established that the deceased had 2 wives, the grant stands for revocation as the Respondents had not involved, included, consulted and or informed the objectors of the proceedings leading to the issuance of the grant.
18. The Objector also relies on the decision in *L.A.K* [2014] eKLR for the proposition that the failure to comply with the process meant that this Court should revoke the grant.
19. On the 2nd Issue, the Objector states he has proved that he has a beneficial interest having availed his birth certificate, his ID, letter from Chief dated 15th August 2016 and the pleadings in Machakos ELC Case No. 108 of 2016. He therefore submits that he is a dependant in terms of Section 29 of the *Law of Succession Act*.
20. He relies on the decision *In Re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR on the probative value of the Chief's Letter in identifying the beneficiaries of the estate of the deceased.
21. The Objector relies on the decision in the cases of *Julius Ndubi Javan* [2018] eKLR; *re Estate of Gatumo Njimuko* [2019] eKLR and *Al- Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & Anor* [2013] eKLR in support of the prayer to revoke the grant for material non-disclosure.

Summary of the Respondents' Submissions

22. In submissions dated 11th July 2023, the Respondent (1st Administrator) identifies the following issues for determination.
 - a. Alleged Marriage
 - b. Being a son of the deceased
 - c. HC ELC No. 108 of 2016
23. On the first issue the Administrator submits that the Objector has not established the existence of a marriage between the deceased and his mother (now deceased).
24. On the Second issue, the Objector has not succeeded in establishing that he is a son, given the variance in the names on the birth certificate with the names of the deceased, this was a matter of great weight as the birth certificate was issued 20 years after the birth of the Objector. In addition the Objector did not adduce any evidence to support the claim that he was a dependant of the deceased.



25. On the 3rd Issue it was submitted that the Objector could not rely on the pleadings in HC. ELC. No 108 of 2016 as the matter had been withdrawn and the Administrator who filed the case had done so without the authority of the other administrators and beneficiaries to the estate.

Submissions On Behalf Of The 4th Administrator And Beneficiaries Of The Estate

26. In submissions dated 4th July 2023, the following are identified as the issues for determination
- a. Marriage to Mumbua
 - b. The Applicant being a son
27. It is submitted that the evidence of the 2 objectors was contradictory and therefore not credible. It is contended that the Deceased contracted a statutory monogamous marriage in 1973 and this would not have been possible if he was married to the mother of the objector under customary law. The decision on [*SMM alias GSM vs CAKM alias CAKM*](#) [2017] eKLR in support of the proposition that if the Deceased had lacked capacity at the time of his marriage to the subsequent marriage the latter marriage would have been void.
28. It is submitted that absent the production of cogent evidence on the existence of the marriage the orders for revocation cannot and should not issue. On the failure to call material witness and the implications for the objector's case, reliance is placed on the decision in [*ASA vs NA & Anor*](#) [2020] eKLR.
29. It is further submitted that the Objector has failed to discharge the onus of proving the existence of a marriage between the deceased and his mother under customary law, reliance is placed on the decision in the Court of Appeal Case *Kimani v Gikanga* (1965) EA 735.
30. It is further submitted that whatever the relationship between the Deceased and the mother of the Objector it did not amount to a marriage and reliance is placed on the decision on [*Eva Naima Kaaka & Another vs Tabitha Waitthera Mararo*](#) [2018] eKLR and that further on the evidence presented before Court, it would not be possible to presume a marriage based on cohabitation.
31. In the instant case it is submitted that there isn't evidence of cohabitation and that therefore following the decision in [*Phylis Njoki Karanja vs Rosemary Mueni Karanja & Anor*](#) [2009] eKLR this was not a case for presuming marriage.
32. It is submitted that the Objector's averment that he attended the funeral of the him closer into the family circle of the deceased and reliance is placed on the decision on [*Mary Njoki vs John Kinyanjui*](#) (1985) eKLR.
33. It is further contended that an invitation to live on land as happened in the instant case is not proof of marriage and that at best the Objector should be considered a licensee whose license has expired upon the death of the deceased. It is submitted that the facts in the instant case mirror those in [*Wilfred Mongare Orina vs Askah Mocheche Momanyi*](#) [2019] eKLR .
34. It is finally submitted that the Objector cannot rely on the pleadings in Machakos ELC Number 108 of 2016 as the Administrator initiated the cause without the authority of his co administrators and reference made to the decision in [*Joseph Kuriaa Kariri vs H-Young & Co \(EA\) Limited*](#) [2018] eKLR. In any event it is submitted that the same Administrator filed an affidavit in this cause denying that the objector was the son of the deceased and his mother a wife to the deceased.
35. Finally, on this issue it was argued that the Chief's letter was of nil evidentiary value where a matter such as beneficial interest in marriage was in contention. As the chief was relying on hearsay evidence, reference was made to the decision by Wendoh J in the [*ASA*](#) case cited above.



36. On the Second issue, the evidentiary value of the birth certificate is challenged on account of the discrepancy in the names of the father of the Objector as it appears on the birth certificate and the given names of the deceased.
37. Finally, it is contended that the Objector has been indolent in presenting his claim and that on this ground the application should be dismissed.

Analysis and Determination

38. Having reviewed the pleadings, evidence, rival submissions, authorities cited and the law I discern that the issue that arises for determination to be
 - a. Whether Mumbua Kithome is the wife of the deceased and Mutisya Kithome the son of the deceased
 - b. Whether the grant should be revoked
 - c. Whether Mutisya Kithome should be appointed to administer the Estate of the deceased
 - d. Whether Mutisya Kithome is entitled to a share of the Estate of the deceased
 - e. Who should pay the Costs;

39. On whether Mumbua Kithome is the wife of the deceased and Mutisya Kithome the son of the deceased and whether they have a beneficial interest in the estate of the deceased?

The Application turns on the answer to this question. I will first address the question as to whether there was a marriage between the deceased and the mother of the objector. The evidence availed to court in support of this claim were the testimony of the Objector, the letter from the Chief, pleadings filed in the ELC matter and the fact that she was buried on a parcel of land known to belong to the deceased.

40. It is the objector's case that the Deceased formalised the marriage with his mother under Kamba customary law. Apart from himself, he did not call additional witnesses who were at the ceremony. He did not provide the details of the rites and ceremonies performed to enable this court confirm whether or not there was a marriage under Kamba Customary law.
41. The Chief's letter in these circumstances cannot provide a life line as was stated in the cited decision of *ASA VS NA & Anor* [2020] eKLR.
42. On the pleadings in the ELC matter, what was availed to Court was a plaint, verifying Affidavit and a witness statement. It has been alleged that the matter was infact withdrawn. The Objector did not challenge this assertion.
43. The Objector set out to persuade the Court that the deceased and his mother were married under Customary law, that assertion is challenged by the beneficiaries and the administrators of the estate.
44. The short cut he seeks to take is not available to him as the Respondents have denied the existence of a marriage. In the circumstances I find that it has not been established that there was a recognisable marriage between the Deceased and the mother of the Objector.
45. I also do not think that marriage is established by place of burial. In the absence of proof of marriage between the parties in their life time, the court can not assume a marriage by virtue of the fact that an individual is buried on a parcel of land belonging to the deceased. There is no evidence submitted to



- demonstrate that she was buried as the wife of the deceased. Infact the known family of the deceased testified that they did not attend her funeral.
46. The Second limb of the 1st Issue is whether the Objector has established that he is a son of the deceased. The Objector has presented a birth certificate. The Respondents have challenged the credibility of the same given the discrepancy in the names. The deceased's given names are Kithome Mutyauvyu according to the birth certificate the father of the Objector is Kithome Mutyaguyu. The Objector has not explained the discrepancy. Without an explanation, I have no option to conclude that these are 2 different individuals. The Birth Certificate therefore does not support the Objector's claim.
47. I have already addressed the issue of the weight that this court will place on the Chief's letter to resolve the controversy as to legitimate beneficiaries. I therefore have no hesitation in holding that the Chief's letter does not meet the veracity test primarily on account of the fact that the Chief is reliant on hearsay evidence in making this statement.
48. The Objector further contended that the Defendant assumed parental responsibility over him, providing him a home, educating him and ensuring he had a role to play in the clan. Apart from the verbal assertions there is no evidence of this being done in the context of a father son relationship.
49. In *In re Estate of Francis Maina Kabiru (Deceased)* (Succession Cause 2484 of 2007) [2023] KEHC 21800 (KLR) (Family) (21 July 2023) I found that a birth certificate when not contested is the best evidence on parentage. Once it is challenged or where it does not exist then as was held in *Wilfred Koinange Gathiomi vs Joyce Wambui Mutura & Anor* [2016] eKLR, DNA is the best evidence.
50. In this matter the paternity is denied, the birth certificate that is presented falls short, the best way to resolve the matter would have been by the Objector subjecting himself to a DNA test. He categorically rejected this route. On this score therefore, I find that that the Objector has failed to establish that he is the son or a dependant of the deceased.
51. Having found that the Deceased was not married to the mother of the Objector and that he was not the father of the Objector, I find that having regard to Sections 38 and 66 of the *Law of Succession Act* find that the Administrators herein being the children of the deceased were not required to give notice to the Objector and his deceased mother.
52. For this reason I find that no basis has been laid for this court to revoke the grant.
53. In the Course of the trial it emerged that the Objector and his mother were living on land that belonged to the deceased and that the mother of the Objector had been buried on that parcel of land and the Objector had established his home on that land.
54. The Respondents stated that they do not challenge the occupation of that parcel of land by the Objector and his family and confirmed they had been settled there by the Deceased.
55. *In re Estate of the Late Mwaura Makuro (Deceased)* [2021] eKLR, Ogola J, observed that the overarching duty of the Court is to uphold substantive justice. Notwithstanding that on the facts presented I will not revoke the grant it is evident that it is in the interests of justice that the parcel of land in Kanzokea, Kangundo Village on which the Deceased settled the Objector and his mother should be transmitted to them.
56. The Administrators have the sole mandate to deal with property of the deceased. The objector's current occupation of that parcel of land is in contravention of Section 45 of the *Law of Succession Act*, however, since the Administrators recognise his interest, it is only right that they regularise his holding of that parcel of land



57. Therefore, invoking the inherent powers of the Court under rule 73 of the *Probate and Administration rules* I order as follows-

- a. That the Summons for Revocation dated 19th May 2017 is dismissed in its entirety
- b. That the Amended certificate of confirmed grant issued herein on 30th July 2013 and Amended on 8th December 2014 is cancelled and the administrators make a fresh application in which they include the Deceased property in Kanzokea Village, Kangundo Location.
- c. That the entire said parcel of land located in Kanzokea Village be transmitted to the Objector.
- d. That the objector to meet the attendant costs to effect the transfer of the parcel into his name.
- e. That the matter be mentioned on 6th December 2023 to confirm compliance and take further directions
- f. Each party to bear their own costs

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 29TH DAY OF SEPTEMBER, 2023.

P M NYAUNDI

HIGH COURT JUDGE

