



**In re Estate of BJC (Deceased) (Succession Appeal E009 of 2024)  
[2025] KEHC 1368 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1368 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION APPEAL E009 OF 2024**

**AC BETT, J**

**FEBRUARY 7, 2025**

**IN THE MATTER OF THE ESTATE OF BJC (DECEASED)**

**BETWEEN**

**MNM ..... APPELLANT**

**AND**

**FAO ..... RESPONDENT**

**AND**

**THE PUBLIC TRUSTEE ..... INTERESTED PARTY**

*(Being an appeal from the Judgement and Decree of Hon. T. Obutu,  
Chief Magistrate in Mumias MC Succession Cause No. 513 Of 2018)*

**JUDGMENT**

1. The matter herein concerns the estate of BJC (herein referred to as ‘the deceased’) who died intestate on 24<sup>th</sup> April 2018.
2. The Respondent, FAA who is the widow of the deceased petitioned for and was issued with grant of letters of administration on 17<sup>th</sup> December 2019. The said grant of letters of administration was confirmed on 22<sup>nd</sup> March 2023. The Respondent later applied for rectification of the grant so that the compensation under the *Work Injury Benefits Act* (WIBA) due to the dependants of the deceased from the group personal accident scheme for civil servants would be included as part of the estate of the deceased.
3. By a chamber summons dated 27<sup>th</sup> March 2023, the Appellant, MNM applied for summons for revocation of the grant earlier issued to the Respondent on the grounds that the same was obtained fraudulently, by means of untrue allegations of facts essential in points of law to justify the grant, and



- that the Respondent had failed to disclose full material particulars or details relating to the estate of the deceased. According to her, she was the first wife to the deceased having been married to him for 7 years during which period they were blessed with a son, BC born on 30<sup>th</sup> March 2009.
4. The Appellant averred that her son had been sidelined from the distribution process, and he would be disinherited if the grant was allowed as proposed by the Respondent.
  5. The Public trustee who was the interested party on the other hand urged the court to exclude the WIBA group personal accident scheme for civil servants from the estate of the deceased.
  6. The trial court in its judgment allowed the Respondent's application for rectification of the grant and included the WIBA benefits as part the estate of the deceased. The trial court then proceeded to order and that the Appellant's son BC junior be included as a beneficiary of his father's estate together with the Respondent and her two children.
  7. The Appellant herein was dissatisfied with the judgment of the trial court and appealed against the decision based on the following grounds;
    - a. The learned Trial Magistrate grossly misapplied and misapprehended the viva voce and documentary evidence tendered by the parties and the law pertaining to Law of succession and the work Injury and Benefits Act 2007 and consequently arrived at a wrong conclusion on the same.
    - b. The learned trial magistrate erred in law and in fact by failing to consider the Appellant's written submissions in its entirety thereby grossly neglecting the apparent facts on record, resulting to a decision not supported in law and facts.
    - c. The learned trial magistrate erred in law and facts by failing to properly examine the evidence on record in relation to the Respondent 's children claim for dependency from the deceased estate thereby arriving at a wrong conclusion on the same.
    - d. The Learned Trial Magistrate erred in law in purporting to administer the compensation under *work injury Benefits Act* on one hand and on the other hand finds that the court lacks jurisdiction to administer the benefits under the Work Injury and Benefits Act.
    - e. The Learned Trial Magistrate erred in law and fact by ignoring the Appellant's claim and evidence tendered during trial with respect to the claim for the Respondent to render full and accurate accounts of the Deceased estate.
    - f. The Learned Trial Magistrate erred in not sufficiently taking into consideration all the evidence presented before him in totality and particularly the evidence presented by the Appellant.
  8. The parties canvassed their appeal by way of written submissions.

### **Appellant's submissions**

9. The Appellant filed their submissions dated 25<sup>th</sup> October 2024. According to the Appellant, the compensation under the *Work Injury Benefits Act* does not form part of the estate of the deceased as the trial court had held and the same was made clear by the Public Trustee.
10. The Appellant contended that the WIBA Group Personal Accident scheme for civil servants was governed by the *Work Injury Benefits Act* and not the *Law of succession Act* and according to Section 20 of the *Work Injury Benefits Act*, the compensation does not form part an employee's estate. She relied on the case of re Estate of Job Kipyegon Selim (deceased) succession Cause 345 of 2015 (2023) KEHC



- 1411 (KLR) where the court held that; “on the issue as to whether the Group Insurance Group forms part of the estate, I find that the answer is in the negative.....”
11. She also cited the case of *Re Estate of Alex Nyumu Mulei (deceased)* (succession cause No. 11977 of 2018) [2018] KEHC 1288 (KLR) where the court held that “on the issue of preliminary objection. I uphold the same as section 20 of the work injury Benefit Act is clear that compensation is not to form part of the deceased employee’s estate....”
  12. She further cited the case of *Owners of the Motor Vehicle Vessel “Lillian s” vs. Caltex Oil (Kenya) Limited (1989) KLR* and *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 others Civil Application No. 2 of 2011* in affirming their claim that the lower court lacked jurisdiction in administering the compensation whose mandate was solely for the office of Public Trustee.
  13. The Appellant argued that the Respondent failed to give a full account of the deceased’s estate. She contended that the trial court failed to address her concerns regarding the amount that comprised the estate of the deceased and the Respondent’s failure to produce any documentary evidence to support her assertions as to how the money was shared.
  14. She relied on section 83 (h) of the *Law of Succession Act* and the case of *Re estate of the Late Mwaura Makuro (deceased)* [2021] eKLR and in *Re Estate of Julius Mimamo (Deceased)* [2019] eKLR on the duty of the personal representative in producing the book of accounts of the estate.
  15. On the claim as to whether the Respondent proved dependency of her children to the deceased, she stated that the deceased was survived by her only child BC and that the Respondent came into the marriage with her two children. According to the Appellant, the Respondent failed to prove that her two children were dependants of the deceased and demonstrate why they should equally share in the estate as dependants. She relied in the case of *Re estate of the late M’thigai Muchangi (Deceased) succession Cause No. 9 of ]2018] KEHC (904)*.
  16. The Appellant also submitted that the Respondent failed to prove that her children were being maintained by the deceased prior to his death and relied on the letter from the Ministry of Health marked ‘D.Exh.6’ which did not indicate the 2 children as dependants to the deceased and claimed that the deceased was survived by only one child. On that basis, the Appellant contended that the Respondent’s children should not be considered in the distribution of the WIBA compensation.
  17. The Appellant prayed that the court quash the decision and finding of the learned trial magistrate that the two children from the Respondent are dependants of the deceased.

### **Respondent’s submissions**

18. The Respondent submitted that there are two main issues for determination. In respect to the first issue as to whether the court correctly determined the beneficiaries of the deceased, she relied on section 29 of the *Law of Succession Act*.
19. According to the Respondent, she was married to the deceased who had accepted her two children. She stated that the deceased took care of her children as his own despite them being his stepchildren. She further submitted that she and the deceased had lived together as husband and wife, and she had been recognized as his next of kin. She did not dispute the deceased’s biological son as a beneficiary and stated that since he was a minor, the Appellant who was his mother would hold his share of his estate in trust for him.
20. In regard to the issue of whether the trial court erred in administering the WIBA benefits as part of the deceased estate, she claimed that the share should be well distributed and that she would hold her



children's share in trust since they were minors. She relied on Section 36 (1) and section 5 G of the Work Injury Benefits Act (WIBA) 2007 on payment of the WIBA compensation to the dependants. In support of her argument, she quoted the case of Re estate of Job Kipyegon Selim (deceased) succession cause 345 of 2015 and re estate of JKC (deceased) [2020] eKLR where the Public Trustee was directed by the court to allow the WIBA compensation for the upkeep of the minors.

### **The Evidence**

21. PW1 was the Appellant MNM, she prayed that the court adopts her witness statement dated 20<sup>th</sup> September 2023 as evidence in chief. She claimed that she was married to the deceased BJC under the Luhya Customary Law in 2007 and separated in 2013. she claimed that from the union, they had one child BC. She averred that she came to know about the succession proceedings in the year 2023 when she was informed by the public trustee.
22. She claimed that the Respondent did not include her son as a beneficiary to the estate even though the Respondent deposited Kshs. 600,000/= in two installments into her account without disclosing its purpose.
23. On cross-examination, she stated that there was no proof of customary marriage between her and the deceased. She claimed that she was not aware that the Respondent was next of kin in respect of the Safaricom shares and the death gratuity.
24. She had no proof that the amended grant was obtained through fraud claiming that she was not aware of the succession proceedings.
25. In cross-examination by the Public Trustee, she responded that she lived with the deceased between 2007 and 2013, and that the Respondent was his girlfriend.
26. She confirmed that on 24<sup>th</sup> April 2023, she attended a meeting at the Public Trustee offices to determine the deceased's beneficiaries. She testified that the Respondent took out a duplicate birth certificate for her son without her authorization and went ahead to submit it to the Public Trustee. She denied knowing that the deceased had a group accident cover of Kshs. 10,000,000. She claimed that had they agreed that the Public Trustee was in charge of distributing the money.
27. The Appellant called 5 witnesses in support of her claim most of whom were from the deceased's immediate family. Notwithstanding their evidence, they conceded that there was no formal marriage between the Appellant and the deceased.
28. DW1 was the Respondent. She testified that the deceased was her husband and adopted her statement as evidence in chief and produced 10 exhibits in evidence.
29. She stated that she was the deceased's widow and next of kin and prayed that the money be distributed according to the listed dependants.
30. On cross-examination by the Appellant's counsel, she stated that she met the deceased in 2015 and they moved in together although they had not been blessed with a child at the time of his demise in 2018. She claimed that she applied for the grant of letters of administration in 2018 after informing the Appellant. She further said that she applied for rectification of the grant on 5<sup>th</sup> February 2023 to include the deceased's biological son. She claimed that she never included her children but later included her children whose father was FW.
31. She admitted that she filed a further summons for revocation dated 8th March 2023 to incorporate the WIBA compensation. She confirmed that the deceased had married her after separating from the Appellant who was previously his wife.



32. She recalled that she got a confirmed grant and that she was paid Kshs. 1 million out of which she gave the deceased's son BC through his mother Kshs. 600,000/=. She further said that she was paid Kshs. 600,000/= by NHIF and from Safaricom she received Kshs. 600/= .She testified that she gave her mother-in-law Kshs. 50,000/=.
33. She stated that together with the deceased, they conducted their marriage under the Tachoni customary marriage laws.
34. During cross-examination by the Appellant's counsel, she asserted that she was the deceased's widow although there was no documentary evidence to prove the marriage.
35. She confirmed that she produced the minor's birth certificate which was issued on 13<sup>th</sup> April 2023 at Kisumu.
36. She stated that she was advised that the cover was not part of the administrable property and further that she had sworn her affidavit of marriage for purposes of NHIF.
37. On re-examination she claimed that she informed the Appellant about the succession and asked her for the minor's birth certificate, but the Appellant was not interested as she was married elsewhere.
38. She alleged that the reason she never removed the WIBA benefits from the inventory of the deceased's assets was because she had been mishandled and she therefore asked the Appellant to file an objection.
39. The Respondent's neighbours testified that they knew the deceased and the Respondent as husband and wife. One of the witnesses was a landlord to the deceased and one said he was a cousin of the deceased.

### **Analysis and Determination**

40. This being a first appeal, the duty of the court is to review and re-evaluate the evidence afresh so as to make its own independent findings and conclusion while considering that, unlike the trial court, it did not have the advantage of seeing and hearing the witnesses as they testified. See *Peters v. Sunday Post Limited* [1958] EA 424.
41. I have carefully considered the appeal before this court, lower court evidence as well as the written submissions filed by all the parties.
42. The issues for determination in this appeal are as follows;
  - i. Whether WIBA compensation forms part of the estate of the deceased.
  - ii. Whether the Appellant and Respondent were wives of the deceased.
  - iii. Whether the Respondent's children were dependants of the deceased.
  - iv. Whether the Respondent should be compelled to render full accounts of the estate of the deceased.

#### **i. Whether the Appellant and Respondent were wives of the deceased**

43. Both the Appellant and the Respondent averred that they were married to the deceased. The testimonies that each produced were not conclusive of marriage under custom. Both had cohabited with the deceased for a period of four to five years each. However, the Appellant separated from the deceased in the year 2013.



44. Even though the three brothers and two uncles of the deceased insisted that the Appellant was married to the deceased, PW3 conceded that no marriage ceremony was ever conducted. No evidence was led in a bid to prove marriage under customary law. In the same breath the witnesses stated that the Respondent was never married to the deceased.
45. It was not disputed that since the deceased parted ways with the Appellant in the year 2013, the two had not reunited. As such, there was no spousal relationship in existence between the Appellant and the deceased at the time of his death.
46. Regarding the Respondent, the Appellant did not challenge her claim to have been a wife to the deceased in her submissions. However, the Public Trustee submitted that the Respondent did not prove that she was married to the deceased under custom and contended that her evidence was more inclined towards the presumption of marriage through prolonged cohabitation.
47. Looking at the Respondent's evidence, there is indeed no conclusive proof of marriage. Nevertheless, there is no dispute that the Respondent cohabited with the deceased in Mumias. Her witnesses confirmed that they lived as husband and wife together with the Respondent's two children. DW4 who testified that he was the deceased's landlord stated that he knew the couple as husband and wife.
48. From her previous conduct, the Appellant had conceded the Respondent's claim to be a wife to the deceased because she wrote a letter to the Public Trustee dated 24<sup>th</sup> March 2023 which she produced as P.Exh. 7 in which she confirmed that she and the Respondent had agreed that the WIBA benefits be paid out on a 50:50 basis to the Respondent and her son, BC.
49. Further, PW4, the Appellant's witness and a brother to the deceased testified that he knew the Respondent in the year 2017 as he visited her, and the deceased introduced her to him and his wife. My conclusion from the introduction is that the deceased had a relationship that went beyond that of boyfriend and girlfriend with the Respondent and that is what propelled him to introduce her to his brother and wife.
50. The brothers of the deceased testified that the deceased's eulogy was drawn by the family committee. The eulogy indicated that the deceased had separated from the Appellant and married the Respondent. It is doubtful that a family committee can allow the inclusion of a stranger in such a solemn document that is normally a summary of a departed soul's life on earth. Moreover, it was not in dispute that the burial permit for the deceased was issued in the name of the Respondent.
51. DW9, the Chief Human Resource Personnel, Kisumu County produced the letter from the Ministry of Health dated 20<sup>th</sup> February 2023 which confirmed the following:
  - i. CM – brother – next of kin
  - ii. CW – father – next of kin
  - iii. FAO – wife
  - iv. BC – son
52. It was DW9's evidence that according to the Ministry of Health's Biodata, the deceased had updated his particulars to include the Respondent as his wife.



53. In the case of MNK v. POM; Initiative for Strategic Litigation in Africa, Petition No. 9 of 2021 [2023] KESC 2 (KLR), the Supreme Court laid down the parameters within which a presumption of marriage can be made as follows:-

“64. ..

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.”

54. On analysis of the evidence as a whole, I find that there is sufficient proof that the Respondent and the deceased cohabited together for long and that they held each other out as husband and wife to the extent that they developed such a reputation within their community.

55. Despite the protestation by the brothers to the deceased, it also came out that the deceased’s family was aware of the relationship. The evidence in totality points to the existence of a husband and wife relationship and the Appellant rightly conceded to that fact. I therefore find that there is sufficient proof, on a balance of probabilities, to presume that there was a marriage between the Respondent and the deceased.

56. As for the Appellant, I find that she was never married to the deceased. She was a cohabitee, and their union was determined or ended upon her separation from the deceased.

ii.

Whether  
the  
Respondent’s  
children  
were  
dependants  
of the  
deceased

57. What I can deduce from the record is that the Respondent’s children were aged 8 years old at the time the deceased passed on. The evidence from the Respondent’s witnesses pointed to a man who used to take care of his wife’s children. It was stated that he used to drop them at school. The evidence was that the deceased lived with the Respondent for the 4 years preceding his death. That means that he started cohabiting with the Respondent and her children when the children were approximately 4 years old. They therefore grew up knowing that he was their father.

58. There was no evidence to controvert the Respondent’s claim that the deceased treated her children as his own.

59. In the case of EKTM v. ECC [2022] eKLR the court held that when spouses accept their partner’s children as theirs, they assume parental responsibility. Such acceptance is signified by bringing up the children, providing for the upkeep, education, and medical expenses, or altering the birth certificates to add them as parents.



60. In *JNK v. EWM* [2014] eKLR, the court declined to order a biological father to take care of his child since the child had been with the mother's cohabitee for 9 years.
61. Based on the foregoing, I find that by accepting to live with the minor children in his house and by dropping them off at school, the deceased assumed their parental responsibility.
62. Section 3 (2) of the *Law of Succession Act* defines a child as:-  
“References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”
63. For a non-biological child to qualify as a dependant of a deceased person, the man must have expressly recognized the child as his or voluntarily assumed permanent responsibility.
64. Having agreed to live with the children and the mother for over 4 years, the deceased is deemed to have voluntarily assumed permanent responsibility for the two children. In *Re Estate of SWM*, Nairobi High Court Civil Appeal No. 6 of 2002, the court held as follows:-  
“...a child that the deceased has taken into his family as his own is a child for the purposes of succession...”
65. Section 32 (2) of the *Children Act* states:-  
“A person who has parental responsibility over a child shall at all times have the duties, powers and responsibilities as are prescribed in this Act or any other written law.”
66. As an auxiliary, Section 29 of the *Law of Succession Act* defines a dependant as follows:-  
“For the purposes of this Part, "dependant" means—  
(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;  
(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and  
(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
67. In the end, I am persuaded that the Respondent's children are the deceased's stepchildren as the deceased and the Respondent were cohabiting as husband and wife and the deceased had taken the children as his own.



68. I therefore find that both the Respondent and her two children are dependants within the meaning of Section 29 (a) and (b) of the Law of Succession Act and hence they are beneficiaries of the estate of the deceased together with BC who is the sole biological child of the deceased.

### **iii. Whether the WIBA compensation forms part of the estate of the deceased**

69. As to whether the WIBA compensation forms part of the estate of the deceased that can be administered under the Law of Succession Act, Section 20 the Work Injury Benefits Act WIBA 2007 is very clear on that. It states as follows: -

“Compensation paid under this Act for the death of an employee shall not form part of the employee’s estate.”

70. This position was reaffirmed in the case of re Estate of Alex Nyumu Mulei (Deceased) [2018] eKLR where the court stated that:- “I uphold the same as Section 20 of the Work Injury Benefits Act is clear that Compensation is not to form part of deceased employee’s estate.”

71. That being the case, the court finds that the WIBA compensation does not form part of the estate of the deceased.

72. In the amended Certificate of Confirmation dated 22<sup>nd</sup> March 2023, the assets of the deceased were listed as follows;

- a. Death gratuity with the Ministry of Health; Kshs. 1,008,855.30/=
- b. Shares from Safaricom; Kshs. 21,060/=
- c. WIBA group personal accident scheme for civil servants; Kshs. 10,008,000/=.

73. For reasons that the WIBA compensation does not form part of the estate of the deceased, the same cannot be included in the administrable assets of the estate of the deceased. The same falls under the jurisdiction or purview of the Public Trustee in the first instance. In that regard, the trial court erred in distributing the compensation.

### **iv. Whether the Respondent should be compelled to render full account of the estate of the deceased**

74. In respect to the 5<sup>th</sup> ground of appeal, Section 83 (h) of the Law of Succession Act obligates the administrator to render full account of the deceased estate as follows: -

“To produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.”

75. It was the Respondent’s duty, once requested by the Appellant, who is a trustee of one of the beneficiaries of the estate of the deceased, to file a statement of accounts to fully account for any of the assets of the estate of the deceased that she has received. This is more so in view of the fact that in the Certificate of Confirmation of Grant of Letters of Administration dated 17<sup>th</sup> December 2019, the Respondent is named as the sole beneficiary of an unspecified number of Safaricom Ltd shares and an undisclosed sum in the form of death gratuity from the Ministry of Health.



76. In light of the irregularity apparent in the aforesaid Certificate of Confirmation of Grant, it is incumbent upon the Respondent to file a full and accurate account of the proceeds from the said two assets of the deceased.

77. In the Estate of the late Mwaura Makuro (Deceased) [2021] eKLR, the court held as follows: -

“The production of accounts is a key component of the administration process of a deceased person’s estate. From the moment a grant is issued to a personal representative of a deceased person, the grant holder becomes responsible to the Court in the carrying out of the duties of administrator. Accounts are an accountability tool that will tell the Court whether the administrator has been faithful to the role entrusted to him or her. When an administrator fails to file accounts as required, questions as to the integrity of the process are bound to arise as in the present case. The law has empowered the Court on either of its own motion or on the application of any interested party in the estate, to order an administrator to produce a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

From the foregoing, I am satisfied that the administrator has not diligently proceeded with the administration of the estate. The administrator is also liable to produce full and accurate account of his dealings with the estate as required by law.”

78. The duty to render accounts was also considered in the case of Re Estate of Julius Mimamo (Deceased) [2019] eKLR where the court held thus: -

“...Although the personal representative has legal title akin to that of an owner, the property does not belong to them. They only hold it in trust for the eventual beneficiaries thereof, that is those named in the will, in cases of testate succession, and those identified at confirmation of grant, in cases of intestacy. They would also be holding it for the benefit of creditors and any other persons who might have a valid claim against the estate. That would mean that they are trustees of the estate, and, indeed, the *Trustee Act*, Cap 167, Laws of Kenya, defines trustees to include executors and administrators. In the circumstances, therefore, the personal representative would stand in a fiduciary position so far as the property is concerned, and owes a duty to the beneficiaries to render an account to them of their handling of the property that they hold in trust for them. The duty to render accounts to beneficiaries arises from the trust created over estate property when the same vests in the personal representative to hold on behalf of the beneficiaries.”

79. It is my considered view that having received the death gratuity and disbursed the same without disclosing the sum received, the Respondent acted contrary to the *Law of Succession Act*.

80. The upshot is that the appeal partially succeeds. I set aside the portion of the trial court’s Judgement administering the compensation arising from the civil servants group accident scheme under WIBA. A further rectified Certificate of Confirmation of Grant shall issue at the trial court excluding the said compensation.

81. I also hereby order the Respondent to file a full and accurate account of the estate of the deceased within thirty (30) days from today.

82. This being a matter concerning family members, there shall be no orders to costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF FEBRUARY 2025.**



**A. C. BETT**

**JUDGE**

In the presence of:

Mr. Mbeka for Appellant

Mr. Lugulu for Respondent

Mr. Mutuku for the Public Trustee

Court Assistant: Polycap

