



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Succession Cause 215 of 2008**

**IN THE MATTER OF THE ESTATE OF JAPHETH BYRUM AMBUSO**  
**1. BEATRICE BADOJA AKWABA**  
**2. EDNA ROSE AMBUSO.....PETITIONERS**  
**-VERSUS-**  
**LILIAN IDAYA MUSODA.....OBJECTOR**  
**JUDGMENT**

The Petitioners moved the Court by Petition for Grant of Letters of Administration Intestate of *Japheth Byrum Ambuso* dated 22<sup>nd</sup> July, 2008. The Petitioners, who were sisters to the deceased, stated that the deceased had died on 25<sup>th</sup> October, 2007 being survived by two children, a son, *D.O*, aged 13 years, and a daughter, *M.M*, aged 11 years. In the supporting affidavit, the petitioners stated under the schedule of assets: “Unknown benefits with Kenya Ports Authority”.

After a notice of the said petition was published in *the Kenya Gazette* of 22<sup>nd</sup> August, 2008, the objector *Lilian Idaya Musoda* of Mombasa filed a notice of objection (dated 1<sup>st</sup> September, 2008). The objector stated that she is the widow of the deceased, and the petition for grant of letters of administration had been made without her knowledge even though she was the one taking care of the two children of the deceased.

The objector subsequently (on 27<sup>th</sup> October, 2008) filed an answer to the petition for grant of letters of administration intestate. The objector pleaded that the petition be dismissed on the ground that she is the lawful widow of the deceased, and the petition had been filed by sisters of the deceased, whereas the objector was the one caring for the two children of the deceased, *D. O* and *M.M*. The objector stated that she was filing a cross-petition for grant of letters of administration intestate, in respect of the estate of the deceased.

The objector’s cross-petition is dated 27<sup>th</sup> October, 2008. She pleads that she is the widow of the deceased who died intestate while domiciled in Kenya. The Objector stated that “every person having an equal prior right to a grant of representation” had consented to her cross-petition, or had renounced such right, or had been issued with a citation to renounce such right or apply for a grant of representation and had not done so.

The objector undertook to faithfully administer according to law all the estate which by law devolves upon and vests in the deceased’s personal representative; and to “render a just and true account of such estate whenever required by law so to do”.

The petitioners filed an answer to the cross-petition dated 19<sup>th</sup> November, 2008. They stated that they, sisters of the deceased, did not know the objector, and that the objector was not legally married to the deceased; they went on to state:

***“All we have gathered is that she used to be a girlfriend to the deceased and was unknown to the entire family until after the deceased died, that she [appeared masquerading] as the wife of the deceased, [and] proceeded to receive an allowance of Kshs. 50,000/= from Kenya Ports Authority, which sum was never applied towards the benefit of the estate.”***

The petitioners stated that “the cross-petitioner is a total stranger to the estate and is bent on reaping ...out of this estate without being legally married to the deceased”.

The petitioners had obtained letters from the Assistant Chief in the rural District from which the deceased came, and from the District Commissioner for Emuhaya District (dated respectively, 26<sup>th</sup> and 29<sup>th</sup> May, 2008) declaring that “we are the only known persons who are fit to administer the deceased’s estate and [to] ensure that his children [get] the best education....”

Giving her testimony on 2<sup>nd</sup> December, 2009 the objector said she had been married to the deceased for **six years**; they lived at Shimanzi in Mombasa; and they had one child who died. The deceased had two children with a different mother. The objector testified that when her husband died, his relatives attempted to take all effects from her house with the deceased; these relatives claimed that such effects were the property of the deceased. The objector averred that the deceased's relatives denied her, even though the Mombasa Port administration recognized her, and invited her to take certain benefits which came in the name of the deceased. The names which the deceased's employer had as the beneficiaries, were those of the objector, and the two children of the deceased – but not the names of the deceased's relatives. This is the background to the inception of actions in Court; and in the objector's perception, the deceased's relatives are reluctant to see her get any money from funds due to be paid out by the former employer of the deceased.

On cross-examination by learned counsel **Mr. Ananda**, the objector affirmed that the deceased was her husband, and they had gotten married in **1998**; this marriage involved no Church wedding; it was traditional and entailed only the consent and blessing of the community elders in Western Province, in 2004. On the occasion of such a traditional solemnization, the objector was taken to the rural home and introduced to the deceased's mother and brothers; the deceased's father, at the time, had already died. Although the petitioner could not remember the names of most of the said relatives of the deceased, she recalled that one of them, a brother to the deceased, was **Charles Ambuso** who has since died; and the objector confirmed that **Beatrice Badoja Akwaba** (1<sup>st</sup> Petitioner) was a sister of the deceased.

The occasion of introducing the objector to the deceased's relatives, she said, was accompanied by a payment of bride-wealth. The event took place in Vihiga District, and **Charles Ambuso** came to witness the giving of bride-wealth. The payment was in money, and the sum paid was Kshs. 40,000/=. Another witness to this event was one **Philip Abur**, an uncle to the deceased.

The objector testified that the deceased was her husband, and they lived together for six years, before he died in 2007. At the beginning, the couple lived at Magongo in Mombasa, but later they relocated to Shimanzi.

It was the objector's testimony that **Beatrice** and **Edna**, the petitioners herein, were not unaware of her marriage to the deceased: for they used to visit the couple at their Shimanzi house; Edna had visited the couple in 2003, to see the newborn child, who died after only six months. This child's name was **Tracy Ambuso**, and when she died, her body was interred at Manyimbo Cemetery in Mombasa.

The objector testified that she was responsible for the up-bringing of the deceased's two children, **D.O** and **M.M**; but just on the day the deceased was buried, a sister of his took away **D.O**, who was now aged 14 years; and in 2006 the same sister of the deceased, 1<sup>st</sup> petitioner herein, took away **M.M**, during the lifetime of the deceased.

The objector testified that the deceased's relatives took away the two children, not an account of her failure in caring for them, and not because she had in any way ill-treated them.

The objector testified that she had been at the burial ceremony for the deceased, in Bunyore, Western Province; and she witnessed that the mother to the deceased's two children, who had re-married a different man, was also in attendance.

The objector testified that she had not yet received any payment from the Kenya Ports Authority, in respect of dues in the deceased's name. She said she is 27 years old, and now lives with her brother's family. The objector testified that she is known as next of kin to the deceased, at the Kenya Ports Authority.

**Mrs. Beatrice Badoja Akwaba** (1<sup>st</sup> petitioner) (PW1) who is a teacher at Mwituh Primary School in Emuhaya District, Western Province, testified that her brother **Japheth Ambuso**, had died in Mombasa on **26<sup>th</sup> October, 2007**, and that the deceased had worked as a clerk with Kenya Ports Authority for 14 years. The 1<sup>st</sup> petitioner testified that the deceased had children by the time he died, but she was "not aware he was married". The 1<sup>st</sup> petitioner testified that the two children, **D.O** and **M.M**, had been staying with their father in Mombasa. The first petitioner herself had been working in Mombasa at first; but she was later transferred to Emuhaya District in November 2006. As soon as 1<sup>st</sup> petitioner relocated to Emuhaya, she testified, the deceased called her and asked her to take **M.M** under her care and custody. When **Beatrice** (1<sup>st</sup> petitioner) sought to know why she should take in **M.M**, the deceased thus responded:

**"You are a teacher and a lady. I think you know how to bring her up, as a respectable lady".**

**Beatrice** denied any knowledge that the deceased was living together with the objector; she said:

**"I am not aware he was staying with the objector; for he used to come and see me in my house. He did not introduce me to Lilian."**

**Beatrice** also testified that **Lilian** (the objector) had not been introduced at all, during the burial ceremony for the deceased in Emuhaya District. **Beatrice** said the first time she had seen **Lilian** was in this Court; and that this was the first time she was hearing of any connection between **Lilian** and the deceased.

**Beatrice** said she and her relatives had approached Kenya Ports Authority, to secure the deceased's benefits,

immediately after the death took place; but she had been asked to complete the burial process first, before the matter could be attended to; but when later she and her relatives followed-up on the issue, they were informed that payment had already been made to “a lady called **Lilian**” – some kshs. 55,000/=; she was told that this money was for transporting the body home; but by her evidence, **Lilian**, who was unknown to her, had “transported nothing home”.

This, by **Beatrice’s** evidence, was the situation necessitating the filing of the petition, in the name of herself and her sister, **Edna**. But the letters of administration intestate were not granted, because **Lilian** had raised objections.

**Beatrice** testified that she was “not aware **Lilian** was ever introduced” to the deceased’s parents; she does not know of any visit which **Lilian** may have made to the deceased’s parents’ home. **Beatrice** went on to aver:

**“I can’t say anything about my late brother Charles and the introduction of Lilian. He did not speak about it. He later died. I never heard that Japheth ever paid dowry for Lilian. That could not happen secretly.”**

**Beatrice** testified that she started staying with **D.O** after the deceased died; the deceased had at one time asked her to do just that, but she refused. Of the two children, and of her staying now with both, **Beatrice** said:

**“Nobody claimed these children. Since 2007 they stay with me, and they are in school.”**

**Beatrice** exhibited receipts showing school-fee payment which she was making for the two children.

**Beatrice** testified that **D.O** had done his KCPE examinations, and was waiting for the results; she needed money, as she would soon be paying Secondary School fees – and she needed to get the deceased’s benefits from Kenya Ports Authority.

Of the deceased’s and the objector’s child who died, **Tracy Ambuso**, **Beatrice** said she never saw her. She doubted whether there was anyone in the deceased’s house caring for **D.O** and **M. M**: because there would then be no reason the deceased would have requested her assistance in caring for these children.

**Beatrice** expressed her surprise that the objector was objecting to her application for letters of administration intestate: for not only was the objector unknown to her, a sister of the deceased, but the most delicate functions done for the deceased at the last hour, were performed not by **Lilian**, but by the deceased’s relatives; here is an example:

**“When my brother died, he was to be dressed at the mortuary. This.....way done by us; but they should have been done by a wife. And no wife stood up [at the burial ceremony] to give testimony. He was just buried like that.”**

**Beatrice** said she had no personal interest in the deceased’s employment benefits; save that she was anxious to educate the children of the deceased.

On cross-examination by the objector, **Beatrice** said:

**“I have only seen you today. I don’t know whether you were at the burial ceremony for our brother”.**

Asked by the Court if she ever visited the deceased at his house, **Beatrice** said:

**“I wasn’t going to my brother’s house. In our culture, senior sisters don’t keep visiting their juniors’ houses. He called me and told me he had children. When I was in Mombasa I did not know where the children were”.**

**Edna Rose Ambuso** (2<sup>nd</sup> petitioner) (PW2), in her testimony, said she had not known that her deceased brother had a wife; and that in March, 2007 he had given PW2 the impression that he was living alone. She said the deceased was unable to care for **M. M**, and this is why that child went to live with PW1. PW2 said she was seeing **Lilian** in Court for the very first time.

Learned Counsel **Mr. Ananda**, for the petitioners, submitted that the objector had failed to show that she was the biological mother to the deceased’s two children, **D.O** and **M.M** and that it was clear, by the time the deceased died, on **25<sup>th</sup> October, 2007** the objector was no longer staying with the two children. Counsel urged that the reason the deceased entrusted **M.M** to 1<sup>st</sup> Petitioner, was that “there was no other person responsible for taking care of his children in Mombasa”.

**Mr. Ananda** urged that, as from the day the deceased was buried, his first child **D.O** remained with 1<sup>st</sup> petitioner in Bunyore, as “nobody claimed that he/she was capable of taking care of him, and to-date the objector has never even bothered to know how the children are faring in Bunyore”.

Counsel submitted that the objector had not even told the Court precisely where she now stays, or what she is doing in Mombasa, and he asked: “Can she be trusted with the children of the deceased after she has been away from them for the last three years since the deceased died?” Counsel doubted that the objector has any reason at all to be granted part of the deceased’s estate – other than “mere allegation that she once stayed with the deceased”.

Counsel submitted that the objector was unable to show that she is the legally married wife to the deceased; she could

not produce a marriage certificate in Court; she could not prove a marriage by cohabitation, and she made no application that the Court do presume married status between her and the deceased; she could not show evidence of her presence at the deceased's home, or of her attendance at the burial ceremony.

Counsel urged that since the objector could not even produce basic family documents such as birth certificates, she had provided no basis for conferment with the status of administrator, in respect of the deceased's estate.

Learned counsel submitted that a party should prove marriage to the deceased, before an objection to a grant is resolved in her favour – and that even in the case of a customary marriage, proof is required. Counsel urged that the objector had provided no proof of marriage between her and the deceased, and there was no corroboration of her evidence that the deceased had made a payment of bridewealth in respect of her.

Counsel urged that there had been no proof of cohabitation, as a basis for presuming marriage: the objector did not show evidence even of jointly-acquired property, which bespoke the level of cohabitation such as will lead to a presumption of marriage.

**Mr. Ananda** urged the Court to find that the objection is misconceived: for if the grant is made to the objector, the two children of the deceased stand to suffer, as she will not be there to provide for them on necessities of life.

Counsel submitted that the objector was unable to prove the grounds she was relying on; and that the objection lacks merit, and so the cross-application should be dismissed with costs to the petitioners. Counsel asked that letters of administration intestate be granted to the petitioners as prayed.

The objector in her submissions, stated that even though the deceased's two children are not her biological children, they had been under her care, before the deceased died on 25<sup>th</sup> October, 2007. She submitted that she should be held to be one of the beneficiaries of the estate of the deceased, as she lived with the deceased for some seven years, and her name is recorded in the books of the Kenya Ports Authority as next-of-kin, and as the only wife; the deceased himself had given the objector's particulars to his employer in that regard.

The objector urged that her application had merit, and so her cross-petition be allowed, and she be included as one of the administrators of the estate of the deceased.

The evidence shows that no substantial estate is involved in this matter; indeed, what is of immediate concern to the parties is only the employment benefits likely to be paid out by the former employer of the deceased.

The petitioners say that their main interest in such employment benefits is that they will go towards educational costs for the two children of the deceased who are no longer staying with the objector, but are with 1<sup>st</sup> petitioner. The children in question would ordinarily have been under the care and custody of the objector, if the deceased had been alive and a state of marriage prevailed. The objector states that the two children, indeed, had always been in her custody as wife to the deceased: save that the petitioners have taken them away and retained custody of them. But the petitioners contend, firstly, that they never knew the objector as a wife to the deceased; and secondly, the objector has not, since the deceased died, made any claim to the two children: so, as far as they (and in particular 1<sup>st</sup> petitioner) are concerned, the responsibility for the deceased's children rests upon them. This "**child-connection**" is the basis upon which the petitioners are seeking grant of letters of administration intestate; but they seek to strengthen their case by contending that they knew of no marriage in the life of the deceased, and hence the objector has no "**marriage-connection**" for coming to compete with them for the grant sought.

The objector by contrast, is mainly relying on the "**marriage-connection**". She states that, firstly, she lived with the deceased for seven years as his wife; secondly, her status as a wife was solemnized in introductions conducted in Emuhaya District, and in bridewealth paid in Vihiga District; thirdly, the deceased himself advised his employer that he had one wife, the objector herein, and had the objector's name listed as next-of-kin.

The objector is partly relying on the "**child-connection**"; she says she cared for the deceased's children for years; and that it is her name and the names of those two children, which grace the records of the deceased's former employer, as beneficiaries.

Although the petitioners have not denied that the deceased gave the name of the objector as his wife, they have strenuously denied all knowledge of the place of the objector in the life of the deceased; although they lived in Mombasa, they deny ever meeting the objector; they even say – though the veracity of this is doubtful – they lived in Mombasa where the deceased also lived, but during all those years, they did not visit the deceased's house, and they knew of no wife being there; they dispute the objector's marriage account by wondering why she did not prepare the body of the deceased for burial – but from my perception of witness demeanour in Court, I doubt that anybody was keen

to create such an opportunity for the objector; I have that same perception as regards the claim by the petitioners that they never saw the objector at the burial ceremony, and they wonder why she did not introduce herself and give testimony on her deceased husband.

The objector's status can also be assessed on the basis of **William Musyoka's** work, **Law of Succession** (LawAfrica), p. 175:

***“Some objections are founded on marriages presumed from long cohabitation. In such cases, the objectors would essentially be asking the Court to presume marriage from prolonged cohabitation between them and the deceased.***

***.....The presumption does not depend on any law or system of marriage. It is an assumption based on the fact of a very long cohabitation and repute that the parties are married. Some of the factors to be considered include: children fathered by the deceased, valuable property acquired jointly, and performance of some ceremony of marriage. There must be a quality cohabitation and not mere friendship. It should be beyond concubinage; a cohabitation which has crystallized into a marriage so that it would be safe to presume there is a marriage”.***

An important aspect of the objector's evidence which is uncontested is that, during the seven years she lived with the deceased, the couple had a child, **T.A** who, unfortunately, died after only six months.

Justice cannot be done by casting to the winds all the evidence given by the objector. On a balance of probabilities, it is to be held that she was indeed the wife of **Japheth Byrum Ambuso** (the deceased). I hold, therefore, that the objector has succeeded in establishing her family connection to the deceased through the route of **marriage**. It will mean, of course, that the objector is not to be excluded from the administration of the deceased's estate.

But it is clear at the same time, that the petitioners, and particularly 1<sup>st</sup> petitioner, has made a serious demonstration of a family connection to the deceased, through the route of **child custody** and **child-care**; she is the one individual bearing the burdens of up-bringing the children of the deceased – children who must figure in the scheme of distribution of the deceased's estate. The 1<sup>st</sup> petitioner is a serious interested party who cannot be kept out of the administration of the deceased's estate.

The foregoing analysis compels one outcome to the petition and cross-petition now before the Court: each one is to be allowed in part, and disallowed in part. The Court's orders are as follows:

***(1) The petition of 22<sup>nd</sup> July, 2008 is partially allowed to the extent that the 1<sup>st</sup> petitioner, BEATRICE BADOJA AKWABA shall be one of the two joint-administrators now granted Letters of Administration intestate in respect of the Estate of JAPHETH BYRUM AMBUSO.***

***(2) The objector's Answer is partially upheld and her cross-petition partially allowed to the extent that the objector, LILIAN IDAYA MUSODA shall be the other of the two joint-administrators referred to in Order No. 1 herein and, with the other joint-administrator, the objector is hereby granted Letters of Administration Intestate in respect of the Estate of JAPHETH BYRUM AMBUSO.***

***(3) The joint-administrators shall exercise a sense of proportion in dispensing any proceeds of the Estate and, in the event of disagreement, they, or either of them, shall apply to the Court.***

***(4) The parties shall bear their own respective costs occasioned by the Petition and the Cross-Petition.***

**Orders accordingly.**

**DATED and DELIVERED at MOMBASA this 28<sup>th</sup> day of May, 2010.**

**J. B. OJWANG**  
**JUDGE**

Coram: *Ojwang, J.*  
Court Clerk: *Ibrahim*  
For the Petitioners: *Mr. Ananda*  
Objector: In person