



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 372 OF 2014

IN THE MATTER OF THE ESTATE OF JK alias JKM (DECEASED)

LN.....PETITIONER

VERSUS

TGS.....1STPROTESTOR

RMK.....2NDPROTESTOR

RULING

1. **JKM** (*the deceased herein*) died on 6/7/2012. **LN** (*the petitioner herein*) initiated these proceedings through citation of the beneficiaries of the estate of the deceased in **Succession Cause No. 277 of 2013**. On 24/2/2014 **Justice J.A. Makau** granted the citees thirty (30) days to file the petition for grant of letters of administration in default of which the citor was granted leave to petition for the same. The citees failed to petition within the prerequisite timeline hence the petitioner filed the petition herein on 11/08/2014. The objectors would later file **Succession cause No. 672 of 2014** that has since been consolidated with this cause.
2. The petitioner attached a letter of introduction from the **Area Chief-Ndamene Location** dated 13/02/2013 that listed the following as the beneficiaries of the estate of the deceased i.e; **TGJ (wife) SMK, DKK, RMK, JKK, EKK, LN (wife), MK, BM, BM**.
3. She also listed the following as the assets of the deceased; L.r. Nos. Nkuene/ Kithunguri/****, Nkuene/Kithunguri/****, Nkuene/Kithunguri/****, Nkuene/Kithunguri/****, Nkuene/Kithunguri/****, Nkuene/Kithunguri/****, Nkuene/Taita/****, Nkene/Taita/****, Nkuene/Nkumari/****, Nkuene/Mitunguu/**** (jointly owned by Josephat Nkaricha & Lawrence Mburugu (both deceased), Abothuguchi/Kijja/****, Abothuguchi/Kijja/****, Abothuguchi/LowerKijja/**** (Jointly owned between Josephat Nkaricha and Rugiri), monies in bank accounts at Family Bank, Cooperative Bank Standard Chartered Bank, Meru Farmers Sacco, Land Rover KPQ ****.
4. On 2/7/2015 this Court issued a grant for letters of Administration to **LN, TG and RMK**. On 9/05/2016 the petitioner filed summons for confirmation of grant proposing her mode of Distribution. She also averred that the deceased sired **BM and BM** and adopted **MK**. On 10/11/2016 the objector also ostensibly filed summons for confirmation of grant proposing their modes of distribution. The same was supported by the sworn affidavit of **TGJ** where she in part averred that the deceased had only one child out of well dock i.e. **BMK**.
5. On 23/11/2016 this Court directed the parties to canvass the two summons contesting the mode of distribution through viva voce evidence. Both parties filed their respective statements which they relied on as their examination in chief during the trial.
6. **Rw1 TGJ** testified that she was married to the deceased in the year 1972 and the same was formalised in the year 1989 under the now repealed African Christian Marriage and Divorce Act Cap 151 Laws of Kenya. That they had five children with the deceased i.e. **SMK, DKK, RMK, JKK, EKK** (deceased leaving behind SG).She denied that LN was ever married to the deceased. It was her testimony that the deceased in one of the family meetings acknowledged that she had an affair with LN out of which **BM** was born.
7. It was also her testimony that **MK** and **BM** are strangers to the estate of the deceased. She took special mention that their names do not bear the surname of the deceased. She also testified that the letter from the chief relied on is misleading since in the face of it recognising the customary marriage the same cannot purport to recognise the petitioner as the co-wife of the deceased.
8. In cross-examination when shown photos of LN during R's graduation ceremony from [particulars withheld] Polytechnic she stated that she does not recognise the petitioner. In re-examination it was her testimony that her daughter occupies **L.r. Nkuene/ Taita/******. That LN neither contributed to its development nor did she stay at the said premises.
9. **Rw2 RMK** also denied LN was a wife to the deceased. He however acknowledged BM as a son of the deceased. He testified that the deceased informed them of his affair with the petitioner during a family meeting in the year 2012 and that they have since recognised BM as

their brother and in part paid for his school fees. He stated that since the petitioner started laying claim to the estate of the deceased she decide to track her whereabouts and that's when he learned that she was a civil servant working at the Deputy Commissioners Office at [Particulars Withheld] and that's how she was able to dictate the area chief to issue the letter dated 13/2/2013. That prior to their citation he had tried to get a letter form the area chief and the Deputy Commissioner but all was in vain.

10. On being shown the photographs of LN during his graduation ceremony she admitted that the same had semblance to N but he denied that at any one time the deceased had introduced her to them as her wife. He denied ever making a statement acknowledging the petitioner as a wife of the deceased. He confirmed that his sister lived in Parcel No. **** which also contained rental premises. He denied that the petitioner had at one time lived in the Parcel No. **** or in the rental premises. He also stated that he is not aware why the petitioner paid for her school fees and that in any case he may have been sent by her father.

11. **Rw3 EMM** brother to the deceased, corroborated the testimonies of Pw1 and Pw2. It was his testimony that the deceased never called them and/or informed them that he had paid dowry for LN. He however acknowledged that BM was a son of the deceased. He also told the court that the area chief never summoned them before he wrote the letter of introduction.

12. **Pw1 LN** testified that she got married to the deceased under Meru Customary Law. The deceased paid for her dowry in the months of April and August 1996 accompanied by **M and K**. That at the time she got married she knew that the marriage between the deceased and T was still subsisting.

13. That Boniface was born on 28/4/1997. The deceased also adopted MK. She denied using her office to obtain the birth certificates in the year 2010. She however stated that she did not disclose to the Registrar of persons that the deceased was not the biological father of the deceased. In relation to plot No. **** he averred that she contributed in building the rental premises from the year 1998.

14. It was his further testimony she is familiar to Pw2 RM as he had sought her admission in [Particulars withheld] Polytechnic and was also present during her graduation. He also stated that she was present during the burial of the deceased but they were not recognised.

15. **Pw2 SM** testified that LN is her daughter. He told the court that the deceased died before he could pay dowry. That he only paid Kshs. 50,000/= which was for introduction and courtship. That when the deceased came to pay for the introduction he came with about ten people. He could however not recall if the brothers of the deceased were present. That he has never paid a visit to the home where the deceased and LN lived and is not aware whether the deceased cohabited with LN and/or had a matrimonial home. That LN had two children (a son and a daughter) prior to when the deceased came to pay for the introduction though he stated he is not aware who the father of the children was.

16. **Pw3 SKK** testified that he was present in the months of April and August when the deceased paid dowry for LN. He was categorical that the same was dowry being paid as opposed to introduction. He stated that in April 1996 the deceased paid Ksh. 50,000/= while in August he paid Kshs. 20,000/=. That it is only elders who went to pay dowry. Women did not accompany them. He denied that Lhad two children at the time they went to pay dowry and stated that she had one child.

17. **Pw4 JM** testified that he was present at the dowry ceremony. That at the time the deceased came with his two brothers, but he cannot recall their names. That he also painted the deceased house in Nkubu in the year 2010. He told the court that at the time the deceased had informed him that he wished to reside in the same together with LN. That he attended the deceased burial in the year 2012 but at this time the deceased had not settled with the deceased in the painted house. He told the court that L had one child at the time they went to visit her parents.

18. **Pw5 Geoffrey Kathira Magambo** testified that he is a retired chief of Ndemene Location. That he is aware that the deceased had five children with his first wife and that he later on married LN as his second wife. That there arose a dispute as to the paternity of the first two children of the deceased. That RM informed him that they were not in agreement with L over the paternity of B and M and that they were not in agreement with the fact that the deceased had married LN. He told the court that he was issued the list of properties by RM. That he listed the beneficiaries of the estate as related to the deceased.

Analysis and Determination

19. The main issue for determination in this cause are; **Who are the immediate beneficiaries of the estate? How shall the estate of the deceased be distributed?**

20. It is not in dispute that **TGJ** was the 1st wife of the deceased and that the deceased had five children with the 1st wife i.e. **SMK, DKK, RMK, JKK, EKK (deceased leaving behind SG)**. They are therefore properly deemed to be beneficiaries of the deceased. The 1st wife and her children also acknowledge **BM** as a child of the deceased. He is also deemed to be a beneficiary of the estate

21. The main contention relates to LN. **Whether she was a wife of the deceased and whether MK and BM are daughter and son of the deceased respectively.**

22. The petitioner relied on the case of **Selina Cheptere Maritim Versus Grace Chemutai Maritim Civil Appeal No. 274 of 2013**. In the case the appellants had contracted a second marriage with the deceased. The 1st marriage was contracted under the civil regime. The court of appeal found that the 2nd wife was a wife not only under common law but also under customary law.

23. The same sentiments were also held **In re Estate of Morris KilonzoMusyimi (Deceased) [2018] eKLR** where the court held;

“There is no doubt that at the time that the Respondent alleges that she got married to the deceased through the Kamba Customary Law, the deceased was already married to the Applicant herein on 12th August, 1944 through a monogamous

statutory marriage. Section 37 of the Marriage Act provides that:

Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.

40. It is appreciated by the parties that it was pursuant to this provision that the decisions in Re Ruenji's Estate [1977] KLR 21 and Re Ogola's Estate [1978] KR 18 were decided. However with the enactment of the Law of Succession Act which came into force in 1981, section 3(5) therefore provides that:

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

.....It follows that Re Ruenji's Estate (supra) and Re Ogola's Estate (supra), can no longer be cited as authorities to bar a woman from being considered as a wife where there is a marriage between her and the deceased whether real or presumed."

24. The submission by the protestors that the petitioner cannot be considered to be lawful legal wife due to the pre-existing civil marriage between the petitioner and TGJ does not bear.

25. As for the dowry payment **Pw2 SM** was categorical that the amounts paid by the deceased was an introductory fee. He denied that the same was paid as a dowry. **In Restatement of African Law, the law of Marriage and Divorce, By Eugene Contran, Pg. 36** on marriage negotiations the same states that the negotiations are done by conducting several visits the first being the selection of the bride, several visits between the parents of the boy and the girl to get more acquainted and thereafter a visit is conducted where a negotiations are done and a first instalment is paid. **Pg. 38** on the method of payment if marriage consideration under the Meru, Tharaka customs it is stated that before cohabitation starts there must be an agreement to pay. The marriage is valid so long as there is an agreement to pay.

26. One may argue that by the fact that the protestors were not aware and the fact that the living brother of the deceased herein did not attend the marriage negotiations then the same cannot be said to have taken place. However the court of appeal in **Selina Cheterer Maritim (supra)** took cognizance of this fact when it held that the absence of fanfare and any elaborate ceremony around the payment stemmed from the very fact that the same was a second marriage.

27. The evidence of the petitioner's witnesses clearly shows that there was a consideration already paid by the deceased. The same may be taken to constitute a valid marriage within the Meru Custom. It then follows that LN was a legal wife of the deceased.

28. Clearly the evidence of cohabitation was not established by the petitioner. Pw testified that the deceased never resided in the house that he was painting in the year 2010 to the time of his death. Pw testified that he was not aware of where her daughter resided with the deceased. None of the petitioner's witnesses led evidence to the residence of the petitioner and the deceased. The petitioner in her evidence was also categorical that the rental homes in P/No. **** was not their matrimonial home. The petitioners averment that the deceased rented for them and their children premises in Nkubu was not supported with any documentary evidence nor corroborated with any of her witnesses.

29. Having however found that the petitioner and the deceased contracted a marriage under Meru customary law it follows that she still remains a wife for the purposes of Succession.

30. The next point of determination is whether the issues arising out of the relationship of the deceased and the petitioner are beneficiaries of the estate. I must point out that the birth certificates relied upon the petitioner are defeatist. The same bear inconsistencies with regard to the minor, MK, the circumstance in which they were issued is also doubtful, for instance the birth certificate for BM and BM were issued after the death of the deceased, hence they cannot be relied upon. The evidence of the petitioner was that the deceased sired BM on 28/04/1997 and BM on 28/10/2003.

31. **Section 29 of the L.S.A.** provides who the dependants of the estate of a deceased person are by stating that:

"29. Meaning of dependant

For the 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, 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; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

32. **In re Estate of the Late Annelies Anna Graff [2019] eKLR** the court explained the provisions of Section 29 when it held as follows;

“Section 29(a) creates a special category of dependants who are dependants due to their relationship to a deceased. Here the wife, wives, former wife or wives and the children of the deceased are automatic dependants and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death. The next category found in Section 29(b) can only be dependants if they were being maintained by the deceased immediately prior to his death. Not all the parents, step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers, sisters, half-brothers and half-sisters of a deceased are dependants of the deceased person. Maintenance by the deceased prior to his death has to be established before a member of this group becomes a dependant. Section 29(c) provides that a husband of a deceased is a dependant if he was being maintained by the wife immediately prior to the date of her death.”

33. The petitioner herein has attached letters form [particulars withheld] Primary School and [particulars withheld] Secondary school that confirms that the deceased paid for the school fees of both BMK and MKK. The petitioner also alleged that they resided with the deceased together with the minors in a rental premises in Nkubu, this much has not been rebutted by the protestors. I do also note that the petitioner and the deceased were in a relationship during the period 1996-2012 when he met his demise, a period of sixteen years. I therefore do find that BMK and MK are beneficiaries of the estate of the deceased.

34. Having determined the immediate beneficiaries of the deceased the next point of determination is the distribution of the estate of the deceased. The deceased herein died intestate and as found above at the time of his demise the deceased was polygamous hence his estate ought to be distributed in line with **Section 40 of the law of Succession Act. Section 40 provides;**

“40 (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal estate shall in the first instance, be divided among the houses and the household effects and the residue of the net intestate 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.

(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in Sections 35 to 38.

35. I do note that all of the properties were acquired by the deceased and TGJ. LN has stated that she assisted in the construction of the rental premises at Parcel No. **** which commenced in the year 1998. I shall therefore take into account the contribution of both TG and LN during the lifetime of the deceased. I find fortress in this determination from the decision **In re the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] Eklr** where **Mumbi Ngugi J** held as follows;

“33. To equate the widow to children, or the first widow to widows who enter the home decades later, who may be the age of the first widow’s children and made no contribution to the acquisition of the estate registered in the name of the deceased, is to perpetrate an injustice against women that cannot be justified under any circumstances. For the courts to perpetuate the perpetration of the injustice on the basis of section 40 of the Law of Succession Act is to abdicate their constitutional responsibility to do justice. The principle of equality and non-discrimination is at the core of the sovereign law of this land, the Constitution. For a court, therefore, to apply any law in a manner that is discriminatory on the basis of sex, or any of the prohibited grounds of discrimination, or to apply a provision of the law that is discriminatory, as section 40 admittedly is, or to consider itself bound by such discriminatory law, is to fail to meet the constitutional demands imposed on it.”

36. The estate shall therefore be distributed as hereunder;

NAME	DECRPTION OF THE PROPERTY	SHARE
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i. L.R. NKUENE/TAITA/**** was registered in the name of the deceased on 7th March 1994 long before LN started cohabiting with the deceased and in the spirit of the holding in **In re the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] Eklr**, the same shall be shared equally between TGJ and her children with the deceased namely:-

TGJ

SMK,

DKK, To share equally

RMK,

JKK,

Shannon Gakii

ii. L.R. NKUENE/TAITA/**** was registered on 27th April 1995 the same is distributed to

TGJ

SMK,

DKK, , To share equally

RMK,

JKK,

SG

iii. **L.R.NKUENE/KITHUNGURI/****** – was registered in the name of the deceased on 21st April 1992 in the name of the deceased, the same is distributed to:-

TGJ

SMK,

DKK, To share equally

RMK,

JKK,

SG

iv. **L.R. NKUENE/ KITHUNGURI/****** registered on 24th December 2001 in the name of the deceased, the same is devolved to Stanly Mutura Kinoti as proposed by LN.

v. **L.R. NKUENE/KITHUNGURI/****** was registered on 14th December 1993 in the name of the deceased and the same is distributed as follows:-

TGJ

SMK,

DKK, To share equally

RMK,

JKK,

SG

vi. **L.R. KITHUNGURI/****** registered on 10th May 2000, this court finds that the proposal by LN the same to be distributed to BM is fair. The same to be held in trust for BM by the 2 administrators to the estate of the deceased namely:- LN and TG.

vii. **L.R.KITHUNGURI/****** is shown in the chief's letter as an ancestral land for which the deceased had a share and therefore this court hereby finds that the share belonging to the deceased should go to TG and her children as well as BM in equal shares.

viii. **L.R. KITHUNGURI/****** is also described by the chief as ancestral for which the deceased had a share and same should go to

TGJ

SMK,

DKK, TO SHARE EQUALLY

RMK,

JKK,

SG

BM

ix. L.R. KITHUNGURI/** was registered in the name of the deceased on 22nd April 2003 and inconsideration of the proposals made by both parties the same shall be shared as follows :-**

TGJ

JKK

SG

LN TO SHARE EQUALLY

BM

MK

x. L.R. NKUENE/KITHUNGURI/** registered on 3rd April 1998 the proposal by TG that**

RM,

SM TO SHARE EQUALLY is fair however BM's share

BM should be held in trust by LN for herself and for BM.

xi. L.R. NKUENE/ MITUMGUU/** was registered 19th February 1991 with JK holding 11/50 shares Whereas LM had 39/50 shares. The share belong to the deceased should devolve to TG in whole.**

xii. LR. ABOTHUGUCHI/KIJA/** is shown in the chiefs letter as jointly dated 13th February 2013 as jointly owned between the deceased and one Rugiri. This court was not shown such certificate or any document evidencing ownership but the share that belong to the deceased should devolve to LN in whole.**

Xiii (a) Account no. [...] held at Family bank Nkubu branch- proceeds to be shared between the widows as follows:

TG - $\frac{3}{4}$

LN - $\frac{1}{4}$

(b) Account no. [...] held at the Cooperative bank Nkubu branch – Proceeds to be shared between the widows as follows

TG - $\frac{3}{4}$

LN - $\frac{1}{4}$

(c) Account no. [...] – held at Standard Chartered Bank – Proceeds to be shared between the widows as follows.

TG - $\frac{3}{4}$

LN - $\frac{1}{4}$

(d) Meru Farmers sacco account no. [...] to go to the person nominated by the deceased.

(e) Motor vehicle registration KPQ * Landrover go to the 1st widow TG.**

This being a cause involving family members each party will bear their own costs.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 27TH DAY OF FEBRUARY 2020.

In the presence of :

C/A: Kinoti

Petitioner :-

Protester 1: Mrs Ntarangwi Advocate for 1st Administration

Ms Lusweti Advocate holding brief for Ndubi for 2nd and 3rd Administration. 0

HON A. ONG'INJO

JUDGE