



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 319 OF 2015

IN THE MATTER OF THE ESTATE OF GIBSON KINUKA NDUNDA (DECEASED)

JEDIDAH MATHEMBO NDUNDA.....PETITIONER

VERSUS

RAEL MUTUNGE.....OBJECTOR

RULING

1. **Gibson Kinuka Ndunda** (Deceased) died domiciled in **Kenya** on the **14th March, 2009**. **Jedidah Mathembo Ndunda**, the Petitioner, petitioned for letters of administration intestate in respect of his Estate in her capacity as his widow. She listed persons who survived the deceased as **herself, Jackson Nzou Ndunda, Anne Mwikali Ndunda, Jane Mumbi Ndunda, Michael Ndunda Kinuka, Nancy Mutio Ndunda, Carol Mwendu Ndunda and Moureen Muluki Ndunda**.

2. Further, she listed assets the deceased had at the time of his death as: **Nzambani/Kyanika/1752; Kyangwithya/Tungutu/792; Plot Nos. Mulongo/Kavisuni/978, 776, 975, 974, 973, 972, 971; Plot Nos. Kisasi/Kimuuni/796, 975, 794, 793, 792, 791, 720, 719, 274, 237, 216, 216, 103, 113; LR Nos. Kitui/Township/4096/255, 4096/360; Plot Nos. Kisasi/Nguuni/1214, 1213 & 1209; A half share of Plot No. Kaluva Adjudication Section No. 2181; Plot Nos. Kanuva 1780, 1792, 1799, 1800, 1801; Plot No. Manzini 2688.**

3. On the **18th May, 2009**, a limited grant of letters of administration ***ad colligenda bona*** were issued to the Petitioner for purposes of collecting, getting and receiving the Estate and doing things that would be necessary for purposes of preserving the Estate until further representation would be granted.

4. On **21st July, 2009**, **Rael Mutunge** (Objector) filed an application seeking revocation of the grant on the grounds that it was obtained fraudulently by making of false statement and deliberate concealment from court of the particulars of all assets and dependants of the deceased.

5. She stated that she married the deceased in **1975** and were blessed with **five issues** of the marriage namely:

- a. **Raphael Mutua Kinuka.**
- b. **Rossinah Ngina Kinuka.**
- c. **Patrick Musyoka Kinuka.**
- d. **John Kithome Kinuka.**
- e. **Richard Kithome Kinuka.**

6. Subsequently the application for revocation of grant was withdrawn on **7th June, 2010** to pave way for confirmation of the grant. As a result a grant of letters of administration intestate were issued to the Petitioner on the **9th December, 2011**.
7. On the **18th August, 2012**, the Petitioner filed summons for confirmation of grant. She averred that she was the only wife of the deceased who was survived by her **seven (7) children** that have been aforementioned.
8. In addition to properties aforementioned, she stated that the deceased also owned **Land Parcel No. 1799 – Kaluva Adjudication Section, a plot within Kitui Town LR 4096/360** that was undeveloped and **Katwala Market Plot No. 5, 6 and 11**.
9. The Objector filed an affidavit of protest where she deponed that she married the deceased under the **Customary Law**. They were blessed with **five (5) issues** of the marriage and at the time of his demise the deceased was staying with her. Although they were excluded from the list of beneficiaries, they were entitled to benefit as the deceased's legitimate dependants. That the Petitioner failed to disclose some of the deceased's properties namely the **house in Athi River** that stands on **LR 337/498** on which the Petitioner resides. The deceased having been separated from the Petitioner, she (Objector) was the one occupying the house in their rural home at **Katwala**. She prayed to be included as a beneficiary together with her children.
10. The application was canvassed by way of *viva voce* evidence. The Petitioner stated that he married the deceased in **1972** and were blessed with **eight (8) children**. In the course of their stay and even at the time of his funeral she never heard of any other family that the deceased purportedly had. She claimed the whole Estate to hold in trust for her children. She denied the allegation that property **LR 337/498, Athi River** belonged to the deceased and stated that it was registered in the name of **Nicholas Ndolo Ndambuki**. She claimed ownership of the house that she occupies in **Athi River**. She denied the allegation that her marriage to the Petitioner was dissolved. She concluded by stating that had their marriage been dissolved the clan could not have allowed her to bury the deceased and that she lived with the deceased upto the time of his demise.
11. On cross examination she stated that she disagreed with the deceased when she blocked sale of the house is **South B** whereafter he swore an affidavit out of anger stating that he had divorced her and married the Objector.
12. PW2, **Nthenge Wa Ndunda**, the elder brother of the deceased stated that the Petitioner married the deceased under the **Kamba Customary Law** and there was no time they separated. He acknowledged having seen the Objector at the house of the deceased but denied having witnessed any other marriage ceremony between the deceased and another woman except the Petitioner. He also denied having known the existence of other children purported to be for the deceased.
13. PW3 **Julius Mulwa Ndunda** the deceased's younger brother recognized the Petitioner as the wife of his brother and denied knowing the Objector.
14. PW4 **Jackson Nzou Ndunda** the son of the deceased with the Petitioner denied the allegation that his parents were separated. He stated that he saw the Objector for the first time after his father's burial when they were summoned by the Chief.
15. The Protester/Objector stated that she married the deceased in 1975 under the **Kamba Customary Law**. They were blessed with **five (5) children**. At the time of their marriage she was aware the deceased had a first family. They cohabited in **Nairobi** until **1997** when they moved to stay at **Kitui Katwala** where she has a house although currently she resides on a plot. She stated that the deceased did not have a cordial relationship with his siblings, one of them, **Nthenge** having sexually molested his daughter from the first family. As a person she still related with them.
16. Further, she testified that when the deceased fell ill she took him to **Kitui District Hospital** where he

was admitted for **six (6) days** prior to **Jedidah** taking him away. She was barred from going to **Nairobi** and participating appropriately in the burial ceremony as she was not included in the programme. Thereafter the clan presided over a meeting that was attended by both families. Both of them signed a document to co-exist with each other. She adduced in evidence the deceased's identity card arguing that she possessed it by virtue of having lived with him. According to her, the deceased told her that all properties that were in Kitui belonged to her while what was in Nairobi belonged to the Petitioner.

17. She called two (2) witnesses. Her first witness **Patrick Musyoka Kinuka** her son, stated that they resided in **Nairobi, Kayole** until **1994** when they moved to stay at **Katwala Kitui**. He identified with his paternal uncles, one of them, **Nthenge** who escorted him to pay dowry.

18. The Objector's witness No. 2 **Jackson Mulu Isika**, a former **Chief of Katwala** stated that the deceased had two (2) wives. After the burial he summoned both families to his office with the clan chairman. They promised to live peacefully and reduced the agreement into writing. All of them signed the document. On cross examination he denied abusing his office by writing letters that were favourable to the Objector and stated that whatever he reduced into writing was in accordance to a will written by the deceased.

19. The Objector's witness No. 3 **Joshua Muasya Mulu** an uncle of the deceased and Vice Chairman of the family stated that the deceased married the Objector in **1975**. He was involved in payment of dowry in **1996**. He alluded to a problem that arose during the burial as the Petitioner deterred the Objector from being involved in the ceremony. The Objector had to seek security from the Chief. He adduced in evidence a letter authored by the deceased proposing that the Petitioner inherits all his properties in Nairobi while the Objector inherits all properties in Kitui.

20. Objector's witness No. 4 **Geoffrey Munyalo Munganga** was the chairman of the deceased's clan, the **Kitutu clan**. He stated that both the Petitioner and Objector were married to the deceased and had children with him and there was an altercation between them at the funeral. On **3rd April, 2009** he attended a meeting called by the Chief in an endeavour to resolve the problem between the two (2) families.

21. Rival submissions were filed by the Petitioner and Objector's counsels respectively.

22. Issues for determination are:

- Whether the Objector was the deceased's widow.
- Whether her children were the deceased's beneficiaries and/or dependants.
- Whether the deceased's wishes expressed in the letter dated **20th July, 2003** are binding on the court?

23. From evidence adduced by the Petitioner, it is apparent that she does not recognize the Objector as a wife of the deceased. She dismisses her as an intruder who turned up after the deceased's demise and is in occupation of some of the deceased's properties. The Objector on the other hand recognizes the Petitioner as the deceased's wife who was married to him prior to the year **1975**. She however argues that at one point in time the deceased disowned her as a wife. What was not established is if he divorced her.

24. On her part she states that she married the deceased under **Kamba Customary Law**. They cohabited from the year **1975** until the deceased's demise. In the case of **Anna Munini and Another vs. Margaret Nzambi – Civil Case No. 751 of 1977**. The court held thus:

“It has been proved that the deceased and the defendant were man and wife under customary law and though some ceremonies and rituals for such marriage had not been fulfilled before the deceased's death they did not affect the presumption or validity of marriage.”

25. In the case of **Hortensiah Wanjiku Yawe v. The Public Trustee, Civil Appeal No. 13 of 1976**. The

court held:

“(i) The onus of proving customary law marriage is generally on the party who claims it.

(ii) The standard of proof is the one usually for a civil action namely “on the balance of probabilities.”

(iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.

(iv) Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.

(v) Only cogent evidence to the contrary can rebut the presumption.

(vii) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.”

26. OW3 **Joel Muasya Mulu** an uncle of the deceased stated that he was involved in payment of dowry in respect of the Objector. Other than alleging that he was one of the persons who took dowry to the home of the Objector he did not tell the court what exactly they took there and whether what happened was in conformity with the Kamba tradition. In the circumstances it was not proved that formalities done for Kamba Customary Marriage to be deemed to exist were fulfilled.

27. Evidence adduced however reveals that the Objector had children, five in number that she stated were sired by the deceased. **Patrick Musyoka Kinuka** the third born testified. His evidence that he was the deceased’s son was not challenged.

28. Further, evidence proves the fact that the Objector cohabited with the deceased. To date she occupies houses constructed by the deceased. Although PW2 **Nthenge** the elder brother of the deceased refused to acknowledge the Objector as the wife of the deceased, he admitted the fact that the Objector cohabited with the deceased but alleged that his brother never told him that the Objector was his wife as required by the customary law. Evidence was adduced that he was the one who would negotiate on behalf of the Objector’s family in case the need arose. Evidence of a photograph in which he appears with the objector, her son and other family members was adduced in evidence.

29. Cohabitation with the deceased for **thirty four (34) years** was a very long time. They have grandchildren therefore a presumption of marriage should be drawn. In evidence we have a letter dated **3rd April, 2009** where both the Petitioner and the Protester/Objector signed as wives of the deceased. The Petitioner admitted having signed it in that capacity but still denied the suggestion that indeed the Protester/Objector was the wife of the deceased. The letter was signed after the burial of the deceased. This was in the course of the two (2) families being reconciled.

30. The long cohabitation coupled with such evidence was proof of existence of the presumption of marriage. The fact that specific ceremonies or rituals may have not been done cannot invalidate the relationship that is presumed to be a marriage.

31. With regard to the 2nd issue, **Section 29** of the **Law of Succession Act**, defines a dependant as:

“(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; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

The children of the Objector having grown up at the deceased’s home it cannot be alleged with certainty that he never participated in their growth life and education. Therefore, whether or not the deceased was maintaining the Objector’s children they remain beneficiaries of the Estate.

32. A letter purported to have been written by the deceased addressed to his uncle and chairman of **Akitutu Clan (Mbutha Muli)** and his younger brothers was adduced in evidence. This letter refers to the wishes of the deceased. In the case of **Apeli vs. Buluku (2008) IKLR (G & F)** it was held thus:

“In cases such as this, the most important rule is that the wishes of the deceased person, though not binding, must, so far as possible, be given effect to..... where the wishes of a deceased person are not contrary to custom nor contrary to the general law or public policy or safety....”

33. The document written in Kikamba language bears a signature and seal in the name of the deceased and has title as a ‘**Notary Public**’.

The letter intended to express the desire of what would happen upon the deceased’s demise. However an indepth look of the letter shows deviation from what a lawyer with knowledge of law of how a person’s last wishes/will would be framed.

34. At **Paragraph 13** and **14** the author alludes to having assets in various towns and proceeds to bequeath to **Mathembo** a plot in **Embakasi** including many slum houses and his storeyed house.

35. At **Paragraph 16** – His assets at home, farms and plots were to be given to **Rael**.

36. These were mere allegations. There was need to be specific as to which plots he was referring to. None of the parties herein seem to know the plots and parcels of land alluded to and the towns. The court cannot distribute what it does not know.

37. These were wishes that were incapable of being enforced. The document is hence disregarded.

38. Consequently, the deceased having died intestate the court is duty bound to distribute his Estate.

39. In the affidavit in support of confirmation of grant, the Petitioner listed the deceased’s properties as hereunder:

1. **Kisasi/Kimuuni/792**
2. **Kisasi/Kimuuni/791**
3. **Kisasi/Kimuuni/237**
4. **Kisasi/Kimuuni/216**
5. **Kisasi/Kimuuni/113**
6. **Kyangwithya/Tungutu/792**
7. **Mulango/Kavisuni/974**
8. **Kisasi/Kimuuni/103**
9. **Kisasi/Nguuni/1209**
10. **Kisasi/Kimuuni/1213**
11. **Kisasi/Kimuuni/274**
12. **Mulango/Kavisuni/978**
13. **Mulango/Kavisuni/976**
14. **Mulango/Kavisuni/975**
15. **Mulango/Kavisuni/972**

16. *Mulango/Kavisuni/971*
17. *Kisasi/Manzini/2688*
18. *Nzambani/Kyanika/1752*
19. *Kisasi/Nguuni/1214*
20. *Kisasi/Kimuuni/796*
21. *Kisasi/Kimuuni/795*
22. *Kisasi/Kimuuni/794*
23. *Kisasi/Kimuuni/793*
24. *Mulango/Kavisuni/973*
25. *Kisasi/Kimuuni/720*
26. *Kisasi/Kimuuni/719*
27. *Kisasi/Nguuni/51*
28. *Katwala Market Plot Nos. 5, 6 & 11*
29. *A half share of Plot No. 2181 Adjudication Section*

Plot Nos. Kaluva Adjudication Nos. 1778, 1799, 1792, 1779, 1800, 1801

30. *Land Parcel Nos. 1799 – Kaluva Adjudication Section*
31. *A Plot within Kitui Town LR No. 4096/360*

40. The Petitioner proposed that the properties be transmitted to her to hold in trust for her children.
41. The Protester sought for inclusion of **Plot No. 337/498 – Athi River**. From evidence adduced, she prayed to take possession of all properties in the rural area – **Katwala** and **Mbitini**. The Petitioner proved that an **unsurveyed Plot** at **Athi River** was allocated to her in the year, **1996**.
42. The deceased was polygamous. **Section 40** of the **Law of Succession Act** provides:

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

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

43. This will be the law applicable in the instant case. All children in the matter are now adults. The deceased’s Estate will be divided amongst them equally. Their mothers (Petitioner and Protester) will be added as units of each household.

The first household consisting of **Eight Members** while the second household consists of **Six (6) Members**.

44. The acreage of each parcel of land having not been provided, the administratrix of the Estate is hereby directed to file a schedule of distribution of the Estate in tandem with the order of the court within **60 days** for endorsement. This being a succession matter there will be no orders as to costs.

Dated, Signed and Delivered at Kitui this 16th day of December, 2015.

L. N. MUTENDE

JUDGE