



REPUBLIC OF KENYA



**In re Estate of Kamatta Muthaa (Deceased) (Succession Cause 42 of 2019)
[2022] KEHC 15170 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 15170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
SUCCESSION CAUSE 42 OF 2019
SN MUTUKU, J
SEPTEMBER 22, 2022
IN THE MATTER OF THE ESTATE OF KAMATTA MUTHAA (DECEASED)**

BETWEEN

JOSEPH MUTHAA 1ST OBJECTOR

SERAPHINE MUTHAA NYAMBURA KINGORI 2ND OBJECTOR

AND

MICHELLE KAMATTA 1ST RESPONDENT

MALVEC KAMATTA 2ND RESPONDENT

JUDGMENT

Introduction

1. The deceased died intestate on April 22, 2019. According to the documents filed in this cause, he was survived by Michele Kamatta (wife), Mavlec Kamatta (son) and Micah Kamatta (son), administrators. A grant of letters of administration was issued to Michelle Kamatta and Mavlec Kamatta on December 3, 2019. Confirmation of grant was sought by the administrators on January 10, 2020 but an objection was raised by Seraphine Nyambura King'ori and her son Joseph Muthaa, objectors, claiming beneficial interest in the estate as first wife and son respectively.
2. The objectors filed summons for revocation of grant dated February 25, 2020 basing it on the grounds that the grant was obtained fraudulently by concealment from the court of some of the deceased's properties and all the beneficiaries entitled to the deceased's estate including the objectors herein and that one of the administrators, the deceased's second wife Michele Kamatta, has attached a distribution schedule on her affidavit in support of the summons for confirmation of grant dated January 10, 2020 and as per the said schedule Michele Kamatta has proposed all of the deceased's estate to be distributed to her to the exclusion of any other beneficiaries of the deceased's estate.



3. This court (Mwita, J) gave directions on this matter on July 29, 2020 to the effect that the summons for confirmation of grant proceed to hearing during which hearing all the issues in respect of the estate can be handled. Further, on October 26, 2020, the court directed the objectors to file an affidavit of protest to the summons for confirmation of the grant dated January 20, 2021.
4. The record does not specifically spell out how the two applications, summons for confirmation of grant and summons for revocation of grant, are to be handled. The record does not specifically state that both matters shall be determined together. What is clear to me, basing on the directions given by Mwita, J, is that all the issues raised in this matter in the summons for confirmation of grant, summons for revocation of grant and the protest filed herein are to be determined concurrently.

The case for the Administrators

5. Michele and Mavlec filed summons for confirmation in which they proposed that the estate devolves solely to Michele. Her two sons, Mavlec and Micah did not lay any claim to the estate and preferred to have their mother as the sole heir. They also opposed the summons for revocation of grant through a replying affidavit dated June 29, 2020 sworn by Michelle Kamatta.
6. Through the various affidavits filed herein and testimony adduced in court during oral hearing, it is the case for the administrators that Michele is the sole legal wife of the deceased having married and solemnized their marriage on August 17, 1982 at Dayton Ohio in the United States of America and that they were blessed with 2 children, Malvec Kamatta and Micah Kamatta. It is the case for the Administrators that all the assets in the deceased name were jointly acquired by Michele and the deceased during the subsistence of their marriage and that although they hold American passports they are not in a hurry to dispose of and or waste the estate of the deceased.
7. It is their case that the two sons, who reside in America, have consented to the estate vesting in Michele and that the protestors are strangers to the estate and their demands are unfounded and far-fetched. They have denied that Seraphine Nyambura was married to the deceased and that Seraphine has not tendered any evidence to show that she was married to the deceased or to demonstrate any support she was receiving from the deceased. According to them, Seraphine Nyambura does not, therefore, qualify as a dependant.
8. They called as a witness, Wabaire Thumbi, a sister of the deceased. Wabaire testified that Seraphine Nyambura was not married to the deceased and that no dowry was paid according to Kikuyu Customary law and further that the deceased did not take Seraphine Nyambura and Joseph Muthaa home to introduce them as his family. It is the evidence of Wabaire that the deceased had only one wife, Michele and two sons, Mavlec and Micah.
9. On July 29, 2020 Michele filed a further affidavit to which she annexed an amended schedule of distribution in a document marked MK-1 which includes some assets that had been omitted. She also filed a further affidavit on October 23, 2020 in compliance with the court's directions on July 29, 2020 to account for the rental proceeds collected from land reference No Ngong/Ngong/20304. The same is outlined under paragraph 4 of the affidavit.
10. It is her contention that the rental proceeds have been her sole source of income and that she does not receive any financial assistance from her sons as alleged by the protestors.
11. She has further amended the distribution schedule to reflect, as claimed, that the deceased had transferred Kajiado/Kisaju/13357 and Kajiado/Kisaju/13358 to Jane Njeri Kimotho on October 22, 2018.



The Case for the Protestors

12. The objectors have filed various affidavits in support of their case including the affidavit of protest dated January 20, 2021, the affidavit in support of the summons for revocation of grant sworn by the objectors dated February 25, 2020 and supplementary affidavit dated March 9, 2020. It is their case that Seraphine Nyambura is the first wife of the deceased and Joseph Muthaa is the first-born son of the deceased. It is their case that the deceased died and left two wives, Seraphine Nyambura Kingori and Michele Kamatta and 3 children, Joseph Muthaa, Mavlec Kamatta and Micah Kamatta. It is their case that they were excluded from the process of obtaining the grant of letters of administration despite the fact that they are beneficiaries to the estate. They claim that there are rental houses located in Ongata Rongai, Kajiado on plot No 20304 and Bank account number 0xxxxx0 held at Co-operative Bank Kenya Limited which were left out of the assets of the deceased.
13. It is their case, further, that the Michele Kamatta has proposed a distribution schedule in which all the property is to be distributed to her to the exclusion of any other beneficiaries. They have expressed apprehension that the administrators, being American nationals, might alienate the deceased's properties and leave the country.
14. In their evidence during the oral hearing, they told the court that the deceased met Nyambura Kingori sometimes in 1973 and developed a relationship with her. Out of that relationship, Joseph Muthaa was born in 1978. It is their evidence that the deceased married Nyambura under Kikuyu Customary Law and that when the deceased moved to United States of American, he met and married a second wife, Michele Kamatta with whom the deceased sired Mavlec and Micah.
15. It is their case that they were left out of seeking a grant of letters of administration and that when they became aware that a grant had been issued, they noted that they had been left out of the list of beneficiaries and that some of the properties of the deceased had also been omitted.
16. They called Peter Ng'ang'a, an older brother of the deceased, as a witness. Peter told the court that the deceased married Seraphine Nyambura as his first wife in 1973 and that he was present during the traditional wedding ceremony.
17. Joseph Muthaa has filed a proposed schedule of distribution in which he has shown how the objectors would wish to have the estate of the deceased distributed.

Submissions

18. Parties filed submissions in support of their respective cases. The administrators filed their submissions on July 19, 2021. They have raised three issues for determination:
 - i. Whether the applicants are beneficiaries/dependants of the estate of the deceased.
 - ii. Whether the applicants are entitled to the estate of the deceased.
 - iii. Whether the respondents are intermeddling with the estate of the deceased.
19. On the first issue, the administrators submitted that it cannot be true that Seraphine Nyambura is the first wife of the deceased and Joseph Muthaa the first-born son of the deceased. They submitted that the Michele Kamatta is the only wife of the deceased having solemnized their marriage on August 17, 1982 at Dayton Ohio in the United States of America. The exhibited the marriage record (MK1) and argued that it is shown on that record that the deceased was neither married nor have children at the time he was getting married.



20. They have submitted that Michele and the deceased were blessed with 2 sons and that this evidence was corroborated by evidence of Wabaire Thumbi, the deceased's elder sister.
21. They cited *Eva Naima Kaaka & another v Tabitha Waitbera Mararo* [2018] eKLR on what constitutes a Kikuyu customary marriage and submitted that protestors have not demonstrated the existence of a valid Kikuyu customary marriage and that no form of long cohabitation between the 2nd objector and the deceased has been proved which may result to presumption of marriage.
22. On the photographic evidence presented to the effect that the deceased used to visit the objectors when he visited Kenya, they argued that it was not clear from the photographs the capacity in which the objectors were allegedly receiving, visiting and or seeing off the deceased. They also argued that the seasonal greeting cards purportedly sent by the deceased do not demonstrate existence of a marital relationship. They relied on the case of *In re Estate of Edward Kariuki Kimani (deceased)* [2021] eKLR where the court stated that:

“ 51. All that the objector has annexed are photographs in which he, his mother and deceased appear. Photographs do not amount to evidence of paternity. All that the photographs prove is that the deceased knew the objector and his mother – the photographs do not prove in what capacity he knew them.”
23. It was their case that the testimony of Peter Ng'ang'a Muthaa that there was a Kikuyu customary marriage between the 2nd objector and the deceased, did not meet the threshold of a valid Kikuyu customary marriage.
24. They submitted that a copy of birth certificate bearing the name of the deceased as the father of Joseph Muthaa is not sufficient proof of paternity; that the said birth certificate was obtained on October 6, 2005 when the 1st objector was over 18 years old; that he has not tendered evidence to the effect that the deceased consented to the use of his name on the birth certificate as required under section 12 of *Births and Deaths Registration Act* cap 149 laws of Kenya and further that, no witness was called from the office of the Registrar of Births to confirm the genuineness of the said certificate. They relied on the case of *re Estate of Edward Kariuki Kimani (deceased)* [2021] eKLR where a similar issue arose and the court found that the evidence in that case did not meet the threshold.
25. On the second issue, it was submitted that the two sons of the deceased and Michel have agreed to have all the assets to vest on the 1st respondent; that the two siblings swore affidavits and witness statement to this effect; further that, the objectors have failed to establish dependency/paternity/matrimonial relationship with the deceased and therefore cannot lay claim over the estate.
26. They submitted, further, that at all material times to the suit, the 1st administrator has acted diligently and preserved the assets of the estate as required by law; that the rental proceeds collected from Ngong/Ngong/20304 are being applied towards the maintenance and rehabilitation of the assets of the estate and further that the rental proceeds are the sole source of the 1st administrators income considering that she is not receiving any financial assistance from her sons.
27. The administrators urged court to disregard the objector's mode of distribution of the estate attached to the affidavit of protest dated July 20, 2020 and allow the summons for confirmation of grant dated January 10, 2020.
28. The objectors filed their submissions on May 11, 2022. They have raised two issues for determination:
 - i. Whether the objectors are the first-born son and the 1st wife of the deceased herein respectively and whether they are beneficiaries of the estate of the deceased.



- ii. Whether the objectors are entitled to the estate of the deceased as proposed in their distribution schedule.
29. The objectors submitted that they are the rightful heirs as the first-born son and first wife of the deceased and that is why they filed summon for revocation of the grant after realizing that they had been left out of the estate of the deceased. They have submitted that they have filed documents like the birth certificate and the passport to prove that the first objector is the son of the deceased and tendered evidence in court to support their case.
 30. They have submitted that the deceased went to the USA in 1977 and left Seraphine Nyambura pregnant with Joseph; that whenever the deceased visited Kenya, Joseph would live with him in Ngong and that the deceased used to keep in touch with him and sent him cards for his birthday, greetings cards and Valentine's day. The objectors have exhibited photographs taken with the deceased and his mother allegedly whenever the deceased came to Kenya. It is also submitted that Joseph Muthaa lived with the deceased in Berlin, Germany, when the deceased worked there.
 31. They have submitted that Seraphine Nyambura was the first wife of the deceased; that both met in 1973 and conducted a Kikuyu Customary marriage later upon their respective parents consenting to the union and that the deceased left Seraphine Nyambura pregnant with Joseph when he left to go to the USA.
 32. They submitted that Peter Ng'ang'a Muthaa supported the evidence that the deceased and Seraphine Nyambura were married under Kikuyu Customary Law and that he attended the customary marriage ceremony. They contested the evidence of Wabaire Thumbi that she did not attend the customary marriage and submitted that the fact that she said she did not attend the ceremony does not mean that it did not take place.
 33. On the second issue, the objectors submitted that they are entitled to the estate of the deceased to the estate of the deceased as dependants as defined under section 29 (a) of the *Law of Succession Act*.
 34. It is their submission that the following prayers be granted:
 - i. That the grant issued on December 3, 2019 be revoked.
 - ii. That summons for confirmation of grant dated January 10, 2020 and the attached distribution schedule be dismissed with costs.
 - iii. That this honourable court orders that a fresh grant of letters of administration is issued in the joint names of the 1st objector Joseph Muthaa Kamatta and Michele Kamatta as co-administrators.
 - iv. That the new co-administrators to file fresh summons for confirmation of grant with the objectors' proposed mode of distribution attached to the affidavit of protest dated January 20, 2021 to ensure that each beneficiary has been allocated the deceased's properties fairly.
 35. The objectors relied on in *re Estate of Lotupokol Sirma (deceased)* [2018] eKLR to support their case.

Determination

36. I have taken time to read and understand the case for the administrators and the objectors. I have read and considered the applications, the various affidavits, witness statements, annexures, the arguments made orally and the submissions filed. To my mind, the central issue raised in this case, and which require the attention of this court to determine, is who the beneficiaries of the estate of the deceased are.



Once this issue is determined, the issue of the entitlement of each identified beneficiary will become clear.

37. Without repeating myself, I have considered all the evidence presented in this court, be it oral evidence in court and affidavit evidence in addition to submissions and the cited authorities. It is clear in my mind what each party requires from this court.
38. First is the issue of wife/wives of the deceased. Seraphine Nyambura claims to have been the first wife of the deceased, married under Kikuyu Customary Law before the deceased left to the United States of America. She claims to have been left pregnant with Joseph Muthaa whom she gave birth to on August 11, 1978. Given that Seraphine Nyambura has not exhibited a marriage certificate to confirm her status as a wife of the deceased, the only way this court can confirm and find that she was a wife of the deceased is if there is evidence proving to the required standard that a Kikuyu customary marriage existed between her and the deceased or that a marriage can be presumed from their long cohabitation.
39. Her evidence on the Kikuyu customary marriage is rather cursory. In the case of *Eva Naima Kaaka & another*, cited by the administrators, the court revisited Eugene Cotran’s ‘*Casebook on Kenya Customary Law*’ at page 30 where the essentials of a Kikuyu customary marriage are set out as:
- i. Capacity to marry of the parties to marry and their capacity to marry each other.
 - ii. Consent of parties to a marriage and consent of their respective families.
 - iii. Ngurario - no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
 - iv. Ruracio – there can be no valid marriage under Kikuyu customary law unless a part of the ruracio (dowry) has been paid.
 - v. Commencement of cohabitation – the moment at which a man and a woman legally become husband and wife is when the man and the woman commence cohabitation.
40. In the above quoted case the Court of Appeal cited with approval *Gituanja v Gituanja* [1983] KLR 575 where the court held *inter alia* that:
- “The existence of a marriage is a matter of fact which is proved with evidence. The evidence at the trial produced a valid marriage under Kikuyu customary law as was evidenced by the slaughtering of the ngurario.”
41. The court in the above case went on to state that:
- “For instance, the ngurario is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage. But our re-evaluation of the evidence, does not point to a ngurario having taken place. This is because a fundamental component of a ngurario is the slaughtering of a ram or goat.”
42. The court, further, stated that:
- “From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased.”



43. Applying the findings of the Court of Appeal to this case, it is clear from the evidence of the objectors and their witness Peter that there is no mention of the essentials of a Kikuyu customary marriage having been fulfilled. save for stating that Seraphine Nyambura was married to the deceased under the Kikuyu customary law and that Peter was present during that ceremony, there is no evidence of ngurario or ruracio.
44. On whether Seraphine Nyambura was married to the deceased as alleged by the objectors, I will echo the Court of Appeal in the Eva Naima case, above, that without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Seraphine Nyambura and the deceased.
45. Further, the 2nd objector has not proved marriage by cohabitation. She has not tendered evidence to demonstrate that she cohabited with the deceased and for how long that went on. She has not tendered evidence by calling witnesses to prove how they presented themselves to society or whether the community held them as man and wife to enable this court presume marriage by cohabitation existed.
46. Is Joseph Muthaa a son of the deceased? I have considered all the evidence tendered and the authorities cited. I have seen the photographs attached. I have noted the averments in the various affidavits. I have also noted the birth certificate (copy) issued on October 6, 2005. It is obvious that it was issued when Joseph was an adult. That in itself is not an issue. However, the original birth certificate was not produced in court for comparison's sake and this copy is not certified as a true copy of the original. There was no witness who testified on the authenticity of the certificate. Even if this court were to hold that birth certificate as a genuine one, the next question would be whether this document proves paternity or whether the photographs produced and the cards of various occasions sufficient to prove paternity?
47. In *Wilfred Koinange Gathiomi v Joyce Wambui Mutura & another*, [2016] eKLR the court was dealing with the issue of paternity as the central in that dispute. It was held that DNA testing was the only way to resolve the paternity issue.
48. I have read section 12 of the *Births and Death Registration Act*. It provides that "No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom."
49. The 1st respondent has not called the registrar to testify as to what criteria was used to issue the birth certificate. In the case of *Josephat Kola Omino & 3 others v Morphine Ogweno Ougo & another* [2017] eKLR, Justice M.W Muigai stated as follows: -
- "..... the birth certificate produced by Bernard was obtained after the deceased's death and after the issue of his paternity was raised at the hearing. Although there is nothing in the *Births and Deaths Registration Act* (cap 149 Laws of Kenya) that prohibits a birth from being registered at any time, the certificate was obtained long after the deceased's death and no explanation was given for the delay. Bernard did not produce any other documents like birth notification or baptismal card that would corroborate the fact that the deceased was his father. The only inference I can draw particularly in the light of all the other evidence is that it was obtained to support his case."
50. It is my view that birth certificates can be used to prove paternity. But where this is contented, then it may be prudent to produce other evidence to corroborate the evidence of birth certificate.



51. Going by the above cited case and though the birth certificate was obtained before the death of the deceased, documents like birth notification or baptismal cards should have been produced to corroborate paternity. In our case the only other evidence adduced to corroborate the fact that the deceased was the 1st objector's father were the photographs taken during the funeral and undated seasonal greetings cards. The 1st objector also testified on cross examination that his passport has a number that belonged to the deceased. He stated that the deceased used to pay his school fees but has attached no evidence to that effect. He also stated that he lived with the deceased in Berlin, Germany but no evidence was tendered in support of this. But this remains his word alone without anything else like school receipts or other evidence to support that the deceased was supporting him or paying his school fees.
52. On the issue of the photographs, I have considered the case of *In re Estate of Jackson Nicholas Kyengo Mulwa (deceased)* [2021] eKLR where it was held that, "The nature of the relationship is what this court aims to establish, however, in my view merely producing photographs of a graduation in which the deceased is standing beside the applicant is not sufficient to prove father-daughter/ dependent relationship. It is not strange for anyone to attend a function and take pictures in those functions, their participation without any corroboration of existence of relationship, is not convincing."
53. It is trite law that he who alleges must prove. In this case, the evidence adduced is insufficient to prove that the 1st objector is the son of the deceased.
54. Are the objectors entitled to the assets of the estate? section 29 provides that:
For purposes of this part, "dependant" means-
- 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-grandchildren, 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; and
 - c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of his death.
55. This court, having established that the objectors are neither son nor the wife to the deceased respectively, it follows that they do not qualify as dependants as defined under section 29(a) of the *Law of succession Act* and are therefore not entitled to the assets of the estate of the deceased.
56. On whether there was intermeddling of the estate by Michele, I have considered the allegations by the objectors and the explanation offered by Michele through averments in an affidavit and I find that the evidence in support of allegations of intermeddling is not sufficient to prove the same on a balance of probabilities.
57. The consequence of my findings is, firstly that the summons for revocation dated February 25, 2020 and an affidavit of protest dated January 20, 2021 must fail and are hereby dismissed. Secondly, that the summons for confirmation of the grant dated January 10, 2020 succeeds and is hereby allowed.
58. There being no reason to prevent this court from confirming the grant given that the summons for confirmation has been allowed, I hereby confirm the grant of letters of administration issued by this court on December 3, 2019.



59. As regards the distribution of the estate, I have read the amended schedule of distribution attached to the further affidavit of Michele Kamatta sworn on July 29, 2020. It includes Jane Njeri Kimotho as a beneficiary of Kajiado/Kisaju/13357 and 13358. I find no evidence as to how these properties are being allocated to Jane Njeri. That further affidavit does not lay the basis and the administrators evidence in court based on their statements do not mention this person. In her evidence in court, Michele told the court that she is the sole beneficiary and did not mention any buyer of some of the assets of the estate.
60. Secondly, I have noted that in the amended schedule of distribution, numbers 40, 41 and 42, property known as Kajiado/Kisaju/13360, 13384 and 13362 is supposed to devolve to one Kamatta Muthaa. It is not clear to me who this person is in relation to the estate of the deceased. Does this refer to the deceased and if so, how can the estate devolve to him?
61. It is clear to me that there are issues to be resolved before this court can conclude granting the orders in respect of the distribution of the estate. To that end, I direct the administrators to file a supplementary affidavit in explaining how the estate is to be distributed. This will guide the court in granting the final prayers on distribution of the estate.
62. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 22ND SEPTEMBER 2022.

S. N. MUTUKU

JUDGE

