



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**SUCCESSION CAUSE NO. 8 OF 2017**

**IN THE MATTER OF THE ESTATE OF JACKSON NDUVA KATHULA (DECEASED)**

**CECILIA MWELU NDUVA.....APPLICANT**

**VERSUS**

**TABITHA KALEKYE KIMEU.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**PATRICK MUTHUI KATHULA.....2<sup>ND</sup> PETITIONER**

**RULING**

1. **Jackson Nduva Kathula** (Deceased) died domiciled in **Kenya** on **12<sup>th</sup> December, 2012**. Letters of Administration Intestate in respect of his Estate were issued to **Tabitha Kalekye Kimeu** and **Patrick Muthui Kathula** on the **26<sup>th</sup> February, 2015**.

2. On the **27<sup>th</sup> November, 2015** **Cecilia Mwelu Nduva** (Applicant) filed summons for Revocation of Grant and sought to be included as the sole Administratrix/beneficiary of the Estate of the Deceased. The application was canvassed by way of written submissions before **Nyamweya J.** sitting at Machakos High Court who made orders thus:

(i) The grant of letters of administration intestate issued herein to **Tabitha Kalekye Kimeu** and **Patrick Muthui Kathula** (Deceased), be and is hereby revoked.

(ii) The summons for confirmation of grant dated and filed herein by the Petitioners on **14<sup>th</sup> August, 2015** is hereby expunged from the record.

(iii) The issue as to whether **Tabitha Kalekye** is a legal wife of the Deceased shall proceed to hearing by *viva voce* evidence, and the Applicant and Petitioners shall file and serve their witness statements and/or affidavits of witnesses they shall call and within 60 days of the date of this Ruling.

(iv) There shall be no orders as to costs.

After delivery of this Ruling she transferred the **Succession Cause** *suo moto* to this Court (Kitui High Court) for hearing and determination.

3. The matter proceeded by way of *viva voce* evidence. In her testimony the Applicant stated that she married the Deceased in church. That marriage was monogamous therefore the Deceased could not have married another woman during the existence of the marriage. That she cohabited with the Deceased until his death hence the 1<sup>st</sup> Petitioner and her daughter were not recognized as part of the family. That she was excluded in planning the programme of burial of the Deceased as it was done in secrecy by the Petitioner and his siblings as she was engaged elsewhere collecting the Deceased's belongings that were scattered at his place of works. She denied the allegation that the Petitioner's daughter was her husband's child since no DNA test had been conducted.

4. Further, the Applicant testified that she never divorced the Deceased and by the **26<sup>th</sup> March, 1996** when she perused the pension's file she was the Deceased's next of kin and the Marriage Certificate had been filed. However, another form found its way into the file dated **6<sup>th</sup> December, 2011**. According to her the document indicating that the 1<sup>st</sup> Petitioner was the next of kin was put on the file after the death of the Deceased.

5. In her response, the 1<sup>st</sup> Petitioner/Respondent stated that she was well known to the Applicant having met the Deceased a married man in **1992**. That she cohabited with the Deceased from **1994** and were blessed with an issue of the union, **Esther Ngele Nduva** who was named after the Deceased's mother. And that when the Deceased started ailing she lived with him at **Umoja Estate** where the Applicant visited them in **August, 2012**. And during funeral arrangements she was recognized as the wife of the Deceased. She called upon the Court to

recognize her as a wife and dependant of the Deceased. On cross examination she acknowledged the fact that there was a Marriage Certificate issued to the Applicant and Deceased when they married and they did not divorce.

6. Regarding the next of kin form she stated that she took to the office a copy of the Death Certificate of the Deceased after his demise but she could not tell if she was made an alternative next of kin.

7. **Esther Ngele Nduva** who testified stated that the Deceased, her father provided for her basic requirements and he lived with them at **Umoja Estate**.

8. At the close of the case, both Counsels filed written submissions which they highlighted. It was submitted by learned Counsel for Applicant, **Mr. Mutinda Kimeu** that the 1<sup>st</sup> Petitioner was not a legal wife of the Deceased because he had married in church, a marriage that was strictly monogamous and was not dissolved. That the Deceased having lacked the capacity to marry another woman, a presumption of marriage could not arise; In that respect the case of **Machauni vs. Vernoor (1985) eKLR** was cited. On the issue of cohabitation, the Applicant relying on the case of **Njoki vs. Mutheu (1985) KLR 27** urged that cohabitation of habit and repute in the absence of consent cannot bring in the missing element(s).

9. It was submitted by **Mr. Awiti**, learned Counsel for the Respondent that it was not in dispute that the 1<sup>st</sup> Petitioner and the Deceased were not formally married but a presumption of marriage existed by virtue of long cohabitation and existence of a child between them. He relied on the case of **Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi CA CA No. 13 of 1976** in that regard; and in **M. W. M. vs. W. E. L (2017) eKLR** where the case of **Christopher Nderi Gathambo vs. Samuel Muthui Munene Nairobi High Court Civil Case No. 1372 of 2001** was quoted. In the case the Court observed thus:

*“The claim is (presumption of marriage) on the basis of cohabitation and friendship, agreement and love. They lived together in Nairobi and had a daughter together..... anyone of those actions cumulatively prove the parties intended to marry and held themselves as married hence presumption.”*

10. On the issue of the Deceased having lacked capacity to marry following the monogamous marriage that he contracted, it was submitted that in the case of **Agnes Katto Njoroge vs. Alice Wakiini Wachira (2008) eKLR** it was stated that:

*“... As for now I need not reiterate the fact that for purposes of succession the court will take cognizance of second and later unions even where the deceased had a valid subsisting marriage. Such is the position which is clearly laid down in section 3(5) of the Succession Act Cap 160 of the Laws of Kenya which provides that ‘notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.’”*

11. In a rejoinder **Mr. Mutinda Kimeu** argued that **Section 3(5)** of the **Law of Succession Act** could only be applicable where a woman married under a system which permits polygamy which was not the case herein.

12. The issue for determination pursuant to the Ruling of **Nyamweya J.** is:

- Whether **Tabitha Kalekye Kimeu** (1<sup>st</sup> Petitioner) is a legal wife of the Deceased.

13. This is a matter where the Applicant and the Deceased entered into a voluntary union on the **11<sup>th</sup>** day of **May, 1991**. Their marriage was solemnized at **A.I.C. Ziwani Church** in **Nairobi** under the **African Christian Marriage and Divorce Act (Cap 151)**. This fact is not in dispute, therefore their marriage was monogamous that was solemnized in accordance with the rites of a Christian Denomination. Either of them was therefore prohibited from contracting another marriage.

14. It is the contention of the Respondent/1<sup>st</sup> Petitioner that she qualifies to be the wife of the Deceased and his Dependant because they had an association that resulted into an intimate relationship, cohabited and had a child, **Esther Ndele Nduva** who was named after the Deceased’s mother. She adduced in evidence a Birth Certificate of the girl bearing the name of the Deceased as her father.

15. **Section 3(5)** of the **Act** provides thus:

*“Notwithstanding the provision of any other written law, a woman 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 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”*

16. The operating words here are a woman married under a system of law which permits polygamy. A system of law that permits polygamy would be envisaged to be a marriage conducted in accordance with the African Customary Law since it has not been insinuated that parties herein professed the Islamic religion. Evidence adduced by the 1<sup>st</sup> Petitioner did not suggest that they married under the customary law. Her contention is that there was long cohabitation. It is for that reason that she relied on the **Hortensia Wanjiku Case (Supra)** where the Court considered circumstances of the parties cohabitation. This therefore brings us to the question whether indeed the 1<sup>st</sup> Petitioner was a cohabitee and if she would benefit from the law as provided by **Section 3(5)** of the **Act**.

17. The argument of the 1<sup>st</sup> Petitioner was that she was acknowledged by relatives of the Deceased as his second wife, hence being included

in the funeral programme. The Applicant on the other hand argued that the programme was prepared in secrecy hence she came to know of the inclusion on the burial date. The Applicant called their area Chief **Augustine Muthinzi Kasilia** as a witness who stated that he arbitrated upon a case involving the parties herein and other family members on the **22<sup>nd</sup> March, 2013**. The issue was who was the rightful heir to the Estate of the Deceased. He concluded that the Applicant was the right beneficiary of the Estate and gave her a letter to that effect. The 1<sup>st</sup> Petitioner stated that the Deceased used to visit her mostly over the weekends. That she visited his home and he also visited her home. In the case of **NUFR vs. MSC HCCC No. 57 of 2011**. It was stated that; the Applicant had the burden of marshalling evidence from which the Court could decide to declare existence of a marriage from prolonged cohabitation or not. Further, that she did her best in adducing such evidence but unfortunately the element of reputation of what may be referred to as the community view of cohabitation fell short. That evidence of community element can only be adduced by members of the community themselves.

18. None of the relatives of the Deceased were called as witnesses to confirm if indeed there had been long cohabitation between the 1<sup>st</sup> Petitioner and the Deceased. Such evidence was crucial. The alleged witnesses should have been available to be cross examined. **(See Re Estate of Mbiyu Koinange; Rule 64 of the Probate and Administration Rules)**.

19. It was averred by the 1<sup>st</sup> Petitioner that during the Deceased's lifetime he filled a next of kin form where he listed both the Applicant and herself as the next of kin. The document was dated **6<sup>th</sup> December, 2011**. However, the Applicant adduced in evidence a next of kin form filled by the Deceased dated **26<sup>th</sup> March, 1996** which gave particulars of the next of kin as **Ciciliah Mwelu Musau** (wife) and an alternate next of kin as **Patrick Muthui Kathula** (brother). There is a second next of kin form that was delivered to the Office of the District Commander, Kieni West by the 1<sup>st</sup> Petitioner per what was expressly noted on the **21<sup>st</sup> January, 2012** a form that was not in the main file of the Deceased which had the names of the Applicant as the next of kin and that of the 1<sup>st</sup> Petitioner as an alternate next of kin. On cross examination the 1<sup>st</sup> Petitioner stated that she took the document to the office after the death of the Deceased but she did not divulge how she acquired it.

20. From evidence adduced it has been demonstrated that the 1<sup>st</sup> Petitioner herein is not a sincere person therefore may not be believed. It was within her knowledge that the Deceased was legally married to the Applicant but she approached the Court having falsely sworn an affidavit on the **10<sup>th</sup> June, 2014** where she deposed that the Deceased was survived by a wife (**Tabitha Kalekye Kimeu**) and a daughter (**Esthere Ndele Nduva**). Such an insincere person cannot be believed. It may even be difficult to believe that the child born out of wedlock to her was actually sired by the Deceased.

21. From the foregoing I find that the 1<sup>st</sup> Petitioner, **Tabitha Kalekye Kimeu** was not the Deceased's legal wife. If her daughter is indeed the daughter of the Deceased which should be subject to proof, she is a Dependant of the Deceased pursuant to the provisions of **Section 29** of the **Act**.

22. It is so ordered.

**Dated, Signed and Delivered at Kitui this 27<sup>th</sup> day of November, 2018.**

**L. N. MUTENDE**

**JUDGE**