



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

SUCCESSION CAUSE NO. 425 OF 2015

(Formerly Rongo Principal Magistrate's Succession Cause No. 298 of 2012)

IN THE MATTER OF THE ESTATE OF TOM OTIENO NGOE (DECEASED)

-BETWEEN-

MARY ADHIAMBO OKOGO.....PETITIONER/RESPONDENT

-VERSUS-

1. FLORENCE ARACHI OMOROH

2. SALLY ANYANGO OTIENO.....OBJECTORS/APPLICANTS

RULING NO. 2

Introduction:

1. The application subject of this ruling is the Objectors' Summons for Revocation dated 26/10/2015. It was filed on 27/10/2015. I will hereinafter refer to it as '**the Summons**'.
2. The Summons challenged the Grant of Letters of Administration Intestate for the estate of *Tom Otieno Ngoe*, (hereinafter referred to as '**the deceased**'), as well as the confirmation and distribution of the estate of the deceased that culminated in the issuance of the Certificate of Confirmation of grant. The grant was issued on 13/01/2013 and the Certificate of confirmation was issued on 18/11/2013.
3. The Grant and the Certificate of confirmation were subject of the proceedings in *Rongo Principal Magistrate's Succession Cause No. 298 of 2012* (hereinafter referred to as '**the Rongo Cause**').

The Summons:

4. The Summons sought the following orders: -

1. The instant application be certified urgent and same be heard ex-parte in the first instance.
2. Pending the hearing and determination of the summons herein, the Honourable court be please to issues an inhibition, to restrain the respondent/petitioner from transferring, selling, Leasing, charging, sub-dividing, alienating and/or in other way whatsoever, dealing with LR NO. SUNA WEST /WASWETA II/1212; SUNA EAST/WASWETA I/1780; KANYADA/KATIENO/KATUMA 'B'/732; SUNA EAST/WASWETA I/9916; SUNA WEST/WASWETA II/1678; SUNA EAST/WASWETA I/7986; LR. NO. 1432/175; KANYANDA/KATUMA/755 and KANYAMKAGO/KAWERE II/3036 which parcel of land formed and/or constitutes the estate of TOM OTIENO NGOE, now deceased.
3. Pending the hearing and determination of summons herein, the Honourable Court be pleased to issue a Prohibitory Order of Injunction and/or Conservatory Order, restraining the Respondnet/Petitioner from alienating, transferring, charging, disposing of, selling and/or Appropriating eh assets of TOM OTIENO NGOE, the deceased herein, more particularly, LR NO. SUNA WEST/WASWETA II/1212; SUNA EAST/WASWETA I/1780; KANYADA/KATIENO/KATUMA 'B'/732; SUNA EAST/WASWETA I/9916; SUNA WEST/WASWETA II/1678; SUNA EAST/WASWETA I /7986; LR NO. 1432/175; KANYANDA/KATUMA/755 and KANYAMKAGO/KAWERE II/3036, in any manner whatsoever and/or howsoever.

4. The Grant of Letters of Administration and the Certificate of confirmation, if any, granted to the Petitioner/Petitioner, be Revoked and/or annulled.

5. The Honourable Court be pleased to proceed and issue Grant of Letters of Administration to and in favour of the Applicants/Objectors and same be confirmed, to facilitate distribution of the estate of the deceased.

6. The Petitioner/respondent herein, do tender accounts in respect of the estate of TOM OTIENO NGOE, the deceased person herein, more particularly, the obtaining extent of the administration so far taken,

7. Costs of the application be borne by the petitioner / respondent.

8. Such further and/or other be made as this Honourable Court may deem fit and expedient.

5. The Summons was supported by two Affidavits both sworn by the First Objector herein, *Florence Arachi Omoroh* (hereinafter referred to as '**Florence**'). They were the supporting affidavit sworn on 26/10/2015 and filed together with the Summons and a Further Affidavit sworn on 28/03/2016 and filed on 13/04/2016.

6. *Mary Adhiambo Okogo*, the Petitioner herein (hereinafter referred to as '**Mary**') opposed the Summons. Mary also filed two Affidavits. They were the Replying Affidavit sworn and evenly filed on 10/11/2015 and a Supplementary Affidavit sworn and evenly filed on 18/02/2018.

7. Directions on the hearing of the Summons were taken. The parties proposed, and this Court approved, the hearing by way of *viva voce* evidence. For purposes of the hearing, Florence and *Sally Anyango Otieno*, the second Objector and hereinafter referred to as '**Sally**', were deemed as the Plaintiffs whereas Mary was deemed as the Defendant. Both parties were represented by Counsels. The Objectors were represented by the late *Mr. Tom Mboya* (may his soul rest in eternity) and *Mr. Brian Mboya* who took over the conduct of the brief thereafter. *Mr. Osoro* appeared for the Petitioner.

8. The parties filed their respective witness statements. At the hearing both Florence and Sally testified. The Plaintiffs called one witness, *Jim Kenyatta Ngoe*, who testified as *PW1*. Mary also testified and called one witness, *William Alando Ngoe*, who testified as *DW1*.

The Objectors' case:

9. The Objectors sought for the revocation of the Grant and the annulment of the resultant Certificate of Confirmation on the ground that they were unlawfully disinherited from the estate of the deceased yet they remained dependants and beneficiaries to the estate. Florence contended that she was the deceased's second wife with whom she had three daughters.

10. According to Florence, she met the deceased in 1994 while working as a Physiotherapist in Homa Bay County Referral and Teaching Hospital in Homa Bay County. The deceased worked in the civil service as an Accountant. They eventually got married under the Luo customs. The deceased paid dowry which consisted of two cows and Kshs. 10,000/=.

11. Florence further testified that she was fully aware that she was a second wife of the deceased to Mary. Florence contended that she swore a joint affidavit with the deceased on their marriage sometimes on 23/04/1998.

12. In her testimony Florence stated that the deceased built a matrimonial home for Mary and herself at Nyabisawa area in Migori County in line with the Luo customary laws. She further stated that whereas Mary was a house wife and lived at their matrimonial home, she instead lived in Homa Bay town due to proximity to her place of work. Florence however used to visit the matrimonial home and generally lived in harmony with Mary and the rest of the family members. She attended to all family issues including visiting the in-laws and attending and participating in funerals and other social functions. Florence affirmed that even the local administration also knew her the second wife of the deceased.

13. It was Florence's further testimony that the deceased and herself jointly acquired a property in Homa Bay and established another home for herself and her children. That was on the parcel of land known as *Kanyada/Katieno/Katuma 'B'/732*. Florence also referred to a photograph she allegedly took with the deceased and Mary sometimes in 2001.

14. It was Florence's further testimony that her union with the deceased was blessed with 3 daughters. They were: -

(a) Sally Anyango Otieno - Born on 16/05/1995

(b) Jennifer Akinyi Otieno - Born on 13/04/1999

(c) Naomi Atieno - Born on 02/06/2002

15. To that end Certificates of Birth Nos. 404174, 1603100 and 530917 were produced as exhibits 1a, 1b and 1c respectively for the said daughters. Florence clarified that in all the Certificates of Birth the deceased appeared as the father of the daughters whereas she appeared as their mother.

16. Florence further testified that the deceased took good care of her and the daughters and left behind a happy family. She fully took part in the funeral of the deceased and even addressed the mourners in her capacity as the second wife of the deceased. She narrated how life

drastically changed since the demise of the deceased.

17. Florence was aware that the deceased acquired and left behind several properties.

18. It was Florence's testimony that all went loose after the death of the deceased. She in particular recalled that in October 2015 she was served with a letter from an Advocate instructed by Mary and one of her sons, *Lawrence Omondi*. The letter informed her that she was a tenant in the house she had lived with her children in Homa Bay town for over 10 years. She was called upon to pay rent arrears of over Kshs. 600,000/= or face eviction.

19. Traumatized, Florence visited Rongo Law Courts and perused the Rongo Cause. She learnt that the Rongo Cause had been filed way back in 2012 without her knowledge and involvement and that the estate of the deceased had even been shared out. Florence and her daughters were not part of the beneficiaries.

20. Florence reported the matter to PW1 who was also shocked to learn of what Mary had done. Several family meetings were called to amicably resolve the matter but none was successful as Mary was adamant that Florence and her children had no share in the estate of the deceased.

21. The Objectors approached the Area Chief over the matter. The Chief was also surprised of what had happened. The Chief ultimately wrote a letter dated 26/10/2015 listing all the lawful beneficiaries. They included Mary, Florence and their respective children. Florence flouted the letter issued on 07/10/2012 by an Assistant Chief which excluded herself and her children as part of the family of the deceased.

22. Florence prayed that the Summons be allowed accordingly and that there be fairness and equity in the administration of the estate of the deceased and the eventual distribution of the estate property.

23. On cross-examination by Mr. Osoro, Florence admitted that she was married to one *Justus Naftali Okoti* (hereinafter referred to as '**Justus**') prior to the marriage with the deceased in 1994. Florence clarified that the relationship with Justus yielded two issues and was terminated on 29/11/1994 by an order of the court in *Butere Resident Magistrates Court Divorce Cause No. 2 of 1994 Florence Arachi Omoroh vs. Justus Naftali Okoti* (hereinafter referred to as '**the Divorce Cause**'). Justus was granted the custody of their two children as she had reasonable access.

24. In clarifying that he knew the deceased way before 1994 Florence stated that her denial of knowing the deceased in the Divorce Cause was for fear of the unknown, but the truth was that by then she indeed had a sustained affair with the deceased.

25. Florence stated that she knew that the father of the deceased had two wives and several children. She named some of the children. She recalled accompanying DW1 to Nairobi in 1994 when he suffered a spinal injury. DW1 was admitted at the Homa Bay Hospital for 1 week under the care of a Surgeon before he was transferred to Kenyatta National Hospital Spinal Department. Those who accompanied DW1 to Nairobi were the Surgeon, a Nurse and herself as a Physiotherapist.

26. As part of the family, Florence stated that she used to visit DW1 at her in-laws' home after he was discharged from hospital two years later.

27. Florence denied that she allegedly requested DW1 for assistance. She further denied that she told DW1 that she had problems at her then rental premises in Homa Bay and that DW1 put in a word for her to the deceased thereby leading her into one of the rental houses then owned by the deceased in Homa Bay as a tenant.

28. According to Florence the transfer of her home in Homa Bay by Mary and her son was unlawful and irregular as she was never given an opportunity to participate in the Rongo Cause. She categorically denied that she was ever a tenant to the deceased.

29. Florence further clarified that PW1 was one of those who took part in payment of her dowry at her parent's home and that she had not adopted the name of the deceased as part of her names by choice.

30. It was Florence's testimony that although Mary was the first wife of the deceased she denied that the two ever solemnized their marriage in Church since the deceased and/or anyone else did not at any time tell her of such.

31. Sally's testimony corroborated that of Florence in some aspects. According to Sally she all her life knew the deceased as her father and Florence as her mother and no one else. To her, Mary was her step-mother and Mary's 4 children were her siblings. She interacted well with her siblings. Sally testified that the deceased and Florence lived together as a couple in the family home in Homa Bay.

32. It was Sally's testimony that she took part in the funeral of the deceased and was even introduced as one of the daughters of the deceased.

33. She prayed for justice to prevail in the matter since she knew of no other family in her life save that of the deceased and Florence.

34. PW1 also corroborated the evidence of Florence. He adopted a statement he had signed and filed as part of his testimony.

35. PW1 confirmed several issues. They included the fact that he was a sibling to the deceased, that Florence was the second wife of the deceased, that the two married under the customs, that he took part in the dowry payment for Florence with other family members at the home of the parents of Florence, that the dowry comprised of two cows and Kshs. 10,000/= and that one of the cows was his, that the dowry was accepted, that the deceased and Florence lived together as a husband and wife in Homa Bay and had 3 daughters born during the

currency of the marriage, that he saw the said daughters grow up in the care and comfort of the deceased and Florence, among other issues.

36. PW1 had lived with the deceased in Homa Bay, Nairobi and in Migori. He was not aware if Mary and the deceased had solemnized their marriage in Church. He was however aware that there was an Affidavit of Marriage between the deceased and Florence. He was also aware that Florence had a first marriage which was terminated in court, but never met the children of that marriage.

37. It was clarified by PW1 that the deceased built a matrimonial home in Migori for his two wives. PW1 further stated that after the demise of the deceased there were constant misunderstandings between Florence and Mary and in a bid to broker peace he gave Florence a portion of his land where she put up a home and lives there to date.

38. According to PW1 it can only be very unfair and inconceivable if Florence and her daughters were held not to be the wife and daughters of the deceased respectively.

39. The Objectors case was closed with the testimony of PW1.

40. In their submissions, the Objectors submitted that they were dependants to the deceased by dint of **Section 29** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya (hereinafter referred to as '**the Succession Act**'). As such, it was further submitted that the Objectors and all the other children of Florence were legal and undisputed beneficiaries of the estate of the deceased alongside Mary and her children.

41. The Objectors submitted since Florence and her 3 daughters were not involved in the administration and distribution of the estate of the deceased and yet they were a wife and children of the deceased then **Section 76** of the **Succession Act** comes in handy to remedy the illegality.

42. This Court was urged to allow the Summons with costs.

The Petitioner's case:

43. Mary testified that she was married to the deceased in 1983 and that their marriage was solemnized in Church in August 1991. She never differed or separated with the deceased until the deceased died in 2003.

44. The union was blessed with 6 children two of whom passed on. The 4 surviving children were: -

(a) Gordon Ochieng

(b) Janet Akoth

(c) Lawrence Omondi

(d) Philip Herman Omondi

45. All through her life, Mary stated that she never knew that the deceased had another wife or wives including Florence. The first time Mary met Florence was when she instituted legal eviction proceedings against her from one of the houses of the deceased in Homa Bay where Florence was a tenant and a perennial rent defaulter. The eviction was sanctioned by the Rent Restriction Tribunal at Kisii. According to Mary after she obtained the eviction order she went to enforce it against Florence and that is when Florence told her that she was also a wife of the deceased.

46. Mary dismissed the testimonies of Florence, Sally and PW1 as untruthful. She reiterated that she knew nothing of Florence and Sally other than being tenants and firmly stated that the Objectors were busy-bodies in the estate of the deceased.

47. It was Mary's contention that it remained on record in the Divorce Cause that Florence did not know the deceased as in 1994.

48. Mary prayed that the Summons be dismissed with costs.

49. In cross-examination, Mary admitted that she instituted the Rongo Cause without any involvement of the Objectors. To her, there was no relation between any of the objectors and the estate of the deceased. Mary reiterated that she was unaware if PW1 took cows to the parents of Florence as part of the dowry.

50. While admitting that 3 Certificates of Births were produced in evidence, Mary did not know if the name of the deceased appeared in any of them. She remained unaware if the deceased had challenged the certificates neither was she aware if any other person claimed to be the father of Florence's daughters.

51. Whereas Mary contended that the deceased never told her of any other wife, she could not rule out the possibility that the deceased could have as well married Florence without her knowledge.

52. Mary was aware that Florence was a tenant in the Homa Bay house. She was however not aware if Florence used to pay rent to the deceased. According to Mary, Florence began collecting rent from the premises from 2003 immediately after the demise of the deceased and did so for 12 years. She did not authorize her to do so. To Mary, that was the basis of the Rent Restriction Tribunal ordering Florence to pay

Kshs. 600,000/= and each of her daughters to pay Kshs. 300,000/=. Florence still lives in the premises.

53. Mary dismissed the alleged family photograph as computer-generated. She prayed that the Summons be dismissed.

54. DW1 was a younger brother to the deceased. He was 39 years old at the time he testified in Court. He testified that when the deceased married Mary he was still young. He however witnessed the Church wedding ceremony between the two.

55. DW1 was physically-handicapped. He was permanently on a wheel-chair. He narrated how he found himself in that state. He stated that his spine was injured in School while he took part in sports. That was in 1994. He was rushed to St. Joseph Mission Hospital in Migori. He was later transferred to Homa Bay County Referral and Teaching Hospital where he was admitted for 1 week before he was transferred to the Spinal Centre in Nairobi. DW1 further testified that he was accompanied by a Surgeon, a Nurse and Florence who was a Physiotherapist.

56. It was DW1's testimony that Florence shared with him that she had a problem with a place to stay in Homa Bay. DW1 then shared with the deceased and Florence was eventually accommodated in the house where she lived to-date. DW1 was aware that the deceased did not tell his family that he had a second wife. DW1 was further aware that the deceased was the one who used to collect rent from his rental houses and that Florence was a tenant to the deceased.

57. When DW1 was discharged from the Spinal Centre in Nairobi he stayed with the deceased in another house in Homa Bay town. He confirmed that Florence used to visit him.

58. PW1 was DW1's elder brother. DW1 affirmed that PW1 may have been truthful to the Court.

59. In cross-examination DW1 stated that he was bed-ridden when Florence asked him to assist her. DW1 then said that Florence had told her that she had problems with her husband where she lived and that is why she sought her assistance. DW1 contended that he was the one who told the deceased to give Florence a house. He however admitted that there was nothing which would have stopped the deceased from marrying Florence and that the deceased did not have to tell him that he wanted to marry another wife.

60. DW1 further stated that he did not know any of the children of Florence, but admitted that all children of the deceased were entitled to share the estate of the deceased.

61. On being asked why his oral testimony was at variance with paragraphs 2 to 4 inclusive of his written statement filed in Court on 31/05/2016, DW1 responded that the statement could as well be amended to reflect his new position.

62. The Petitioner then closed her case.

63. In her submissions Mary submitted that she was the sole wife of the deceased and that their marriage was solemnized in Church on 18/08/1991 under the **African Christian Marriage and Divorce Act, Cap. 151** of the Laws of Kenya (hereinafter referred to as '**the Marriage and Divorce Act**').

64. Accordingly, Florence was not a wife to the deceased. Mary further submitted that there was ample and credible evidence that Florence was a tenant, and a serial rent defaulter, in one of the rental houses of the deceased in Homa Bay and not a wife. She also submitted that no marriage between the deceased and Florence was ever proved.

65. To Mary, both Florence and the deceased lacked capacity to marry one another. On one hand it was submitted that the proceedings in the Divorce Cause proved the existence of a valid marriage between Florence and Justus. That marriage was the subject of the Divorce Cause. Therefore, Florence lacked capacity to marry the deceased unless there was proof of the death of Justus or that the marriage between Florence and Justus was annulled by a decree absolute by the time Florence allegedly married the deceased.

66. On the other hand, Mary submitted that the deceased equally lacked capacity to enter into any other marriage before the annulment of the Christian marriage solemnized on 18/08/1991.

67. Mary extensively relied on **Nairobi Court of Appeal Civil Appeal No. 332 of 2014 O.K.N. vs. M.P.N. (2017) eKLR**, **Nairobi Court of Appeal Civil Appeal No. 229 of 2009 P.K.A. vs. M.S.A. (2014) eKLR**, **Nairobi High Court Divorce Cause No. 90 of 2007 B.M.M. vs. C.M.C. (2008) eKLR** and **Nairobi High Court Divorce Cause No. 114 of 2010 E.A.O. vs. G.J. & Another (2011) eKLR** in buttressing the submission.

68. It was further submitted that the attempt to produce an alleged family photograph for the deceased, Mary and Florence and the Certificates of Birth for the 3 daughters of Florence did not aid the Objectors since the documents were only marked for identification and not produced as exhibits. The Court of Appeal decision in **Nairobi Civil Appeal No. 140 of 2008 Kenneth Nyaga Mwige vs. Austin Kigita & 2 Others (2015) eKLR** was referred to.

69. Mary urged this Court to find that the deceased was never married to Florence either as alleged or otherwise and that she was the sole wife of the deceased. It was further argued that since there was no evidence that the 3 daughters of Florence were children of the deceased, likewise the said children, just like Florence, had no nexus into the estate of the deceased.

70. The Court was requested not to disturb the prevailing *status quo* in the estate of the deceased since distribution of the estate properties was long finalized.

Issues for Determination:

71. Having read and understood the Summons, the response thereto, the evidence, the submissions and the decisions referred to by the parties, the following issues for determination come to the fore: -

- (a) **Whether Mary and the deceased were married under the Marriage and Divorce Act;**
- (b) **Whether there was any valid marriage between the deceased and Florence;**
- (c) **Whether Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno were the daughters of the deceased;**
- (d) **Whether Florence and/or Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno were entitled to benefit from the estate of the deceased;**
- (e) **Whether the Summons should be allowed;**
- (f) **The way forward;**
- (g) **Costs.**

Analysis and Determinations:

72. I will in turn deal with the above issues separately.

- (a) **Whether Mary and the deceased were married under the Marriage and Divorce Act:**

73. Mary testified that she married the deceased under the Luo customs in 1983 and that their marriage was formalized under the **Marriage and Divorce Act** on 18/08/1991. Mary annexed a copy of the Certificate of Marriage in her Replying Affidavit.

74. At the hearing of the Summons, Mary attempted to produce a copy of the Certificate of Marriage as an exhibit. The Objectors opposed the attempt. The Certificate of Marriage was hence marked for identification.

75. An attempt to avail the marriage presiding officer to produce the Certificate of Marriage was unsuccessful. Therefore, the Certificate of Marriage was not produced as an exhibit.

76. The legal effect of not formally producing a document marked for identification was rightly put forth by Mary. That is the correct position in law. Such a document does not become part of the evidential record and cannot be basis of any finding in the matter.

77. In the words of the Court of Appeal in **Kenneth Nyaga Mwigie vs. Austin Kiguta & 2 Others** (supra): -

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they have simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa –vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification..... (emphasis added).

78. Having said so, I must now ascertain whether there was any other credible evidence on the formalization of the marriage between Mary and the deceased under the **Marriage and Divorce Act**.

79. Such evidence was fronted by DW1 and PW1. DW1 testified on 09/02/2019. He was by then 39 years old. He was therefore born in 1980. At the time of the alleged formalization of the marriage DW1 was aged about 11 years old. DW1 testified that he witnessed the wedding ceremony in church.

80. PW1 immediately followed the deceased. He testified that he lived with the deceased in Nairobi, Migori and Homa Bay. He also testified that he took part in the dowry payment for Florence.

81. PW1 was however unaware of the alleged formalization of the customary marriage between Mary and the deceased in church.

82. By placing the evidence of PW1 and DW1 on a legal scale, the scale tilts in favour of PW1. I am unable to agree with DW1 on the issue. I say so because unlike PW1, DW1 was by then still a minor and since PW1 lived with the deceased for a long period it was not probable that PW1 would not be aware of such a ceremony.

83. From the above, there was no evidence that Mary and the deceased were at any time married under the **Marriage and Divorce Act**. That being the case, the status of the marriage between Mary and the deceased in this matter remained as in 1983.

84. I hereby find and hold that Mary and the deceased were married under the Luo customary laws and not under the **Marriage and Divorce Act**.

85. The issue is answered in the negative.

(b) Whether there was any valid marriage between the deceased and Florence:

86. Florence testified that she married the deceased under the Luo customary laws on or about 05/02/1994 and that dowry was accordingly paid.

87. There was however the contention that Florence was by then legally married to Justus and that she lacked capacity to marry the deceased. Proceedings in the Divorce Cause were produced as an exhibit. It was further contended that in the said proceedings Florence denied ever knowing the deceased as late as 1994 and as such she could not have married a person unknown to her.

88. I have carefully perused the proceedings in the Divorce Cause. The marriage between Florence and Justus was dissolved *vide* a decision delivered on 29/11/1994. There was no evidence that the decision was in any way challenged.

89. It is true Florence testified that she did not know the deceased. However, the trial court dealt with the issue at length in its ruling and found that indeed there was a subsisting relationship between Florence and the deceased and that, as a result of the secret relationship, Florence had filed the proceedings in disguise as for maintenance and separation instead of divorce. That was the basis on which the trial court instead dissolved the marriage between Florence and Justus. As the decision was not appealed against, it remains as an unchallenged decree of the court. It therefore follows that Florence knew the deceased in 1994.

90. Florence therefore entered into the alleged marriage with the deceased during the subsistence of an earlier contracted marriage with Justus. From the evidence both the marriages which Florence entered into were under customary laws. The one that Florence entered into with Justus was under Luhya customary laws whereas the one with the deceased was under the Luo customary laws.

91. Florence contended that she had capacity to marry the deceased. Unpersuaded, Mary contended that Florence lacked capacity to marry the deceased.

92. In such a scenario the issue of the capacity of Florence to marry the deceased became a contested issue. It was imperative that evidence be adduced on whether the Luhya customary laws under which Florence was married to Justus sanctioned Florence's marriage to the deceased during the currency of the first marriage.

93. I must point out that the position would have been straight-forward had any or both of the marriages between Florence and Justus and between Mary and the deceased been statutory. Had it been proved that the marriage between Florence and Justus was a statutory one then Florence would have outrightly lacked capacity to marry the deceased. Likewise, had it been proved that the marriage between Mary and the deceased was a statutory one the deceased would have lacked capacity to marry Florence. However, that was not the case.

94. **Sections 107 and 109 of the Evidence Act, Cap. 80** of the Laws of Kenya lays the burden of proof of any issue on the party who wishes the Court to believe the existence of such an issue and to accord a judgment based on that issue. As said the issue herein is the capacity of a married woman to re-marry under the Luhya customary laws.

95. The standard of proof in respect of the contested issue was on a balance of probability. (See **Mbuthia Macharia v. Annah Mutua Ndwiwa & Another (2017) eKLR** and **Bungoma High Court Election Petition No. 4 of 2017 Levi Simiyu Makali vs. Koyi John Waluke & 2 Others (2018) eKLR**).

96. It was Mary who contested that Florence lacked capacity to marry the deceased since Florence was married to Justus, the spouses were still alive and the marriage was not dissolved. The burden of proof therefore was on Mary.

97. Mary was to lead evidence to the effect that under the Luhya customs a married woman could not be re-married during the currency of the first marriage.

98. The Court of Appeal in **Njoki vs. Muteru (1985) KLR 874** was categorical that: -

... The existence of a custom must be established by the party who intends to rely on it...

99. On how customs may be proved in a case, the Court of Appeal in **Kimani vs. Gikanga (1965) EA 739** (Duffus, JA) stated as follows: -

.... To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must 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 of reference and would include a judicial decision but in view, especially of the present apparent 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 facts of his case....

100. Mary did not lead such evidence. The reason must have been that Mary did not see the need to do so since she heavily relied on the alleged statutory marriage between the deceased and herself.

101. This Court is bound by the parties' pleadings and the evidence. Like a caged animal, a Court can move but only within the cage. The Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Sylvester Umaru Onu, JSC** stated that: -

.... It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it....

It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties...

102. As Mary failed to lead the required evidence on the contested issue this Court cannot do more. The matter ends there. It is all about evidence. Had Mary properly discharged the evidential burden of proof on her part, I would have carefully received and weighed that evidence in light of the **Constitution** and the law whether current or in place when the parties contracted the marriages.

103. The upshot is that in view of the evidence on record, or lack of it, Mary did not prove that Florence lacked capacity to marry the deceased by dint of the marriage which Florence had earlier on contracted under the Luhya customary laws.

104. I now find and hold that, in the unique circumstances of this matter and in the absence of evidence against polygamy under the Luo customary laws, Florence and the deceased had the requisite capacities to marry under the Luo customary laws.

105. It is now for this Court to determine if indeed Florence and the deceased actually got married.

106. Mary denied and testified that she knew nothing about the marriage allegedly between Florence and the deceased.

107. DW1 also denied any marriage between Florence and the deceased. He narrated how he met Florence when he suffered a spinal injury in 1994. In as much he attempted to portray Florence as only a tenant in the house of the deceased in Homa Bay town DW1, in cross-examination, stated that '*... there was nothing which could have stopped the deceased from marrying the First Objector [Florence]....*'

108. Florence testified that the deceased paid dowry for her. The dowry comprised of two cows and a token of Kshs. 10,000/= and that PW1 attended the dowry payment ceremony at her parents' home.

109. PW1 corroborated the evidence of Florence. He confirmed that he truly attended the dowry payment ceremony at the home of Florence's parents. He further stated that he gave out one of the cows the deceased paid as part of the dowry since he was very close to the deceased and they had stayed together for long.

110. Both Florence and PW1 further testified that the deceased and Florence lived together as spouses in Homa Bay after the dowry payment and were blessed with 3 daughters. They also established their matrimonial home in Migori. They fortified the fact that Florence took part in the affairs and attended functions, including funerals and other social events, held at the home of the parents of the deceased and other family members as the second wife of the deceased.

111. Upon careful consideration of the evidence and having had the advantage of observing the demeanor of the witnesses when giving evidence I find the evidence of Mary and DW1 largely unreliable.

112. Mary admitted during cross-examination that she was not versed with the Luo customary laws especially those on marriage. Whereas Mary admitted that she was unaware if PW1 took dowry to the parents of Florence she insisted that PW1 was untruthful. Surprisingly, Mary did not explain the basis of her conviction. She however admitted that '*... It is possible that the deceased may have married the First Objector [Florence] but he did not tell me....*'

113. It was Mary's further evidence that the first time she learnt of Florence was when she went to the house where Florence lived in Homa Bay town to enforce eviction orders from the Rent Restriction Tribunal. However, Mary at one point said that she was aware Florence used to pay rent to the deceased and later changed that she was not aware if Florence paid rent to the deceased. Again, Mary was aware that Florence used to collect rent from the other tenants in the premises as from 2003 and that Florence did so for 12 years. Mary did not state how she came to know as much.

114. DW1 suffered a spinal injury during sports at school. He was rushed to a hospital in Migori where he was referred to Homa Bay County Referral and Teaching Hospital. He was admitted for a week as plans were under way to be taken to the Spinal Center at the Kenyatta

National Hospital in Nairobi. DW1 confirmed that he was throughout bed-ridden at the Homa Bay hospital.

115. Florence stated that DW1 was under the care of a Surgeon, Nurses and herself as a physiotherapist at the Homa Bay hospital. I find it somehow difficult to believe that Florence would unethically open up a private conversation with a patient who was in such a helpless state, so young in age compared to her, share her life tribulations and to have even sought assistance from that very patient.

116. There was also what DW1 said Florence told him. In his oral testimony DW1 stated that Florence told him that he had a problem with a place to stay in Homa Bay town while he was yet to be taken to Nairobi. In his filed statement DW1 stated that Florence asked for the assistance from him after he had been discharged from Kenyatta National Hospital where he was admitted for 2 years. The double-speak was too loud. When asked by Counsel for Florence on the twin versions DW1 stated that the version in the statement was wrong and urged the Court to substitute the statement with his oral testimony. DW1 did not give any reason for the parallel versions.

117. DW1 also stated that the deceased did not tell his family that he had married a second wife. What pops up is how DW1 was so certain of such given that he was away from the family for at least 2 years. DW1 further stated that there was a possibility that the testimony of PW1 was truthful. DW1 was well aware that the testimony of PW1 was in support of the marriage between the deceased and Florence.

118. It is the foregone cumulative effect of the evidence of Mary and DW1 that led this Court to find the evidence disturbing.

119. I am persuaded by the testimonies of Florence and PW1 that the deceased paid dowry for Florence under the Luo customs and the two cohabited and lived as spouses. I hence find and hold that the deceased and Florence were married under the Luo customary laws.

120. Having said so, I must further add that even if there was no marriage under the Luo customary laws aforesaid, still this Court is under a duty to consider the applicability of the doctrine of presumption of marriage. I will now consider the doctrine just for completeness of the record.

121. The doctrine of presumption of marriage is premised on **Section 119** of the **Evidence Act** which states as follows: -

119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

122. The former Court of Appeal for Eastern Africa in **Hortensiah Wanjiku Yawe vs. The Public Trustee, Civil Appeal No. 13 of 1976** stated as follows of the doctrine: -

The presumption does not depend on the law or a system of marriage. The presumption is simply an assumption based on very long cohabitation and repute that the parties are husband and wife.

123. In **Joseis Wanjiru vs. Kabui Ndegwa & Ano. (2014) eKLR** the Court of Appeal held thus:

14. The existence or absence of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage can't be presumed in favour of any party in a relationship in which one of them is married under a statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife....

124. And, in **Joseph Gitau Githongo vs. Victoria Mwihaki (2014) eKLR** the Court of Appeal had the following to say: -

It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the "husband", or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of "wife" upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased "husband"....

125. A Court must hence consider the entire body of facts and circumstances in determining whether the doctrine of presumption of marriage is applicable in a matter.

126. The facts and circumstances surrounding the lives of the deceased and Florence have been variously captured above and in detail. There is evidence including how the two came together, where they cohabited and the children of their union. It is on record that Florence used to participate in her husband's family activities. She used to attend family funerals and other activities as a second wife of the deceased. Florence and her children fully participated in the funeral of the deceased. They were even recognized and introduced to the mourners in their respective status. PW1 and Sally vouched all that.

127. The life of Florence and the deceased spanned for a period of 9 years. During that time the two ordered their lives as a husband and wife.

128. In *Brooms Legal Maxims, 10th Edition* it is stated at page 326 on the doctrine of presumption of marriage that: -

.....Living together, naming of children and others are symbols of marriage so if a man and a woman cohabit together, order their lives together, and appear as married to the public, the society conceives that situation as a married state. It

is a presumption of fact...

129. By taking into account the foregone I am further persuaded that even in the absence of proof of a marriage between Florence and the deceased under the Luo customary laws there is still room for the applicability of the doctrine of presumption of marriage in favour of the two. I so find and hold.

(c) Whether Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno were the daughters of the deceased:

130. There is no doubt that Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno are daughters of Florence. As to whether they were daughters of the deceased PW1, Sally and Florence testified in the affirmative.

131. Florence produced Certificates of Birth for each of them as exhibits. They were received and marked as Exhibits 1a, 1b and 1c respectively. The integrity of those exhibits was not impugned. There was no application for the daughters to undergo DNA examinations. The certificates indicated the name of the deceased as the father of the 3 daughters. The certificates hence corroborated the evidence of Florence, Sally and PW1.

132. Counsel for Mary however submitted that the Certificates were only marked for identification but not produced as exhibits. I take a great exception to that. The record is clear that the documents were produced by Florence and received by this Court as exhibits on 13/04/2016. I recall that it was the alleged Certificate of Marriage for Mary and the deceased which was only marked for identification but not produced as an exhibit.

133. Sally testified that she knew the deceased as her only father and the sole father of her siblings. Sally was the first born.

134. PW1 firmly corroborated the position. He confirmed that the daughters were born out of the union of the deceased and Florence and he saw them grow up.

135. On a balance of probability, I find and hold that Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno were daughters of the deceased and Florence.

(d) Whether Florence and/or Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno were entitled to benefit from the estate of the deceased:

136. I have found that Florence was the second wife of the deceased. I have also found that Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno were daughters of the deceased.

137. **Section 29(a)** of the **Succession Act** defines a dependant to include *'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'*. Florence being the second wife of the deceased and Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno being daughters of the deceased were dependants of the deceased in law.

138. The **Succession Act** and the **Probate and Administration Rules** provide for full participation of all the dependants into the affairs of the deceased. All dependants, unless on renunciation, must take part in the petitioning for the administration of the estate of and the distribution of the estate of the deceased.

139. In this case Mary was categorical that she did not recognize the Florence, Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno as having any relation with the deceased and that is why she did not involve them.

140. The entire proceedings in the Rongo Cause were therefore an affront to the law. They were defective in substance and concealed material facts from the Court. The unqualified rights of Florence, Sally Anyango Otieno, Jennifer Akinyi Otieno and Naomi Atieno in the estate of the deceased were trampled on.

141. I must answer this issue in the affirmative which I hereby do.

(e) Whether the Summons should be allowed:

142. **Section 76** of the **Succession Act** states as follows: -

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 as 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.

143. Applying the law to the facts in this case, I find that the Summons is merited and the proceedings in the Rongo Cause must be interfered with.

144. Both the Grant of Letters of Administration Intestate for the estate of the deceased issued to Mary on 13/01/2013 and the Certificate of confirmation issued on 18/11/2013 cannot stand.

(f) The way forward:

145. Even as the legal process in this matter is revisited, it is imperative to secure the estate of the deceased and ensure that there is/are administrator(s) in place at any time.

146. Guided by **Section 66** of the **Succession Act** and **Rule 73** of the **Probate and Administration Rules** this Court is duty bound not to render the estate unadministered.

(g) Costs:

147. Costs in the Summons shall follow cause.

Conclusion:

148. As I come to the end of this ruling I highly appreciate the input of the Counsels in this matter.

149. Keeping hope alive, I urge the Counsels and the parties to find a common ground and amicably resolve the dispute.

150. In the end the following orders do hereby issue: -

(a) The Grant of Letters of Administration Intestate for the estate of the deceased issued to Mary Adhiambo Okogo on 13/01/2013 and the Certificate of confirmation issued on 18/11/2013 be and are hereby revoked and/or annulled;

(b) In the event any of the properties which was registered in the name of the deceased prior to his death on 09/10/2003 was/were transferred to a third party such transfer is hereby revoked and/or cancelled and the property(ies) shall forthwith revert to and be registered in the name of the deceased herein, Tom Otieno Ngoe;

(c) A joint Grant of Letters of Administration Intestate for the estate of the deceased shall be issued to Mary Adhiambo Okogo and Florence Arachi Omoroh;

(d) The Administrators and/or any of them shall file and serve an application for confirmation of the joint grant within 45 days of this ruling;

(e) The contemplated application for confirmation of the joint grant is hereby fixed for directions on 4 /11/2020;

(f) Subject to further orders, the prevailing *status quo* in this matter shall be maintained. For avoidance of doubt, Florence and any of her daughters shall not be evicted from the house on the parcel of land known as Kanyada/Katieno/Katuma 'B'/732 in Homa Bay town;

(g) As this ruling is delivered by way of email transmission, for abundance of caution, I hereby grant leave to appeal to the Petitioner in case of any intention to prefer an appeal.

(h) Costs of the Summons shall be borne by the Petitioner.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 31st day of August 2020.

A. C. MRIMA

JUDGE

Ruling delivered electronically through: -

- 1. japhetkaosa@gmail.com** for the firm of Messrs. Moriasi Osoro & Company Advocates for the Petitioner.
- 2. tommboyaadvocates@gmail.com** for the firm of Messrs. Tom Mboya & Company Advocates for the Objectors.
- 3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges**

A. C. MRIMA

JUDGE