



REPUBLIC OF KENYA



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**In re Estate of Joseph Kamau Kimanzi (Deceased) (Succession Cause E086 of 2021) [2025] KEHC 2288 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE E086 OF 2021**

**SM MOHOCHI, J**

**FEBRUARY 13, 2025**

**IN THE MATTER OF THE ESTATE OF JOSEPH KAMAU KIMANZI (DECEASED)**

**BETWEEN**

**CAROLINE MUMBI WACHEKE ..... OBJECTOR**

**AND**

**CAROLINE MUTWA MWENDE MWINZI ..... 1<sup>ST</sup> ADMINISTRATOR**

**KALISA MWINZI ..... 2<sup>ND</sup> ADMINISTRATOR**

**RULING**

1. When the Deceased Joseph Kamau Mwinzi suddenly succumbed to Covid-19 related health complications on the 2<sup>nd</sup> April 2021, he was in his middle-age, a serving Kenya Prisons Officer with a significant portfolio of wealth. The deceased left no will hence this intestate succession.
2. It would appear his sudden demise occurred while he was in transition of divorcing the 1<sup>st</sup> Administrator while onboarding the objector into a union of marriage. It is against this backdrop that this ruling is prepared and it is a reality that the parties herein and other relatives to the deceased shall have to live with and as it is said, "Death is not the opposite of life, but a part of it." We are all on the way and none of us knows when our time comes.
3. What is before this Court for determination is the Applicants' Summons for Revocation of Grant dated 31<sup>st</sup> December, 2021 filed under certificate of urgency under Sections 76 and 43 of the *Law of Succession* and Rules 44 and 73 of the *Probate and Administration Rules* where the Applicant who is also the Objector is seeking;
  - i. Spent



- ii. That, this Honourable Court be pleased to suspend the implementation, use and the import of the Grant of Letters of Administration intestate issued to the Petitioners herein pending the hearing and determination of this Application.
  - iii. That, the Grant of Letters of Administration intestate issued to the Petitioners in this cause be revoked.
  - iv. That, this Honourable Court be pleased to grant leave to the Applicant to lodge her objection, Answer to the petition and a Cross Petition out of time.
  - v. That, the costs of this Application be awarded to the Applicant/Intended Objector.
4. The Application is grounded on the following grounds;
- i. That, the proceedings leading to the Grant of Letters of Administration intestate were materially and inherently defective in that the Petitioners (they are blood sisters to each other) discretely petitioned for the cause without informing or seeking the consent of the Applicant prior to the filing of the Petition, yet the Applicant as a wife of the deceased had a superior right to the petition for the Grant.
  - ii. That, the proceedings leading to the Grant of letters of Administration intestate were so skewed by the Petitioners with a view of ensuring that the Applicant did not get wind of its existence, knowing quite well that the Applicant ranked higher in priority of seeking the Grant, as a wife of the deceased and discretely indicating the Applicant's child as a beneficiary of the deceased's estate.
  - iii. That, in petitioning for the grant of letters of administration and ultimately obtaining it, the Petitioners fraudulently made false statements, introduced false allegations of facts and consciously concealed from the Court important and very crucial information so that the Applicant would be excluded from this petition or would not know of its existence altogether.
  - iv. That, the 1<sup>st</sup> Petitioner who tagged along her sister-the second Petitioner fraudulently introduced herself as the widow or the sole surviving spouse of the deceased leaving out the Applicant who as the widow of the deceased has an equal or even superior right to the Administration of the deceased's estate.
  - v. That, the Petitioners conspired to disinherit the Applicant by deliberately omitting her as an Administrator and failing to seek her consent and or approval prior to the filing of this cause.
  - vi. That, this Court has the inherent powers under section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration rules to make such orders and grant such reliefs as may be necessary for the ends of justice to be achieved and to prevent parties from abusing the Court process.
  - vii. That, the Applicant who was either equally or in higher rank entitled to apply for the Grant of letters of Administration intestate for and on behalf of her late husband's estate was neither notified by the Petitioners of their intention to apply or petition for the Grant nor was her consent sought nor was there any citation taken out against the Applicant.
  - viii. That, the Petitioners deliberately, decidedly and consciously concealed very crucial information and facts and in the cover of sheer discreet they Petitioned for this Grant and fraudulently obtained it



5. The Objector seeks revocation of Grant of Letters of Administration issued to Caroline Mutwa Mwendu Mwinzi and Kalisa Mwinzi on 29<sup>th</sup> November, 2021.
6. Directions were issued by the Court where the Petitioners and the Objector were directed to file and serve their List of witnesses and their witness statements early enough and prepare themselves for "Viva voce" Hearing of the Objectors Application dated 31<sup>st</sup> December 2021.

### **Objector's Case & Submissions**

7. The objector testified adopting her witness statement and all documents filed in support including witness statements, an affidavit of marriage, photographs and a letter from the chief. She was intensely cross-examined and she called five (5) witnesses in support.
8. Objector in her written submissions dated 17<sup>th</sup> January 2025 avers that by a Petition dated 28<sup>th</sup> July 2021, Caroline Mutwa Mwendu Mwinzi and her biological sister Kaliba Mwinzi petitioned for a Grant of Letters of Administration intestate in respect of the Deceased who passed on 2<sup>nd</sup> April 2021.
9. That they indicated in the petition they were related to Deceased as the widow and Sister-in-law respectively and that the Late Joseph Kamau Kimanzi (Deceased) was survived by the following:
  - a. Caroline Mutwa Mwendu Mwinzi-Widow
  - b. Sabina Nzuna Kamau-Daughter(minor)
  - c. James Kimanzi Kamau-Son (minor)
  - d. Joan Syombali Kimanzi-Daughter (minor)
  - e. James Kimanzi Junior-Son (minor)
10. That the reason to have more than one Petitioner was because there were minors who survived the Deceased and therefore there was a continuing trust.
11. The biological children of the 1<sup>st</sup> administrator are Sabina Nzuna Kamau, James Kimanzi Kamau and Joan Syombali Kimanzi. James Kimanzi-Junior's mother is the objector and the two Petitioners were conscious and alive to this fact and that is precisely the reason why they included James Kimanzi Junior as one of the beneficiaries who survived the Deceased.
12. That the Objector lined up the following witnesses and filed and served their statements: -
  - a. A joint Affidavit sworn on 13<sup>th</sup> May 2020 by the Late Joseph Kamau Kimanzi (Deceased) and Caroline Mumbi Wacheke.
  - b. A statement of Caroline Mumbi Wacheke Dated 18<sup>th</sup> March 2022.
  - c. A statement of Francis Mwendwa Mbutu dated 18<sup>th</sup> March 2022.
  - d. A jointly signed statement of Francis Mwendwa Mbutu & Samuel Makau Ngula dated 18<sup>th</sup> March 2022.
  - e. A statement of Ealah Kalunda Mithya dated 13<sup>th</sup> March 2022.
  - f. A further statement of Samuel Makau Mbutu dated 13<sup>th</sup> March 2022.
  - g. A statement of Dan Muringa Mbaluka Advocate dated 16<sup>th</sup> March 2022.
13. That, a list of all the Objector's documents in support of her objection was also filed and served.



14. That, the 1<sup>st</sup> Administrator's side, lined-up the following witnesses to be called;
  - a. Caroline Mutwa Mwendu Mwinzi
  - b. Kalisa Mwinzi
  - c. Esther Kilonzo
  - d. Tony Kilonzo
  - e. Mbaa-Koli clan Elder.
  - f. Court Administrator, Magistrate's Court Family Division.
  - g. The In-Charge-Nakuru G.K. main prison.
  - h. Regional Director-NHIF-Nakuru.
  - i. Any other witness with the leave of the Court.
15. That, no statements were filed or recorded by the 1<sup>st</sup> 's witness. However, a list of Documents to be relied on was filed and served. A further list of the Petitioner's Documents dated 14 March 2022 was filed and served.
16. All the lined-up witnesses of the Objector testified in support of the Petition. They were cross-examined and re-examined and that it emerged very clearly that Caroline Mumbi Wacheke was fully married to the Deceased, and all the customary proceedings were followed.
17. That, the Respondents/Administrators lined-up nine (9) witnesses but it was only the 1<sup>st</sup> Administrator-Caroline Mutwa Mwendu Mwinzi who gave evidence.
18. That the 1<sup>st</sup> Respondent was conscious when she included the Objector's son as a beneficiary knowing that she was the biological mother.
19. That, when asked by counsel for the Objector, as to why she included the said as a beneficiary, the 1<sup>st</sup> Administrator stated:

“it was because James Kimanzi Junior was appearing as a son of Late Deceased in the obituary”.
20. That this answer is a true reflection of the fact that the 1<sup>st</sup> Respondent knew all along that the Deceased had a second wife namely Caroline Mumbi Wacheke and that out of that union, James Kimanzi Junior was born.
21. The objector attempts to attribute her exclusion and inclusion of one of her sons when it was apparent that she was a wife of the Deceased as follows;

“Co-wives often dislike each other due to a complex mix of factors including jealousy over shared access to their husband, competition for his attention and resources, feelings of insecurity about their positions in the relationship and the inherent challenges of navigating a polygamous dynamic”
22. That, it is very clear that the proceedings to obtain the Grant were defective in substance for omitting the Objector. The Grant was obtained fraudulently by the making of a false statement or by concealing the existence of the Objector as the second wife of the Late Joseph Kamau Kimanzi (Deceased) which is very material in the proceedings.



23. That, the Grant was obtained by means of untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently. In fact, the Petitioner's deliberately and knowingly excluded the Objector as a co-petitioner and as a widow of the Late Joseph Kamau Kimanzi (Deceased).
24. Reliance is placed on the case of *Samuel Wafula Wasike-v-Hudson Simyu Wafula* Court of Appeal, Civil Appeal Number 161 of 1993 (Kwach, Omollo & Tunoi - JJA) holding: -
- “A grant obtained on the strength of false claims, without obtaining the Consent of persons who had prior right to the Grant And on the basis of facts concealed from the Court is liable to revocation”
25. Further reliance is placed on the case of *In the matter of the Estate of the Late Ngai Gatumbi alias James Ngai I Gatumbi (Deceased)*, Nairobi High Court Succession Cause No 783 of 1993 (ULR) (Kooome J. as she then was) held: -
- “A grant will be revoked where a person who is entitled to apply for it is not notified by the Petitioners at their intention to apply and that persons consent to the Petitioner's Application is not sought”
26. That the objector summoned the 2<sup>nd</sup> Respondent who on being asked if she would be willing to relinquish her position in favor of a more immediate family member she responded in the affirmative.
27. The Objector cites the case In, Nairobi High Court Succession Cause No 1072 Of 2002 *In The Matter Of The Estate of the Late Joseph Kimemia Gichuhi (Deceased)* to urge the Court to find that the deceased person was polygamous.
28. The Objector views herself as the rightful person who should be the Co-Administrator as she is a wife of the Deceased and whose son has been included in this cause as a child, heir and beneficiary by the present Administrators citing Nairobi High Court Succession Cause No. 6 of 2002 *In the Matter of the Estate of the Late Stephen Wanyoike Mubia (Deceased)* where Hon. Lady Justice M. Koome J. (as she then was) held-
- “The dispute was on whether a woman, who cohabited with the deceased, and a child that she had brought along with her, were a widow, and a child for succession purposes. The Court held that both the woman and the child were heirs to the Estate of the deceased.”
29. The Objector further urges the Court, to accommodate the 1st Administrator, Joan Syombua Kimanzi and Caroline Mumbi Wacheke as the Administrators of the Estate of the Late Joseph Kamau Kimanzi (Deceased).
30. The Objector further urges the Court to accommodate the 1<sup>st</sup> Administrator, Joan Syomibua Kimanzi and Caroline Mumbi Wacheke as the widows the Late Joseph Kamau Kimanzi (Deceased).

### **Respondents' Submissions**

31. The 1<sup>st</sup> Administrator filed a Replying Affidavit in opposition sworn on 19<sup>th</sup> January 2022 and testified without calling any witness. In her filed written submissions in opposition to the summons dated 31<sup>st</sup> December, 2021, the Administrators framed five issues for consideration as follows;



- i. Whether Caroline Mumbi Wacheke was a wife to the deceased and whether she ranked in priority or equality with Caroline Mutwa Mwendu Mwinzi to take out Grant of Letters of Administration over his Estate?
  - ii. Whether Caroline Mwendu Mwinzi had been divorced under Kamba Customary Law and was no longer a wife for purposes of Succession?
  - iii. Whether failure to obtain Caroline Mumbi Wacheke's Consent prior to filing the Petition for Grant of Letters of administration tainted the procedure with fraud and amounted to deliberate concealment of crucial facts, consequently impeaching the ensuing Grant?
  - iv. Whether Alvin Mureti had been taken in by the deceased and is thus a rightful beneficiary to his estate as a dependant?
  - v. Whether mother to James Kimanzi Junior is automatically considered wife of the deceased and whether interests of James Kimanzi Junior can be taken care of without revoking the grant?
32. As to whether Caroline Mumbi Wacheke ranked in priority to take out letters of Administration as a wife to Joseph Kamau Kimanzi,
  33. That, Section 66 of the *Law of Succession Act* lists a hierarchy of individuals entitled to Petition for Grant of Letters of administration Intestate. The same was aptly captured by Mativo J. (as he then was) in Nyeri Succession Cause No. 46 Of 2015 *Immaculate Wangari Munyaga v Zachary Waweru Ireri* [2016] eKLR.
  34. That, from the hierarchy given and uncontroverted evidence that Mwendu was married to Kimanzi, it is submitted that, she ranked in priority to file this Petition and was well within the law to take out letters of Administrations.
  35. As for the Objector, the hierarchy does not rank friends, workmates, mistresses and/or concubines. The objector herein falls under those categories and does not rank in priority or equality with Mwendu.
  36. On the 1<sup>st</sup> issue as to Whether Caroline Mumbi Wacheke, the Objector was a wife to Joseph Kamau Kimanzi, the deceased? the Respondents contend that "Marriage is a question of fact", and facts are proven by evidence. Given that she alleges to have been married in the year 2020, then the applicable law is the *Marriage Act*, 2014.
  37. That, Section 59 of the *Marriage Act* enumerates a list of acceptable Evidence of marriage in Kenya after passing of the Regulations to the Act as: -
    - a. a certificate of marriage issued under this Act or any other written law
    - b. a certified copy of a certificate of marriage issued under this Act or any other written law,
    - c. an entry in a register of marriages maintained under this Act or any other written law:
    - d. a certified copy of an entry in a register of marriages maintained under this Act or any other written law, or
    - e. an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra communities, or a certified copy of such an entry.
  2. Despite subsection (1), a marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry.



38. The Respondents further rely on the case of EGK v JMM holding that;

“The Marriage Act No. 4 of 2014 commenced on 20 May 2014. This law did away with the presumption of marriage and required that all marriages, including those conducted under customary law, be registered. In the present case, the parties ought to have registered their alleged marriage under Part V of the Marriage Act No. 4 of 2014.”

39. That the holding in EGK v JMM is in line with Regulations to the Marriage Act which operationalized Section 55 of the Marriage Act and made it Mandatory for all Customary Marriages contracted post-2018 to be registered. Stating that: -

“ 55

- (1) Where the parties to a marriage under Part V have completed the necessary rituals for their union to be recognized as a marriage under the customary law of any of the parties both shall apply to the Registrar within six months of their marriage for a certificate and both shall appear in person before the Registrar to be issued with the certificate of marriage.
- 2) Where the Registrar is satisfied that the parties to a marriage under Part V have complied with the provisions of this Act, and the parties have appeared before him in person, the Registrar shall register the marriage and issue the parties with a certificate of marriage”

40. That, no Certificate of Marriage has been tendered in evidence and that the Objector attempts to prove her marriage to the deceased through extraneous evidence listed in her List of documents dated 21<sup>st</sup> March, 2022.

41. That, exhibit 1-Joint Affidavit Paragraph 2 indicates that the Objector and Deceased got married under Kamba Customary law. This contradicts the oral evidence of the Objector and her witnesses who insisted that the Objector got married under Kikuyu Customs.

42. That, the objector’s Supporting Affidavit sworn on 31<sup>st</sup> December, 2021 cements the contradiction as follows;

3. “That I am related to the deceased (The late Joseph Kamau Kimanzi) by virtue of being his wife since August 2019.
4. That I and the late Joseph Kamau Kimanzi (deceased) got to know each other way back in April, 2019, when I was attached to Mwingi G.K Prison and he was attached to Nakuru GK Prisons.
5. That we fell in love with each other and the relationship developed into a marriage that was celebrated under the Kikuyu Customary law”

43. That, this contradiction goes to the root of objection which diminishes probative value of the Joint Affidavit as well as the Objector’s testimony as evidence of marriage.

44. The Respondents also fault the formal validity of the Joint Affidavit for offending mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act, Cap 15 laws of Kenya, under which it was drawn.



45. That, the section states:

“ 5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”

46. That, the Affidavit is allegedly drawn in Mwingi and commissioned in Kitui. The Witness, an advocate of the High Court of Kenya, did not displace the presumption that the Affidavit is fatally defective.

47. Further, that the witness who produced it, claims to have drawn it in the year 2019 yet the Affidavit is dated 13th May, 2020.

48. The Respondents submit, that the *Marriage Act* allows parties to subscribe to any or both of their marriage customary rites, and that the Objector did not adduce evidence to show that she and the deceased applied both customs and contracted marriage under both Kamba and Kikuyu ceremonies.

49. That, exhibits 2 & 4- Bundle of Photographs and funeral Program do not prove marriage.

50. That, without additional evidence, photos and obituaries are not recognized as conclusive evidence of marriage as was held in Machakos Succession Cause No.374 Of 2012 Consolidated with Nairobi Succession Cause 976 Of 2012 *The Matter of the Estate Of JNM (Deceased)* that: -

“ 21. *In Re the Matter of the Estate of Samuel Kiarie Kirimire (Deceased)* (1999) eKLR Justice Githinji (as he then was) held that the fact that the applicant was included as a wife of the deceased in the eulogy is not proof of marriage. Section 39(1)(c) of the *Law of Succession Act* provided that the petitioner is the next in order or priority as administrator of the estate of the deceased”

51. That, it is also worth noting that, there is material difference in the two Funeral Programs annexed to the objectors Affidavit of 31st December, 2021 and the one listed in the list of documents.

52. That, the former says 'wives' while the latter says 'wife' which means that the document cannot be relied on as there could have been many more versions of it out there.

53. That, exhibit CMWII 9 annexed to the Objector's Affidavit sworn on 31<sup>st</sup> December, 2021 is alleged to have been taken during a traditional wedding ceremony however look at the photo quickly reveals that the deceased is not featured.

54. That, it is the Petitioners' case that the photo was not taken during nuptial celebrations as alleged but during the Objector's mother's retirement party.

55. That, Section 11 (1) (1) of the *Marriage Act*, 2014 declares that a union is not a marriage (if at the time of the making of the union either party is absent from the ceremony,

56. That, the deceased was not present in the ceremony and could not have married the Objector in absentia or through a proxy.

57. That, exhibit 3 Mpesa Statements, does not provide proof of either marriage or dependency. Out of hundreds of transactions, only five (5) transactions are by the deceased. That, the Statement shows the objector was paying her own bills including hospital Bills, school fees, shopping, water and electricity bills. It also shows that at some point, the Objector sent cash to the Deceased, as she has been sending other people as well.



58. That, exhibit 5- Letter from Migwani area chief, which the Respondents submits it contains material factual misrepresentations. For instance, it says Mwende was estranged from Kimanzi since 2015 and that Annah Mwaleh Kimanzi was the one taking care of Mwende's children. The chief did not witness any marriage ceremony between the Objector and the Deceased,
59. That, although listed in the list of documents, there are no dowry records. This is because there was never dowry negotiations and payments between the Objector and the Deceased.
60. That, the 1st Respondent was married to the Deceased in the year 1999, before the enactment of *Marriage Act*, 2014. Therefore, the case is to be gauged under a different set of laws and presumption of marriage is available to her
61. To prove her marriage, the 1<sup>st</sup> Respondent produced the following pieces of evidence that corroborate each other and her oral evidence of Kamba Customary Marriage:
- a. Bundle of photographs spanning 2 decades, with her, Kimanzi and their children as well as extended family members.
  - b. Business registration Certificate and Company CR-12s showing long business partnership with Kimanzi
  - c. Acknowledgement of marriage from Kimanzi in his Statement of Defense filed in the Children's case No. 50 of 2020.
  - d. Travel permit dated 5<sup>th</sup> April, 2021 issued to her by Prisons department to travel despite travel restrictions imposed due to COVID-19 pandemic.
  - e. Letter from Viwandani area chief
  - f. NHIF member data summary listing her as spouse as of March, 2021.
  - g. Obituary and Funeral program of the late James Kimanzi Simba-Kiliviti, father to Kimanzi, listing her as daughter-in-law.
62. That, it is a known fact that, Customary Law Marriage Rites under the Akamba and Agikuyu people are different and even in the unlikely event that the Mumbi and Kimanzi got married under both customs Kikuyu and Kamba customs, the same ought to have emerged from her evidence.
63. The Respondents place reliance on the Court of Appeal in Civil Appeal No. 132 of 2017 *Eva Nauua Kaaka & Another v Tabitha Waitthera Mararo*[2018] eKLR restated the elements of a Kikuyu Customary rites as follows:-

“Eugene Cotran's "Casebook on Kenya Customary Law" at page 30 sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;

1. Capacity...
2. Consent; the parties to the marriage and their respective families must consent to the union
3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.



5. Commencement of cohabitation

64. That further more in the case of *Gituanja v Gituanja* (1983) KLR 575 the Court held inter-alia that:

“From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased”

65. The Respondents rely on the case of *Munyao Ndolo & 3 Others v Mary Nduku Mutisya* [2018] eKLR, Makueni HCCA NO. 134 of 2017 where the essentials of a Kamba Customary Marriage were highlighted as follows:-

“ 48. It is clear from the evidence of all the witnesses that the most essential step in a Kamba custom marriage is the ntheo. That once the ntheo ceremony has been performed, there exists a valid Kamba custom marriage.

49. I have looked at several judicial proceedings where witnesses gave evidence on the issue of marriage under Kamba custom law. I will sample a few.

50. *In Re Andrew Manunzyu Musyoka (deceased)* [2005] eKLR, Steven Mututu Mutisya (DW2) testified as an expert on Kamba custom law. He said that a marriage is contracted when goats of "Ntheo" are paid to the girl's parents and that even if dowry is not paid "Ntheo" has to be paid and concludes a marriage.

52. *In Re estate of James Simu Nthiwa* [2005] eKLR there was a contestation as to whether the deceased was married. The objector was the deceased's mother, she averred that he was not married as he had never informed her of it nor had any dowry been paid in accordance with Kamba custom law where goats

66. That, this evidence gives some credence to the 1<sup>st</sup> petitioner's position that the objector was only brought in by her in-laws to teach her a lesson for refusing to part with the documents for what they called the deceased's properties. .... It is evident from the objector's case that not even one member of her own family stepped forward to support her claim to have been married to the deceased, only members of the deceased family, giving further credence to petitioner's position that the objector's presence in this case was a ploy by in laws.

67. In the circumstances of this case are such that it is evidence that the deceased's family pushed for inclusion of the objection into the eulogy and the death announcement yet there was no proof that the deceased was married to the objector or had children with her

68. That the argument is not tenable, and particularly in the circumstances of this case where it is clearly evident that the family of the deceased were pitted against his wife. One can be married to a person, but the children that person has do not automatically become dependant because of the marriage if they are not biological children”

69. As to whether mother to James Kimanzi Junior is automatically considered wife of the deceased the Respondent associates with the finding of Justice Aluoch in Nairobi Succession Cause No. 2269 Of 1998 *In the Matter of The Estate of James Mberu Muigai Kenyatta* that:-

“I cannot therefore rely on that evidence for making a finding that Elizabeth was married to James because James "fathered" her two children.



I want to take Judicial Notice of the fact that a man and woman do not have to get married in order to have children. I do not find Elizabeth's argument convincing that she was James's wife because the two had children together"

70. As to whether the interests of James Kimanzi Junior can be taken care of without revoking the grant, the respondents rely on *Re Estate of the Late Symon Kipngény Koima (Deceased)* (2021) eKLR that dealt with a similar scenario as follows:
62. Does that finding require that the grant be revoked? I do not think so, because the inclusion of the 2nd objector would only require the redistribution of the estate so that she gets her share, the grant need not be revoked, since the petitioner was entitled under Section 66 of the *Law of Succession Act* to bring the Petition in the 1st place and to be issued with grant letters of administration"
71. That this succession is at its nascent stages and at the point of distribution, James Kimanzi Junior's share will be held in trust by his true mother. It is worth noting that no proof of maternity has been placed before Court. A Birth Notification is not conclusive proof of parentage.
72. In view of the foregoing, the Respondents submit that the Application dated 31<sup>st</sup> December, 2021 is not merited and the same be dismissed with Costs.

### **Analysis & Determination**

73. I have considered the lengthy viva voce proceedings and extensive cross-examination and the entire body of pleadings by the objector and the Respondents leading me to the Sole issue that presents itself for determination herein is whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of Section 76 of the *Law of Succession Act*.
74. From the onset it is important to note that a Succession Court is more concerned with securing the estate of the deceased before distribution and that any personal representatives or administrators are Only appointed as such, to provide leadership in administration settlement and distribution. This Court views this as honor and not a militaristic medallion for lording over others, or a position to be a stumbling block in concluding the probate.
75. This Court intends to support the family of the deceased to conclude the administration, settlement of the estate and distribution to all rightful beneficiaries within the shortest period possible.
76. For avoidance of doubt, Section 76 of the *Law of Succession Act* states as follows:
- “76. Revocation or annulment of grant
- A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on application by any Interested Party or of its own motion—
- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case;



- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
  - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the Court order or allow; or
  - ii. to proceed diligently with the administration of the estate; or
  - iii. to produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

77. Section 76 was clearly expounded on *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where it was stated that:

“Under section 76, a Court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

78. Revocation of grant is an ultimate tool where it is apparently demonstrated that the Administrators can no longer be allowed to be. This Court can, even where a Revocation would be allowed, give directions to conclude distribution as a catalyst of conclusion.



79. Revocation of a grant should thus only result where it is apparent that the continued retention of the Administrators is untenable and shall not be in the interest of the estate of the deceased. In this particular instance, I unfortunately view the motion as a subtle attempt by the objector to force judicial recognition of marriage as well as anchor herself as a co-administrator.
80. The entire objection brings to the fore the grey area the objector finds herself in, she has demonstrated cohabitation with the deceased resulting in the issue and that she currently enjoys the recognition as the widow of the deceased with apparent support of the Deceased extended family.
81. On the other hand, the 1<sup>st</sup> Respondent was clearly estranged from the deceased and had commenced divorce proceedings against the deceased including other matrimonial based disputes pending in various Courts. She is clearly not in good books with the deceased extended family.
82. I conform to the reasoning as held in *In re Estate George Ragui Karanja (Deceased)* [2016] eKLR where J. Kamau considered criteria for appointment of administrator(s) is to whom may be appointed as an administrator and that Section 66 of the *Law of Succession Act*, provides the guide to determine who should be appointed an administrator and where a replacement is sought to follow the same path, as follows –
- “When a deceased has died intestate, the Court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –
- Surviving spouse or spouses, with or without association of other beneficiaries;
- Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided in Part V;
- The Public Trustee; and
- Creditors.’
83. The order of preference set out in Section 66 of the *Law of Succession Act* is not binding to the Court. It is discretionary. Section 66 refers to it as ‘a general guide.’ and in this instance the 2<sup>nd</sup> Administrator is neither a dependant or beneficiary to the estate but falls within the Part V of the *Act*.
84. Nothing bars a distant relative from being appointed as an administrator of an estate if no closer relatives come forward to apply, but they would need to prove their relationship to the deceased and would generally be considered further down the hierarchy of eligible individuals under the *Law of Succession Act*, meaning closer relatives would be prioritized first.
85. In this instance the brothers or sisters to the deceased would rank higher than the 2<sup>nd</sup> Respondent but this Court is of the considered view that they themselves never offered themselves save for the Objector who this Court has found not to have been married to the deceased.
86. The Court can appoint administrators without following the order of preference. Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the *Act*, then the Public Trustee and Creditors.
87. This Court would not hesitate to recall the grant and appoint new administrator(s) where it is apparent that the Administrator(s) are acting contrary to the best interests of the estate or disregarding or ignoring the law however in this instance the Court is of the view that to avoid protraction it shall maintain the grant as issued.



88. This Court finds no anomaly in the 1<sup>st</sup> Administrator seeking support of her biological sister as co-administrator, what is of importance is having administrators that can work on a common approach.
89. I find that, no divorce had occurred under the customary law between the 1<sup>st</sup> Administrator and the deceased as alleged.
90. The Objector has failed to demonstrate to this Court to the required standard that, she was married to the deceased and as such she is neither a dependant or beneficiary in these proceedings.
91. The Objector alleged to have been married in the year 2020 and is subject to the Marriage Act, 2014.
92. Section 59 of the Marriage Act enumerates a list of acceptable Evidence of marriage in Kenya after passing of the Regulations to the Act as: -
- f. a certificate of marriage issued under this Act or any other written law
  - g. a certified copy of a certificate of marriage issued under this Act or any other written law,
  - h. an entry in a register of marriages maintained under this Act or any other written law:
  - i. a certified copy of an entry in a register of marriages maintained under this Act or any other written law, or
  - j. an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra communities, or a certified copy of such an entry.
2. Despite subsection (1), a marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry.
93. I conform to the holding in the case of EGK v IMM that;
- “The Marriage Act No. 4 of 2014 commenced on 20<sup>th</sup> May 2014. This law did away with the presumption of marriage and required that all marriages, including those conducted under customary law, be registered. In the present case, the parties ought to have registered their alleged marriage under Part V of the Marriage Act No. 4 of 2014.”
94. In the absence of a marriage certificate or satisfactory proof of customary marriage either under Kamba Customs or Kikuyu Customs then the Law of Succession shall not recognise the objector as wife of the deceased or as a beneficiary.
95. This Court however notes that, the objector was in an active cohabitational relationship with the deceased when he met his unfortunate demise while on the other hand he was in an active separation proceeding with the 1<sup>st</sup> Administrator which separation was yet to be finalised and that the deceased was yet to answer to the petition for divorce.
96. This is the reality of an intestate succession, where the deceased left no will the estate becomes subject to the Law of Succession Act and the Probate and Administration Rules.
97. I find that, the proceedings leading to the Grant of Letters of Administration intestate were not materially and inherently defective the fact that Petitioners are blood sisters to each other was disclosed on the filed petition and the same was not a discrete Petition.
98. No consent from the Objector was required.



99. The Objector has failed, to demonstrate to this Court that, the Petitioners fraudulently made false statements, introduced false allegations of facts and consciously concealed from the Court important and very crucial information.
100. The Court finds no merit in the Summons for Revocation of Grant dated 31<sup>st</sup> December, 2021 and accordingly dismisses the same.
101. Parties shall bear their own costs.
102. This Court shall however invoke its inherent jurisdiction under Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules to direct that:
- i. The objector shall benefit from the common law “presumption of marriage” not as a spouse of the deceased but as guardian and next friend of James Kimanzi Junior.
  - ii. The Objector shall file a protest if not in agreement with the mode of distribution proposed by the Administrators.
  - iii. The Administrators shall cause a summons for confirmation of grant to be filed within the next sixty (60) days from today the same shall be served upon the Objector’s Advocate.
  - iv. This matter shall be mentioned for compliance and further direction after sixty (60) days.
  - v. A forty-five (45) day Leave to Appeal is hereby granted to Any party aggrieved.

It is so Ordered.

**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 13<sup>TH</sup> FEBRUARY 2025**

**MOHOCHI S.M**

**JUDGE**

