



**In re Estate of David Omare Kimori (Deceased) (Succession Cause 4 of 2020) [2023] KEHC 23286 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
SUCCESSION CAUSE 4 OF 2020**

**RE ABURILI, J**

**SEPTEMBER 28, 2023**

**N THE MATTER OF THE ESTATE OF DAVID OMARE KIMORI DECEASED**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**GRACE NYAMOITA OMARE ..... PETITIONER**

**AND**

**JOSEPHINE EVERLINE KIMORI ..... 1<sup>ST</sup> OBJECTOR**

**FAMINAS MANYARA ..... 2<sup>ND</sup> OBJECTOR**

**TIMOTHY WAYNE ..... 3<sup>RD</sup> OBJECTOR**

**VILMER KEMUNTO ..... 4<sup>TH</sup> OBJECTOR**

**JUDGMENT**

1. On 12<sup>th</sup> June 2029, David Omare Kimori died intestate of natural causes in Minneapolis Hennepin Minnesota. The underlying causes as described in the certificate of death issued on 13<sup>th</sup> June 2019 was Dysphagia, advanced dementia. Other causes or condition contributing to his demise are stated to be pneumonia.
2. On 28<sup>th</sup> day of June 2019, 16 days later, his children Damaris Nyanganyi Omare, Jacklyne Obonyo Omare, Lydia Moka Omare, Hellen Kemunto Omare all allegedly consented to Grace Nyamoita Omare petitioning for a grant of letters of administration Intestate. The deceased, according to the certificate of death, hailed from Kisii.



3. The Petition for a grant was filed at Mombasa High Court. From the P&A 5, Affidavit in support of Petition for letters of administration intestate, the deceased was only survived by the 6 daughters named above who are listed as the only beneficiaries.
4. Several assets of the deceased are also listed with an estimated value of Kshs.80,000,000. The liabilities listed are medical bill of Kshs.50,000,000 and last expense and logistics of Kshs.2,000,000.
5. Before the gazettelement of the petition, vide objection to making of grant dated 14<sup>th</sup> August 2019, the objectors herein Josephine Everlyne Kimori, Faminus Manyara Timothy Wayne and Vilmer Kemunto claiming to be the deceased's wife and children respectively, objected to the making of grant, as contemplated under the Law of Succession Act. The grounds upon which the objection was made were that the deceased married the 1<sup>st</sup> Objector on 28<sup>th</sup> March 2008 at St. Monica's Catholic Church Kisumu and that he then took into his custody the children of the objector as his own. The children named and who are now all adults of sound mind are Faminas Manyara, Timothy Wayne and Vilmer Kemunto and that he lived with them at his Kisumu home on plot No. Kisumu/Manyatta 'B'/878.
6. That the deceased raised the said children, educated and maintained them until his demise hence they were his dependants recognized under Section 29 of the Law of Succession Act.
7. The objectors also objected to the petition for grant being filed in Mombasa High Court and contending that the objectors had not been listed as dependants of the deceased and that their exclusion therefor was for selfish reasons.
8. The objectors also listed other minor dependants who had not been included as such namely; Brian Marube, Cynthia Mecha, Clinton Mwaniki and Sahuki Mwaniki who the objectors alleged were grandchildren of the deceased, whose fathers were Harrison Mecha Kimori and George Mwaniki both deceased.
9. That the named minors and their mother Jacklyne Nyamoita should have been included as dependants because they were maintained by the deceased prior to his demise.
10. They further added that as there were minors dependants in the estate, the Petitioner could not be appointed as the sole administrator of the estate of the deceased David Omare Kimori.
11. Further, that the Petitioner is incapable of objectively administering the deceased's estate because in 2009, she sold the deceased's land in Nyamira without the deceased's knowledge which action depressed the deceased so much as a result of which the 1<sup>st</sup> Objector borrowed the proceeds of sale Kshs.800,000 from her parents and refunded the buyer to avert the arrest of the petitioner and that that was the genesis of the deceased's illness that eventually caused his death.
12. Further, that in 2014, the Petitioner, without the consent of the deceased, filed a divorce petition on his behalf against the Objector in Mombasa High Court Divorce Cause No. 45 of 2024 which shocked the deceased, which petition was declared a nullity in a ruling rendered on 26<sup>th</sup> April 2019.
13. That on 10<sup>th</sup> June 2019 when the deceased was hospitalized, the Petitioner single handedly and without involving family members, filed for leave to be appointed as guardian ad litem of the deceased in order to sell the deceased's assets at Kisumu to recover a non-existent hospital bill of Kshs. 50,000,000 and that soon thereafter, the deceased died on 12<sup>th</sup> June 2019 thereby rendering the order null and void and overtaken by events.
14. That knowing very well that the deceased had died, the Petitioner and her husband purported to sell to some Asians, land parcel Nos. Kisumu/Manyatta'B'/878 where the Objectors resided and Kisumu/



- Municipality/Block 6/486 where the deceased and Objector carried out business which attempted sale and transfer aborted upon which restrictions were placed on the titles to the said parcels.
15. That the petitioner chased away workers from the deceased's farm at Ekerenyo, the land which the deceased had allocated to the Objector.
  16. That because of the hostility exhibited by the Petitioner against the 1<sup>st</sup> Objector and her children, the 1<sup>st</sup> Objector was compelled to file Misc. Cause No. 12 of 2019 at Kisumu and obtained an order on 24<sup>th</sup> June 2019 directing the Petitioner and all the family members to keep peace to enable the deceased get a dignified send-off but that the Petitioner still used hired goons who threatened to kill the objectors and they ejected the objectors from their Manyatta home.
  17. In addition, it was asserted that the Petitioner published an obituary on 25<sup>th</sup> June 2019 and omitted the objectors as the deceased's surviving spouse and other children hence the 1<sup>st</sup> Objector filed Nyamira CMCC No. 39 of 2019 and obtained an order allowing her to participate in the deceased's burial ceremony. Further, that the Petitioner violated the order issued on 17<sup>th</sup> July 2019 and removed the deceased's body from Umash Funeral Home and had it transported to Nyamira and hurriedly buried it at 1.00am on 18<sup>th</sup> July 2019 after burning the deceased's body with acid to diminish any future need of conducting DNA over the deceased's body.
  18. That the Chief's letter was a forgery; that the Petitioner lied that she is worth Kshs.80,000,000 yet she is a nure with no known assets while her husband purporting to be her surety was a junior staff at Kenya Ports Authority and so was Lawrence Machora Ikobe.
  19. That Lydia Moke Omare and Jenifer Kemunto Omare never signed the consents because Lydia was then living in USA without a status hence she could not come to Kenya and return there while Jenifer Kemunto Omare was a resident of the USA and did not travel for the burial of her father.
  20. That some of the properties listed in the P&A 5. 1-8 had been willed away yet the petitioner never disclosed.
  21. That the liabilities listed do not exist as the medical bills were cleared through a funds drive in the USA. That the only liabilities are those of the unpaid workers at Kisumu Workshop and the Kshs.800,000 borrowed by the Objector to refund the buyer who had been conned by the petitioner.
  22. Finally, the objectors asserted that the petitioner started intermeddling with the deceased's estate on 27<sup>th</sup> June 2019 by authorising Stephen Okwanyo to collect rent from the deceased's houses for the petitioner and seeking to evict the objectors from the deceased's home and business so as to render them destitute.
  23. The Objector also swore an affidavit in support of the Objection reiterating the grounds stated above and annexing a marriage certificate and photographs taken at a church wedding where she allegedly wedded the deceased.
  24. She also filed a witness statement signed by Rev. Father Jacob Arieke Osa who officiated her marriage to the deceased at St Monica Catholic Church at Nyamasaria in Kisumu.
  25. The 1<sup>st</sup> objector prayed that this honourable court be pleased order for a fresh application for grant of representation whereby the 1<sup>st</sup> objector is involved and be considered as the joint administrator of the Estate of the deceased David Omare Kimori who died intestate.
  26. The objectors also prayed that the 1<sup>st</sup> objector being the only surviving widow, she be allowed to live in the matrimonial home with her children at Kisumu/Manyatta "B"/1878 and who are equally entitled as dependents and beneficiaries of the estate of the deceased David Omare Kimori.



27. The Succession Cause was initially filed in Mombasa High Court where the Petitioner resided but the same was later to Kisumu High Court for hearing and determination on account that before his demise, the deceased permanently resided in Kisumu where his estate was located with some other assets in Nyamira.
28. Opposing the objection to making of the grant, the petitioner swore a Replying affidavit on 7<sup>th</sup> February 2020 and deposed that she was here father who was married to her later mother Agnes Saringi Omare in 1968 until she died on 16<sup>th</sup> May 2001 and that the two lived on plot Kisumu/Manyatta 'B'/878. She annexed copies of marriage certificate dated 1<sup>st</sup> January 1991, death certificate and search certificate for the plot.
29. That the deceased had 8 children including the Petitioner who lived at the said Manyatta home with their grandchildren. That on 10<sup>th</sup> June 2019, she was appointed guardian ad litem to manage the deceased's estate for one year vide Mombasa ELC No. 21 of 2019 and that she was also authorized to cater for his medical bills amounting to Kshs.50 million. She annexed the court order.
30. That the deceased never wrote any will. That prior to his death, he was mentally ill as per the annexed medical report dated 21<sup>st</sup> July 2016 by Dr. C. M. Mwangombe, consultant psychiatrist. That she had discharged her duties as guardian ad litem as appointed by the court.
31. She denied that the objector lived with the deceased as husband and wife in the Manyatta home and deposed that the Objector was an aunt to the deceased and only moved in the said residence in 2008 and later left on her own volition in 2009 and was only his caregiver who was now intermeddling with the estate residence.
32. That she hurriedly convened a wedding and that the deceased lived with his children since 2009 until his death and that the objector had voluntarily left the home. That no prejudice had been demonstrated and that she was only hell bent on derailing succession proceedings, that the objection was.
33. A further affidavit was sworn by the Petitioner contending that the Objector had been married and lived with her husband in Mombasa and that they were neighbours with the petitioner.
34. That in 2002 when the deceased was operated on due to a brain tumour, he went and lived with the Petitioner in Mombasa and that is when the Objector offered to care for him and relocated with him to Kisumu as his caregiver, not a wife and later faked birth certificate for her children to claim that the deceased was their father leading to investigations by Ekerenyo DCI.
35. That when she purported to marry the deceased, she mistreated him, she denied his children the opportunity to visit him but his health deteriorated hence he was taken to Mombasa and later to the USA in 2011 where he died.
36. Selina Nyaboke a younger sister to the deceased's 1<sup>st</sup> wife Agnes Saringi and therefore a maternal aunt to the petitioner also swore an affidavit narrating how the objector was merely the deceased's caregiver and not a wife and that the deceased had no capacity to marry due to his mental incapacity in 2002 hence there was no marriage. That the Objector cannot be entitled to the property of the deceased as she was not his wife, but a relative and an aunt to the deceased.
37. This dispute was referred to Court Annexed Mediation by my predecessor Judge but the Petitioner declined to participate in the mediation proceedings and demanded that the dispute be resolved by the court although the Objector was willing to give mediation a chance.
38. Mediation having collapsed, the mediator returned the file to court. Directions were given for hearing by way of viva voce evidence and parties filed further affidavit evidence with the Objector filing affidavit



evidence of herself and her children as well as that sworn by Father Rev. Jacob Ariek who deposed on 28<sup>th</sup> October 2020 that he officiated the wedding ceremony between the deceased David Omare Kimori and Josphine Everlyne Nyamoita Ndubi at St. Monica's Catholic Church, Nyamasaria Parish on 29<sup>th</sup> March 2008 as per the annexed Marriage Certificate No. 617422 and that before the marriage, invitations were made to any objections but none came up.

39. The Petitioner also filed her own witness statement on 8<sup>th</sup> November 2022 reiterating her depositions in the affidavit earlier on filed and maintaining that the Objector was married to Livingstone Nyaribo who was still alive and the father to the objector's children. She contended that the deceased having been a mental patient as at 2002 as per Dr. Mwangombe's medical report, he was incapable of contracting a marriage.
40. That the Objector was her father's caretaker and that she mistreated the deceased after he moved to Kisumu and that it took the police to rescue him to Mombasa then the Objector destroyed their Manyatta house and the matter was with the police.
41. This court heard the case viva voce. The Objector, her 3 children and Father Rev. Jacob Ariek testified for the Objector while the Petitioner and her maternal aunt Selina Nyaboke Makori testified reiterating their depositions and witness statements which were adopted as evidence in chief and they were cross examined and re-examined. They also produced exhibits in support of their respective positions. I have already referred to the evidence as reproduced above.
42. Parties also filed written submissions reiterating their respective positions and making their final prayers before court for consideration.

### **The objectors' submissions**

43. The objector framed the following issues for determination and submitted on the same:
  - a. Whether the 1<sup>st</sup> objector herein-Josephine Everlyn Kimori was legally married by the deceased David Omare Kimori and is recognized as a wife to the deceased.
  - b. Whether 1<sup>st</sup> objector herein has any legal right to object to succession cause application by the petitioner herein who is a daughter of the deceased father David Omare Kimori and whether Josephine Everlyn Kimori is entitled to be given letters of administration of the estate of the deceased David Omare Kimori as administrator or joint administrator.
  - c. Whether the children of surviving widow Josephine Everlyn Kimori are entitled as beneficiaries of the Estate of David Omare Kimori being dependants.
  - d. Whether the 1<sup>st</sup> objector and her children have a legal right to live peacefully in her matrimonial home on land parcel No.Kisumu/Manyatta "B"/878 without interference from the petitioner or any other person(s) or at all.
44. On Whether the 1<sup>st</sup> objector Josephine Everlyn Kimori was legally married to the late David Omare Kimori, it was submitted that in August 2008 Josephine Everlyn Kimori and David Omare Kimori (then a widower) celebrated a holy matrimony under the African Christian and Civil Law marriage Act as it then was, which marriage was conducted and presided over by Reverend Father Jacob Ariek of Saint Monica's Catholic Church -Nyamasaria Parish in Kisumu, as evidenced by the marriage certificate produced as Objector's exhibit No.7. Further, that Mr. David Omare Kimori had before then in the year 2001 lost his first wife Mrs. Agnes Saringi -the mother to the petitioner herein.
45. It was submitted that the said wedding ceremony between the 1<sup>st</sup> objector and David Omare Kimori (the father of the petitioner herein) was attended by the immediate and extended family friends, and



- neighbors at Nyamasaria Parish Kisumu and that even the petitioner herein was in attendance and made the last prayer in that wedding. It was submitted that in her evidence and in cross examination, the petitioner admitted to that fact that she attended the wedding and actively participated at the wedding.
46. The objector submitted that her and the entire family of David Omare Kimori stayed peacefully until the year 2014(A period of more than six years) when the petitioner herein Grace Nyamoita Omare-the daughter to David Omare Kimori filed a petition for Divorce to dissolve the marriage between the 1<sup>st</sup> Objector Josephine Everlyn Kimori and David Omare Kimori-the father to the petitioner, which petition for divorce application No.45 of 2014 was heard before justice Thande in Mombasa High Court and dismissed by the Judge for lack of merit hence, the marriage between David Omare Kimori and Josephine Everlyn Kimori the objector was upheld as a legally binding marriage.
47. On Whether the 1<sup>st</sup> objector Josephine Everlyn Kimori has a legal right to object the petition for grant of representation in the succession cause filed by the petitioner Grace Nyamoita Omare -the daughter to the deceased David Omare Kimori, it was submitted that the deceased David Omare Kimori died intestate, leaving behind a surviving widow Josephine Everlyn Kimori who is the 1<sup>st</sup> objector herein and that the larger family of the late David Omare Kimori -that is the 1<sup>st</sup> family of the first objector lived happily and peacefully until the demise of David Omare Kimori is when the dfirst family led by the petitioner herein wanted to disinherit the family of the 1<sup>st</sup> objector by refusing her to participate in the interment of her deceased husband David Omare Kimori which culminated in the 1<sup>st</sup> objector moving to court and filed ELC Case No.39 of 2019 wherein she obtained orders to participate in the funeral of her late husband David Omare Kimori. That notwithstanding the said orders, the petitioner herein decided to bury the deceased David Omare Kimori at night without involving the 1<sup>st</sup> objector surviving widow a chance to participate in the burial as per the court orders. The 1<sup>st</sup> objector therefore submitted that the petitioner herein was in contempt of court as well as the Gusii culture which prohibits secret burials at night which goes against morality.
48. It was submitted further that the petitioner herein has tried by all means to block the 1<sup>st</sup> objector from even participating in the succession cause as the petitioner without any color of right applied to be granted letters of administration intestate leaving out the surviving widow and her children thereby disinheriting her and the children. She maintained that the first family and second family of the late David Omare Kimori are entitled as beneficiaries of the estate of the deceased who died intestate.
49. On Whether the 1<sup>st</sup> objector herein with her children are legally entitled to live peacefully in her matrimonial home in Kisumu/Manyatta “B”/878 and also manage the business and the entire estate of the deceased David Omare Kimori who died intestate, reliance was placed on Section 3 (2) of [\*Law of Succession Act\*](#) which provides that:
- “References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born of her out of wedlock and in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”
50. It was submitted that in March 2008 when the 1<sup>st</sup> objector was married to the deceased, she settled with her children at the matrimonial home in Kisumu/Manyatta “B”/878 by the husband David Omare Kimori. The 1<sup>st</sup> objector with said children continued to live peacefully in the said matrimonial home until after the demise of her husband when she started being hounded out of the home by the petitioner herein. It was submitted that on 14<sup>th</sup> January 2020, the petitioner served the 1<sup>st</sup> objector herein with a notice to pay rent or vacate the deceased’s house where she had been living peacefully with her children



or failure to which she would be evicted by the said petitioner yet the deceased did not intend that the 1<sup>st</sup> objector be evicted from the matrimonial home after his demise. She maintained that no law allows anyone to evict a widow before confirmation of grant. It was submitted that the function of courts is to protect families and properties of the deceased person through channels established in the succession Act Cap 160 laws of Kenya.

51. Further submission was that upon the death of a person all his assets and liabilities fall under Cap 160 Laws of Kenya and managed as such. That the petitioner being a daughter of the deceased David Omari Kimori has no better right than the surviving widow of the deceased. It was submitted that the petitioner does not respect the law at all and that out of ignorance, she takes pride in extra Judicial processes which could bring anarchy if the other party takes the same route.
52. It was submitted that in the 1<sup>st</sup> objector's supporting affidavit dated 15<sup>th</sup> January 2020 and filed in court on 16<sup>th</sup> January 2020, the objector deposed that she is the only surviving widow of the deceased David Omari Kimori, and that she had lived in her Matrimonial home at Kisumu Manyatta "B"/878 with her children peacefully ever since she was married by David Omari Kimori the deceased; and that before her husband David Omari Kimori left for the U.S.A for treatment, he left the 1<sup>st</sup> objector Josephine Everlyn Kimori to manage his workshop resting on parcel No. Kisumu Municipality/Block 6/486 where she would get income from which she used to fund for her upkeep; and that she was sending money on a monthly basis through the petitioner herein to the deceased in the U.S.A.
53. On Whether the 1<sup>st</sup> objector and her children have a legal right to live peacefully in her matrimonial home on land parcel No. Kisumu/Manyatta "B"/878 without interference from the petitioner or any other person(s) or at all, it was submitted that that on 24<sup>th</sup> December 2019 the petitioner herein hired goons who descended on the deceased's workshop and broke the office and carted away all goods, hard cash and destroyed documents and items all valued at Kshs. 10,900,000/= thereby completely destroying the 1<sup>st</sup> objector's source of income which matter was reported to police. Further, the petitioner completely blocked the 1<sup>st</sup> objector from accessing the said workshop to deny her any source of income. That as if that was not enough, the petitioner further proceeded to the rural home of the 1<sup>st</sup> objector and chased away workers who were plucking tea on the land that the deceased had allocated to the 1<sup>st</sup> objector by destroyed crops and trees and the matter was also reported to the police at Ekerenyo Police Station, which situation prompted the 1<sup>st</sup> objector to file in court a Miscellaneous Application No. 12 of 2019 at Kisumu Law Courts where an order was given that all family members keep the peace to enable the deceased be given a dignified sendoff.
54. According to the 1<sup>st</sup> objector, the petitioner would hear none of these and on the night of 26<sup>th</sup> June 2019, she hired goons who descended on the matrimonial home of the deceased on parcel No. Kisumu/Manyatta "B"/878 seeking to break in and eject the 1<sup>st</sup> objector (widow) with her children –which they did and destroyed the matrimonial house by removing doors and other structures to evict the objectors from the said matrimonial home.
55. It was submitted that the petitioner in her further Replying Affidavit dated 22<sup>nd</sup> October 2020, pretended and stated that the 1<sup>st</sup> objector voluntarily moved out of the matrimonial home at Kisumu/Manyatta "B"/878-which is not a true position.
56. It was submitted that the 1<sup>st</sup> objector then moved to court on 15<sup>th</sup> January 2020 under certificate of urgency and obtained orders issued by Hon. Justice Thande on 16<sup>th</sup> January 2020 which stated that:

“Prayer 2 is granted to wit that the honourable court is hereby pleased to issue an injunction to restrain the petitioner herein through herself and/or her appointed agents from evicting the 1<sup>st</sup> objector/applicant herein from her late husband's house resting on land parcel No.



Kisumu/Manyatta “B”/878 where she has stayed for more than 10 years and is currently staying with her children pending the hearing and determination of this application interpartes” which orders were allegedly ignored by the petitioner herein who proceeded to evict the 1<sup>st</sup> objector with her children.

57. In conclusion, the objectors submitted that they had raised pertinent issues in their objection to making of the grant in favour of the petitioner maintaining that the petitioner does not stand in priority over the surviving widow of the deceased David Omare Kimori in applying for grant of letters of administration without the objectors’ involvement.
58. It was submitted that the petitioner herein being a daughter of the deceased David Omare Kimori has no legal right overriding that of the only surviving widow of deceased, to apply for a grant of representation and or excluding her and other dependents.
59. The 1<sup>st</sup> objector prayed that this honourable court be pleased order for a fresh application for grant of representation whereby the 1<sup>st</sup> objector is involved and be considered as the joint administrator of the Estate of the deceased David Omare Kimori who died intestate.
60. It was further submitted that the objectors herein pray for an order that the 1<sup>st</sup> objector being the only surviving widow be allowed to live in the matrimonial home with her children at Kisumu/Manyatta “B”/1878 and who are equally entitled as dependents and beneficiaries of the estate of the deceased David Omare Kimori.

#### **The Petitioner’s submissions**

61. The petitioner’s counsel filed submissions reiterating her averments in the affidavits and the oral testimony in court. He framed the following issues for determination:
  - a. Whether the Objectors are dependants of the estate of the deceased herein;
  - b. Whether the Objectors are entitled to a share of the estate of the deceased;
  - c. Who should bear the costs of the claim.
62. On whether the objectors are dependants of the estate of the deceased herein, reliance was placed on section 29 of the [Law of Succession Act](#) which defines a dependant as follows:

“ 29 ]

- (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 .”
63. It was submitted that under the above provision, a dependant must prove that she was being maintained by the deceased immediately prior to his demise. It was submitted that the 1<sup>st</sup> Objector’s contention that she was married to the late David Omare Kimori in 2008, that the deceased provided for and her children was not true as she was the petitioner’s caregiver, who duped them in 2008 that she was taking him for a baptism but that later they learnt that she was getting married to their father. It was submitted



- that the 1<sup>st</sup> Objector had failed to prove that she was a wife of the deceased since the deceased had no mental capacity to contract the marriage in question.
64. It was submitted that the Petitioner had proved through the medical reports that the deceased's brain surgery to remove a tumor had caused significant memory lapses. Further, that the medical reports from the United States of America and Dr. Mwang'ombe a government consultant made a finding that as a result of the brain surgery, the deceased's brain had been affected, hence they declared him mentally incapacitated in 2002.
65. Reliance was placed on *Patel & Another V MJC & Another (Suing as The Guardians of PIP)* (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment), where the Court further opined inter alia that besides proving that a party was under mental incapacity and that the other party was aware of the fact, evidence has to be adduced in proof that such incapacity was continuous and that he was under incapacity at the time the transaction was entered into.
66. It was submitted that it was evident from the evidence that the 1<sup>st</sup> Objector had pre-planned everything for purposes of attempting to disinherit the rightful heirs of the deceased's estate, which was all a long con game.
67. It was the Petitioner's submission that the deceased had diminished mental capacity since 2002 and that as a result, he lacked the requisite mental capacity to contract the marriage in question. It was submitted that having been employed as the deceased's the caregiver, the 1<sup>st</sup> Objector was aware of the deceased's mental incapacity hence the 1<sup>st</sup> Objector cannot allege that she was lawfully married to the deceased since he was not of sound mind to contract a marriage nor make reasonable decisions.
68. Further submission was that since the Petitioner cannot be deemed as a wife under S. 3(5) of the *Law of Succession Act*, she is not therefore a dependant under S. 26 of the *law of Succession Act*. Further, that a child cannot have two fathers and therefore the 2<sup>nd</sup> to 4<sup>th</sup> Objectors' father being alive, they should be content with their father, regardless of his status.
69. On the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Objectors' allegations that they are the beneficiaries of the estate of the deceased, it was submitted that since they were sired in a previous relationship before their mother, Josephine Ndubi allegedly married the late David Omare Kimori, their biological father who is Livingstone Nyaribo and who used to live with them in Mombasa was still alive. That the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Objectors had not adduced any tangible evidence to show that indeed they were being maintained by the late David Omare Kimori prior to his death in terms of section 29 of the *law of Succession Act*. Further, that there was no proof that the deceased took the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Objectors up, recognized and accepted them as his children.
70. Reliance was placed on the case of *Sarah Kanini Thigunku v Elizabeth Njuki Thigunku* [2016] eKLR where the court had this to say regarding dependency:
- “For one to be a dependent however, under Section 29 aforesaid, it is clear that one must prove dependency. The use of the words “... as being maintained by the deceased immediately prior to his death....” in that Section, connotes that one must prove that he was dependent on the deceased before his demise. From the record, there was no evidence to show that either the Appellant or any of her children were dependent on the late Mbungu Thigunku.... Prove of dependency is imperative.”



71. Further reliance was placed on the case of *Beatrice Ciamutua Rugamba v Fredrick Nkari Mutegi & 5 others* [2016] eKLR, where the court observed that:

“A dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”

72. Counsel for the petitioner cited section 107 of the *Evidence Act* and submitted that the Law imposes a burden of proof on the person who alleges.

73. It was submitted that the legal and evidential burden fell upon the Objectors to prove that they were the dependants of the estate of deceased herein. That in this case, the 1<sup>st</sup> Objector had not tendered evidence to dispute the Petitioner’s evidence that the deceased had no mental capacity to contract a marriage. Secondly, that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Objectors have not adduced any evidence whatsoever to prove that they were maintained by the deceased prior to his death. On the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Objectors’ allegations that the deceased paid their school fees, it was submitted that they did not produce any evidence hence the burden was not discharged and that therefore the Objectors cannot claim that they are dependants pursuant to Section 29 of the *Law of Succession Act*.

74. On whether the objectors are entitled to a share of the estate of the deceased, the Petitioner submitted relying on Section 29 of the *Law of Succession Act* and contending that the said section disqualifies the Objectors as dependants of the deceased and therefore, they are not entitled to benefit from the estate herein. The Petitioner submitted that both Objectors are total strangers to the estate of the deceased and so they don’t have any legal standing to question the distribution of the said estate since they are neither beneficiaries nor dependants of the estate of the deceased herein. That the Objectors having failed to prove the extent of dependency on the estate of the deceased, this court should find that the Petitioner together with her siblings are the rightful beneficiaries with priority to the estate of the deceased.

75. It was submitted that however, in the event the Court considers the 1<sup>st</sup> Objector as the wife of the deceased herein who died intestate, he will be survived by a widow and children and the anchor of the distribution of his estate will be as stipulated under Section 40 of the Laws of Succession Act which section provides that:

“1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;

76. Which principles were expounded in the cases of: *Rono –v-Rono Civil Appeal NO. 66 of 2002*, where Waki J.A stated inter alia that:

“More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”



77. Further reliance was placed on In the Matter of Re Estate of Benson Ndirangu Mathenge (deceased) Nakuru HCSC NO. 231 of 1998(Ondeyo J), where the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The court stated that the first house was comprised of five units while the second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children.
78. From the foregoing, the Petitioner submitted that in case the Objectors are considered as beneficiaries of the estate of the deceased for purposes of succession, the estate of the deceased herein be divided in accordance with the provisions of Section 40 of the Act where the estate will be divided into units according to the number of children in each house with a widow being added as an additional unit. In the present case, it was submitted that the first house had 8 children making eight units while the second had 3 children who have a father elsewhere hence they cannot be construed as beneficiaries for this cause.
79. However, that if the Court disagrees with the court's finding at Mombasa that the marriage was null and void, then the second house has only one unit and that therefore the two houses combined made up nine units.
80. It was further submitted that the estate of the deceased properties and liabilities of Kshs.50 million accumulating from the deceased's medical expenses available for distribution be divided by the court into nine units. The number of units to translate as ration of distribution of assets between the two houses, which will result in equal and fair distribution of the deceased assets among the dependants.
81. Counsel maintained that the evidence tendered clearly eliminated the 2<sup>nd</sup> to 4<sup>th</sup> Objectors as beneficiaries to the estate of the deceased hence they should get nothing at all and that upon this court finding that the deceased had no capacity to marry, it should also make a declaration that the 1<sup>st</sup> objector is not entitled to inherit anything.
82. On who bears the costs of this claim, it was submitted that section 27 of the [Civil Procedure Act](#) provides that costs follow the event and to the successful party hence this court should dismiss the objection herein with costs to the petitioner.

## DETERMINATION

83. Having heard this very acrimonious dispute and considered the affidavits evidence and oral testimonies and exhibits produced in evidence as well as the written submissions, the issues for determination are as framed by both parties when combined and these are:
1. Whether the Objectors are dependants of the estate of the deceased David Omare Kimori
  2. Whether the 1<sup>st</sup> objector was lawfully married to the deceased David Omare Kimori
  3. Whether the Objectors are entitled to object to the making of the grant and or to benefit from the estate of the deceased.
  4. Whether the Court should determine the liabilities of the deceased's estate at this stage
  5. are the objectors entitled to a peaceful residence at the Manyatta Home of the deceased in Kisumu?



6. What orders should this court make
  7. Who should bear costs of these objection proceedings.
84. On whether the objections are dependants of the estate of the deceased, the commencement point is that whoever desires any court to give judgment as to any legal right or liability, depending on the existence of fact which he asserts, must prove that those facts exist.
  85. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. See section 107 of the *Evidence Act*.
  87. In *Lewis Waruiro vs Moses Muriuki Muchiri* (2012) CA 106, it was held that:
 

“ All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA vs Edmunds* remarked:- ‘no Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.’
  86. Thus, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah J in *Britestone Pte Ltd vs Smith & Associates Far East Ltd* (2007) 4 SLR 855 as follows:
 

“ The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

    19. It is therefore a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is on the balance of probabilities. In the case of *Miller vs Minister of Pensions* (1947) 2 All ER 372, Lord Denning said the following about the standard of proof in civil cases:
 

“ The (Standard of proof) is Well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: ‘we think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.”
  87. It is a fundamental principle of law that a litigant bears the burden or onus of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court a fact can be said to exist or not exist.
  88. In this case, the objectors bear the burden of proving that they were and are dependants of the deceased and therefore of his estate and that therefore they are entitled to benefit from his estate.
  89. A dependant is defined under Section 29 of the *Law of Succession Act* as:
    - 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, grandparents, 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.
90. As correctly submitted by the Petitioner's counsel, a person claiming to be a dependant must prove such dependency in the degrees provided for under Section 29 of the *Law of Succession Act*.
91. Further, other than biological children of the deceased or wives, the other categories of 'dependants' must prove dependency by establishing that such persons were being maintained by the deceased immediately prior to the demise of the deceased. It is not merely having a relationship with the deceased. See *Beatrice Gamuta Rugamba vs Fredrick Nkari Mutegi & 5 Others* [2010] eKLR and *Sarah Kanini Thigunku vs Elizabeth Njoki Thigunku* [2010] eKLR.
92. Thus, the burden of proof lies on the person who alleges that they are dependants hence beneficiaries of the deceased's estate.
93. In the instant cause, the burden of proof indeed lay on the Objectors to prove such dependency. In support of their case/objection, the 1<sup>st</sup> Objector testified and produced a marriage certificate showing that she got married to the deceased in 2008. She was however not able to establish that the 2<sup>nd</sup> to the 4<sup>th</sup> Objectors were biological children of the deceased.
94. That evidence of marriage was corroborated by DW 2 Rev Father Jacob Ariek Osa who officiated the marriage/wedding between the deceased and the 1<sup>st</sup> objector at St Monica Catholic Church at Nyamasaria Parish within Kisumu County on 29<sup>th</sup> March, 2008. He stated that he had been the spiritual father to the couple and maintained in cross examination that the deceased was of sound mind during the wedding and that the church issued notice prior to the wedding but no objections was filed. He further stated that had there been doubts as to the mental status of the groom, they would have asked for a medical report and that they would not have conducted the wedding.
95. The 1<sup>st</sup> Objector testified how she met the deceased and they started living together as husband and wife and later wedded in the Catholic Church and that even the deceased's children including the petitioner herein attended the said wedding. She produced some photographs taken of her, the deceased and the petitioner herein together with other persons wherein the petitioner was identified as one of those who were at the wedding. the 1<sup>st</sup> objector further testified that in fact, it was the petitioner herein who said prayers at the said Church wedding.
96. The 2<sup>nd</sup>-4<sup>th</sup> Objectors too testified that their mother the 1<sup>st</sup> objector herein got married to the deceased, whom they fondly referred to as their father who according to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Objectors, provided them with all their basic needs including payment of their school fees and all other needs.
97. The petitioner and her witness, Selina Nyaboke who is her maternal aunt testified that the 1<sup>st</sup> Objector was an aunt to the deceased hence she could not get married to him as they were related by blood. They claimed that the 1<sup>st</sup> Objector invited them to her baptism only for them to find themselves at a wedding between her and the deceased.
98. Further, that the deceased had mental illness hence he had no capacity to contract a marriage as he had been operated on to remove a tumour from his head in 2002. A medical report by Dr Mwangombe was produced as an exhibit on the deceased's medical and mental condition although the maker did not testify.



99. Having heard the evidence for the Petitioner and Objectors, It is not in doubt that the 1<sup>st</sup> objector and her children lived with the deceased at Kisumu in his matrimonial home where he had lived previously with his late wife Agnes Saringi. It is also not in doubt that the deceased contracted a church marriage with the 1<sup>st</sup> objector at St Monica Catholic Church in Nyamasaria a marriage certificate is prima facie evidence of a legal marriage celebrated under whatever legal regime, unless the contrary is proved
100. Although the Petitioner attempted to file proceedings to nullity that marriage between her now deceased father and the 1<sup>st</sup> objector herein in 2014 vide Mombasa High Court Divorce Cause No. 45 of 2014 in her capacity as guardian ad litem of her father who was still alive, Thande J dismissed the said divorce petition for want of mental capacity on the part of the deceased David Omare Kimori to bring the petition. The Petitioner has submitted that the learned Judge found that the deceased had no mental capacity to marry the 1<sup>st</sup> objector herein. However, my perusal of the judgment of the said court reveals at paragraph 16 that the Judge found that the deceased had no mental capacity to bring the suit. She did not make a definitive finding or holding that the had no mental capacity to marry the 1<sup>st</sup> objector in 2008. The learned Judge had this to say at paragraph 1:
- “ 15. If indeed as the applicant claims the petitioner had diminished mental capacity since 2002 and had no mental capacity to contract the marriage, then it follows that he had no mental capacity to file the petition herein It further follows that there is no petition before me...”
101. At paragraph 13 of the said judgment, the court further observed that the application which was seeking to amend the petition to make it a petition for annulment of the aforesaid marriage had been brought in 2016, 8 years after the celebration of the marriage contrary to the law at section 73 of the *Marriage Act* which provides that such petition for annulment of a marriage could only be brought within one year of the celebration of the marriage.
102. It is not lost to this Court that the petitioner’s documents on record herein include her response to the citation filed by the petitioner herein and the response to the Citation No 3 of 2019 filed by the 1<sup>st</sup> objector against the petitioner and her sisters seeking orders to cite them to take out letters of administration and in that bundle, is a statutory declaration by Charles MARIKO Kimori the younger brother to the deceased David Omare Kimori who swore before a commissioner for oaths that after the demise of the deceased’s first wife, the deceased married the 1<sup>st</sup> objector herein and celebrated their marriage as testified by the 1<sup>st</sup> objector, attended by all the deceased’s children and family, himself included on 29<sup>th</sup> March, 2008 at St Monica Catholic Church, Nyamasaria in Kisumu County and that even the Petitioner herein together with her siblings attended the said wedding and as children of the deceased, they congratulated their father.
103. That being the case, in my humble view, at that time of the marriage, if the petitioner’s father was mentally ill hence incapable of contracting a marriage, the question is why did they not object and had to wait until 2014 six years later is when the petitioner purported to file an application to be her guardian ad litem and for the nullification of the said marriage on account of her father’s mental illness.
104. The petitioner claims that from 2002, their father having been operated on to remove the tumour from his head, he was unable to function mentally, and relies on the medical report dated 21/7/2016 by Dr. Mwangombe who was not called as a witness to be cross examined on the said report. I observe that as at the time that the deceased was wedding the 1<sup>st</sup> objector, he was 62 years while as at 2016 when the medical report was being written, he was 70 years old. Further, from the said Doctor’s report, which was not supported by any medical notes, the doctor does not state that she participated in the operation of the deceased in the USA in 2002 and follow up until 2008 when the deceased wedded the



- 1<sup>st</sup> objector. No medical notes were produced to show the deceased's condition immediately after he was operated on and 2008 when he married the 1<sup>st</sup> objector.
105. From Dr. Mwangombe's medical report, with the history being given by the petitioner herein, the deceased 'suffered significant memory loss and subsequent epileptic fits after the operation in the USA in 2002 and that according to the petitioner, the fits were controlled when the deceased took medication. Dr. Mwangombe then says that the deceased was reviewed in Kenya in 2007 by a neurosurgeon who adjusted the medication in question and recommended other treatment like physiotherapy for his lumbar spondylosis. Again no medical notes from the Neurosurgeon were availed. This doctor does not say that she saw the deceased between 2002 and 2007. She only reviewed him in 2015 and in 2016, she was being asked to write a medical report on the deceased, relying on the information supplied by the petitioner on what the deceased had allegedly been going through since his operation in 2002. No medical treatment records were produced to show that between 2002 and 2008 when the deceased and the 1<sup>st</sup> objector got married, he was mentally incapacitated to contract the marriage.
106. Mental incapacity being a medical condition, the report and testimony of a doctor who attended to the deceased for mental incapacity between 2002 when he was operated on and 2008 when he married the 1<sup>st</sup> objector in the full view of the petitioner and her siblings would have been important evidence. Since no proof of mental incapacity as at 2008 when the marriage took place has been provided, the deceased is presumed to have been of sound mind at the time of celebrating his marriage with the 1<sup>st</sup> objector. In *Patel & Another V MJC & Another (Suing as The Guardians of PIP) (Civil Appeal 182 Of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment)*, a case which was cited by the petitioner's counsel, the Court opined inter alia that:
- “ Besides proving that a party was under mental incapacity and that the other party was aware of the fact, evidence has to be adduced in proof that such incapacity was continuous and that he was under incapacity at the time the transaction was entered into.”
107. This court does not believe the testimony of the petitioner that she was invited by the 1<sup>st</sup> objector to attend her baptism at the Church only for them-as children of the deceased who were all adults of sound mind to find that a wedding had been conducted with her father whom she now claims had no mental capacity to contract a marriage. If that were the case, the question is why did the petitioner wait for close to six years is when she filed an application in court to purport to nullify the said marriage, after the deceased had, during the said period, lived with the 1<sup>st</sup> objector as husband and wife? In addition, this court does not find to be credible the contention that the 1<sup>st</sup> objector was an aunt to the deceased and that she was employed to take care of him as his caregiver. There was no evidence of who was paying the 1<sup>st</sup> objector as a caregiver and or that she was an aunt whose duty was only that of a caregiver and not a wife. A wife is a caregiver too but in this case, I find no evidence to prove that she was only but a caregiver and I refuse to be persuaded that the 1<sup>st</sup> objector was not a wife to the deceased for all purposes.
108. Nothing would have been easier than producing evidence of employment or payment of the 1<sup>st</sup> objector's wages by the petitioner or her sisters who are all from my own observation as they appeared in court online from the USA and are educated people and who could not, from my own observation, have allowed their mentally sick father to be taken advantage of by the 1<sup>st</sup> objector herein. I am unable to find that the photographs annexed at JEK 3 and JEK 4 of the deceased and his family including the petitioner herein and her other siblings being wedding photographs taken and not denied by the petitioner, depict the deceased as an invalid in 2008. In addition, PW2 the aunt to the petitioner in her



- sworn testimony and affidavit testified that indeed the deceased married the 1<sup>st</sup> objector after her sister died in 2001 only that she claims that he had lost his memory after the operation in 2002 in the USA.
109. The petitioner never referred to that declaration by Charles Kimori, her father's younger brother which is part of the documents that were filed in a bundle, by her own advocate herein on record and in which he also annexed a CD showing the wedding ceremony at Nyamasaria catholic Church.
  110. I reiterate that there was no evidence to demonstrate that as at 29<sup>th</sup> March 20228 when the deceased was celebrating his marriage to the 1<sup>st</sup> objector, he was mentally unsound and therefore incapable of understanding what was happening as officiated by Father Jacob Ariek Osa whose testimony was not shaken that the deceased was well and of sound mind. I saw and heard Rev. Father Jacob Ariek testify and I am persuaded that he was telling the truth. I am satisfied that the 1<sup>st</sup> Objector was lawfully married to the deceased and that the marriage was valid as his first wife, the mother to the Petitioner had since died hence, he was an eligible widower. Furthermore, there is no evidence that that marriage as celebrated was not consummated or was incapable of being consummated.
  111. The medical report produced by the Petitioner dated 21<sup>st</sup> July 2016 shows that the deceased underwent brain surgery in 2002 in USA to remove a tumour. That he subsequently suffered memory loss and subsequent epileptic fits. That in 2016 he was 70. That he was reviewed by a neurosurgeon in 2007 in Kenya who reviewed his medication for anti-epilepsy and recommended physiotherapy for his lumbar spondylosis and bilateral knees osteoarthritis and that he had urinary incontinence which needed personal care.
  112. Review was done in May 2015 and that according to Grace, David's epileptic fits were controlled when he took his medication. He would at times remain naked in the presence of his daughter Grace and would even be laughing. That he lacked self-care and had to be bathed. That at times he would use vulgar language and even be abusive without any provocation. That he had remained incontinent of urine and at times he had to use pampers.
  113. Apart from that history as given, there is no medical treatment notes produced to show that the deceased became an invalid after the removal of the brain tumour in 2002 or that between 2002 and 2008 when he married the 1<sup>st</sup> Objector herein, he was incapable of marrying her or consummating the marriage.
  114. Furthermore, the attempts by the Petitioner to nullify the marriage between the objector and the deceased in 2014 was dismissed. There was also no evidence adduced on when the deceased left the 1<sup>st</sup> Objector after the wedding, to return to the USA so that the marriage became a nullity for want of consummation.
  115. Apart from the medical report which was based on the information furnished by the petitioner, no medical treatment notes were produced to show that after being operated on in 2002 and review in 2007 by a neurosurgeon, the deceased's situation was worse and if it was, this court does not believe that the Petitioner would have allowed him to go and live in Kisumu away from her caring hand since she had employed a care giver for him and so she could have monitored his situation from Mombasa.
  116. The other theory advanced by the Petitioner and her aunt is that the 1<sup>st</sup> Objector was the deceased's aunt hence she could not marry the deceased. Again, no credible evidence was adduced by the petitioner to prove this allegation and therefore it remains just that.
  117. The Medical Report by Dr. Wangombe makes a conclusion of severe cognitive impairment and this was in 2016, which was eight years after the marriage to the 1<sup>st</sup> Objector. I have already referred to the Ruling by Justice Thande on her findings.



118. As stated earlier, there is no evidence that at the time of the wedding, the deceased was mentally incapacitated and there is no evidence that after the operation in 2002 to remove the tumour from his brain, he lost his mental faculties to the extent of not being capable of contracting a marriage with the 1<sup>st</sup> objector.
119. Further albeit the Petitioner claimed that the 1<sup>st</sup> Objector destroyed the Manyatta Home and left voluntarily, this court is unable to believe her testimony as the 1<sup>st</sup> Objector is the one who went to court and even reported to police of the harassment she was receiving from the Petitioner and her hired servants who were harassing the 1<sup>st</sup> Objector and her children, appointing agents to receive rent from the premises and eventually it became risky for the objectors to live in that house hence they had to flee for her lives. Further, there is evidence on record that in attending the burial of the deceased in Nyamira the 1<sup>st</sup> objector had to obtain a court order and seek for security. This evidence was not controverted by the Petitioner.
120. The 1<sup>st</sup> Objector testified and that testimony was well corroborated by her adult children that upon her marriage to the deceased who had a workshop, they lived in Manyatta premises and that she also joined him at his workshop where he eked a living and he provided for her and her 3 children until he was removed and taken to Mombasa and to the USA. The objectors then remained in the said premises until the petitioner herein unleashed terror on them through her appointed agents making them flee for their lives.
121. For the above reasons, I am satisfied that the 1<sup>st</sup> Objector was lawfully married to the deceased David Omare Kimori and that she was and is a dependant of the deceased David Omare Kimori and his estate as his widow. For that reason, I am inclined to find and hold that the 1<sup>st</sup> objector is entitled to benefit from the deceased's estate as his widow and therefore the petitioner herein should not have excluded her from the petition subject of these objection proceedings.
122. As to whether the deceased's children were dependants of the deceased and therefore whether they are equally entitled to benefit from his estate, I have considered the Objector's testimony and that of her children. It is true that Timothy Wayne was just about 7 years when his mother married the deceased and that he lived with his said mother and the deceased in Manyatta, Kisumu. The other 3 children were older and of school going.
123. However, there is uncontroverted evidence adduced by the Petitioner that the 1<sup>st</sup> Objector had these children with Livingstone Nyaribo and the children too admitted in cross-examination that Nyaribo was their father. Although there is no credible evidence that the 1<sup>st</sup> Objector was married to the said Nyaribo, the fact that Livingstone Nyaribo was alive and well known to be the father of the 2<sup>nd</sup> – 4<sup>th</sup> Objectors, there was absolutely no duty imposed on the deceased to maintain the said children who only benefitted from his generosity because he had married their mother, the 1<sup>st</sup> objector herein.
124. There was no tangible evidence adduced to prove that the deceased paid the school fees for the said children, when their father was available and known. There is no evidence that the deceased took up the parental responsibility of the three children exclusively or even attempted to adopt the children of Livingstone Nyaribo who is well and alive and there is no evidence that Livingstone Nyaribo relinquished his parental responsibility towards the said children. If anything, the 1<sup>st</sup> objector was bound by law to seek for the children's maintenance from their biological father since the deceased never sought consent of their biological father to be their guardians or to adopt them as his own. There being no evidence that the deceased assumed parental responsibility over the objector's children in as much as they may have been fond of him and that they had moved in his house with their mother.



125. In addition, the 1<sup>st</sup> Objector's attempt to change the identity and therefore the paternity of two of her children from Nyaribo to Omare, which attempt led to her being convicted of the offence of false registration of persons, is an indictment that clearly disentitles her to claim that the deceased maintained her children as there is no evidence that the deceased was involved in the unorthodox change of the said names of the said children so that he could assume parental responsibility over them.
126. Every child has a right to know their parents and there is no evidence that Livingstone Nyaribo had given away his children for adoption by the deceased who only lived with them by virtue of his marriage to their mother.
127. Accordingly, I am not satisfied that the 2<sup>nd</sup> – 4<sup>th</sup> Objectors qualify to be the deceased's dependants. I reject their proposition and further find that for that very reason, they are legally not entitled to inherit from his estate.
128. The next question is whether the 1<sup>st</sup> Objector should have been consulted before succession proceedings were filed and therefore whether her consent too should have been sought before filing of the petition for grant. The answer is yes. Being the deceased's wife, the Petitioner had no right to exclude the 1<sup>st</sup> objector from the succession proceedings. In addition, the 1<sup>st</sup> objector was equally entitled to petition for a grant of letters of administration intestate of the estate of the deceased David Omare Kimori and for the petitioner to petition, the consent of all other beneficiaries except those who are minors was mandatory.
129. The 1<sup>st</sup> Objector also raised an important issue that two married sons of the deceased died and one also lost his widow Cecilia but that the surviving widow and children being grandchildren were never included in the list of dependants.
130. I have perused the file and indeed, albeit the Petitioner never responded to this issue, one Jacklyne swore an affidavit which is on record saying she was a daughter in-law to the deceased and although she states that the 1<sup>st</sup> Objector was not a wife to her father in-law, she acknowledges being a daughter in-law, that she has two children, lived with them at Manyatta 'B' and that her late brother in-law too left behind a son who became orphaned as his mother, Cecilia died thereafter.
131. These children too of the deceased's two dead sons are dependants of the deceased by virtue of being grandchildren and therefore they ought to have been included in the petition as beneficiaries. Their omission therefrom renders the petition fatally defective for concealing material facts. In addition, there being minors in the estate, a grant even if it is issued to one administrator, cannot be confirmed in the name of a sole administrator.
132. The other challenge to the petition are consents allegedly given by Lydia Moke Omare and Hellen Kemuma Omare to the effect that they lived in the USA at the time hence they could not have signed consents.
133. No response was made to that serious allegation and or a rebuttal made. If indeed the said daughters were in the USA, no doubt the consents purported to have been jointly signed on 28<sup>th</sup> June 2019 are a forgery and they are hereby struck out from the proceedings herein for being invalid consents.
134. The 1<sup>st</sup> Objector also claimed that part of the properties listed by the petitioner were willed away. I have examined the handwritten document filed in the name of a will and I am not satisfied that it fits the description of a will, in as much as it may be an expression of the deceased's wishes. The author is unknown and the 1<sup>st</sup> Objector is a signatory thereto as a beneficiary. It lacks objectivity. For the above reasons, I am inclined to find that all the deceased's estate is intestate and available for distribution to



- all his eligible beneficiaries who include the 1<sup>st</sup> objector herein, the petitioner and her siblings as well as the children of the deceased's two dead sons.
135. On what proportion of the deceased's estate the 1<sup>st</sup> Objector would be entitled to, a question posed by the petitioner's counsel in submissions, the law is clear where the deceased was polygamous man. The deceased was married to Agnes Saringi and together they bore 8 children made up of two sons who are now deceased and six daughters. After her demise in 2001, the deceased married the 1<sup>st</sup> objector herein.
  136. The distribution of the estate in this kind of situation would be in accordance with Section 40 of the *Law of Succession Act*. See the decisions in *Rono v Rono & another* [2005] 1 KLR 538, *Rael Vulekani Musi v Rachael Edagaye Akola, Eldoret*, High Court P&A 5 of 2013 [2016] eKLR. I am also fortified by the decision of Koome J (as she then was) in *Re Mwangi Giture (Deceased)* High Court at Nairobi, Succession Cause 1033 of 1996 [2004] eKLR.
  137. Consequently, in this case, the 1<sup>st</sup> objector would be considered as one unit in the distribution of the estate of the deceased. This is because the deceased's first house had 8 children, 2 died but are survived by 3 children. Each child of the deceased David Omare Kimori will be a unit and the 1<sup>st</sup> Objector too will be considered as one unit. See in *Re Benson Ndirangu Mathenge*(supra).
  138. Before concluding, I observe that the petitioner had claimed that the medical bill of Kshs 50,000,000 incurred in the treatment of the deceased be included as a liability. That is a matter that shall be subject to proof before the Succession Court in the fresh petition and not for this court to pluck figures from what is filed in court without interrogating whether those bills which are in dollars and without any exchange rate given in Kenya shillings, including the claims by the persons who alleged that they worked for the deceased at his engineering workshop who alleged that they were owed monies, were due or not. That issue cannot be conclusively determined at this stage.
  139. The 1<sup>st</sup> objector also urged this court to find that she is entitled to peaceful stay in the Manyatta home which she calls her matrimonial home. However, as Manyatta home is part of the estate of the deceased where he lived with his first wife and in view of its dilapidated condition as destroyed, as shown by the pictures filed in these proceedings, and in view of the risks posed to the security of the 1<sup>st</sup> objector due to the acrimonious nature of this dispute, I would hesitate to make such an order and leave it to the process of distribution of the state once an all-inclusive petition is filed in court for consideration on its merit. This court would not share out any specific part of the estate of the deceased.
  140. On the whole, having found that the petition herein as filed was fatally defective for lack of consent of all the adult beneficiaries of the estate of the deceased David Omare Kimori and for leaving out some of the beneficiaries of the deceased, which defect amounts to concealment of material facts, as that in itself would be a fertile ground for annulment of a grant if already issued or confirmed, as stipulated in section 76 of the *Law of Succession Act*, the petition for grant as filed on 28<sup>th</sup> June, 2019 is found to be fatally defective and a nullity. It is hereby struck out.
  141. Having found that the petition as filed by the petitioner is a nullity, I order that a fresh petition shall be filed and all the adult children of the deceased and the 1<sup>st</sup> objector herein shall be involved in the process of petitioning for a fresh grant which shall list all beneficiaries including the 1<sup>st</sup> Objector and the children and or households of the deceased's dead sons. As there are minors in the estate, there shall be a minimum of two administrators of the said estate.
  142. Each party shall bear their own costs of these objection proceedings.
  143. This file is closed.
  144. I so order



DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023

**R.E. ABURILI**

**JUDGE**

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