



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA  
Probate & Admin Cause 55 of 2002**

**IN THE ESTATE OF J M O (DECEASED)**

**AND**

**C E M .....PETITIONER**

**AND**

**R F A .....APPLICANT**

**R U L I N G**

On the 2nd day of December 2002 this court issued the grant of letters of Administration intestate of the Estate of J M O, deceased to C E M hereinafter referred to as the petitioner. Pursuant to the provisions of Rule 44 (1) and 73 of the Probate and Administration Rules R F A hereinafter referred to as the objector filed a summons dated 17.12.2002 seeking for the aforesaid grant to be annulled or revoked. The application is supported by an affidavit sworn by the objector on the 17th day of December 2002. The petitioner strenuously opposed the application in a replying affidavit she swore on the 6th day of January 2003.

This matter was fixed for hearing after pleadings were closed and parties chose to give oral evidence as opposed to reliance on affidavit evidence. The objector's case was heard first and the petitioner responded.

R F A told this court that she got married to J M O , deceased, accordingly to the Luhya customs and rites on 6th February 1999. Before that she said she cohabited with the deceased as man and wife in Embu between 1992 to 1999 and in Nambale between 1999 and 2001 when he passed away. The Objector further averred that the deceased paid dowry in form of 2 heifers and 1 bull plus Ksh.20,000/= to her uncle E A M who also testified as P.W2. He confirmed that the elders of Ekembuli village sat on 6th February 1999 to receive the dowry from the deceased whom he said was accompanied by four other people. The objector said she married the deceased while she knew he was married to the petitioner, C E M . She disclosed that their marriage was blessed with two children. The first is called B A born on 11th December 1994 and the second born is called E S M born on 11th April 2001. She produced copies of the birth certificates and clinic cards as exhibits in evidence. The two documents show that J M O was father of both children.

The objector also summoned the evidence of her neighbours to prove that her cohabitation with the deceased was open and notorious and that they regarded them as husband and wife. Pamela Nabwire who testified as P.W. 3 told this court that she knew the couple as husband and wife being their neighbour as from the year 2000. This witness averred that she accompanied the objector while taking the deceased to Tanaka Nursing home. She claimed she even attended the deceased's funeral.

The objector further claimed that the deceased used to maintain her, the children of the marriage and one R M . She claimed R was adopted by the deceased as her guardian.

The objector further averred that the deceased acquired property during the existence of their marriage. He called one Bernard Shikuku Mami to testify. This witness told this court that he sold L.R. NO. BUKHAYO/KISOKO/5135 to the deceased at a price of Ksh.110, 000/=. He said he came to know the deceased in 1999 and even visited his rural home in Samia and that is when he came to know he was a polygamist. The objector listed all the assets owned by the deceased and claimed that the deceased disclosed to her all what he had in this world. She further claimed that her relationship with the deceased was within the knowledge of the petitioner. She even averred that she used to stay together with some of the petitioner's children particularly the late F B . She accused the petitioner for concealing the fact that she was a co-wife and now a co-widow. She also accused her of not including her and her children in the petition as dependants and beneficiaries of the estate of J M O (deceased). In view of these concealments she urged this court to annul and revoke the grant given to her on 2nd December 2002.

On her part the petitioner denied the allegations made by the objector and her witnesses. She testified by telling this court that she was not aware that her deceased husband J M O had married the objector. She produced a marriage certificate as an exhibit in her evidence to show that she was married to the deceased under the African Christian Marriage and Divorce Act (Cap 151 Laws of Kenya). She averred that the deceased had no legal capacity to contract another marriage whilst her marriage remained undissolved under the provisions of Section 37 of the Marriage Act (Cap. 160 Laws of Kenya). She named the issues of the marriage who survived the deceased as follows:

**(i) C M aged 28 years**

**(ii) A B M aged 28 years**

**(iii) S P aged 26 years**

**(iv) S M aged 23 years**

**(v) L M years 16 years**

And a grandson known as R M aged 2 years. She said she only came to know the objector when she filed this application for revocation of grant. However when she was cross-examined she admitted she came to know the objector earlier and had even sued her in Busia S.R.M.C.C.C. No. 255 of 2002 which was filed on 25th July 2002 while the current application was filed on 17th December 2002.

The petitioner disputed the allegation that the objector bore children sired by the deceased. She claimed that J M O O (deceased) had undergone a vasectomy in the month of July 1986 hence it was not possible for him to sire children after undergoing the Medical Process. She called one Hakeem Bakunda, a medical Doctor who is alleged to have performed the vasectomy. Hakeem Bakunda testified as D.W 3. He produced as an exhibit in evidence a Family Planning visit Card which showed that the late J M O underwent a vasectomy on the 15th day of July 1986. The petitioner admitted she was an employee of the Family Planning Association of Kenya, Kakamega where it is claimed the deceased underwent vasectomy in her presence and with her approval. She conceded that the deceased was not issued with any document to show that she underwent vasectomy. The petitioner was unable to explain the apparent conflict between her evidence and her averments in the replying affidavit she swore on 6th January 2003. In her oral evidence before this court, she said her deceased husband underwent vasectomy in 1986 while in her aforesaid affidavit she depones the deceased underwent vasectomy in 1980. The document produced by Dr. Hakeem Bakunda shows the last time the deceased visited the doctor was on 23/7/86. The aforesaid doctor also produced a letter dated 27th June 2003 to confirm that the deceased underwent a vasectomy Dr. Hakeem Bakunda admitted he did not prepare these documents save that they were handed to him to present in court to buttress his evidence. He also admitted under intense cross-examination that he did not review his patient's condition after he discharged him on 23rd July 1986. He admitted that there was a possibility of a patient siring children even after undergoing a vasectomy if the severed veins or parts of

the body reincarnates. He gave a possibility of such an occurrence taking place between 8 to 10 years from the date of the vasectomy.

P O M , testified in support of his mother, the petitioner. He told this court that he used to visit his late father when he was in Embu during school holidays and that he did not see the objector cohabiting with his father during that period. He said he did not see her either at the funeral of his father.

Both Mr. Barasa and Mr. Onsongo for the objector and the petitioner Respectively made their oral submissions in support of their dispositions. Their submissions were of great assistance to this court particularly the authorities cited and supplied by the objector's advocate. Though the learned advocates did not file the issues for my determination I think the following issues arose for my determination, from the pleadings and the submissions presented to this court:

*(i) Whether or not J M O, deceased, underwent a vasectomy*

*(ii) Whether or not J M O deceased contracted a marriage with R F A , the objector herein*

*(iii) Whether or not J M O deceased had capacity to contract another marriage after solemnizing his marriage with C E M , the petitioner herein.*

*(iv) Whether or not there were issues of the marriage contracted between the objector and the J M O deceased.*

*(v) Whether or not R F A and her children are entitled to inherit or benefit from the estate of J M O deceased.*

*(vi) Whether or not the objector has established the grounds necessary to support the application for the revocation or annulment of the grant issued to the petitioner.*

I will start with the first issue as to whether or not J M O , deceased, underwent a vasectomy. I have considered the evidence of C E M , the petitioner herein. She gave two conflicting dates in her affidavit and in her oral evidence as to when the deceased underwent a vasectomy. She was unable to explain this anomaly. There was therefore doubt whether the deceased underwent vasectomy in 1986 or in 1980. The evidence of Dr. Hakeem Bakunda attempted to settle the issue concerning dates. His evidence however created confusion when this witness doubted the efficiency of vasectomy in family planning. He did not produce medical records and treatment notes to show how he conducted the process. This witness only produced a visit card and a letter from the Family Planning Association of Kenya which was written about 18 years confirming that the deceased underwent vasectomy in 1986. These documents were not prepared by the witness. I find the evidence of doctor Hakeem Bakunda insufficient to prove that J M O the deceased, underwent vasectomy. However even if I give this witness the benefit of doubt and proceed to believe his evidence, still his evidence would not be conclusive to determine the issue at hand. His evidence was to the effect that the method was subject to error. My conclusion in the matter is that the evidence received did not establish on a balance of probabilities that vasectomy took place. The petitioner was an insider of Family Planning Association of Kenya, Kakamega branch, there is a possibility she played a role to create this piece of evidence to buttress her case. Her conduct in the matter betrays her. I am also satisfied that the method was not free of error in family planning.

The second issue is whether the deceased contracted a marriage with the objector. The objector gave evidence and summoned the evidence of Pamela Nabwire and Edward Ambundo Munyeshi. The evidence of Edward Ambundo Munyeshi concurred with the objector's evidence that the deceased took dowry to the home of the objector in form of 2 heiffers, 1 bull and Ksh.20,000/=. There was also the evidence of Pamela Nabwire that the deceased and the objector cohabited as man and wife in her neighbourhood at Nambale. She even accompanied the objector while taking the deceased to Tanaka Nursing Home. I find their evidence credible. They were unshaken during cross-examination. I am convinced the deceased contracted a marriage with the objector in 1992 by cohabitation and thereafter he solemnised the same on 6th February 1999 when the deceased paid dowry according to the Luhya

customary law and rites.

The next issue is whether the late J M O deceased had capacity to contract another marriage in view of the fact that he had solemnized his first marriage with the petitioner on 31/7/71 under the African Christian marriage and Divorce Act. There is no doubt that the petitioner got married to the deceased under Cap. 151 Laws of Kenya. I agree with the submissions of Mr. Onsongo that the deceased in view of that fact lacked capacity to contract another marriage pursuant to the provisions of section 37 of the marriage Act (Cap. 150 Laws of Kenya). The provisions of Cap. 150 Laws of Kenya apply to marriages solemnised under Cap. 151 Laws of Kenya pursuant to the provisions of S. 4 of Cap 151 Laws of Kenya which states:

*“Except as otherwise provided in this Act, the provisions of the marriage Act, shall apply to all marriages celebrated under this Act.”*

At this stage it is noteworthy to reproduce the contents of Section 37 of the marriage (Act cap 150 Laws of Kenya).

*“Any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under native law or custom, but save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”*

**The court of appeal restated this position of the law in the case between IRENE NJERI MACHARIA VS MARGARET WAIRIMU NJOMO & PATRICK MURIITHI HARRISON. Civil appeal No. 139 of 1994 as follows:**

*“The deceased, having married the appellant under and in accordance with the provisions of cap 151, lost the capacity to contract any other marriage as long as his marriage to the appellant remained valid and undissolved.”*

The 4th issue is whether or not there were issues of the marriage between the objector and the deceased. The objector averred that their marriage was blessed with two children namely: B A and E S M She produced copies of the clinic cards and birth certificates as exhibits in evidence to show that the two were the deceased's children. She also produced two photographs of the deceased and the two children allegedly taken at their residence at Nambale. The petitioner attempted to disown these children on the ground that the deceased underwent a vasectomy hence she was of the view that the deceased was unable to sire children. I have already made a conclusion that there was doubt as to whether the deceased underwent a vasectomy and if at all he underwent then its efficacy is doubted. The petitioner did not discredit the authenticity of the birth certificates and the clinic cards apart from the fact that it is stated that the birth certificates were said to have been obtained much later. There was no other piece of evidence set out by the petitioner to discredit the origin of the documents. There was no dispute also that the deceased opened a bank account for B A with KCB which was later on closed by the petitioner. I have considered the evidence of both the petitioner and the objector over the issue. I believe the evidence of the objector. I am satisfied that B A and E S M were the deceased's children in view of the evidence presented. The deceased appears to have openly taken parental responsibility of the two minors. There were credible evidence that the deceased was in a position to sire children.

Having come to the conclusion that there were two issues out of the union of the objector and the deceased, it is now time to consider whether or not the objector and the issues of the union have any right to benefit from the deceased's estate. The petitioner is of the view that the objector and her children should be locked out of the deceased's estate in view of the fact that the marriage between the objector and the deceased is invalid in law. The petitioner also contended that the two issues of the invalid marriage should not benefit from the deceased's estate because they were not sired by the deceased whom she alleged he had undergone a vasectomy before he contracted the invalid Luyha customary marriage.

It is a well established fact that the Luhya customs allow polygamy. This fact was not disputed by the petitioner save for the fact that the petitioner's marriage with the deceased was contracted under a statute which only recognised monogamous marriages. However the law envisaged such disputes like this were likely to occur. I will refer to the provisions of Section 3(5) of the Law of Succession Act which provides:

*“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.”*

The position I take is that the marriage between the deceased and the petitioner did not dissolve the customary marriage between the objector and the deceased. The objector therefore is considered a wife for the purposes of the Law of succession Act. The deceased conducted himself as a husband to the objector when they cohabited and thereafter paying the requisite bride price. There is evidence that the deceased maintained the objector and her children. The deceased therefore had assumed parental responsibility towards the children of the union at the time he was alive. Those children and their mother turned to the deceased for their needs, protection and welfare. The objector and the issues of her marriage with the deceased are therefore entitled to apply for reasonable provisions as dependants of the deceased's net estate at the appropriate stage pursuant to section 26 of the Law of Succession Act. The distribution of the estate is obviously governed by section 40 of the aforesaid Act. In a nutshell I have come to the conclusion that the objector should be considered as the widow of the deceased hence a co-widow to the petitioner. She is therefore entitled to a share of her husband's estate available for distribution.

The final matter for my decision is whether or not the objector has proved the grounds necessary for the annulment or revocation of the grant. The provisions of 76 of the Law of Succession Act clearly sets out the grounds under which an interested party may apply for the revocation or annulment of a grant. The objector now complains that the petitioner obtained the grant by concealing the fact that the deceased had two wives i.e the petitioner and the objector. She also accused the petitioner of failing to disclose the full beneficiaries, heirs and assets of the estate of Joackim Makokha Ochieng, deceased. The petitioner gave evidence stating that she was not aware of the existence of the marriage between her husband and the objector hence she cannot be accused of concealment of material facts. It is not denied that the petitioner excluded the objector and her two children from the administration of the deceased's estate. It is also clear from her evidence that the petitioner did not disclose all the assets in her petition for grant. I am not convinced that the petitioner told the whole truth in the saga. I am satisfied that the petitioner was aware that the deceased had married the objector though she detested the idea. The petitioner admitted having sued the objector in Busia S.R.M.C.C. No. 225 of 2002 before filing this petition. She also admitted upon cross-examination that she closed an account in the name of B A for the minor opened by the deceased. She did not also discount the fact that the deceased was taken ill while staying with the objector in Nambale. The petitioner did not discredit the evidence of P.W. 3, Pamela Nabwire who stated that she accompanied the deceased and the objector on his way to hospital. She also stated that the objector and her children attended the deceased's funeral where they were all recognised and received. P.W3's evidence concurred with the evidence of P.W2, Edward Ambundo Muyeshi. In view of the undisputed evidence from these witnesses I am of the view that the petitioner knew the existence of the objector as a co-wife and the two children as her step-children. I think she intentionally concealed these facts from the court. These facts are obviously material to the this succession cause. The petitioner has not therefore justified why she excluded the objector and her children from the list of beneficiaries and heirs of the deceased estate.

The objector made a full disclosure of the deceased's assets in her affidavit in support of the summons for revocation and or annulment of grant sworn on 17th December 2002. The petitioner admitted having failed to disclose all the assets in her petition for the grant. She did not give any justification why she did this. She admitted to have made a general statement to the effect that the deceased had various accounts and various shares in various companies in her affidavit in support of the petition sworn on 17th May 2002. In essence the petitioner failed to disclose the following assets due to the deceased's estate:

(i) That the deceased had the following bank accounts:

(a) K.C.B. Ltd A/C No. [particulars withheld] at Busia Branch

(b) “ [particulars withheld] at Busia Branch

(c) “ [particulars withheld] at Mumias Branch

(d) “ [particulars withheld] at Siaya Branch

(e) “ [particulars withheld] at Siaya Branch

(f) “ [particulars withheld] Moi Avenue Nairobi

(g) “ [particulars withheld] at City Centre

(h) “ [particulars withheld] at City Centre

(i) “ [particulars withheld] at Kapenguria

(j) “ Ltd card centre [particulars withheld]

(k) Shares at standard chartered Bank (K) Ltd [particulars withheld]

(l) “ Kenya sacco Ltd shares [particulars withheld]

(m) “ Tourism promotion service Ltd Divident [particulars withheld].

(n) N.S.S.F dues Fund member number [particulars withheld]

(o) Alico America life Insurance Co. (K) Ltd Policy [particulars withheld]

(p) Kenya Airways shares a/c [particulars withheld]

(q) National Industrial Credit Bank Ltd Shares [particulars withheld]

(r) Barclays Bank of Kenya Ltd Queensway Branch [particulars withheld]

(ii) Parcels of Land known as:

(a) [particulars withheld]

(b) [particulars withheld] BUSIA MUNICIPAL COUNCIL

These assets were not even mentioned or disclosed by the petitioner in her replying affidavit sworn on 6th January 2003. The only inference I can make is that the petitioner willfully concealed these facts with a purpose of excluding the objector and her children from sharing. This act is material to these proceedings.

In the final analysis therefore, I have come to the final conclusion that the objector has proved her complaint to the required standard on a balance of probabilities. She has established that her claim comes within the provisions of section 76 of the Law of succession Act. In view of the above the grant issued on 2nd December 2002 is annulled and revoked. I am of the view that the same was obtained by the concealment from the court of material facts to this petition.

For the avoidance of doubt the parties if so advised may re-apply for a fresh issuance of the grant upon rectifying the weaknesses pointed in this decision.

Costs shall be paid by the estate to the objector.

**DATED AND DELIVERED THIS 8th DAY OF April 2005**

**J.K. SERGON**

**JUDGE**