



REPUBLIC OF KENYA



**In re Estate of Juma Kasanga Ngio (Deceased) (Family Appeal
E025 of 2024) [2025] KEHC 5304 (KLR) (15 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 5304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E025 OF 2024
G MUTAI, J
JANUARY 15, 2025
IN THE MATTER OF THE ESTATE OF JUMA KASANGA NGIO (DECEASED)**

BETWEEN

PURITY BETH KILONZO APPELLANT

AND

DORRIES MWENDE MATHILA RESPONDENT

JUDGMENT

1. The appellant herein petitioned the trial court for letters of administration intestate as a widow to the deceased vide petition dated 8th May 2019. The petition was filed in the Chief Magistrate's Court. In her affidavit in support of the petition, in paragraph 6, she stated that they lived with the deceased in Changamwe and together were blessed with three children, namely Benson Kilonzo Kasanga, Esther Kamwaki Kasanga, and Sasha Munyiva Juma. She further stated that the deceased was the sole breadwinner as she was a housewife.
2. In paragraph 8 of her affidavit, she listed the following as the dependants of the deceased:-
 - a. Teresia Musavai Kasanga – Mother;
 - b. Dorothy Mwendu Mathila - 1st Wife;
 - c. Rose Musenya Kasanga – (Daughter of the first wife);
 - d. Anthony Kasanga Juma – (Son of the first wife);
 - e. Stellah Kavemba Kasanga – Daughter (Daughter of the first wife);
 - f. Purity Beth Kilonzo - 2nd Wife;
 - g. Benson Kilonzo Kasanga – (Son of the second wife);



- h. Esther Kamwaki Kasanga – (Daughter of the second wife); and
 - i. Sasha Munyiva Juma – (Daughter of the second wife).
3. She cited the 1st wife and her 1st and 2nd children vide citations dated 8th May 2019. The petition was gazetted on 13th May 2019 vide Gazette Notice No.11086. A grant of letters of administration intestate was issued to the appellant on 24th January 2020 in her capacity as wife to the deceased. She then filed a summons for confirmation dated 28th August 2020.
4. The appellant herein moved the court via summons for revocation of the grant via summons dated 25th November 2020, seeking, inter alia, revocation of the grant issued to the appellant. The same was on the grounds that:-
 - a. the proceedings leading to the issuance of the grant were utterly defective and grossly unprocedural;
 - b. that the grant was obtained fraudulently as the appellant was never married to the deceased and thus not a beneficiary of the deceased, nor did she have the capacity to file the proceedings herein; and
 - c. the grant was obtained through false statements and concealment of material facts from the honourable court.
5. The summons for revocation were canvassed by way of viva voce evidence.
6. Since the matter has been the subject of severe contestation between the parties hereto, it is necessary that I set out a summary of the evidence adduced in the court below.
7. PW1 Musabai Kasanga, mother to the deceased, testified that the deceased had two wives, Mwende and Mbete, and six children. The deceased married the 2nd wife, Mbete, after separation from the 1st wife, Mwende, and built her a house at home. They were in the process of organizing the traditional ceremony for the 2nd wife when the deceased fell ill and passed away before he could pay the dowry for her. She stated that dowry can be paid even after the death of a party under Kamba customs, and they were planning the same for the 2nd wife.
8. During cross-examination, she stated that in Kamba customs, there are steps taken once a woman starts living with a man:-
 - a. the relatives of the man must first go to the parents of the woman and inform them that their daughter is with their son;
 - b. Secondly, they visit the parents of the woman to develop a friendship; and
 - c. Thirdly, a meeting is organized to negotiate a dowry. The first is “nzero”. She confirmed that the said steps were taken for the first wife, who still lives at home, and that the deceased is buried next to her house. She was not aware of any divorce ceremony under Kamba’s custom in respect of the 1st wife, Mwende.
9. It was her testimony that the ceremony of nzero is essential to the marriage ceremony, and where it is not done, the marriage is not complete. During the ceremony, three goats are taken, two females and one male. The male goat is slaughtered, and its blood is mixed with traditional brew and given to the elders. After that, both families eat together. The brew mixed with blood from the goat is given to the bride’s father. The bride’s father must drink, and whatever remains is poured onto the ground in salutation



- to the ancestors. The goat's meat must be eaten, and another should be left. If nzeo is not done and a woman dies, then she is taken back to her parent's home for burial.
10. She told the court that the 2nd wife, Mbete, had two children before she married the deceased, and they were blessed with one child with the deceased. When asked about the alleged fact that the petitioner had been married elsewhere by two different men, she stated that she was unaware of it. According to her nzeo cannot be done twice in respect of the same woman. She testified that she never accompanied the deceased to see the respondent's parents, nor did the deceased visit them. She went with other women to see Mbete's parents.
 11. It was her evidence that the 1st wife has the right to inherit part of the deceased's estate; however, in this case, she stated the 1st wife was uncooperative. She noted that it was the first wife, Mwendu, who ought to be in charge of the deceased's estate and that under Kamba customary law, the legal wife of the deceased and her children and the deceased parents are the heirs of his estate.
 12. PW2 Mwendu Mathila, aka Doris Mwendu Juma, told the court that she married the deceased on 18th June 1992 and was blessed with three children: Rose Juma, Antony Kasanga Juma and Stella Juma. They went through all customary rites in 1998.
 13. She stated that when she went to Kenya Ports Authority, she was shown the grant herein. She stated that had she been involved in the succession process, she would have had no worries about the appellant being an administrator because of how she lived with the deceased. She testified that the deceased never visited the appellant's home despite the fact that they lived in her house in 2016 and 2017. She moved to the countryside in 2016 since the deceased, and the appellant lived in her house. Her evidence was that without the customary rites being performed, the appellant could not inherit the deceased's property.
 14. The respondent testified that they both took care of the deceased when he was hospitalized and when he died, he was buried in the land they purchased together. She said she was the bona fide administrator and urged the court to revoke the grant.
 15. In cross-examination, she stated that she got to know the appellant through her children. It was her evidence that the appellant was given Kes.7,000,000/- by the Kenya Ports Authority and almost Kes.900,000/- from the Port SACCO, and also that she has a house on her mother's land.
 16. In re-examination, she told the court that the appellant's two children's birth certificates were not genuine and that she should not inherit the deceased's estate as they do not belong to the deceased. It was her evidence they both get an equal share of the monthly pension of Kes.37,000/-, and the same ought not to be shared equally since she has three children while the respondent had one child with the deceased.
 17. PW3 Koki Muli told the court that the deceased was a cousin to her husband. She stated that the appellant was married to the deceased but not under the Kamba customs. She stated that the respondent herein was the deceased's wife and was never divorced under the Kamba customs.
 18. She stated that the appellant was jobless and that the deceased had constructed a house for her. It was also her evidence that the appellant had one child with the deceased.
 19. PW4 Stephen Mbuvi Mulu testified that the deceased was his nephew and his 1st wife was the respondent herein, and they were blessed with three children: Rose, Tony and Stella.
 20. He explained the nzeo process and stated that if the process is not done and the woman dies, they cannot bury the woman or her kids. He stated that upon separation of couples /divorce, the husband gives a goat to the girl's parents, which marks the end of the marriage.



21. It was his evidence that the appellant herein had one child with the deceased and that a house had been constructed for her on her father-in-law's land. The deceased was buried on the respondent's land.
22. He told the court that the nzeo process was not done for the appellant, and according to the Kamba customary law, the respondent herein was the legal wife and the only person entitled to inherit the deceased's estate. It was his evidence that the appellant obtained the grant wrongly.
23. In cross-examination, he stated that the appellant herein had two children before her life with the deceased. That she had not gone through Nzeo and a woman who has not gone through the said process cannot be a wife. He testified that the appellant did not inform the family of the succession process.
24. RW1, the appellant herein, testified that she got married to the deceased in 2013, and his family recognised her as his wife. Among those that were recognised included the deceased's mother, Teresia, and his brother, Alfred Mutua, as well as the area Assistant Chief, Chagamwe Chief, Deputy County Commissioner and the deceased's workmates at the Kenya Ports Authority, who also gave her the deceased's burial money. She testified that she receives a pension from KPA of Kes.27,597/- per month.
25. She stated that she had one child with the deceased and that she was not in communication with the fathers of the other two kids. They live in Kitui and also in town, in the house where the deceased used to live with the respondent before the deceased constructed her house.
26. It was her evidence that she informed the respondent and her mother-in-law of the succession process, but they didn't cooperate. The same was gazetted, and no objection was raised.
27. She stated that she had received Kes.977,925 from Port Sacco and Kes. 6,881,400 from the Kenya Ports Authority, which is in the joint account of the two advocates, a total of Kes.7,856,949/-. She uses the money to pay for school fees, food and business.
28. In cross-examination by the court, she told the court that the pension is utilized by herself and her children only.
29. RW2, Julia Likhulungu, Assistant Chief, told the court that the appellant was the deceased's 2nd wife and that the 1st wife was known to her.
30. RW3, Isaac Siengo, retired Chief Chagamwe, stated that he didn't know the deceased or anyone in the letter. He got to know the appellant when she went for the letter. The information on the six kids and two wives was written by the Assistant Chief of Mousa.
31. RW4, Daip Abdi Haifhar, the Deputy County Commissioner, Kisasi Sub-County, told the court that he never knew the deceased and the letter was to identify the truth of the deceased's estate and that he was not stationed at Kisasi when the letter was written.
32. RW5, Patrick Sila, the Civil Registration Officer Kitui, Civil Registry, told the court the Birth Certificates for Esther and Benson were obtained in 2018 on application and presentation of documents. They relied on the Assistant Chief to verify the information when the application was made.
33. He told the court that if the parents met in 2014, the children's health cards would not be genuine, as they were opened on 27th March 2007 and 17th May 2011.
34. The court, in its ruling of 28th March 2024, stated that the appellant herein did not produce any evidence that the customary rights were done or concluded, she had any marriage certificate under any statute as required under the Marriage Act 2014, which was operational as at the time she started living with the deceased.



35. The court went ahead to interrogate whether there was a presumption of marriage and stated that the only evidence that was available was the chief's letter and the fact that she had built a home with the deceased's parents. The court, in its findings, stated that the union between the respondent and the deceased was not that of a husband and wife.
36. The court also termed the appellant not a dependant of the deceased because she was unclear about her previous relationships.
37. The trial court, in its decision, revoked the grant issued to the appellant and substituted the same with another in the respondent's name. It directed that the respondent be an administrator together with one other adult other than the appellant (the respondent then) for purposes of the children who were still minors. The court directed administrators to file an application for confirmation of the grant within 45 days after collecting the deceased's estate.
38. Aggrieved, the appellant appealed to this court seeking to have the ruling of the trial court of 28th March 2024 set aside; the court to issue an order dismissing the summons for revocation of grant dated 25th November 2020 with costs to the appellant; the court to direct that the matter be placed before any other magistrate, with requisite jurisdiction in Mombasa Chief Magistrate's Court for hearing of the appellant's summons for confirmation of grant dated 28th August 2020; and costs.
39. The appeal is based on the following grounds:-
 - a. The learned magistrate erred in law and, in fact, by revoking the grant of letters of administration intestate issued to Purity Beth Kilonzo on 24th January 2020;
 - b. The learned magistrate erred in law and, in fact, by holding that Purity Beth Kilonzo was not the wife of the deceased person;
 - c. The learned magistrate erred in law and, in fact, by holding that Purity Beth Kilonzo did not provide evidence of how the deceased person supported her (Purity Beth Kilonzo) during his lifetime;
 - d. The learned magistrate erred in law and, in fact, by holding that the birth certificates of the minors were issued after the death of the deceased person pursuant to a criminal enterprise;
 - e. The learned magistrate erred in law and fact by failing to consider the binding decision by the court of appeal in the case of Malindi CACA No. E008/2020: Virginia Wangari vs Jane Muthoni (Unreported);
 - f. The learned magistrate erred in law and, in fact by misapplying the Supreme Court's decision of MNK v POM; Initiative for Strategic Litigation In Africa (Isla)(Amicus Curiae) (Petition 9 of 2021)[2023]KESC 2(KLR)(Family)(27 January 2023)(Judgement);
 - g. The learned magistrate erred in law and, in fact, by appointing Mwende Mathila, aka Dorries Mwende Juma, an administratrix of the subject estate.
40. The appeal was canvassed by way of written submissions.
41. The appellant, through her advocates Muriithi & Masore Law, filed written submissions dated 8th July 2024. Counsel submitted on two issues, namely: did the learned magistrate err in law and fact in holding that the appellant was not a wife of the deceased; did the learned magistrate err in law and fact in holding that the appellant did not provide evidence of how the deceased supported her during the deceased's lifetime.



42. On the first issue, counsel submitted that the appellant's case was that she was the deceased's wife. They got married in the year 2013. The appellant did not dispute that the respondent was a wife of the deceased, and neither did the respondent dispute that she was also a wife to the deceased. It was urged that the appellant recognised that the respondent also had a right to apply for a grant of letters of administration intestate. It was for that reason that the appellant took out citation proceedings which the respondent did not respond to. The same was resolved through a court ruling on 27th September 2019.
43. Counsel submitted that the evidence of the respondent, as well as that of PW3 and RW2, confirmed that the appellant was a second wife of the deceased. It was urged the learned magistrate ruled that there was no evidence that customary rights were done, neither was there a marriage certificate bespeaking the union. Counsel stated that the fact that by the time the deceased died, all the Kamba customary rights of solemnising marriage were not complete did not mean that the appellant was not a wife for purposes of the law of succession.
44. Counsel submitted that there was enough evidence for a presumption of marriage to be made and that the court below ought to have done so. The evidence also established on a balance of probability that the union between the deceased and the appellant was marriage. Counsel urged the court to be persuaded that that was the case.
45. On the second issue, counsel submitted that having proved that the appellant was a wife of the deceased, the appellant need not prove that she was being maintained by the deceased prior to his death so that she could be a dependent. The learned magistrate erred in imposing a non-existing standard when she required the appellant to provide evidence of how she was being maintained by the deceased. Counsel relied on Section 29 (a) of the *Law of Succession Act* to support his argument.
46. In conclusion, counsel for the appellant submitted that the learned magistrate erred in revoking the appellant's grant and appointing the respondent as the administrator. The appellant administered the estate consistently without intending to disinherit the 1st family. Counsel urged the court to allow the appeal.
47. The respondent, through her advocates, Tindika & Company, filed written submissions dated 23rd July 2024.
48. The first issue was whether the appellant was married to the deceased or was a wife of the deceased. Counsel relied on section 6 of the *Marriage Act* and submitted that no marriage, as provided under the primary law, ever existed between the deceased and the appellant, and thus, the appellant was not married to the deceased nor his wife. Counsel urged the court not only to evaluate the evidence on the record but also to peruse the analysis on the same by the respondent before the lower court.
49. Counsel submitted that the appellant and the deceased being Kamba by birth, there are mandatory requirements to be fulfilled, namely nzeo/ntheo, which was never fulfilled in the case of the appellant and the deceased. The same is key and mandatory in the sealing of marriage under Kamba customary law, and where there exists none, there cannot exist a marriage under the Kamba customary law.
50. Counsel submitted that the appellant relied on cohabitation. It was urged that 5 years of cohabitation cannot be termed to be a long period of time. From the relationship between the appellant and the deceased, it is evident there was no intention to marry as the deceased never stepped into the appellant's parents' homestead, and neither did he pay dowry, which is mandatory in customary unions.
51. Counsel submitted that the appellant doctored her first two children's birth certificates, which were obtained after the demise of the deceased. The same was confirmed by the Registrar of Births and



- Deaths in his testimony. The same was meant to benefit the appellant and her two older children from the deceased's estate, but they are not beneficiaries of the deceased's estate.
52. In conclusion, counsel submitted that the appellant was not a wife of the deceased and, therefore, not a beneficiary of his estate, and thus, the learned magistrate cannot be faulted in her judgment. Counsel urged the court to dismiss the appeal with costs to the respondent.
 53. The submissions were highlighted on 23rd July 2024. Mr Masore, learned counsel for the appellant, reiterated the position in their submissions and submitted that the deceased's mother referred to the appellant as a daughter-in-law.
 54. On the birth certificates counsel submitted that the allegation that they were obtained fraudulently was true.
 55. Mr Tindika, counsel for the respondent, submitted that they were relying on the supplementary record of appeal and their submissions dated 23rd July 2024.
 56. Counsel submitted that the deceased only sired one child with the appellant and reiterated their position in their submissions on birth certificates.
 57. In rejoinder, Mr Masore, counsel for the appellant, submitted that the respondent, in cross-examination, conceded that the deceased was their husband.
 58. I have perused the proceedings of the Court below and considered the written submissions of the parties and must now determine if the trial court was wrong in its finding that the appellant was not the wife of the deceased and for revoking the grant it had issued to her.
 59. This being a first appeal, this court is under a duty to re-evaluate and reassess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
 60. The foregoing is settled law cited in various decisions of the courts of record. In the case of Mbogo and another vs Shah [1968] EA 93, the Court stated that:-

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
 61. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the case of Selle & another vs Associated Motor Boat Company and Others [1968]EA 123, where they stated as follows:-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
 62. An appellate court thus has to bear in mind that it had neither saw nor heard the witnesses. It is the trial court that observed the demeanour and truthfulness of those witnesses.



63. When applying for a grant of representation, the appellant did so as the deceased's wife. The marital status was, therefore, key. Upon the objection being filed, it was incumbent on the appellant to demonstrate that she was the wife of the deceased either under statutory law or customary law or that there were grounds to presume that she was married.
64. It is common ground that she was not married to the deceased under statutory law. For her to succeed, therefore, she needed to either show that she got married to the deceased under customary law or that a presumption of marriage could be made in her favour.
65. Did she prove that she was a wife under either of those two grounds? I will look at each of them in turn.
66. Since it was the appellant who was asserting that she was married to the deceased she had the burden of proof to prove that very fact. Section 107 of the *Evidence Act* states that:-
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
67. It was, therefore, the appellant's obligation to prove that she was married under the customary law of the Akamba people, the community to which the appellant and the deceased belonged. She had to show that she contracted a marriage under the said customary law and that all the prerequisites were adhered.
68. I am guided by the decision of Thande J where it was stated as follows:-
- In re Estate of Fares Michael Kuindwa (Deceased) [2019] KEHC 11254 (KLR)
- “23. A person who seeks to propound customary law must call evidence to prove that customary law. In Sakina Sote Kaitany & another v Mary Wamaitha [1995]eKLR, Gicheru, J.A. (as he then was had this to say concerning proof of customary law and practices:
- ...the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case to call evidence to prove that customary law, as would prove the relevant facts of his case.”
69. It is evident from the record that the appellant did not call experts in Kamba customary law to establish the marriage. The witnesses who testified were, in my view, unanimous that the essential rites under the customary law of the Akamba people were not adhered to, in particular, that the “nzeo/ntheo” ceremony, without which there can't be a marriage, was never conducted.
70. In the circumstances, I cannot fault the learned magistrate for holding that there was no proof of a customary marriage; there was no basis for her to do so.
71. The foregoing notwithstanding, could a marriage between the deceased and the appellant be presumed based on the period of cohabitation?



72. The Supreme Court of Kenya in MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) [2023] KESC 2 (KLR) set out strict parameters in paragraph 64 within which a presumption could be made:-

“We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:

1. The parties must have lived together for a long period of time.
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.
5. The parties must have held themselves out to the outside world as being a married couple.
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
8. The standard of proof is on a balance of probabilities.”

73. The Supreme Court said that “presumption should only be used sparingly where there is cogent evidence to buttress it.”

74. From my perusal of the Record of Appeal, I am of the opinion that the evidence was borderline at best. It is true that the deceased cohabited with the appellant and that they had a child together. On the other hand, the period that they did so was too short for a presumption to be made. The evidence of the witnesses was not unanimous. Given that the learned magistrate heard the testimony of the witnesses, it is my opinion that there aren't sufficient grounds for me to disturb her findings.

75. The upshot of the foregoing is that the appeal has no merit and is for dismissal.

76. The appeal is therefore dismissed. Since this is a succession dispute, I find and hold that each party shall bear her own costs.

77. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 15TH DAY OF JANUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Masore, for the Appellant;

Mr Tindika, for the Respondent; and

Arthur – Court Assistant

