



**In re Estate of the Late Alex Okungulo Mukongi (Succession Cause
220 of 2012) [2022] KEHC 14551 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 220 OF 2012
JN ONYIEGO, J
SEPTEMBER 23, 2022
IN THE ESTATE OF THE LATE ALEX OKUNGULO MUKONGI**

BETWEEN

ROSE ONGACHI AMAYOTI OKUNGULO APPLICANT

AND

ROSE AHOYI OKODO 1ST RESPONDENT

ABWORI JUMA 2ND RESPONDENT

PUBLIC TRUSTEE 3RD RESPONDENT

MOMBASA TEACHERS SACCO 4TH RESPONDENT

JUDGMENT

1. The deceased herein died intestate on March 25, 2007 while domiciled in Changanwe Kenya. Due to family wrangles revolving around identification of who the rightful heirs (beneficiaries) were, the Pensions Department Ministry of Finance paid to the public trustee Ksh 682,453 on November 18, 2020 being death gratuity due to the estate of the deceased who died while serving as a teacher.
2. On December 21, 2010, one Rose Ongachi Amayoti Okungulo (hereafter the applicant) claiming to be the deceased's widow formally reported the deceased's death to the public trustee. In the said report, the applicant indicated that the deceased was survived by herself, Godfrey Wanjala Okungulo (son) and Agnes owino Okungulo (daughter).
3. Subsequently, Rose Ongachi Amayoti Okungulo (applicant) filed a chamber summons dated September 13, 2012 citing as respondents Roseline Ahoyi Okodo (1st respondent), Roseline Abwori Juma (2nd respondent), the Public trustee (3rd respondent) and the Mombasa teachers Sacco (4th respondent). In the said application, the applicant sought orders as follows;



- a. An order that the respondents jointly and severally do account for what they had received or are holding in cash or in kind from the proceeds of the estate of the deceased Alex Okungulo Mukhongu.
 - b. A declaration that the applicant is the 2nd wife of the deceased entitled in law and in equity to a share of the deceased's estate.
 - c. Directions regarding an equitable and speedy distribution of the estate of the deceased.
 - d. Such other /further orders /direction as the justice of the case may necessitate and costs of the application.
4. The application is anchored on the grounds set out on the face of it and an affidavit sworn by the applicant on September 13, 2012 in which she claimed that she was the 3rd wife to the deceased while the 1st and 2nd respondents were the 1st and 3rd wives respectively. She claimed that despite making a death report to the 3rd respondent to commence and complete the administration of the deceased's estate, the public trustee had failed.
5. She claimed that the respondents had conspired to deprive her what is rightfully hers. She listed the deceased's beneficiaries as follows;
- 1st house
- a. Roseline Ahoyi Okodo -1st wife-55yrs
 - b. Susan Anyango Okungulo –daughter-30years
 - c. Lawrence Okodo –son-30years
 - d. Stephen Mukhongu Okungulo-son-25years
- Second house
- a. Rose Ongachi Amayoti Okungulo- 2nd wife - 60 years
 - b. Godfrey Wanjala Okungulo - son - 24 years
- Third house
- a. Roseline Abwori Ouma -3rd wife
 - b. Rosebella Atieno- daughter -15 years
 - c. Wilson Mukhongu-son- 13 years
 - d. Jane Wanjiro - daughter - 10 years
6. She attached several letters addressed to the 3rd and 4th respondents demanding to be paid her share as widow to the deceased but in vain. She therefore prayed for orders to have the estate of the deceased distributed as soon as possible.
7. In response, the second respondent Roseline Abwori Juma filed a replying affidavit on October 22, 2012 denying that the applicant was a widow to the deceased as she was not married to the deceased. She also claimed that the application was frivolous and bad in law as the applicant ought to have filed a succession case in court instead of the application.
8. On their part, the public trustee filed a replying affidavit sworn on October 23, 2012 denying allegations of any conspiracy with the 1st, 2nd and 4th respondents thereby denying the applicant her rightful share



of the estate. It was averred that the District Commissioner's office Bundalangi having given a list of all beneficiaries some of whom the applicant had consented to, it was imperative for the applicant to avail the requisite duly signed consent forms from all the beneficiaries a condition the applicant failed to comply with leading to the delay in concluding the administration of the proceedings.

9. On the other hand, the chairman to the 4th respondent filed a replying affidavit sworn on October 13, 2012 stating that they had distributed Kshs 378,820 being the deceased's Sacco dues to the nominated next of kin and beneficiaries in accordance with the wishes of the deceased at the time of registration and the entire family during distribution.
10. On her part, Roseline Ahoyi also filed her replying affidavit sworn on May 15, 2017 thus challenging the competence of the application on grounds that the death certificate presented by the applicant was not genuine as she (1st respondent) was in possession of the original death certificate. She dismissed the claim by the applicant that she was married to the deceased. That the applicant did not even attend the deceased's funeral and that Godfrey Wanjala a grown up over 18 years should have filed his own claim and not through the mother (applicant).
11. During the pendency of the said application, the public trustee filed a petition dated June 2, 2017 seeking a grant of representation of the estate of the deceased pursuant to the court's direction *suo mottu*.
12. According to the petition, the deceased was survived by;
 - First house
 - a. Roseline Ahoyi Okodo - 1st widow
 - b. Susan Anyango -daughter 34 years
 - c. Lawrence Okodo - son 33 years
 - d. Stephen Mukhongi - son 29 years
 - 2nd house
 - e. Rose Ongachi - 2nd widow
 - f. Godfrey Wanjala Okungulo - son 28 years
 - 3rd house
 - g. Roseline Abwori Juma - 3rd widow adult
 - h. Rosebella Atieno -daughter - 19 years
 - i. Wilson Mukhongi - son 17 years
 - j. Jane Wanjiro - daughter - 14 years
13. The assets listed as comprising the estate are;
 - a. Immovable - nil.
 - b. Movable -
 - (a) death gratuity
 1. Ksh 682,453



2. Personal effect 1,000,000

14. Consequently, a grant of letters of administration intestate was issued on May 31, 2018 to the public trustee as the administrator.
15. Subsequently, the public trustee filed an application for confirmation of the grant on November 12, 2018. In the supplementary affidavit sworn on November 9, 2018, the public trustee introduced the 4th widow represented by her son Brian gift Omondi and aka Brian Mukhongi Okungulo.
16. It was their proposal that the estate be distributed as follows.
 - 1st house
 - a. 4/11 of the net intestate estate to Roseline Ahoyi Okodo the 1st widow and as trustee for life and thereafter to the 3 children to the deceased's 1st house absolutely and in equal shares;
 - i. Susan Ayango Okungulo - daughter
 - ii. Lawrence Okodo Okungulo- son
 - iii. Stephen Mukhongi – son
 - 2nd house
2/11 of the net intestate to Rose Ongachi Amayoti alias Rose Ongachi Okungulo the second widow of the deceased as tenant for life and to Godfrey Wanjala Okungulo the child of the deceased's second wife absolutely
 - 3rd house
 - b. 2/11 of the net instate to following three (3) children of the deceased's 3rd house absolutely and in equal shares;
 - i. Maxmilla Atieno Okungulo alias Rosebella Atieno - daughter
 - ii. Wilson Mukhongi Okungulo - son
 - iii. Jenniffer Anyango Okugulo Wanjiro - daughter
 - 4th house
 - c. 1/11 of the net intestate to Brian gift Omondi aka Brayan Mukhongi Okungulo the only child of the deceased's 4th house absolutely.
17. Dissatisfied with the proposed mode of distribution, Roseline Ahoyi Okodo filed an affidavit of protest of confirmation of grant dated December 10, 2018 thus denying that Rose Ongachi was a wife to the deceased. She however admitted that Godfrey Wanjala Rose Ongachi's son was a beneficiary to the estate. That Rose Ongachi was not included in the chief's letter dated November 25, 2007 as a wife because she was a stranger to the local chief.
18. In response, Rose Ongachi filed a replying affidavit sworn on January 28, 2019, deposing that she started cohabiting with the deceased in 1983 and formally married under Luhya customary law in 1993. She attached a letter dated February 12, 1993 authored by Ebusiratsi Ass Chief who allegedly witnessed payment of two cows as dowry for Rose Ongachi (see annexure ROA -17).



19. She stated that while the deceased was living in one bedroom house in Changamwe , he rented her a house at Magongo and that they were blessed with two children namely; Godfrey Wanjala and Agnes Awino who died in 1994.
20. She further claimed that in 1986, the protestor deserted her matrimonial home until March 23, 2007 two days to the death of the deceased. That it was during that period of desertion that the deceased married the 3rd and 4th respondent. She claimed that the 3rd wife to the deceased one Lilian Atieno left the deceased 3 years after their marriage and that she left a son known as Brian Mukhongi .
21. She also claimed that all the four wives were married under Luhya customary law and that the protestor's marriage was not superior than the others.
22. It was further averred that, during her marriage with the deceased, he neglected her and her son culminating to her filing a maintenance case No 1/91 Mombasa RM' court. She denied the claim that she did not attend the funeral of her husband. She further stated that the chief's letter referred to by the protestor was doctored so as to exclude her from the list of beneficiaries.
23. During the hearing, Roseline Ahoyi (petitioner - Pw1) told the court that she got married to the deceased in 1973 and were subsequently blessed with three children namely; Lawrence, Susan and Stephen. That in 1991, the deceased was sued by Roseline Ongachi Amayoti Okungulo who sought maintenance orders against him and that the court gave custody of the subject minor aged 6 years to the deceased. That she took over the child but in 1993 the mother picked him up.
24. She further stated that in 1994, her husband informed her that he had impregnated a lady known as Lilian whom he later married and together had a son know as Brian.
25. That after Lilian left, the deceased got married to Roseline Abwori Juma who also got three children namely; Maxmilla, Wilson and Jennifer. Basically, she recognized everybody else as a beneficiary except Rose Ongachi.
26. Pw2 Paul Namugasa corroborated the evidence of Pw1. He stated that the deceased had 3 wives namely; Rose Ahoyi (1st wife), Lilian Ochieng (2nd wife) and Roseline Abwori (3d wife). He claimed that the deceased was his father's brother and that she was not aware that the deceased was married to Rose Ongachi.
27. Pw3 Lawrence Okodo a son to the deceased also corroborated their testimony. He stated that Rose Ongachi was a stranger to the family although her son Godfrey was recognized as a beneficiary.
28. Pw 4 Paul Simba a brother to the deceased corroborated the evidence of Pw1, Pw2 and Pw3. He stated that Rose Ongachi was not officially married to the deceased his brother.
29. On her part, Rose Ongachi (Dw1) adopted the content of her witness statement dated January 16, 2012, replying affidavit of January 28, 2019 and further list of documents filed on May 13, 2021. She stated that she got married to the deceased in 1983. That the deceased visited her at her residence while in company of his brother Simba and Wanjala for introduction and that in 1984 she started staying with him. That in 1986 she gave birth to Godfrey and later A who died while 5 years old. She further claimed that the deceased paid 2 cows as dowry while in company of four people among them a brother to the deceased. She also stated that when Roseline Ahoyi separated with the deceased, she (Ongachi) took over Ahoyi's children and stayed with them. She claimed that she took part in the deceased's burial arrangements but was isolated last minute.
30. It was her testimony that they were blessed with their first born son Godfrey in 1984 and later A a daughter who died at the age of 5 years. She further stated that it was the deceased who used to pay



rent for her. That he later paid two cows as dowry while in company of four people and in the presence of their local area chief Ass chief.

31. She went further to state that when the deceased neglected their children, she filed a maintenance suit whereof the court advised the deceased to maintain the children. She denied claims that she did not participate in the burial arrangements of her husband. She however told the court that she was isolated from attending his burial ceremony.
32. On cross examination, she admitted that the dowry payment agreement did not bear the deceased's signature and that she did not know why it was omitted.
33. Dw2 Maxmilla Atieno a daughter to the 2nd respondent denied the claim that Rose Ongachi was his father's wife. Pw3 Wilson Mukhongi Okungulo a son to the deceased denied that Rose Ongachi was his stepmother.
34. Upon close of the hearing, parties agreed to file written submissions.

1st Respondent's Submissions.

35. The 1st respondent /petitioner appearing in person filed her submissions on November 18, 2021. She basically reiterated the content in her protest and response to the applicant's chamber summons dated December 13, 2012. she categorically stated that the applicant /Rose Ongachi was not married to the deceased. She however recognized all beneficiaries except for Rose Ongachi.
36. She opined that when Rose Ongachi filed a maintenance case against the deceased, she referred to herself as a cohabitee and not a wife. That mere cohabitation and getting a child who is not disputed does not amount to a marriage.
37. She contended that the grant issued contrary to Section 66 of the Law of Succession Act to the public trustee should be revoked as it was issued based on false statement given by the applicant (Ongachi) by not disclosing that there were other beneficiaries .To buttress this position, the court was referred to the holding in the case of Ibrahim vs Hassan & Charles Kimenyi Macharia (, Interested party (2019) e KRL and Jamleck Maina Njoroge VS Agnes Wanjiru Mwangi (2015) e KLR .
38. It was further contended that nobody testified to corroborate her testimony that she was married to the deceased nor was any evidence of the alleged marriage adduced. At best she only described Rose Ongachi as a concubine with whom they sired one child known as Godfrey Wanjala.
39. As to whether the applicant was a dependant to the deceased prior to his death, it was submitted to the negative.

Applicant's/Respondent's Submissions.

40. Through the firm of Otieno Otwere and associates, the applicant (Rose Ongachi) filed her submissions on December 3, 2021 reiterating the content contained in her affidavit in support of the chamber summons dated September 13, 2012 and her testimony before court. She submitted that she was lawfully married to the deceased under Luhya customary law hence entitled to a share of the estate. She further submitted that she was a dependent to the deceased pursuant to section 29 of the Law of Succession Act.
41. That the deceased having died a polygamous man, his estate was subject to distribution in equal share in accordance with Section 40 of the law of Succession Act. That beneficiaries who have already benefited from the Mwalimu Sacco proceeds should get less their rightful share. In support of this argument, reliance was placed in the case of Catherine Nyaguthii Mbauni Vs Gregory Maina Mbauni (2009) e



KLR where the court held that there is no discrimination of children on account of their sex and that the intestate estate should be distributed in accordance with the ratio reflecting the number of units in the two houses of the deceased. The court was further referred to the case of Francis Mwangi Thiong'o and 4 Others vs Joseph Mwangi Thiong'o (2015) e KLR where similar position was held.

4th Respondent's Submissions

42. The firm of Bosire and partners representing the 4th respondent (Mombasa Teacher's Sacco) filed their submissions on January 28, 2022 contending that the deceased was their member who had saved Kshs 278,820 with them. That the said amount was distributed to the beneficiaries who had been nominated by the deceased *inter alia*; Lawrence Okodo Okungulo Ksh 127,000, Roseline Ahoyi Okodo Ksh 75,910 and Rosaline Abwori Juma Ksh 75,920. That the said distribution was done after holding a family meeting with the society members pursuant to Section 39 of the Co-operative Society Act.
43. It is however worthy noting that the 3rd respondent (Public trustee) did not file any submissions.

Determination.

44. I have considered the application herein for confirmation of grant and the protest thereof. Issues that emerge for determination are ;
- a. Whether the grant herein was obtained through fraud and concealment of material facts hence subject to revocation.
 - b. Who are the rightful beneficiaries or heirs to the estate
 - c. Who is entitled to what share of the estate

Whether the grant herein was obtained through fraud and concealment of material facts hence subject to revocation.

45. The law governing revocation of a grant is Section 76 of the Law of Succession which provides;

“Revocation or annulment of grant-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
 - (ii) to proceed diligently with the administration of the estate; or



(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

46. It is trite law that for a court to revoke a grant, the applicant must meet the grounds set out under section 76 of the Law of Succession Act. See the case of *Jamleck Maina Njoroge Vs Mary Wanjiru Mwangi* (supra) where the court stated that;

“the circumstances that can lead to the revocation of grant have been set out in section 76 Law of Succession Act. For a grant to be revoked either on the application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by making of false statement , or by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law”.

47. Similar position was held in the case of *Matheka and another vs Matheka* (2005) KLR.

48. In the instant case, the applicant/respondent Rose Ongachi made a death report to the public trustee after engaging in family wrangles as to who were the rightful beneficiaries of the deceased’s estate. Rose Ongachi named herself, her son Godfrey and A her daughter now deceased as the only survivors. These position was later corrected by the area DC Budalangi after the public trustee requested for more information.

49. According to the protestor, failure to disclose all beneficiaries amounted to concealment of material information hence a ground for revocation. It is worthy- noting that, by the time Rose Ongachi made the death report to the public trustee, no petition had been filed. The petition filed by the public trustee has the full list of all beneficiaries according to the DC Badalangi’s letter of March 29, 2010. The petitioner having disclosed a full list of beneficiaries, the element of non- disclosure of material facts by not revealing all beneficiaries cannot apply hence not a ground for revocation.

50. As to who should have taken a grant of letters of administration, section 66 of the Law of succession is clear as to who is entitled in order of preference to take out a grant of representation in an intestate estate. For avoidance of doubt, I wish to reproduce Section 66 of the Law of Succession as below;

“Preference to be given to certain persons to administer where deceased died intestate-

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

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and



(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."

51. It is trite that the power to issue a grant of representation is purely a matter of discretion exercisable by the court depending on the circumstances of each case
52. However, in the instant case, it was the court which directed the public trustee to take out letters of administration on behalf of the estate after realizing that the beneficiaries were unable to agree. Therefore, the application of Section 66 of the *law of succession Act* was properly applied by the court and therefore the question as to who had priority to take out letters of administration does not arise after the court exercised its discretion by directing the public trustee to do so. For those reasons, that ground fails.

Who are the rightful beneficiaries or heirs to the estate

53. Save for the applicant Rose Ongachi, all beneficiaries listed as per the petition presented by the public trustee (administrator) herein have been agreed upon. The only contention is the inclusion of the name of Rose Ongachi as a widow to the deceased and therefore a beneficiary.
54. The question which begs for an answer is whether Rose Ongachi was ever married to the deceased. According to the applicant (Rose Ongachi) she got married to the deceased in 1983 in accordance with Luhya traditions. To support this position she produced a letter authored by the Ass chief Ebusiratsi, sub- location dated December 12, 1993 indicating that the deceased did pay two cows as dowry for the marriage of Rose Ongachi.
55. The purported letter is addressed to Alex Okungulo Mukhongi the deceased and signed by four male witnesses namely; Charles, Josphat, Joab, Sadok. and the area Ass - chief. Unfortunately, the deceased did not sign the agreement. None of the witnesses including the Ass chief ever testified. To that extent the said letter alone cannot stand as binding evidence to prove payment of dowry
56. Ordinarily, when dowry is paid under customary marriage, close relatives must be in attendance and certain cultural practices performed. In this case there is no proof that such dowry was paid and necessary Luhya customary marriage practices performed. None of the relatives from either side ever gave evidence to confirm the existence of the alleged marriage. Pw 2 Paul Namugasa a nephew to the deceased denied the claim that Rose Ongachi was married to the deceased. Equally, Catherine Okodo Dw2 and Dw3 all children from the other two houses (Ahoyi and Abwori) also denied that their father was married to one Rose Ongachi.
57. It is trite law that it is incumbent upon a party alleging existence of customary marriage to prove on a balance probability that such marriage did exist
58. It is not enough to claim existence of customary marriage without proof. The burden proof therefore lie on he who alleges; See *Kimani Gikanga* (1965) EA 736 where the court expressed itself as follows;

“ to summarize the position; This is a case between Africans and African customary law forms a part of the law for the land applicable to this case. As matter of necessity the customary law be accurately and definitely established. The court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present lack in Kenya of authoritative text



books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant fact of his case”.

59. Similarly in the case of *ASA VS NA and another* (2020) e KLR the court had this to say;

“The onus vest on the appellant to prove her allegation that dowry was paid”.

60. The court went further to observe as follows;

“It is very curious that immediate members of both the appellant and deceased were not present in the dowry ceremonies. These are the people who ordinarily are present during such ceremonies and would be the first port of call in giving primary evidence. It is even more curious that the ones who witnessed the ceremony were not called.”

61. The other ground relied upon to support evidence of the alleged marriage is the fact that the deceased and Rose Ongachi sired two children among them Godfrey and A now deceased which is not in dispute. All family members recognized Godfrey Wanjala as the deceased’s son but born out of marriage between Rose Ongachi and the deceased.

62. To prove that fact, the protestor referred to the maintenance case No 1/91 where the applicant referred to herself as a cohabitee to the deceased and not a wife. A perusal of the complaint attached as annexure ROA 2 attached by Rose Ongachi to her replying affidavit to the protest, confirms that she did not refer to herself as wife but a cohabitee. If indeed there was customary marriage, why would the appellant refer to herself as a cohabitee?

63. The mere fact that parties cohabit and children are born does not mean that such relationship would amount to a marriage. In the case of *KEO & another Vs JO* (2008) e KLR the court expressed itself on the issue of cohabitation without necessarily giving rise to a marriage relationship as follows.

“marriage must be distinguished from sexual relationship that result into siring of children. Whereas such relationship raises fundamental legal issues, the presumption of marriage transcends such boundaries ...”

64. In view of the above holding, it is my finding that mere procreation is not synonymous to a marriage. A marriage whether statutory or customary has its underlying basic requirements which must be fulfilled before such relationship would graduate to a marriage. In this case, there is not an iota of evidence to conclusively hold that there was a customary marriage between the deceased and Rose Ongachi.

65. The next question for consideration although not pleaded but worth consideration is whether the alleged relationship between the deceased and Rose Ongachi would have given rise to a presumption of marriage. In the case of *NLS VS BRP* (2016) e KLR the court had this to say;

“The court of appeal in Phyllis Njoki Karanja and 2 others Vs Rosemary Mweni Karanja & another (2009) e KLR held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows;

“ Before presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute: that having cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystalized into a marriage and it is



safe to presume existence of a marriage . We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed”.

66. It is clear from the testimony of Rose Ongachi that it was the deceased who visited her residence and then started cohabiting. She was never taken to the deceased’s home or residence as a wife. In fact, from the description of their relationship it was more of concubinage than a marriage. Nobody gave evidence to confirm that the two conducted themselves before the general public or ordinary thinking men in society that they did live or behaved as husband and wife. I suspect that is the reason why the applicant could not attend the burial of the deceased.
67. From the evidence of the applicant it would appear like from 1993 until the deceased died in 2007, there was no further cohabitation. That conduct further explains that there was no marriage but mere sexual relationship. It is absurd that a value can be attached to somebody after he has died simply because he or she has left property which is the point of interest here.
68. In view of the evidence availed and general circumstances of this case, it is my finding that one Rose Ongachi was not married to the deceased. The mere fact that some chief somewhere included her in the list of beneficiaries a fact which was vehemently disputed does not create a marriage.
69. Regarding the question of dependency under section 29 of the *Law of succession Act*, it was upon the applicant to prove that she was a dependant to the deceased immediately preceding his death. Before me there is no such proof hence that allegation is not tenable. To that extent, the only inescapable conclusion is that, the said Rose Ongachi is not a beneficiary to the estate of the deceased.

Who is entitled to which share of the estate

70. As stated above, the undisputed beneficiaries listed by the public trustee in the supplementary affidavit in support of the application for confirmation are entitled to a share of the estate save for Rose Ongachi , whom I have already excluded. How much is each beneficiary entitled?
71. There is no dispute that the deceased died intestate. He was a polygamous man having married three wives namely; Roseline Ahoyi, Roseline Abwori Juma and Lilian Achieng now deceased. The first house comprises of the following beneficiaries;

First house

- a. Roseline Ahoyi Okodo - widow
- b. Susan anyango Okungulo - daughter
- c. Lawrence Okodo Okungulo - son
- d. Stephen Mukhongu Okungulo - son

Second house

- e. Lilian Achiengi - deceased widow
- f. Brian Gift Omondi aka Bryan Mkhongi Okungulo - son

Third house

- g. Maxmilla Atieno Okungulo aka Rosebella Otieno - daughter
- h. Wilson Mukhongu Okungulo - son
- i. Jennifer Anyango aka Jane Wanjiro - daughter



1. In addition, there is Godfrey Wanjala a son born out wedlock.
73. The deceased having died while in a polygamous marriage, Section 40 of the [Law of Succession Act](#) applies. Sub section 1 provides that;

“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”.
74. The above provision was emphasized in the case of *Francis Munyi Thiongo and 4 others Vs Joseph Mwangi Thiongo* (supra) where the court shared the subject property (land) between the two houses in the ratio of 4:5.
75. However, in sharing the subject death gratuity which is the only asset available for distribution, the court will take into account the benefit already derived by some beneficiaries in sharing out the Sacco benefits (shares)
76. Equally, the only surviving widow (spouse) one Roseline Ahoyi will benefit as an additional unit. In my view, the surviving beneficiaries shall share the estate equally less the benefit already received.
77. Since the amount paid to Lawrence Okodo Ksh 123,000 was for completion of the family house, he cannot suffer loss of his benefit by that amount. Equally, Roseline Abwori Juma who benefitted kshs 75,910 is deceased hence the amount paid cannot be recovered. Therefore, the only person who will get her benefit less kshs75,910 already benefited is Roseline Ahoyi Okodo.
78. Accordingly, the grant herein made on May 31, 2018 is hereby confirmed and the estate comprising of death gratuity of kshs 683,453 shared equally amongst the surviving beneficiaries as follows;
 - a. Roseline Ahoyi Okodo Ksh19,009
 - b. Susan Anyango Okungulo Ksh 94,919
 - c. Lawrence Okodo Okungulo ksh 94,919
 - d. Stephen Mukhongu Okungulo Ksh 94,919
 - e. Maxmillan Atieno Okungulo alias Rosebella Otieno Ksh 94,919
 - f. Wilson Mukhongu Ksh 94,919
 - g. Jenifer Anyango Okungulo aka Jane Wanjiro Ksh 94,919
 - h. Brian gift Omondi aka Bryan Mukhongu Okungulo Ksh 94,919
79. Regarding costs, this is a family matter hence each party shall bear own wen costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER, 2022

J. N. ONYIEGO

JUDGE

