



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
SUCCESSION CAUSE NUMBER 153 OF 2011
IN THE MATTER OF THE ESTATE OF ADRIANO WELIKHE MULIALI (DECEASED)

AND

LUKAS WAMALWA WELIKHE.....1ST PETITIONER

VERSUS

EUNICE NASIMIYU MUMARAKI.....OBJECTOR/2ND PETITIONER

J U D G M E N T

Adriano Welikhe Muliali died on 2nd September, 1997 at East Sangolo in Bungoma County. He left as his estate land Parcel No. E. Bukusu/E.Sangalo/50 measuring five point four (5.4) acres. Lukas Wamalwa Welikhe (1st Petitioner) applied for letter of administration in his file, stating that he was the only surviving son of deceased and beneficiary to the estate. On the basis of that information a grant was issued to him dated 9th August, 2011 and certificate of confirmation of grant issued on 9th February, 2012. In the confirmed grant the whole property E.Bukusu/E. Sangolo/50 was granted to the 1st petitioner Lucas Wamalwa Welikhe. On 27th March, 2012 the property was transferred to the 1st Petitioner.

By summons for Revocation or annulment of grant dated 23rd January, 2015, the objector/2nd petitioner Eunice Nasimiyu Mumaraki, sought that the issued grant be revoked on the ground that the same was obtained fraudulently by concealing material facts, that the 1st petitioner was the only beneficiary. The objector averred that she was a widow of the deceased and had been left out of the estate. The objection as canvassed by way of via voce evidence. By ruling dated 11th June, 2019 this court ordered: -

“The grant of letters of administration issued and confirmed to the petitioner on 2nd September, 2011 be and is hereby revoked and any transaction entered in pursuance of that grant is null and void.”

Subsequent upon the revocation of the grant issued to 1st Petitioner, this court on 15th June, 2019 directed: -

“The grant of letters of administration be jointly issued to the petitioner and objector. Parties to file summons for confirmation and their mode of distribution.”

Being unable to agree on a common mode of distribution, the petitioners filed their respective mode of distribution. The 1st petitioner in his filed mode of distribution, distributed the estate as hereunder: -

Land parcel No. E. Bukusu/E.Sangalo 50.

1. Lucas Wamalwa Welikhe – 5 has (the entire portion)
2. Eunice Nasimiyu Mumaraki – NIL

The 2nd petitioner Eunice Nasimiyu Mumaraki proposed as follows: -

1. Eunice Nasimiyu Mumaraki – 3 acres
2. Susana Nanjala Welikhe – 2 acres

3. Lukas Wamalwa Welikhe – 0 acres

Both parties filed written submission in support of their proposals. Mr. Wanyonyi for the 1st petitioner submitted that the 2nd petitioner and her daughter have not tendered evidence to show that they were dependents in terms of Section 25 read together with Section 29 of the law of Succession Act. He submitted that the deceased was a monogamous man and there is no way he would have contracted a subsequent marriage. He submitted that if the 2nd petitioner had married the deceased that she was just a girlfriend who is not entitled to any share. Finally, he submitted that there is no evidence that the 2nd petitioner's daughter was sired by the deceased. Counsel referred this court to **In the Estate of Morris Kilonzo Musyimi (Deceased) 2018 eKLR.**

Mr. Wamalwa for the 2nd petitioner Eunice Nasimiyu Mumariaki submitted that it is not in dispute that the 2nd petitioner stayed with the deceased on plot No. E.Bukusu/E. Sangalo/50 until he died and was buried on the same parcel of land. He submitted that 1st petitioner is registered as owner of E/Bukusu/N Sangalo 649 measuring 4.6 Ha (above 11.5 acaras) and is therefore, not entitled to any share in E. Bukusu/E. Sangalo/50. He urged the court to order the parcel No. E. Bukusu/E. Sangalo/50 be shared between the petitioner and her daughter.

The issue which was raised in the application for revocation of grant dated 23rd January, 2015 and which is also subject to the submissions by the parties is a determination whether 2nd petitioner Eunice Nasimiyu Mumalaki was a wife of the deceased Adriano Welikhe Maliali. To determine that this court will examine the evidence tendered by the 1st petitioner and 2nd petitioner in the hearing of the application by way of viva voce evidence.

The 1st petitioner Lukas Welikhe gave evidence. He testified that he had filed an affidavit which he adopted as his evidence in chief. In the affidavit filed on 18th February, 2015 he deponed in paragraph 7 & 8: -

“7. That it true that Adriano Welekhe Muliali died in the year 1997 and on suit land parcel E.Bukusu/E. Sang’alo/50 there was no physical boundary between the applicant and myself. The applicant only married the deceased by late 1996 and on 2nd September, 1997 he passed away he had no child in their marriage.

8) That in reply to paragraph 6 the time the applicant was marrying my late father I was already in occupation on the suit parcel constructed a permanent houses as my late father was still alive.”

The petitioner then later filed a further supporting affidavit dated 14th August, 2018 in which he deponed that the claim by the 2nd petitioner that she was a wife of deceased are lies. He deponed that he had lived on the parcel of land for all his life and he built a permanent house and that his father and mother are buried on the same parcel of land. He further deponed that the deceased was only married to Anyasi Namaokiba Welikhe by a wedding ceremony on 9th May, 1933. He also deponed that the document purported to be an arbitration by elders dated 20th December, 2012 purporting to distribute the property was not signed. In his evidence before court he stated that the 2nd petitioner says she was married to the deceased as the deceased was already married as per the extract from the marriage Register which showed he was married in the Catholic Church. Finally, he testified that if the 2nd petitioner is 44 years old and born in 1974 and she married deceased in 1983, then it is not possible that she married deceased when she was 9 years old. He deponed that there is no evidence of dowry paid and that all the 2nd petitioners witnesses are all his relatives and, therefore, not neutral in this matter or in their evidence.

Eunice Nasimiyu Mamareki the 2nd petitioner filed witness statement dated 29th January, 2018 which she adopted as her evidence in chief. She testified that she married the deceased in 1983 as the 3rd wife. They were blessed with two issues of the marriage but one died and one Susan Nanjala Welikhe is alive. She stated that the deceased paid dowry of 3 cows and one goat. The deceased allocated her plot No. E.Bukusu/E. Sangalo /50 and the 1st petitioner who is a son of her 1st co-wife was allocated E. Bukusu/N Sangalo 649. She testified that when the deceased passed on the 1st Petitioner started asking her to leave the land and has been assaulting her, a matter she reported to authorities. Upon being cross-examined by petitioner, she confirmed that they got married at 25 years in 1983 and that her child who died was buried on the parcel of land. She confirmed that land is 5½ acres.

OW 2 Pius Kimwan testified that he is the Chairman of Babuya clai where the deceased came from. He testified that the 2nd petitioner was a wife of the deceased and he participated in dowry payment where 3 cows and one goat were paid.

OW 3 Samson Wekesa Mamaraki the brother of the 2nd petitioner testified that in 1986 he received dowry form the deceased clan in respect of the 2nd petitioner. OW 4 Charles Wanjala Toili the nephew of deceased testified that the deceased had 3 wives and 2nd petitioner was the 3rd wife. He testified that the children of the 1st house – where 1st petitioner is one of them were given separate land by deceased. He testified that after the death of deceased, the Lufu ceremony was held on 9th September, 1997 where Zacharia Namasu was the Chairman and he was the secretary. In ‘lufu’ the ceremony, it was decided the subject parcel of land be allocated to the 2nd petitioner as the 1st wife's children had been given another parcel of land.

From the evidence and submissions, the 1st petitioner contends the the 2nd petitioner would not have been married to deceased as the deceased having married Anyesi Nyamaokibe as his first wife under a Christian marriage had no capacity to marry the 2nd petitioner. The evidence and submissions of the 2nd petitioner was that she was married to the deceased under customary law as a 3rd wife and had two issue of marriage but only one is alive.

It is common ground that the deceased died on 2nd September, 2019 intestate. His estate, therefore, is subject to the administration under the Law of Succession Act Cap 160. The Law of Succession applies in all cases of succession, testate and intestate, in respect of the administration on the estate of any person dying after the commencement date. Section 2 provides: -

(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

The deceased having died on 2nd September, 1997 the protection and administration of his estate is to be governed by the Law of Succession Act. The purpose of the act is the protection and administration of the estate for the benefit of the defendants. Section 29 sets out the meaning of who a defendant is an estate. Section 29 provides: -

For the purpose of this part, defendant means: -

a) The wife of 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, grand-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.

The 2nd petitioner's counsel, therefore, in submissions that the 2nd petitioner being a wife of the deceased is entitled to a share of the estate. The 1st petitioner submits that the 2nd petitioner was not a wife and, therefore, not a dependant.

The 1st petitioner contends that his father, the deceased having married his mother under the Christian marriage did not have capacity to marry to 2nd petitioner. He premised his argument on Section 37 of the Marriage Act which Provides: -

“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 foresaid, nothing in this Act contained shall affect the validity of nay marriage contracted under or in accordance with any native law or custom, or in any manner apply opt marriages so contracted.”

It is upon the said application of this provision that the court's decision in **Re Ruenji's estate 1977 KLR 21** and **Re Ogollas estate 1978 KLR 18** were decided. These decisions which had good intentions, did not recognize as beneficiaries widows and children born from a union of a man already married, under statute and another woman during the subsistence of the statutory marriage. To mitigate this effect of the decision Parliament enacted the Law of Succession Act 1981 Section 3(5) of the Act provides: -

“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 proposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

The rationale for the enactment and application of the law of Succession Act was well stated by the court of Appeal in **MNM Vs DNMK & 13 others (2017) eKLR**.

“The Section was introduced in 1981 by the Statute Law (Repeals & Miscellaneous Amendments) Act, No. 10 of 1981. The purpose of the amendment was to mitigate the rigours of decisions such as Re Ruenji's Estate and Re Ogola's Estate, which did not recognize as beneficiaries widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage. To the extent that a marriage arising from a presumption of marriage that is potentially polygamous, the prior monogamous marriage of the deceased to M would not preclude E from being recognized as a beneficiary of the deceased. See Irene Njeri Macharia Vs M Wairimu Njomo & another, CA No. 139 of 1994 Miriam Njoki Muturi Vs Bilha wahito Muturi, CA No. 168 of 2009 and Muigai Vs Muigai & another 1985 – 1998). I EA 206.”

A marriage being a universal institution parties enter into it in various ways depending on religion, culture, belief. In Kenya the recognized form of marriage are the Christian marriage, Hindu marriage, statutory or civil marriages, customary law marriage, Islamic law marriage and to some extent a presumption of marriage. Whichever way you enter, the marriage becomes a union of man and wife which bestows rights and obligations to each party as man and wife.

The 2nd petitioner in her evidence contends that she was married to the deceased under Luyhia Customary law to which the two of them belong. She testified that dowry was paid. She moved to the home of deceased who built her a house. They had 2 children but one died and one is alive. She also testified that when he died, he was buried at her home. Further, in compliance with Bukusu Customs after his death the Lufu Ceremony was performed and at all times she was recognized as a wife. Though the 1st petitioner denies that there was a customary marriage, the witnesses who testified for 2nd petitioner and who are relatives of the deceased confirmed she was married to the deceased. There was evidence of payment of dowry, an important element of customary marriage.

The 1st petitioner's contention, however, is that she could not have been married to deceased under any other law as the deceased having married in the Christian marriage had no capacity to marry the 2nd petitioner. In **Mary Wanjiru Githatu Vs Esther Wanjiru Kiarie (2010) IKLR 150** the Court of Appeal stated: -

“The cases of Machani and Njoki were based on the old thinking and it is noteworthy that Parliament realized that women who genuinely had been taken a wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnize the union and by Act No. 10 of 1981. Parliament added Section 3(5) of the Law of Succession Act, Cap 160. Laws of Kenya to the effect 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 Section 20 and 40 thereof and her children are accordingly children within the meaning of the Act.”

The legal position, therefore, is that the fact that a person who had married under statutory marriage and later married under any other law, the wife married under the other law is still a wife for the purposes of the law of Succession Act.

In this case, 1st petitioner admitted that the 2nd petitioner was staying with the deceased before his death. In paragraph 7 and 8 of his replying affidavit filed in court on 18th February, 2015 he depones that the 2nd petitioner married the deceased by late 1996 and on 2nd September, 1997 he passed away and did not have a child in their marriage. He admits that when 2nd petitioner was marrying deceased, 1st petitioner had already constructed a permanent house on that parcel of land.

Having been married under Customary Law by the deceased before he died, I find that the 2nd petitioner was a wife for purposes of the Law of Succession Act.

Having so found that the 2nd petitioner is a wife and therefore entitled to a share of the estate, the law of Succession Act provides for mode of distribution. Section 40 of the Law of Succession Act provides: -

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

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

Parties filed their respective made of distribution. Each of the parties excluded the other from distribution. The 1st petitioner of the basis that 2nd petitioner is not a wife. 2nd petitioner excluded the 1st petitioner on the basis that he had been provided for by the deceased and given another parcel of land; to which he had a title deed to. This court can only distribute the estate of the deceased. Section 3 of the law of Succession Act. According to Section 3 of the Act: -

“Estate” means the free property of a deceased person” while “free property”. In relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death”.

It is therefore, clear that the only property that forms part of the estate of the deceased is that property which the deceased herein was legally competent to dispose of during his lifetime and in which by that time his interests had not been terminated.

In form P2A 5, the only listed property of the deceased is E.Bukusu/E.Sangalo/50 measuring 5.4 acers. That is the only free property of the deceased. There is evidence that the 1st petitioner has been staying on the land and built a permanent house. This court must, therefore, distribute the estate as equitably as possible, taking into account the settlement on the ground. This is a principle set to cause minimum disruption of implementation Maraga J (as he then was) in **Benson Njoroge Gitau Vs Peter Mwangi Gitau, Nakuru HCSC NO. 330 of 2003** held: -

“Section 40(1) of the Law of Succession Act states 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..... Taking all the circumstances into consideration, it is important that when the subdivision is effected over the main property the portions occupied by respective beneficiaries should revert to them. The developed portion of the plot should also be valued and shared equally among the beneficiaries thus it may be easier to sell the plot and share the proceeds. But if the plot is divisible the beneficiaries can group themselves in a way that they can be registered as tenants in common.... Under Sections 42 of the Law of Succession Act previous benefits should be brought into account during distribution.”

The total acreage of the land is 5.4 acres. I, hereby distribute the estate as follows: -

1. 1st Petitioner Lucas Wamalwa Welikhe to get 2 acres.

2. Eunice Nasimiyu Mumaraki and her daughter Susan Nanjala Welikhe to get 3.4 acres.

The portions to be curved in consideration as much as possible where each of the parties is already settled.

I make no order as to costs.

Dated, signed and delivered at Bungoma this 29th day of May, 2020.

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S N RIECHI

JUDGE