



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**SUCCESSION CAUSE NO. 163 OF 2012**

**IN THE MATTER OF THE ESTATE OF GODFREY KITUKU (DECEASED) AND REGINA  
MUKUI NDAKA (DESEASED)**

**RULING**

On the 4<sup>th</sup> of October, 2012 at about 9.00pm, there was fire at Malindi High School. The late Godfrey Kilatia Kituku was the deputy principal at the school. He was asleep in his house together with his wife Regina Mukui Ndaka and their six children. The entire family was burnt and no one survived.

The petitioner, Kituku Mutiso Kilatia, is the father of the deceased deputy principal. He filed this succession cause seeking letters of administration for both his son and his daughter in-law. The succession cause was filed as one instead of two separate causes. A grant of letters of administration intestate was issued on the 3<sup>rd</sup> of October 2013. Ndaka Mutinda, father to Regina Mukui Ndaka, filed an objection claiming that he was entitled to administer the estate of his late daughter. Ndaka Mutinda passed on while the matter was pending and his son Joseph Mbevo Ndaka applied to the court to substitute his late father. The application was granted. A grant was issued on 10<sup>th</sup> April 2015 in the joint names of Kituku Mutisyo Kilatia and Ndaka Mutinda.

On 24<sup>th</sup> of February 2016 this court gave directions whereby Kituku Mutiso Kilatia was allowed to file an application for the confirmation of the grant. Joseph Ndevo who substituted his late father was made to be the objector and was to respond to the application for the confirmation of the grant. In compliance with that directive an application dated 18<sup>th</sup> April 2016 for the confirmation of the grant was filed. It is supported by the affidavit of Kituku Mutiso Kilatia. The objector filed a replying affidavit sworn on the 24<sup>th</sup> of August 2016. Counsels for both parties agreed to determine the objection by way of written submissions.

Miss Marubu, counsel for Kituku Mutisyo Kilatia, submit that the initial objection by the late Ndaka Mutinda was due to none payment of the balance of the dowry. In accordance with Kamba customs, where a woman is married, she becomes assimilated to her husband's family. The Kamba customs precludes the family of a married woman from claiming inheritance of their daughter/sisters' estate if the marriage met all the customs. It is submitted that the mode of distribution proposed by the petitioner is proper. There were perishable goods and the same were sold. Some assets were sold to pay debts. The objector has not challenged the proposed mode of distribution. No alternative mode of distribution has been offered by the objector.

It is further submitted that the succession cause was filed as one as the estate is inseparable. Under section 43 of the law of Succession Act, estates of spouses or husband and wife are treated as separate where one died prior to the other or where the senior is presumed to have died earlier. This situation is not applicable

in the present circumstances. The husband and wife died at the same time. Rule 64 of the probate and administration rules allow the court to take into consideration the customs of the parties. African customary law is applicable. Under the Kamba customs where a woman is married off and dowry is paid, she becomes the daughter of the home where she is married and her family where she came from has no right of claim of her estate upon her death. Therefore, even if the two estates were to be separated, Regina's family has no right of claim of her husband's estate or her own estate. This is the situation whether she is survived by her husband or not. Under the Kamba customs after payment of "Ntheo", the marriage is consummated and any claim thereafter can only be to the extent of the agreed dowry. In the present case "Ntheo" was paid and Regina became fully assimilated to the family of Godfrey. Before the burial of the deceased both families held discussion and the parents agreed that the dowry that had not been paid was to be paid in full and there after Regina's family had no further interest. This was put in writing.

It is also submitted that Regina's father did not want to object to the succession cause. It is the current objector who has been pursuing the matter. The objector has other six brothers who have never bothered to pursue this matter. Regina was a house wife who was only looking after her husband's shops and properties. There is no proof that she contributed to the purchase of the properties. All the properties were purchased in the name of Godfrey. The objector is not a dependant of Regina and cannot qualify to inherit out of her estate.

Mr. Mwadilo submit that the petitioner is of the view that he is the dependant on all the estate of the two deceased persons. The objector and his siblings are lawful beneficiaries of Regina's estate. The petitioner cannot benefit from the estate of Regina.

The succession cause involves the estate of two people. Ordinarily each deceased's estate ought to have been administered separately. The parties were a couple and all their children perished in the fire. Section 43 of the law of succession Act provides as follows: -

**"Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, the deaths shall, for all purposes of this Act, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder: provided that, in the case of spouses who died in those circumstances, the spouses shall be presumed to have died simultaneously."**

The effect of the above section is that age shall take into account the order in which the two-people died. The younger person will be deemed to have been the last one to die even if the two people or more would have died at the same time. In this situation, the deceased had two of their last-born children aged 1½ years old (Gloria and Sharon). I presume they were twins. Under the provision of section 43 of the law of succession Act, these two children survived their parents.

The record shows that two death certificates were obtained for the couple. The death certificate for Godfrey Kilatya Kituku indicate that he was 39-year-old. Similarly, the death certificate for Regina Ndaka indicate that she was 39 years old. Being of the same age, the presumption of survivorship in this case as provided under section 43 of the law of Succession Act does not apply. None of the two survived the other.

Counsel for the petitioner has dwelt on the issue of customary law being applicable in succession matters. It is submitted that under customary law, once dowry is fully paid, the woman becomes assimilated to her man's family and she loses her own distinction. She does not own her own property to be inherited by members of her original family including parents and siblings.

Rule 64 of the probate and administration rules state as follows: -

**"Where during the hearing of any cause or matter any party desires to provide evidence as to the application or effect of African customary law he may do so by the production of oral evidence or by reference to any recognized treatise or other publication dealing with the**

**subject, notwithstanding that the author or writer thereof shall be living and shall not be available for cross examination.”**

Parties agreed to determine the dispute through written submissions. No oral evidence was taken. The petitioner did not adduce any evidence on the issue of Kamba Customary Law apart from the submissions by his counsel. No reference in form of a text book is made on Kamba Customs. This court cannot take the submissions by counsel to be the correct position in Kamba Customary Law. I do not find that Regina became assimilated to her husband's family and her own estate was subsumed by that of her husband. Regina could have bought her own property and such properties would have formed part of her own estate. What would have been the position if Regina had other children from a previous marriage before getting married to Godfrey. Can it be said that under Kamba Customary Law the children from the first marriage could not have inherited their mother's estate. I do not think so. Regina 's estate is distinct from that of her husband whether dowry was paid or not.

The scenario of this case is that none of the children survived to inherit their parents' estate. Counsel for the petitioner submits that it is only the husband's family which is entitled to inherit the estate. I do find that since the couple died on the same day, each one of them is entitled to have his/her family inherit their respective estate. Regina's family cannot be pushed to the periphery simply because she was married to Godfrey. Her family is entitled to claim her estate.

The next issue is, what constitutes the estate? The original petition filed on 29.10.2012 lists the estate as follows: -

#### **ASSETS**

- (a) A cereals shop located near the Malindi new stage.**
- (b) A matrimonial home situated at Takaye area within Malindi District**
- (c) Livestock-6 grade-cows and 1 donkey.**
- (d) 1 unregistered plot situate at Kwa Chocha area within Malindi District.**
- (e) 1 plot situate at Kisumu Ndogo area containing a retail shop therein.**
- (f) Nissan Matatu registration number KBM 607C.**
- (g) Plot situate at Maweni area under construction.**
- (h) Plot measuring approximately 98' by 7 217' feet situate at Gede Dabaso.**
- (i) Bank Accounts at Co-operative Bank, equity bank and Kenya commercial Bank.**
- (j) Other light movables.**

**Total estimated value Kshs.15,000,000/=.**

#### **LIABILITIES**

- (a) Claims so far received kshs.500,000/= (Aprox.)**

The application for confirmation of the grant dated 18.4.2016 gives the following properties: -

- (a) A cereals shop located near the Malindi new state**
- (b) A matrimonial home situated at Takaye area within Malindi District**

**(c) 6 grade cows and 1 donkey.**

**(d) Pension for Godfrey Kilatya Kitutku from TSC**

It is submitted that some of the properties were sold to pay off the debt. Some properties were perishable and had to be sold. There is no proper account as to how much money was realized after the properties were sold. There is no mention of the money in the bank accounts or the Nissan matatu. I do find that there is need for the petitioner to give proper details as to what assets were sold and for how much. What constituted the liabilities. How much was paid to settle the liabilities.

On the issue of dependancy, as indicated hereinabove, none of the children survived their parents. The petitioner is Godfrey's father. The original objector is Regina's father. He died before the matter was concluded. The current objector is Regina's brother. Section 29 of the Law of Succession Act defines the meaning of dependant as follows: -

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.**

Section 39 of the succession states as follows: -

**(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –**

**(a) father; or if dead**

**(b) mother; or if dead**

**(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**

**(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none**

**(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree in equal shares.**

**(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.**

Given that the two deceased persons left no surviving children, section 39 of the succession Act allows the parents of both deceased to be the next in line to succeed them and if dead, like in the case of Regina, her mother steps in. If Regina's mother is dead too, then her brothers and sisters are allowed to inherit her. The objector is therefore entitled to pursue the estate of his deceased sister. Even if the objector did not depend on Regina during her lifetime, the law of Succession allows him to succeed his sister.

The estate has not been quantified. The contention by the petitioner's counsel that all the properties were bought in the name of the husband is not proof that Regina did not contribute towards their acquisition. I have seen the plaint in Malindi HCCC No. 22 of 2013; Ndaka Mutinda (Administrator) v Kenya Power & Lighting Company Ltd. It is indicated under paragraph 9 of the plaint as follows: -

**The deceased man was a university graduate employed as a deputy head teacher at Malindi**

**High School and a businessman with a monthly net income of over 180,000/= and the deceased lady was also a university graduate having (sic) in secondary school for two years resigned to engage in business and her monthly returns were over 100,000/=.**

The above plaint was filed by counsel for Regina's father before he died. What can be deduced from the plaint is that Regina was engaged in business at Malindi. This fact is appreciated in the petition. She was equally a graduate like her husband. She taught in a secondary school for two years before she resigned to engage in business. She had an estate of her own to be inherited. She took care of the children. I will apportion her contribution to the estate less the gratuity at 35%.

The final issue is the distribution of the estate. Having noted that the list of properties to be inherited has dwindled without any information and noting that the petitioner was the sole administrator before the grant was revoked, I do make the following orders before the estate is distributed.: -

- 1. The petitioner within twenty one (21) days to file a report on the sale and proceeds of all the movable and immovable properties mentioned in the original application but not indicated in the application for confirmation of the grant.**
- 2. The petitioner to file a proper statement of account of the remaining estate and the valuation of each remaining property within forty five (45) days hereof.**
- 3. The petitioner to indicate what constituted the liabilities and if the liabilities were settled in the report under order (1) hereinabove.**
- 4. Costs of the valuation shall be charged on the estate.**
- 5. Final orders on distribution shall be given after the above information is filed in court as directed hereinabove.**

**Dated, signed and delivered in Malindi this 28<sup>th</sup> day of February, 2017.**

**S. CHITEMBWE**

**JUDGE**