



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.852 OF 2005

IN THE MATTER OF THE ESTATE OF JOSEPH ABONGO ODIPO (DECEASED)

JUDGMENT

1. The deceased to whom these proceedings relate died intestate on 28th August 2004. Beth Nyawira Gathoni and Charles Oduor Kado petitioned for grant of letters of administration intestate and was issued with the same on 31st May 2005. She listed herself (widow), Jane Sewe Odipo (mother of deceased) and Sharon Atieno Abongo (daughter of deceased) as the beneficiaries of the deceased's estate.

2. Jane Sewe Odipo via application dated 18th July 2005 seeks the following orders;

i. That the grant of letters of administration issued to Beth Nyawira Gathoni and Charles Oduor Kado on 31st May 2005 be revoked and or annulled on grounds that the grant was obtained fraudulently by making of a false statement and concealment from court something material to the case. That the grant was obtained by means of untrue allegations of facts essential in points of law to justify grant.

ii. That Beth Nyawira Gathoni and Charles Oduor Kado be restrained by themselves, servants or agents be restrained from dealing in administration of the estate of the deceased Joseph Abongo Odipo pending the hearing and determination of this application.

iii. That the said administrators be ordered to furnish full account of a monies and property received by them from the estate of the deceased.

iv. That grant of letters of administration be given to Jane Sewe Odipo

v. That a prohibition order be placed on the deceased's assets until application is heard and determined.

vi. Cost of the application be provided for.

3. The application is based on grounds that the administrators and guarantors herein are strangers to the estate. That the deceased is only survived by Jane Sewe Odipo and Sharon Atieno Abongo. That the deceased's wife Beatrice Abongo Odipo died on 7th March 1998 and Joseph Abongo Odipo never re-married. That the deceased was survived by the following assets;

i. L.R. No 82/175/6060 Donholm estate Phase 5

ii. Plot No. C1/248 Kayole Estate Nairobi

iii. Bank Account No. [xxxx]

iv. Motor Vehicle Registration Number KAQ 400P- Toyota

In her affidavit in support of the said application Jane Sewe Odipo reiterated the grounds laid down in face of the application. She added that Bank account Number [xxxx] had already been paid to her. That when she came to Nairobi to follow up on the assets of the deceased she was surprised the respondents had been issued the grant and were in the process of disposing the same. She emphasizes that the respondents are not related to the deceased and should not be allowed to administer his estate.

4. Jane Sewe in her further affidavit dated 7th November 2005 stated that Beth attended the deceased's burial as a friend and was never married to the deceased. That if they had been married Luo traditions would have been followed which was not the case here.

5. Beth Nyawira opposed the application and filed her replying affidavit dated 24th October 2005. She stated that she cohabited with the

deceased from 1998 until his demise 2004 and hence is the putative mother to the minor Sharon having provided her with motherly love and attention. That she assumed responsibility of the minor after the demise of the deceased and has not absconded or ceased to carry out her duties to the minor. That she currently resides in Donholm phase 5 House no. 175 a property owned by the deceased. That the deceased was holder of account no. 01001-727098 with Standard Chartered and she had informed the bank awaiting for confirmation of the grant to disburse the amounts therein in accordance with the grant. That the applicant claims dependency while she is listed as one of the deceased's beneficiaries in the affidavit in support of the petition for grant. That she seeks that the petitioners give full account of the deceased's assets while she has forcefully taken over the management of the rental collection at Kayole hence frustrating the administration of the deceased's estate.

6. The evidence adduced by the parties is as follows; **Jane Sewe Odipo**, mother to the deceased testified that Beth is not a widow of the deceased and Sharon is not her biological child but the deceased's child from an earlier marriage. She stated that the deceased had a house in Donholm Phase 5 which is occupied by Beth Nyawira and also a motor vehicle KAQ 400P. She admitted to having received funds held at the deceased's account [xxxx] about 8 months after the demise of the deceased. That Sharon used to stay with the deceased until his demise in 2004. She denied knowledge of when Beth moved into the Donholm house. That before his demise the deceased had given the child to her to look after and she stayed with her during school holiday. That there was a case in the children's court at Nairobi that Beth tried to steal the child. That she first saw Beth when she accompanied the deceased to a burial in Nheiya and that the two worked together. That on the said day they did not spend the night. That she visited the deceased at his home in Donholm once and did not see Beth there. That Lucas communicated the hospitalization and demise of the deceased and it was he who accompanied her to the mortuary and not Beth. She stated that she did not know Beth's mother and father. That there is a person who was nominated to collect rent at Kayole called Luke.

7. **Joseph Oaro Oalo** brother in law to the deceased's mother stated that the deceased was initially married to Beatrice Odhiambo who bore him 2 children however one died and one surviving called Sharon. That the deceased did not remarry. That when a man dies a home has to be constructed for the widow at home and if no dowry was paid dowry had to be paid before the burial. Further that the deceased's late wife was buried near her house.

8. On cross examination he stated that the work regulations did not allow the couples to work together as he had tried to get his wife employment at the same place. He stated that he never visited the deceased's home in Donholm. That the medical bills from the wife were paid by the company adding that the company sent Beth Nyawira a message of condolence and was also referred to as a wife in the proposal for benefits form. That according to Luo customs the deceased's home was inside his father's homestead. He stated that he did not see Beth at the funeral and also at the funeral of Beatrice, the deceased's late wife. That the deceased left employment in 2000 and started seeing vehicles.

9. On cross examination she stated that he had met Beth severally before the demise of the deceased. That he knew Beth as the deceased wife reason he gave her a letter but did not know that she was going to confirm that she was the wife. That he did not attend the cultural rites and Beth's home. He denied any knowledge of payment of dowry adding that after the widow is shaved the children are also shaved. But could not confirm if the deceased's daughter was shaved or not.

10. **Sharon Atieno Abongo** a daughter to the deceased testified that the deceased died in August 2004 when she was barely 11 years. That she lived with the deceased for 2 years and at the time they were staying and Komarock but later on moved to Donholm. That at the time they lived with the father and a house help called Atieno and no one else. That the deceased was a businessman and she attended his funeral in Alego – Siaya. She was there for two weeks and later on went back to school and when schools closed she went to stay with her grandmother Jane Sewe Odipo. That Beth moved her from Mbagu Girls to another school on claims that she was her legal guardian and took her to a school in Kiambu where she stayed for one month but moved to Mbagu Girls schools when it became clear that she was not her legal guardian. She was later admitted to Moi University and that her grandmother is the one who has been paying her school fees. She admitted to have communicated with Beth via letters before and after her father's demise. That at the time the Donholm house had been constructed but was not complete. That the deceased had a car KAQ 400 and he used to drive it before they left Komarocks. That the Kayole plot was still under construction. That Beth had asked her to call her mum as she also addressed her aunties. That since 2004 she has been under the care of her grandmother. Further that the deceased never lived with Beth when she lived with him. She admitted to having photos taken with Beth and the deceased when she was 11 years. She admitted to writing letters to Beth when she was at Ng'iya. She denied having communicated with Beth through Whatsapp. She denied having visited Beth in Donholm.

11. **Rose Apollo Oduol** the deceased's elder sister testified that she lived in Dandora. the deceased was married to the late Beatrice Adhiambo Otieno having married her in 1989 at the time he used to reside in Huruma but later moved to Komarock. That Beatrice died in 1999. That the deceased died in Nairobi and was taken to Siaya for burial and was present when they made burial arrangements and during his burial in Siaya. That the deceased did not have a wife at the time of his demise. She was told by her cousin Lucas that there was a lady claiming to be the deceased's wife. That the lady wanted the property and that is why they are in Court. They are not in possession of the Donholm house nor the car. No one came forward during the funeral to claim to be the deceased's wife. No traditions were performed as the deceased had no wife. She visited the deceased from 1998 he had no wife but he lived with his daughter and a worker. Charles Oduor is was a friend of the deceased and not a cousin.

12. **Benson Gathomi** father to Beth Nyawira testified that Beth was married to the deceased since 1998 and stayed in Komarock. He had met the deceased's mother at the deceased's place in Komarock on several occasions and her daughter Sharon who was in the company of the deceased and her daughter had visited him at racecourse on several occasions. Further that he met his friends Charles and George Owino whom he worked with at Unilever when they came to 'Kuhada Ithigi' and paid Kshs. 40,000/-. That they were to come again for the dowry negotiations but his wife was unwell and decided she undergoes treatment first. However the deceased died before the same could be done. When the deceased died his wife was at a critical stage in treatment and he could not attend the burial but requested his 2 brothers to accompany her daughter for the burial. After leaving hospital he and his wife went to comfort his daughter for her loss. He stated that the deceased and her daughter did not have a child together as she had gotten an ectopic pregnancy and had her uterus removed.

13. **Beth Nyawira** stated that she was wife to the deceased and they had lived together in Donholm for over 6 years until his demise. At the time his daughter Sharon was barely 5 years. That they were not blessed with a child of their own as she lost her pregnancy. That the deceased was self-employed and they worked together at Unilever Kenya. That though Sharon had testified on not knowing her she was

doing so under duress as the letters she had written to her she had signed off as 'your loving daughter'. That her mother in law benefitted from the deceased's bank account. That the deceased was declared redundant in 2001 and he started seeing used spare parts. That prior to his demise the deceased started behaving in a strange manner, she called his cousin and rushed him to Metropolitan hospital where he was admitted and he died 5 days later. She attended his burial. In a photo she pointed out her mother in law and Sharon the deceased's daughter despite them claiming they did not see her at the funeral. That after the burial she stayed for a week at the upcountry home. That after the demise of the deceased her relationship with the deceased deteriorated and she proceeded to demolish the upcountry house. That her mother in law had filed a suit in the children's court with intentions to frustrate her.

14. She denied claims of having chased Sharon and has not seen her since 10/1/2014. That after the demise of the deceased efforts to have Sharon stay with her were made it possible by her mother in law. That they had a house in Komarock where they stayed for 4 years but they later sold it. She stated that she did not list the motor vehicle KAQ 400P as the same did not registered in the names of the deceased. That the deceased sold motor vehicles and the same was in their custody awaiting sale. That the asset at Kayole was the only asset belonging to the deceased that brought money adding that the applicants have been in charge of the same and were yet to furnish accounts on the same. She urged the court to look into the evidence of Sharon and her sister in law as it was not true. That she contributed towards the Kayole property and wished the estate to be distributed. That Charles Oduor a cousin to the deceased was the co-administrator.

15. On cross examination she stated that she had met with the deceased's family members including her mother in law in 2004 in Siaya and it was agreed that she would take out the grant of letters of administration. Those present included Charles Muanja Mulonga, Mr. Joseph a clansman. That she met her mother in law in 1995 when she and the deceased visited their rural home. That the deceased had assets a property in Kayole and Donholm and household items furniture and electronics. That he sister in law regularly visited her. That they visited her home to start a kikuyu marriage and gave Kshs.40, 000/- and shopping but did not return after 2003 but they regularly visited her parents. That she had not disposed any property belonging to the deceased.

16. She testified that the deceased had built a permanent 2 bedroom house at home where he had lived with Sharon's mother and also her and the deceased frequently. That she worked together with the deceased at East African Industries and later joined Unilever in 1996 but the deceased ceased working there in 2001 and at the time they were already married. Unilever knew them as a couple and gave them a media card as a couple. They both could use each other's medical card and he took advantage of her card when he fell ill. That the documents of title for the property were with the seller of the property and she had protected the same by pacing a caveat. That the vehicle in question was taken by the owner when the deceased died. She started dating the deceased 2 months after her demise and moved in with the deceased 3 months later. That though she did not have a marriage certificate she was married to the deceased under customary law. That the process had started and part of dowry was paid. They had agreed on the dowry and they were to come back. Further that her relatives had not visited the deceased's home. She admitted to not knowing customs of Luo marriage. Adding that no cultural rites took place after the deceased died. She stated that Sharon is a true heir and is entitled to inherit the deceased's estate. Title document for Kayole property is held by the deceased's cousin and efforts to get it have been frustrated by the hearing.

17. **Charles Muoya Odipo** a step brother to the deceased relied on his statement dated 16/2/2018. He stated that once Sharon's mother Beatrice Adhiambo Otieno died the deceased introduced them to Beth Nyawira as his wife. That the deceased accompanied by Beth and his daughter Sharon regularly visited Siaya since Sharon was young and while there they used to stay in the deceased's house which was later demolished by Jane Sewe. That sometime in 2003 the deceased invited them to Nairobi to accompany him to Beth's place to pay dowry. On the visit they were advised they could only introduce themselves and get to know Beth's parents and siblings. That the delegation consisted of their uncle Maricus Mulonga, Rose Olale, Joseph Ooro their clansman, and Joseph's friends. They left a token of Kshs. 40,000 and at the time Beth's mother was unwell and the deceased fell ill later and died in August 2004. That during the laying of the cross it was agreed that Beth and Charles be administrators of the deceased's estate.

18. On cross examination he stated that he among those that went to visit Beth's parents sometime in 2003 for dowry payment accompanied by Joseph Omro and Joseph Abongo and a friend called Lando. That the deceased gave Kshs. 40,000/-. That after the deceased's burial it was agreed Aoko, Oduor and Beth be administrators of the deceased's estate as they were residents of Nairobi. That things did not work out and they said that Beth belongs to another tribe and cannot take their property.

19. Charles Oduor stated that he and Beth had petitioned for grant of letters of administration. He sought to rely on his statement dated 16/2/18. He considered the background of the Odipo's family and his actions were for the interest of the family. He stated that he did not attend the meeting in Siaya where it was agreed that he be an administrator in the deceased's estate. He admitted that he did not know if the deceased paid dowry. That the estate of the deceased is being controlled by the daughter of the sister of Joseph. He added that Sharon and Beth are beneficiaries of the deceased. That under Luo customary law one has to pay dowry of at least 2 cows and failure to do so you are not considered to be married. That the sister controls the deceased's residential plot in Kayole.

20. **Raphael Oduol Nyapere** a senior assistant chief testified that he recognized the letter dated the 16.6.2005. He knew the deceased and his mother Jane. They are from location. As per his letter Joseph died living a wife and child. Beth asked him to write the letter.

21. Parties filed written submissions. The applicant (Sharon) submits that the co-administrator has not alluded to any meeting where he agreed to be enjoined as a co-administrator of the deceased's estate further that he admitted to not having done anything that would constitute administration hence it's only Beth that was undertaking the administration of the deceased's estate she urges the court to interrogate the same as per section 94 of the Act. She seeks an order compelling the petitioner to render full account of the estate of the deceased. That evidence tendered before this court proves that the petitioner was never married to the deceased as no ceremony was performed and no dowry was paid to her parents. That when the deceased died his body was laid where he had resided with his late wife Beatrice Adhiambo. That no one came to the burial as in laws of the deceased and Beth's head was not shaved in line with the Luo customs. She urged the court to interrogate the cohabitation whether the same constituted a marriage as no such evidence had been placed before the court. Adding that there were no children borne out of the said cohabitation and the petitioner never assumed the surname of the deceased and she was never recognized as a daughter in law by the objector. She relied on the following cases; Phyllis **Njoki Karanja & 2 Others vs Rosemary Mueni Karanja and Another [2009] eKLR** where it was held, "*Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the*

presumption is in the nature of an assumption it is not imperative that certain customary rites be performed...”

22. **Mary Njoki vs John Kinyanjui Mutheru [1985][1985] eKLR** Njarangi JA stated, “...*The fact that the appellant and the deceased together visited the deceased father’s home or that she attended the funeral of the deceased’s father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity. That is how friends treat one another. And on account of the cohabitation the appellant could not help meeting and knowing and even assisting the relatives of the deceased including the respondents. The appellant’s own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant’s father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage*”.

23. **In SWG vs HMK** Justice Musyoka while declining to presume a marriage stated as follows; “*The doctrine of presumption of marriage has a statutory foundation, in section 119 of the Evidence Act, Cap 80, Laws of Kenya, where it is provided that ‘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.*”

24. She added that the court has to be satisfied that there existed circumstances that would support the existence of a marriage. That the burden was on the petitioner and not the applicant and she has failed to discharge that burden and as such the court cannot find in her favour.

25. The Objector (Jane) in her written submission stated as follows; she reiterated that the deceased did not remarry after the demise of his first wife Beatrice Achieng. She stated that Beth did not attend the burial of her son the deceased and was never recognized as his widow and her head was not shaved as was required by Luo customs. Further, that she did not sleep in any house constructed by her husband. She denied knowledge of Beth having received shs.61, 000 for the death of the deceased and also claims not to have been aware of the obituary published in the newspaper. That evidence called that of Joseph Abogo Odipo, sister to the deceased and Sharon Abogo corroborated her evidence that Beth was not married to the deceased and all supported the application for revocation of grant issued to Beth Nyawira Gathomi and Charles Oduor Kado. That the petitioner never obtained PW1’s consent in petitioning for grant of letters of administration and no consent to support the same was ever filed. That Beth ‘s evidence is contradictory in that she claims she cohabited with the deceased but also claims that in 2003 the deceased in the company of others went to pay dowry to her home. It was submitted that there was no marriage between Beth and the deceased and she only used the same as a guise as a widow in order to inherit the deceased’s estate. She denied claims that she intends to waste and dispose off the estate of the deceased and she cannot do so without the authority of the true heir Sharon Abongo. It was submitted that Beth should be stopped from intermeddling with the estate of the deceased. She relied on the case of Civil Case No. 13 of 2010 S.W.G vs. HMK where the court observed that where a marriage does not comply with the relevant formalities provide under the marriage Act under customary law, the same may be rescued by presumption of marriage and considerations of the same were laid out.

26. Further in **Yahwe vs Republic Trustee Civil Appeal No. 13 of 1976**, Kneller, JA stated, “*The presumption does not depend on the law or system of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.*”

27. It was submitted that from the facts Beth had not established or proved that her stay with the deceased would have led to presumption of marriage. She urged the court to dismiss the petitioner’s claim.

28. The petitioner respondent submitted that the testimony by the objector, clan elder the deceased’s sister and step sister was aimed at refuting knowledge of the deceased marriage to Beth this it was argued was rebutted by the evidence adduced by the petitioner’s evidence and documentary evidence. Further the deceased had acknowledged the said marriage as per her affidavit of marriage. Beth took part in the burial arrangements and even has photos as proof.

29. That section 2 of the Marriage Act defined cohabit to mean to live in an arrangement in which an unmarried couple lives together in a long term relationship that resembles marriage. “Dowry” means any token of stock, goods, moneys or other property given or promised in consideration of an intended marriage. She relied on the following cases; **Njau & Another v Wahito [2008]1 Klr**, Justice Ojwang as he then was expressed himself thus, “*I would hold that whether the defendant’s marriage to Joseph Njau Kairu by Kikuyu customary law was complete or remained inchoate, or was simply a travesty of the applicable customary law, she had a de facto union with the deceased which must be pronounced to have been a valid marriage. As I have noted earlier on, such a marriage established by cohabitation and repute, which is evidence, has been proved in great abundance, in favour of the defendant. This is a common law principle which has been held applicable irrespective of the form of marriage which is recognized under law; and so it applies in every respect as regards polygamous marriages, as with monogamous ones.*”

30. **Re Estate of Waaba [2008]1 Klr**,328 where Justice Rawal held, “*The essentials of a Kikuyu marriage are capacity of parties, consent of the parties and their respective families, Ngurario, ruracio and the commencement of cohabitation, Stringent application by the court of the customary law should be interpreted with flexibility and breath of view even in circumstances where parties fail to fulfill all the ingredients of Kikuyu Customary law, as where dowry is paid to a female relative and absence of a ceremony of male relatives from either side , a court may never the less find that there exists a valid marriage under customary law. There was nothing in Kikuyu customary law to oppose the concept of presumption of marriage. Such a presumption may arise where a man and a woman cohabit for a long period without solemnizing their union by going through recognition of marriage.*”

31. The case of **Kimani V Kimani & 2 Others [2006]2 Klr, 292 Court of Appeal at Nairobi**, Bosire Waki & Deverell, it was held, “*2. It mattered not whether statutory or customary marriage requirements were strictly proved in a marriage. The High Court should have gone further and considered whether on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant’s favour.*”

3. *The evidentially burden of proof was not on the appellant, but on the respondent to show that the appellant was not the deceased's wife or put another way, to rebut the presumption of marriage.*

4. *It was more probable than not that the deceased cohabited openly with the appellant as man and wife for a long period and she would on that ground be deemed to have been a wife of the deceased.*"

32. In the Matter of the estate of **Stephen Wanyoike Muhia (deceased) Nrb Hcrt Civil Appeal No. 6 of 2002** Koome J, "*both woman and child were heir of the estate of the deceased.*"

33. In the case of **Hortensiah Wanjiku Yawe v Public Trustee, Court of Appeal for E.A. Civil Appeal No. 13 of 1976**, Wambuzi P. Mustafa and Musoke JJA, held, "*a woman who cohabited with the deceased was a wife following presumption of marriage, it follows that such a woman is to be treated as a widow for purposes of succession.*"

34. It was submitted that on a balance of probability the objector has not proved that the grant of letters of administration was obtained fraudulently as there is sufficient evidence that the deceased cohabited as man and wife and further solemnized it by taking steps to pay dowry according to Kikuyu customary law and urged the court to dismiss the objector's application dated 18th July 2005.

DETERMINATION

35. I have considered the parties pleadings, their evidence, and rival submissions. From the same I find that these are the issues for determination.

i. **Whether the petitioner has proved she was a wife to the deceased?**

ii. **Has the applicant given reason that the grant should be revoked?**

v. **Who is suitable to administer the estate of the deceased?**

On whether the petitioner was a wife

36. The objector alleges that the petitioner was not a wife to the deceased as no ceremony was ever performed, no dowry was paid and that the petitioner did not attend the burial of the deceased and as such she is not entitled to administer the deceased's estate. In support of her case the petitioner called several witnesses amongst them was her father Benson Gathomi who testified of having met the deceased and him having visited his homestead with the intentions of paying dowry. However on the said day they could only undertake what is called "*kuhada Ithigi*" which entailed the deceased meeting petitioner's parents and siblings. He does admit that the deceased gave a token of Kshs.40, 000 and were to come back some other day for payment of dowry. However, the petitioner's mother was unwell and the same was not held and unfortunately the deceased died before completing the rites as per the kikuyu customs. This evidence was corroborated by Charles Muoya Odipo step brother to the deceased and Charles Oduor who were among the people who accompanied the deceased to Beth's home. At the said time it was said that the petitioner and deceased were cohabiting in Donholm.

37. It is trite law that for presumption of marriage to arise there should be long cohabitation and general repute that the two people held themselves to be husband and wife. The Court of Appeal in **Eva Naima Kaaka & another v Tabitha Waithera Mararo [2018] eKLR held**, "*Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their nature they are a determinant of whether a presumption of marriage can be found to exist.*"

38. There is also a copy of affidavit of marriage deposed, signed and commissioned on 12th October 1998 by both Joseph Abongo Odipo and Beth Nyawira Gathomi the same states that the two are married under kikuyu customary law and cohabit as husband and wife despite them not having a marriage certificate. There is also a letter dated 6th September 2004 from Unilever condoling with Beth Nyawira on the loss of her husband Joseph Abong'o Odipo. From the foregoing it is clear even their employees held the deceased and the petitioner to be husband and wife. There also spousal benefits accruing to her on the loss of her husband and offering to give towards purchase of a coffin and also towards medical expenses. All these are by virtue of the deceased being a spouse to Beth Nyawira.

39. Further the obituary / Death announcement publication of 3/09/2004 which noted that Joseph Abong'o Odipo was survived by a wife Beth Nyawira. The respondent Beth in her bundle of documents page 60-68 she has attached letters from Sharon dating back from 2005 to 2008. The same depict a lot of affection Sharon had for Beth. Despite the deceased having died in 2004 it appears Beth was keen on furthering the wellbeing of Sharon. She even requests her to bring her items she forgot at home when she comes to visit her in school. From a perusal of the said letters it is clear that at some point in time the two must have been close. One wonders what changed. From the foregoing I find that the petitioner Beth has proved on a balance of probability that she was a wife to the deceased and as such she is a beneficiary to the deceased.

Should the grant be revoked?

40. The applicants claim that their consent were not obtained. Sharon was a minor at the time the petition was filed. The petitioners evidence is that the family sat and agreed on who should be the administrators. Jane's main reason for seeking to revoke the grant is that the deceased did not marry again. I have made a finding that though the deceased's wife died he subsequently cohabited with Beth Nyawira, his wife. Though she claims she was not aware of the matter I am not persuaded that she was not informed. Under section 76 of the Act the court has the discretion on whether to revoke the grant or not. Having considered the evidence it is my view that there is no need to revoke the grant. Jane and Sharon are listed as beneficiaries in the petition. The grant in my view was not fraudulently obtained nor was there concealment from the court material facts nor has it been proved that the grant was obtained by means of untrue allegations of facts to warrant this court

revoke the grant issued on 31st May 2005 to Beth Nyawira Gathoni and Charles Oduor Kado. The petitioners listed the 2 objectors as beneficiaries of the estate.

Who is suitable to administer the estate of the deceased?

41. Section 66 of the Law of Succession Act, which provides that, “*Preference to be given to certain persons to administer where deceased died intestate. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

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

42. From the fore going it is clear that Beth Nyawira ranks in priority to the objector in petitioning for grant of letters of administration. Sharon Abongo is beneficiary and it is not in contention that she is indeed entitled to inherit from the deceased’s estate.

43. The objector has insisted on the petitioner giving account on the assets of the deceased. The deceased had 2 assets the Donholm house where the petitioner lives and Kayole which is being managed by the objector. In regards to the Motor vehicle KAQ400P the copy of records from Registrar of motor vehicle dated 23rd April 2014 indicate the same was registered in the name s of Muriithi Ephantus and Equity Bank limited. Page 83-91 indicate the importation of the said motor vehicle and receipts for duty paid on the same. There also other documents comprising of emails from the company that the deceased imported the vehicle from the amount paid. From perusal of the document adduced by the respondent it could be implied that the said motor vehicle had been purchased in the order of the deceased’s business which from the attached emails he conducted together with Beth and as such could have passed to the owner despite the deceased dying before completing the transfer to the purchaser.

44. Section 48 of the Law of Succession Act provides that the court shall have final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned be made. Now that Sharon is an adult in my view she should be a co-administrator together with two administrators Beth Nyawira and Charles Oduor Kado. The grant issued on the 31st May 2005 is revoked and a fresh grant shall issue in the names of **Beth Nyawira Gathomi, Sharon Atieno Abongo and Charles Oduor Kado** They shall proceed with their duties as provided for under Section 83 which provides

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

46. **Beth Nyawira Gathomi, Sharon Atieno Abongo and Charles Oduor Kado** the administrators shall meet with the beneficiaries

concerned and agree upon a mode of distribution and have the grant of letters of administration confirmed and proceed to wind up the deceased's estate. The application to confirm the grant shall be filed with 60 days from the date of this Ruling. No orders as to costs. It is so ordered.

Dated, signed and delivered at Nairobi this 30th day of May 2019.

R. E. OUGO

JUDGE

In the presence of;

1st the Objector

Absent

Miss Ndungu h/b for Mr. Luseno

For 2nd the Objector

Mr. Kamau

For the Petitioners

MS. Charity

Court Clerk