



In re Estate of the Late Priscillah Kidai Mwamidi (Deceased) (Succession Cause 477 of 2011) [2022] KEHC 10802 (KLR) (22 April 2022) (Ruling)

Neutral citation: [2022] KEHC 10802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 477 OF 2011**

JN ONYIEGO, J

APRIL 22, 2022

**ESTATE OF THE LATE PRISCILLAH KIDAI MWAMIDI (DECEASED)
CHARELS NDURYA CHIMONI.....APPLICANT**

VERSUS

**CHRISPUS MWAKAMBA NYAMBU
BRAYSON MWAMIDI KIDAIRESPONDENTS**

RULING

1. The deceased herein Priscillah Kidai Mwamidi died intestate on June 16, 2011. According to form P&A 5 and the local area chief's letter, the deceased was survived by;
 - a. Preston Mwachori Kidai (brother)
 - b. Chrispus Mwakamba nyambu (brother)
 - c. Sophie Walegwa Mkala (sister)
 - d. Catherine Mghoi Kidai (sister)
 - e. Miss Gertrude Malemba Kidai (sister)
 - f. Brayson Mwamidi Kidai (brother)
2. Two properties among them LR Mgumo/Patsa/Mazeras/191 and money at Kenya Commercial bank were listed as assets comprising the estate.
3. On November 21, 2011 Crispus Mwakamba Nyambu and Brayson Mwamidi Kidai petitioned for a grant of representation. Subsequently, the same was issued on May 18, 2012 and then confirmed on December 14, 2012. Subsequently, the estate was shared equally amongst the six beneficiaries.
4. Later, vide a summons for revocation or annulment of grant dated March 18, 2015 and filed the same day, one Charles Ndurya Chimoni claiming to be a husband (widower) to the deceased sought for



- revocation of the grant herein. The application is anchored on grounds that it was obtained through fraud and deceit and that he was married to the deceased for a period of 18 years before she died.
5. The applicant further claimed in his affidavit in support of the application that he was not consulted as a spouse to the deceased before petitioning for a grant of the representation. He alleged that the administrators secretly buried his wife without his consent and hence the grant without his consent was unlawful.
 6. It was further averred that despite not having any biological child/children with the deceased as the second wife, he had children with the first wife who were staying in the premises erected on LR Mugumo/Patsa/Mazeras/191.
 7. He stated that the transfer of the said property to the respondents was irregular and unlawful. Meanwhile, vide a replying affidavit filed on September 28, 2015, the respondents denied the allegation of any marriage relationship between the deceased and the applicant. They attached a marriage certificate marked CM-1 indicating that the deceased was married to one Eli Mwailengo who is now deceased and that the applicant had no capacity to contract a customary marriage with the deceased herein before a statutory marriage between him and Eli could be dissolved.
 8. When the matter came for directions, the court directed for hearing of the revocation application *viva voce*. Hearing then kicked off on October 4, 2016 with the applicant testifying. During the pendency of the proceedings and before any other witness could testify, the applicant died sometime in June, 2018.
 9. Consequently, Ronald Wangani Ndurya and Gideon Chimoni Ndurya the applicants in the instant application claiming to be the children of the late Charles Ndurya (original applicant) from the first wife filed a notice of motion dated March 29, 2019 and filed on April 18, 2019 seeking leave to come on record in place of their late father Charles Ndurya Chimoni. Secondly, that they be allowed to proceed with the revocation application.
 10. The application is supported by grounds stated thereof and averments contained in the affidavit in support jointly sworn by the applicants on March 29, 2019. They averred that there will be no prejudice to allow them amend the revocation application to enable them come on record.
 11. In response, Bryson Mwamidi Kidai on his own behalf and that of his co- respondent filed a replying affidavit sworn on October 27, 2012 arguing that the deceased applicant filed his application in his capacity as a husband of the deceased hence his children cannot fit in that relationship to be able to succeed him as they have no spousal interest.
 12. They further averred that had the deceased applicant survived he would only have had a life interest over the property and not ownership of the same. They further stated that the applicant's cause of action in the revocation application does not survive as any possible life interest he may have had in the estate extinguished upon his death.
 13. To dispose the application parties agreed to file submissions.

Applicant's submissions

14. The applicants filed their submissions through the firm of IRB Mbuya advocate. They identified the issues for determination as follows;
 - a. Whether the deceased applicant was married to the late Priscillah Kidai Mwamidi
 - b. Whether the applicants who were step children to Priscillah the deceased could sustain the revocation application.



- c. Whether the deceased applicant was a trespasser and or a tenant on the suit property
 - d. Whether sections 36, 29 41 and 42 of the law of succession apply on the present case.
 - e. What is the interest of the applicants in this case.
15. With regard to the first issue, counsel submitted that there was sufficient evidence based on the late applicant's testimony that he was married to the late Priscila and that the said Priscila stayed with the current applicant in the subject property. That given an opportunity they shall prove that fact. Counsel submitted that the property in question is not an agricultural land hence the question of life interest does not arise. That the deceased died leaving a husband who was then entitled to inherit her estate. To support this proposition, the court was referred to the holding in the case of Joseph Wabwire Wanjala Vs Margaret Onjelo (2015) eKLR
 16. On the second issue, it was submitted that the applicants can sustain the said suit through their late father's interest as they stand to inherit directly from him being beneficiaries of his estate. In support of this submission, the court was referred to the holding in the case of John Kibara Njau alias Kibara John (deceased) (2012) eKLR where the court held that if a party who has an interest dies, his or her personal representative would succeed his case.
 17. Regarding the 3rd issue whether the deceased applicant was a trespasser, counsel submitted that this is not the right forum as there was a suit being civil suit No 262/2013 where similar issues were raised but the same suit was dismissed and a fresh one filed under civil case No 230 of 2014 describing the deceased applicant as a tenant which has since been stayed pending the outcome of the hearing of the revocation application herein.
 18. As to the applicability of sections 35 and 39 of the Law of succession Act, counsel submitted that only section 35 is applicable in the instant case and that section 39 of the law of succession Act is not .In that regard the court was referred to the case of Festo Akwera kusebe (deceased) (2019) eKLR where the court held that under section 66 of the law of succession a spouse is ranked in priority when petitioning for a grant of representation.
 19. On whether the current applicants have interest in the estate, counsel submitted that the property in question was brought through the joint effort of their father although registered in the deceased's name. That the applicants are entitled to a share that would have been due to their late father.

Respondent's submissions

20. Through the firm of Mwashushe & Co advocates, the respondents filed their submissions on December 3, 2021 thus submitting on the issue whether or not the cause of action has survived the deceased applicant to enable the sought substitution to be made? Basically, the respondents adopted averments contained in the affidavit in response to the application.
21. It was counsel's submission that no cause of action has survived the deceased by the applicants. That had the deceased applicant survived the late Priscillah he would have been entitled to a life interest pursuant to section 36 and 39 of the Law of Succession Act.
22. To support the proposition that the deceased applicant was only entitled to life interest over the estate which would then terminate upon his death, counsel relied on the finding in the case of, In the re -estate of Festo Akwera Kusebe (supra). Further reliance was placed in the case of the estate of Risper AkOngo Odongo (deceased) (2019) eKLR in which the court held that the step children had no right to petition for a grant of letters of administration in respect to the estate of the deceased step mother.



Determination.

23. I have considered the application herein, response thereto and oral submissions by parties' respective counsel. The only issue that crystalizes for determination is; whether the cause of action herein can survive the deceased applicant one Charles Ndurya Chimoni, by his children Ronald Wangani Ndurya and Gideon Chimoni Ndurya.
24. The application herein has been filed pursuant to section 47 of the [law of succession Act](#) which provides that;
- “The high court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decision and make such orders therein as maybe expedient”
25. It is clear that there is no express provision in the [law of succession Act](#) which provides for substitution of a deceased litigant. Unlike order 24 of the [civil procedure rules](#) which provides clear procedure on how a suit can be withdrawn, substituted or abates in case of death of a litigant, such situation under the [Law of succession Act](#) can only be handled under section 47 of the Law of success Act and rule 73 of the [P&A rules](#).
26. There is no dispute that the applicants are children to the deceased applicant but not biological children to the deceased herein. Since the application for revocation is based on the alleged marriage relationship between the deceased Priscillah and the deceased applicant which was disputed, the same is the subject of determination under this application. This court cannot venture to make a determination under the application for revocation. Whether Priscilla was married to the deceased or not is an issue which cannot with finality be determined in this application.
27. Before the court can make a finding on the issue of survivorship, it must be satisfied that the applicants have a bonafide interest which may be rendered useless if they do not substitute or survive their deceased father.
28. Who is an interested party? In the case of [Trust Society of Human Rights Alliance Vs Mumo Matemu & 5 others](#) (2014) eKLR an interested party was defined as;
- “...one who has a stake in the proceedings, though her or she was not party to the case *abinitio*. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her case. ...”
29. Similar position was recited in the case of [Francis Karioko Muruatetu & another vs Republic & 5 others](#) (2016) e KLR.
30. In the instant case, the current applicants are claiming a stake or interest through their late father whom they allege was a husband to the late Priscilla who jointly bought them up and took care of them. They however do not specifically claim dependency which would have placed them squarely under section 29 of the [law of Succession Act](#) for reasonable provision.
31. The applicants are claiming that by virtue of their father's contribution in the acquisition of the subject property which was registered in Priscillah's name and further taking into account that they are heirs to the estate of their late fathers's estate, they are entitled to a share. With this argument, I am persuaded to believe that they are claiming to be heirs to the deceased applicant's estate to which they are beneficiaries hence any benefit accruing to the estate of their late father automatically will devolve



to them as representatives of his estate. With this argument, one would conclude that prima facie they have an interest in the estate of the late Priscillah.

32. To some extent sections 35, 39, 66 and more particularly section 36 of the *Law of succession Act* will in detail be engaged and interrogated by both parties. It will be premature to delve on the consequences or implication of the applicability of these sections at this stage before the applicants are given a hearing. Indeed, if the deceased applicant's estate was to be entitled to a share from Priscillah's estate, then his heirs among them the applicants who are heirs to his estate would lay claim over his share. See In re estate of *Veronica Njoki Wakagoto (deceased)* (2013) eKLR where it was held that;

“Under part V, grandchildren have no right no right to inherit their grand- parents who die intestate after July 1, 1981. The argument is such grandchildren should inherit from their own parents. This means that the grand children can only inherit their grand-parents indirectly through their own parents, the children of the deceased... The grand -children step into the shoes of their parents and take directly their share that ought to have gone to the said parents”

33. Guided by the above authority and without dealing with details as to whether the deceased applicant would be entitled to a share or not, justice will demand that the applicant do substitute their deceased father as the applicants and then continue with prosecuting the revocation application. To that extent the suit is deemed to have survived the deceased applicant. Accordingly, hearing shall proceed from where the case had reached. Regarding costs, the same shall be in the cause.

DATED, DELIVERED AND SIGNED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL 2022

J N ONYIEGO

JUDGE

