

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.2548 OF 2002

IN THE MATTER OF THE ESTATE OF PETER MUTUKU KYONGO (DECEASED)

**GEORGINA MWENDE
MUTUNGA.....PETITIONER**

VERSUS

**FRANCISCA MUNINI MBITHE.....
OBJECTOR**

JUDGMENT

Georgina Mwende Mutunga, the Petitioner herein petitioned the court to be issued with a grant of letters of administration intestate in respect of the estate of Peter Mutuku Kyongo (deceased). In the petition, she described herself as a widow of the deceased. She listed herself and Tabitha Kalei Kyongo, the mother of the deceased, as the two beneficiaries of the deceased. She was issued with a grant of letters of administration in respect of the estate of the deceased on 4th December 2002. On 25th July 2003, Francisca Munini Mbithe moved the court by summons pursuant to the provisions of **Section 76** of the **Law of Succession Act** seeking to have the said grant that was issued to the Petitioner revoked on the grounds that the proceedings leading to the Petitioner obtaining the said grant was defective in substance and was tainted by fraud. In the affidavit in support of the application, the Objector averred that she was also a widow of the deceased. The Petitioner had therefore misled the court when she failed to list her as the first widow of the deceased. The issue that was placed for determination by the court was the question whether the Objector was a widow of the deceased, and therefore a dependant of the deceased, and therefore entitled to be considered as a beneficiary of the estate of the deceased.

Directions were taken before the court. The parties to the succession cause agreed that the question whether the Objector is a widow of the deceased would be determined by the court hearing *viva voce* evidence adduced by the parties. The Objector testified as PW1. She called the brother of the deceased John Mutua Kyongo (PW2) as her witness. It was the Objector's case that she got married to the deceased in April 1988 under **Kamba Customary Law**. They were not blessed with any children. The Objector testified that the deceased married the Petitioner as a second wife. The Petitioner was also married under **Kamba Customary Law**. The Objector produced letters written by the Chief of Mtito Andei Location dated 22nd August 2002 and another one written by the District Officer Mtito Andei Division dated 26th August 2002 which confirmed that she was indeed the first widow of the deceased. She also produced another letter written by the District Commissioner Makueni dated 27th August 2002 addressed to the then Air Force Commander which identified her as a widow of the deceased.

The Objector conceded that all these letters were written after the death of the deceased. It was her case that at no time was she divorced by the deceased during his lifetime. She testified that she continued cohabiting with the deceased even after he got married to the Petitioner. PW2 corroborated the testimony of the Objector. He testified that the deceased was married to two wives, the Petitioner and the Objector. Both wives were married under Kamba Customary Law. Whereas the Objector was married in 1988, the Petitioner was married in 1996. Both wives lived in Eastleigh area. It was his evidence that the beneficiaries of the estate of the deceased were therefore the two widows and the mother of the deceased. He however conceded that he was not aware whether the deceased had converted his customary marriage to the Petitioner into a statutory one.

On her part, the Petitioner testified as DW1. She also called Major Mathew Mweu, a custodian of records at Defence Headquarters as her witness (DW2). It was the Petitioner's case that she was married to the deceased in 1997 under Kamba Customary Law. The marriage was later converted into a statutory one when they got married at the Registrar's Office in Nairobi on 30th June 2000. She produced the certificate of marriage as an exhibit in the case. She further testified that she was aware that the deceased was married to the Objector. However, by the time the deceased met her, he had divorced the Objector. The divorce was under Kamba Customary Law. She testified that all the records kept by the deceased's employer (Kenya Defence Force), identified her as a wife of the deceased and the next of kin of the deceased. She denied the suggestion put forward by the Objector that she (the Objector) was cohabiting with the deceased at the time of his death. She testified that the deceased was not involved at all with the Objector at the time of his death.

This was evident from the fact that the Objector did not go to see the deceased when he was sick prior to his death. DW2 produced copies of the records kept by the Kenya Defence Forces in respect of the deceased. In the said records, the deceased recorded both the Petitioner and the Objector as his wives. In an entry made in March 2000, the deceased recorded that he had customarily divorced the Objector. However, in another entry made in November 1998, he referred the Petitioner as his second wife. DW2 testified that in accordance with the employment records of the deceased, the Petitioner was identified as the next of kin of the deceased.

After the close of both the Petitioner's and the Objector's case, the respective counsel for the parties filed written closing submission in support of their respective client's cases. This court has carefully considered the evidence adduced on record. It has also considered the respective submission filed in this case. As stated earlier in this judgment, the issue for determination by this court is whether the Objector was married to the deceased at the time of his death and whether she should be considered as a dependant of the deceased as provided under **Section 29** of the **Law of Succession Act**. The Petitioner concedes that the Objector was married to the deceased before the deceased met her. It is however her case that the deceased divorced the Objector before he married her. According to the Petitioner, the deceased divorced the Objector under Kamba Customary Law. No evidence was however adduced to support the contention that indeed Kamba Customary divorce rite was performed or that infact it took place. Even if the Petitioner was able to establish that such Kamba Customary divorce rites did take place, the same would not have been valid because under the **Matrimonial Causes Act**, the only venue that married couples, whatever the system of the celebration of marriage can be divorced, is either through the ordinary courts or the Kadhis' court. The law does not recognize any divorce purportedly undertaken under customary law.

This court therefore holds that the Objector was married to the deceased at the time of his death. The Objector was able to establish that despite the deceased marrying the Petitioner, she still maintained a relationship with him upto the time of his death. Although the deceased changed the particulars of his next of kin with his employer, that fact alone cannot lead this court to the conclusion that the deceased was not married to the Objector. Another issue that came to the fore for determination by this court is whether the fact that the deceased converted his customary marriage to the Petitioner to a statutory one gave the Petitioner a higher marital status to the Objector. **Section 3(5)** of the **Law of Succession Act** provides thus:

“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.”

In the present case, it is clear that since the Objector was not formally divorced by the deceased, she was still the wife of the deceased at the time of his death. The Objector is therefore a dependant of the deceased within the meaning of **Section 29(a)** of the **Law of Succession Act**. This court therefore holds that the Petitioner obtained the grant that was issued to her on 4th December 2002 by concealing the material fact that the deceased had another wife.

In the premises therefore, the court holds that the Objector established to the required standard of proof on a balance of probabilities that she was a wife of the deceased and therefore entitled to be recognized as a dependant of the deceased. The grant that was issued to the Petitioner on 4th December 2002 is therefore revoked pursuant to the provisions of **Section 76(a) and (b)** of the **Law of Succession Act**. A new grant shall be issued to the Petitioner, Georgina Mwendu Mutunga and the Objector, Francisca Munini Mbithe. Since this matter has remained pending before this court for a long time, this court invokes its inherent jurisdiction and further directs that the properties that comprise the estate of the deceased shall be distributed equally between the Petitioner, the Objector and the Tabitha Kalee Kyongo, the mother of the deceased. This decision is made pursuant to provisions of **Section 40(1)** of the **Law of Succession Act**. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF APRIL, 2014.

L. KIMARU

JUDGE