



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
SUCCESSION CAUSE NO. 42 OF 1997**

ERNEST ENGAFU KITAZI PETITIONER

A N D

REHEMA HASSAN NDUBA DECEASED

SALIMA YUSUF OBJECTOR

- *Ex parte order may be challenged at the substantive hearing.*
- *A person married under Cap 151 & 150 has no capacity to contact a subsequent one without dissolving the former.*
- *Application of Sections 39 & 66 of Law of succession Act.*

J U D G M E N T

By a petition dated 18th February 1997, Ernest Engafu Kitazi sought for letters of administration in respect of the estate of Rehema Hassan Nduba (deceased) in his capacity as husband to the deceased. Before the grant was issued one Salima Yussuf Nduba filed an objection Pursuant to the provisions of Section 68 of the Law of Succession Act Chapter 160 Laws of kenya.

The objector, Salima Yussuf Nduba, also petitioned for a grant of representation in respect of the estate of Rehema Hassan Nduba (deceased) by way of cross-petition in her capacity as the grand daughter of Rehema Hassan Nduba (deceased).

Before the objection was heard the petitioner, Ernest Engafu Kitazi passed away on 5th October 2000. By an application dated 30th day of November 2000 one Salome Migaliza Engafu applied to substitute the deceased in this cause as the petitioner. The record reveals that the order to substitute was granted on 14th March 2002. This matter was ordered to proceed for hearing in which the parties were allowed to tender oral evidence. The aforesaid directions were given on 11th February 2003 by the Honourable Mr. Justice J.K. Mitey.

The objector lined up four witnesses to support her objection. She informed this court that the deceased, Rehema Hassan Nduba, was her grandmother whom she lived with in L.R. NO. EAST BUKUSU/SOUTH KANDUYI/1736 in premises containing 18 rental rooms. She disclosed that her deceased grandmother was married to one Hassan Mwangi who is also deceased, under Islamic law. She

denied having seen nor known Ernest Engafu Kitazi (deceased) and that she only came to know him when he filed the succession cause. She denied the claim that the deceased was married to Ernest Engafu Kitazi. She further told this court that the deceased gave her title to L.R. NO. EAST BUKUSU/SOUTH KANDUYI/1736 for safe keeping before she died. She denied having appeared before the District officer, Kanduyi Division to arbitrate over the dispute in respect of the land in dispute. She said that she moved out of the suit premises when she got married in 1988. She however moved to the suit premises with her husband in 1991 on the request of her deceased grandmother. According to the objector the father of her grandmother was called Hassan Nduba. She further alleged that her father was a Mkamba.

Mwanaisha Ndulo testified as the second witness in support of the objection. She said she was a cousin to Rehema Hassan. She also confirmed that Rehema was married to one Mwangi who was said to have worked with the ministry of water. She saw Ernest Engafu for the first time when this succession was filed. She is said to have lived with the deceased (Rehema) in her house between 1958 and 1966. She said she was present when Rehema Purchased the suit premises from one Mr. Mchanga. She denied having knowledge of the marriage between Rehema and Ernest Engafu.

P.W 3, Wanyama Tatasi Nabanyira testified to the effect that he came to know Rehema in 1950 and that in 1966 his younger brother Kaniala sold land to her which land was registered in her name after which she developed and took occupation. This witness later on became the chief of the area and retired in 1987. He denied knowledge of the marriage between Rehema and Engafu.

Mr. Patrick Luhale Kwabulungu who was a street preacher is said to have been a secretary to a panel of elders sat to deliberate on the burning issues over the suit land. The committee sat and deliberated on 4th January 1997 and found that the land in dispute was for Rehema and not Engafu. A copy of the ruling by the elders was produced in evidence.

Juma Mkubwa Bakari gave evidence as P.W. 5 to show that Rehema bought the suit premises from one Muchanga Kaniala. He said he came to know Ernest Engafu when this case was filed.

On the other hand the petitioner, Salome Migaliza Engafu is said to be the 1st wife of Ernest Engafu (deceased). It is in her evidence that their marriage was solemnized in the church. She said that Rehema simply cohabited with her deceased husband and were seen as husband and wife. She told this court that the deceased purchased some land from one a Mr. Gerishom. She further alleged that she and Engafu were issued with a marriage certificate when they solemnised their marriage in 1960. She however admits that Engafu did not complete payment of dowry in respect of the marriage between him and Rehema.

Amos Murubi Engafu said that he lived with the deceased (Rehema) who was his step-mother. He went to reside on the suit premises in 1985. Rehema is said to have died when Engafu was at his rural home at Vihiga. This witness says he came to know Rehema for the first time in 1984 but does not know when she married his father.

The evidence of Fred Juma Nyongesa who gave evidence as the 3rd witness on behalf of the petitioner recalls having read the findings of a dispute between the relatives of Rehema (deceased) and Ernest Engafu over the ownership of L.R. NO. East Bukusu/South Kanduyi/1736 in his capacity as the chief of Bungoma township location. He however did not know much about the parties involved in the dispute.

Asumani Subuka, the 4th witness said that Engafu bought the suit premises from Gerishom Ongonge in 1960 whereupon he settled Rehema as his wife. He however admits that the two cohabited without having any wedding or ceremony to solemnize their marriage.

The petitioner also called Michael Oguya Abanju to testify in support of the petition. The thrust of his evidence is that he was the carpenter who www.kenyalawreports.or.ke 6 constructed 3 rooms in the suit premises under the instructions of Engafu whom he thought was the husband to Rehema.

The advocates who appeared for the parties made substantive submissions in support of their positions. Mr. Ocharo who appeared for the objector urged this court to dismiss the petitioner's petition because the

petitioner did not have the requisite locus standi. It is stated that by the time Salome Migaliza Engafu made her application to substitute Engafu. She had not obtained the grant of representation to the Estate of her deceased husband. Hence she had no capacity and therefore whatever order that was granted was of no legal effect.

The learned counsel further submitted that even if the petitioner possessed the necessary letters of administration to the estate of Ernest Engafu (deceased) still she would not qualify to be granted the letters of administration to the estate of Rehema Hassan because it was not established that there was a marriage between the late Ernest Engafu and the late Rehema Hassan, hence she is a stranger under the provisions of Section 39 of Law of succession Act.

Mr. Ocharo further submitted that even if it was established that there was a marriage between them then the same would not be recognised by law because Ernest Engafu, (deceased) had contracted a Christian marriage thus he was barred from contracting another marriage pursuant to section 37 of the marriage Act Chapter 150 Laws of Kenya.

The learned counsel urged this court to grant the objector the prayers made in her cross-petition because she fell in the categories of persons entitled to administer and to benefit from the Estate of Rehema Hassan under S. 39 of the law of succession Act.

Mr. J.S. Khakula who appeared for the petitioner opposed the objector's learned advocate's submission. He submitted to the effect that the petitioner was legally substituted in place of Ernest Engafu (deceased) and the objector did not raise an objection to the application hence she cannot be heard to raise an objection at this late stage. This view was countered by Mr. Ocharo who stated that he put forward his client's objection but the same was not recorded by the Honourable Mr. Justice Mbiti. The objector's advocate was of the view that the failure to object or the apparent lapses on his client's part did not create jurisdiction or capacity to validate an unlawful order of substitution.

The petitioner's Advocate further urged this court to grant the petitioner the prayers contained in the petition because he was of the view that there is sufficient evidence to show that Ernest Engafu (deceased) and Rehema Hassan (deceased) were married.

I have considered the evidence adduced by the parties and their witnesses before this court. I have also taken into account the able submissions made by both learned counsels. The main issue which has come out clearly is that the petitioner and objector have beseeched this court to exercise its discretion under the provisions of Section 66 of the law of succession Act chapter 160 Laws of Kenya. The issue is who ranks on priority between the petitioner and the objector as to be entitled to be granted letters of administration in respect of the Estate of Rehema Hassan (deceased) pursuant to section 39 of the law of succession Act!

The petitioner, Ernest Engafu Kitazi (deceased) petitioned this court to grant him letters of administration in respect of the estate of Rehema Hassan Nduba (deceased) in his capacity as the husband to the deceased. It was therefore incumbent upon him to tender evidence to establish that a marriage existed between him and Rehema Hassan Nduba (deceased). However before he could do that he unfortunately died and consequently his wife, Salome Migaliza Engafu successfully applied to substitute him with a view of pursuing the petition. The record shows that substitution was allowed on 14th March 2002 upon the Judge hearing the petitioner's Advocate but without giving a chance Mr. Ocharo for the objector. The learned advocate has complained that he was not given a chance to object.

He however says that he raised an objection but was not recorded by the Judge who allowed the substitution. I have taken the view that I will go as per the record and treat the order of substitution as having been granted ex parte. Having come to that conclusion, I am of the view that a party who is affected by an ex parte order has a right to challenge the same at the substantive hearing of the matter. This issue was considered by the court of appeal in the case of **MARY WAMBUI KABUNGUA VS KENYA BUS SERVICE LTD C.A. NO. 195 OF 1995**. In his Judgment at Page 3 Akiwumi J.A. said:

“Now, when a Judge of the superior court grants leave ex parte, under the Limitations Act

to institute proceedings which can be challenged at the trial, he in away, does no more than a Judge does when he for instance, grants an ex parte injunction, which can also be successfully challenged before another Judge at its inter partes hearing. Furthermore, the question of a Judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation Act by another Judge of the superior court, does not in the particular circumstances arise.”

In the same Judgment the comments of Lord Denning in the case of COZENS VS NORTH DERON HOSPITAL MANAGEMENT COMMITTEE & ANOTHER (1966) 2 ALL E.R. 799 were referred to in which he said:

“Now I quite agree that in general a party affected by an ex parte order can apply to discharge it. We applied this rule as of course in R VS MORLEY (Valuation Officer) E.P. PEACHEY PROPERTY CORPORATION LTD recently; but the procedure under the limitation Act 1963 is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the Judge is to decide the application on hearing one side only. No provision is made for the defendant being heard; and I do not think we should allow it to be done at this stage. It must be remembered that, even when the Judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The Judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the Judge in chambers who gave leave.”

In this matter I have already stated that the objector was not afforded an opportunity to challenge the order of substitution until this matter came up for hearing. Mr. Ocharo’s submission is that Salome Migaliza Engafu had no legal capacity by the time of substitution to substitute the petitioner. I have considered the evidence tendered by Salome Migaliza Engafu, and her witnesses particularly exhibit No. 1. It is clear that by the time the order of substitution was being made she had already obtained Limited granted of letters of administration ad colligenda bona dated 18th December 2001 over the estate of Ernest Engafu Kitazi (deceased). Hence the objector’s preliminary point lacks merit, it is rejected.

Now, going back to the substance of the petition, the thrust of the petitioner’s petition is that the deceased (Rehema) was married to Engafu (deceased). The evidence tendered to this court however, do not establish that a marriage took place between Ernest Engafu Kitazi (deceased) and Rehema Hassan Nduba (deceased). Salome Migaliza Engafu says in her evidence on cross-examination that her deceased husband did not pay dowry in respect of Rehema’s marriage. The petitioner’s second witness, Amos Murubi Engafu, admits that he does not know when Ernest Engafu Kitazi (deceased) married Rehema (deceased). Fred Juma Nyongesa who was the petitioner’s 3rd witness admitted that he did not know much about the relationship between the petitioner and Rehema Hassan Nduba (deceased). Asumani Subuka, informed this court that he knew the two deceased persons cohabited but had not done a wedding ceremony to solemnise their marriage. In view of these testimonies I have come to the conclusion that the petitioner has not established on a balance of probabilities that there was a marriage between Ernest Engafu Kitazi (deceased) and Rehema Hassan Nduba (deceased).

Even if I were to be faulted on the issue I am still not impressed that the late Ernest Engafu Kitazi could contract a valid marriage in view of the fact that the evidence tendered shows that he had contracted a christian marriage either under the marriage Act Cap 150 laws of Kenya or the African Christian marriage & Divorce Act Cap 151 Laws of Kenya. In her evidence in chief, Salome Migaliza said that she got married to Ernest Engafu Kitazi (deceased) in February 1960, the Christian way and that her deceased husband married Rehema Hassan Nduba (deceased) as his 2nd wife in 1961. On cross-examination this witness says that she got married to her deceased husband in the church and that she was never divorced until his death. She did not produce the certificate of marriage to enable this court determine the law in which their marriage fell. However I can only deduce that their marriage can only fall within the marriage Act or the African Christian marriage and Divorce Act. Whichever law the marriage fell it is crystal clear that the petitioner (Engafu) did not have capacity to contract a subsequent marriage with Rehema while

the 1960 marriage between him and Salome subsisted. I refer to section 37 of the marriage Act which provides:

“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 un der any 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 the native law or custom or in any manner apply to marriages so contracted.”

It should be noted that the provisions of Section 37 of the marriage Act applies to marriages contracted under the provisions of the African Christian marriage and Divorce Act. Consequently the petitioner (Ernest Engafu) having married Salome Migaliza Engafu under and in accordance with the provisions of either Cap. 150 or Cap. 151 Laws of Kenya lost the capacity to contract any other marriage as long as his marriage to Salome remained valid and undissolved.

My conclusion therefore is that neither the original petitioner Ernest Engafu Kitazi (deceased) nor Salome Migaliza has the necessary locus standi to petition. They cannot fall into the categories particularised under Section 39 of the Law of Succession Act (Cap 160 Laws of Kenya).

On the part of the objector, she brings the objection and the cross petition in her capacity as the grand daughter of Rehema Hassan Nduba (deceased). The objector’s evidence and those of her 4 witnesses agree in one aspect that Rehema Hassan Nduba (deceased) had one son by the name Yusuf Mzee who was the father of the objector and three other siblings. The village elder of Muheni village Wanyama Tatasi Nabanyinra who testified as the objector’s 3rd witness informed this court that he was the chief of Bungoma township location until he retired in 1987. He came to know Rehema Hassan (deceased) in 1950 and that she bought his brother’s land which land was demarcated in 1969. He remembers having seen Yusuf Mzee as a small boy. His evidence was not shaken even upon undergoing intense cross-examination from the petitioner’s advocate. He even confirmed that Yusuf Mzee was the father of the objector. I find his evidence being consistent and credible. He is a person who held a responsible position as a chief and later as a village elder. There is no evidence to show that he had an interest in the matter at hand.

From the evidence received I am convinced that the objector herein Salima Yusuf has established that she is a grand daughter to Rehema Hassan (deceased) hence she is entitled to obtain a grant of representation to the deceased estate and to benefit from the estate pursuant to provisions of section 39 the Law of succession Act. She has priority over that of the petitioner.

In the final analysis I have come to the conclusion that the objector has established her objection and the cross-petition on a balance of probabilities. Consequently the petition filed herein is ordered dismissed and the cross petition allowed with costs to the objector. A grant of letters of administration in respect of the estate Rehema Bint Asan (deceased) should be issued to Salima Hassan Nduba.

DATED AND DELIVERED THIS 25th DAY OF June 2004.

J.K. SERGON

JUDGE