



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Succession Cause 294 of 2001**

**JANE PAMELA ANYANGO KOUNAH.....1<sup>ST</sup> PETITIONER**

**MARGARET AUMA OUNA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JENNIFER NJOKI OCHIENG.....1<sup>ST</sup> DEFENDANT**

**JAMES KOUNAH OCHIENG.....2<sup>ND</sup> DEFENDANT**

**RULING**

The deceased, Gabriel James Ochieng Kounah died on the 14<sup>th</sup> of January, 2001. On the 19<sup>th</sup> of June, 2001 Jane Pamela Anyango Kounah (*1st petitioner*) and Margaret Auma Ouna (*2<sup>nd</sup> Petitioner*) petitioned this court to be granted letters of administration to the estate of the deceased. The petitioners listed themselves and eight others as the dependants of the deceased. In the inventory of the properties owned by the deceased, the petitioners listed two properties. On the 7<sup>th</sup> of August, 2001 Jennifer Njoki Ochieng and James Kounah Ochieng (*the objectors*) objected to the petitioners being issued with the grant of letters of administration to the estate of the deceased. They filed a cross-petition denying that the petitioners were the dependants of the deceased. In their cross-petition, the objectors listed the dependants of the deceased excluding the petitioners, Charles Akech Ouna and Boaz Owuor Kounah as the dependants of the deceased's estate. For one reason or the other, the objection proceedings were not immediately listed for hearing so that the issues in dispute could be determined by the court.

On the 28<sup>th</sup> of February, 2006, this court directed the parties to this objection proceedings to file further affidavits indicating whom each recognized as the beneficiaries of the deceased's estate and what they would propose to be the mode of distribution to be adopted by this court to distribute the estate of the deceased to the deceased's beneficiaries. The petitioners and the objectors complied with the directions of this court and filed further affidavits. It is apparent from the said affidavits that the 1<sup>st</sup> petitioner is no longer resident within the Republic of Kenya. She is now a resident of the United States of America, specifically in the State of New York. On the 10<sup>th</sup> of November, 2006, the parties to this objection proceedings agreed by consent for this court to determine who the beneficiaries of the deceased's estate are by considering the affidavits that were filed by the parties to these objection proceedings. This court obliged.

I have carefully considered the pleadings that were filed by the parties to these objection proceedings including the further affidavits that they were ordered to file by this court. It is clear that the deceased

was married to two wives during his life time. The said widows are Jennifer Njoki Kounah (*the 1<sup>st</sup> objector*) and Jane Pamela Anyango Kounah (*the 1<sup>st</sup> petitioner*). Whereas the 1<sup>st</sup> objector contended that the deceased had long been separated from the 1<sup>st</sup> petitioner before his death, the 1<sup>st</sup> petitioner insists that she was still legally married to the deceased at the time of his death. I have perused the documents filed by the parties in these objection proceedings and I am inclined to agree with the 1<sup>st</sup> petitioner that the deceased had not divorced her by the time of his death. In any event **Section 29 of the Law of Succession Act** recognizes former wives of a deceased person whether or not maintained by him immediately prior to his death as dependants of the deceased's estate. **Section 3(5) of the Law of Succession Act** 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.”***

In this case therefore, the relevant fact to be considered by this court is whether or not the deceased was married to the 1<sup>st</sup> petitioner and the 1<sup>st</sup> objector and not whether or not the deceased was separated or not from either the 1<sup>st</sup> objector or the 1<sup>st</sup> petitioner. It is further irrelevant for this court to consider whether or not the deceased maintained the 1<sup>st</sup> petitioner at the time of his death. There are many decided cases by the Court of Appeal on this point. I would only refer to two cases which more or less settled the issues to be considered by this court in considering situations such as the one that has arisen in these objection proceedings. The two cases are **John Ndungu Mubea vs Milka Nyambura Mubea CA Civil Appeal No.76 of 1990 (Unreported)** and **Irine Njeri Macharia vs Margaret Wairimu Njomo & Anor. CA Civil Appeal No.129 of 1994 (Unreported).**

In the present case therefore, I hold that the 1<sup>st</sup> petitioner Jane Pamela Anyango Kounah and the 1<sup>st</sup> objector Jennifer Njoki Ochieng are the widows of the deceased and therefore the dependants of the deceased for the purposes of these succession proceedings. The other dependants of the estate of the deceased are as follows;

- (i) James Ochieng Kounah
- (ii) Caroline Atieno Kounah
- (iii) Emmanuel Ouna Kounah
- (iv) Moses Ochieng Kounah
- (v) Martha Mumbi Kounah
- (vi) David Nayalia Kounah

No evidence was placed before this court to suggest that the Boaz Owuor Kounah, Margaret Auma Ouna and Charles Akech Ouna were dependants of the estate of the deceased. I therefore declare that they are not dependants of the estate of the deceased subject to the caveat that this court would be amenable to reconsider the issue of their dependency if further evidence is placed before this court.

Having determined the dependants of the deceased's estate, the issue for determination is who among the dependants of the deceased should be granted the letters of administration to administer the estate of the deceased. As stated earlier in this ruling, the 1<sup>st</sup> petitioner is no longer a resident of this country. It would therefore be impossible for her to administer the estate of the deceased in view of the onerous responsibilities placed upon the administrators of the estate of a deceased's person as provided by **Section 82 and 83 of the Law of Succession Act**.

This court is not oblivious of the animosity that exists between the 1<sup>st</sup> petitioner and the 1<sup>st</sup> objector. It would therefore be most unlikely that the 1<sup>st</sup> objector, who is resident in Kenya, would cater for the interest of the 1<sup>st</sup> petitioner during the distribution of the deceased's estate. I have taken into account the totality of the evidence that was placed before me by the parties to these objections proceedings. I will nominate the 1<sup>st</sup> objector Jennifer Njoki Ochieng and the 2<sup>nd</sup> Objector James Kounah Ochieng to be the administrators of the deceased's estate together with one person other than Margaret Auma Ouna who shall be nominated by the 1<sup>st</sup> petitioner. I would suggest that the 1<sup>st</sup> petitioner nominates a brother or a sister of the deceased who is acceptable to the 1<sup>st</sup> objector to be a joint administrator of the estate of the deceased. I have made this decision to exclude the 1<sup>st</sup> petitioner from administering the estate of the deceased because of the fact that she is not a resident of this country. However, if the 1<sup>st</sup> petitioner is prepared to be in the country during the distribution of the estate of the deceased until its conclusion, this court is open to review its decision.

On the issue of how the estate of the deceased should be distributed, **Section 40(1) of the Law of Succession Act** is clear and unambiguous. It provides that;

***“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 addition unit to the number of children.”***

Applying the above law to the facts of this case, I hereby hold that the units that shall be taken into account when distributing the estate of the deceased shall be eight i.e. the two widows of the deceased and the six children of the deceased as listed earlier in this ruling. The parties to these objection proceedings are now aware on how the estate of the deceased shall be distributed. For the avoidance of doubt, I hereby declare that the two widows of the deceased shall inherit each a unit of the total properties that comprises the deceased's estate while the children of the deceased shall jointly inherit six units. For the time being, I refrain from distributing the estate of the deceased. The parties to these objection proceedings are hereby given opportunity to distribute among themselves the properties that comprises the estate of the deceased so that this court can confirm the letters of administration issued to the persons named therein. For the avoidance of doubt, the proceeds that the 1<sup>st</sup> petitioner received on behalf of the estate of the deceased in case No. **HCCC No.114 of 2002** (*it is not stated which court*) shall be taken into account, unless otherwise established, when the estate of the deceased shall be distributed.

Either party shall be at liberty to apply to this court in case there shall be a disagreement in the manner in which the estate of the deceased shall be distributed following the guidelines laid down by this court in this ruling. The letters of administration shall be issued immediately the 1<sup>st</sup> petitioner nominates a person to administer the estate of the deceased together with the objectors in this case.

There shall be no orders as to costs since this is a family dispute.

**DATED at NAKURU this 14<sup>th</sup> day of November, 2006**

**L. KIMARU**

**JUDGE**