



REPUBLIC OF KENYA



**In re Estate of Joram Njuya Wamiya (Deceased) (Succession Cause 100 of 2002) [2025] KEHC 4681 (KLR) (9 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4681 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 100 OF 2002**

**REA OUGO, J**

**APRIL 9, 2025**

**IN THE MATTER OF THE ESTATE OF JORAM NJUYA WAMIYA (DECEASED)**

**BETWEEN**

**FRED MALOBA MATETE ..... APPLICANT**

**AND**

**MWANAIKI NEKESA ..... RESPONDENT**

**RULING**

1. Joram Njuya Wambiya died on the 17.8.1967. Fred Maloba Matete (the petitioner) filed a petition for letters of administration intestate on October 31, 2002. In his affidavit in support of the petition dated 29 October 2002, the petitioner states that the deceased left two sons, David Njuya and Eliud Nairuka, and two assets: Kabuyefwe Scheme 207 (6.2 HA), parcel number 207 and Ndivisi/Mihuu/864 (1.8 HA), parcel number 864. On the 24<sup>th</sup> July 2017 the petitioner sought to confirm the grant issued to him on the 12.6.2003. A certificate of confirmation of the grant was issued on the 17.7. 2019 and the deceased's assets were distributed as follows; land parcel number Bungoma/ Kabuyefwe/207- Fred Maloba Matete-8.5 acres and David Njuya Joram- 7 cares. Land Parcel number Ndivisi/ Mihuu/ 864 , Fred Maloba Matete- 3 acres, Emily Nanjala Njuya- ½ acre, Joyce Nabangala Njuya ½ acre and Gladys Khasiro Njuya- ½ acre
2. On 20.4.2023 Mwana Idi Nekesa, the Applicant, filed a Summons for Revocation or Annulment of Grant brought under Article 159(2) of the Constitution and Sections 47 & 76 of the Law of Succession act cap 160 Law of Kenya. She seeks the following orders;
  - i. The grant of letters of administration intestate issued to the petitioner herein on 12.6.2003 and confirmed on 17.7.2019 be revoked and of annulled, and that there be fresh succession proceedings.



- ii. That upon grant of prayer (i) an order be issued cancelling titles to L.R. No Bungoma/ Kabuyefwe/ 207 and LR No Ndivisi/ Mihuu/864 from the current owners, if any, and the same revert to the deceased names for fresh succession and distribution.
  - iii. Costs of this application be borne by the Respondent.
3. Her grounds are that the grant was obtained fraudulently by making a false statement and/or by concealment from the court of material facts and the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. The application is supported by her affidavit dated 20.4.2023.
4. The application was opposed by the petitioner. Parties gave oral evidence.
5. The Applicant relied on her supporting affidavit and her further affidavit dated 6.7.2023. The Applicant testified that she married the deceased in 1965. She was the deceased's 2<sup>nd</sup> wife. The first wife was Risper Khevali. Risper died in the year 1981. The deceased was survived by 9 children. The 2<sup>nd</sup> house where she belongs has 3 surviving children, one died. The deceased had the 2 parcels of land, parcel numbers 207 and 864. Upon the deceased's death, the petitioner, who is from the 1<sup>st</sup> house, commenced the succession proceedings. She was not involved, nor were her children, despite her being the only surviving widow. She is a beneficiary, and so are children Aswani Njuya, Khasiro Njuya, and Grace Nyuja. Aswani and Grace Anekuya Njuya are children she sired in her previous marriage. She married the deceased when they were 4 and 2 years old. The deceased took care of them and maintained them. The deceased's estate was divided amongst the children of the 1<sup>st</sup> house. After the death of the deceased, the late Risper ganged up with her children and razed down her matrimonial house and chased her from the home together with her four children, Maloba (deceased), Khasiro, Grace Anekeya Njuya, and Aswani, including the biological children of the deceased. She returned to her paternal parents' home in Lugari, where she resides with her children. Khasiro, who was given a share of the deceased's estate, does not have the land she was denied the same. It was discriminatory to exclude the other children on the grounds that they are not the deceased's biological children. Grace Anekeya died and is survived by seven children who are entitled to her share of the estate. Aswani was dependent of the deceased. She has never been in a third or fourth marriage after the deceased's death. She is currently residing in rental houses in Majengo location. During cross-examination, the Applicant told the court that she has three children with Joseph Cheki, who was her friend. The deceased is the one who paid her dowry.
6. The petitioner testified and called 3 witnesses in support of his case. Fred the petitioner adopted his replying affidavit dated 18.5.2024 and a supplementary affidavit dated 31.5.2023, and a statement dated 13.11.2023. Gladys Khasiro Njuya (Grace) (DW1) adopted her statement dated 18.11.2023. Bernard Nyongesa Khisa (Bernard) (DW4) adopted his statement dated 18.3.2023. Henry Maulo (Henry) (DW4) adopted his statement dated 18.11.2023. The petitioner told the court that the applicant was the deceased's 2<sup>nd</sup> wife and sired two children with the deceased, Maloba, who is deceased, and Gladys Khasiro. He is the son of the deceased from the first house, they are four children from the first house, namely Emily Nanjala, David Njuya and Joyce Nabangala. They are the children of the first wife Risper Khevali, who is deceased. The deceased had 2 parcels of land, parcel numbers 207 and 864. As the administrator of the estate, he included all the beneficiaries save for the applicant, who had remarried and lost interest in the deceased's estate. The applicant remarried. She married Joseph Cheki Lutali, who lived in Lugari where she resides. Gladys Khasiro from the 2<sup>nd</sup> house was included as a beneficiary, and she got her share, a ½ an acre and she is satisfied with it. During cross-examination, Fred denied that the applicant's house was burnt. He knows that the applicant's other children stayed at her place. The applicant's other husband, Joseph, died in 1981. Gladys Khasiro told the court that



she is the deceased's daughter and her mother is the Applicant. She has inherited land from her father's estate. Her brother was Maloba, but he died. During cross-examination, she told the court that she did not know if the applicant remarried. She grew up at her father's home. They left the deceased's home in 1977. She does not know if their house was burnt or if they were chased from the deceased's home. Her other siblings were not the deceased's children. Bernard told the court that he is a clan elder of the Abasia clan, which the deceased belonged to. He is also a neighbour of the deceased. He knows that the applicant is a resident of Lugari in the home of Joseph Cheki Lutali and that, per the clan, once a wife of the deceased person re-marries, her interest in the deceased's estate ends, but her children get a share of the deceased's estate. Henry testified that he is the chairman of Abasia, which the deceased belonged to. According to the clan when a wife of the deceased person remarries, her interest in the deceased estate ends, but her children must get a share of his estate.

7. Parties filed written submissions. I have considered the said submissions. The applicant raised two issues for determination: whether the application meets the threshold for revocation or annulment of the grant, and whether the court has the power to cancel the land titles. The applicant noted the discretionary power of the court under section 76 of the [Law of Succession Act](#) Cap. 160 (the Act). It was submitted that the applicant is the only surviving spouse of the deceased and is entitled to benefit from the deceased's estate under section 29 (a) of the Act. No consent was obtained from the applicant at the time the petition was filed. Reliance was also made on section 35 of the Act, which stipulates what a surviving spouse is entitled to. It is not in dispute that the applicant was the deceased's 2<sup>nd</sup> wife. No credible evidence was adduced to prove that the applicant remarried after the deceased's death; reliance was made in the case of [Re Estate of Joshua Apiyo Ongany \(Deceased\)](#) (Kisumu High Court Succession Cause 12 of 2019) [2023] KEHC KLR. There was evidence that the applicant did not leave her matrimonial home voluntarily. Grace Anekeya Njuya and Aswani Njuya are dependents of the deceased as per section 29 (b) of the Act, even though the applicant sired them in her previous marriage. Their being left out is discriminative and unconstitutional and it violates the provisions of Article 27 and 53 of the [Constitution](#) of Kenya, reliance was made in the case of [FAAF v REM & 2 others](#) (Mombasa COA Civil Appeal E043 of 2022 KECA 1322 (KLR) and [Re Estate of Francis Wekesa \(Deceased\)](#) Bungoma H.C. Succession Cause No 3 of 2019 KEHC 2540 KLR). On the 2<sup>nd</sup> issue, it was submitted that Section 47 of the Act empowers this court to decide and pronounce any decree or make an order as it shall deem expedient in respect of the estate and Rule 73 of the [Probate and Administration Rules](#), empowers the court to make such orders as shall be necessary to meet the ends of justice. Reliance was made on two cases on this point, the case of [Munyasya Mulili & 3 others v Sammy Muteti Mulili](#) (2017) eKLR and [Santuzzza Bilioti alias Santuzzza \(Deceased\) v Giancarlo Falasconi](#) (2014) eKLR. It was submitted that since the grant was obtained fraudulently, the resultant titles are also null and void and should be cancelled, and the titles revert to the deceased's names for fresh succession and re-distribution.
8. The respondent submitted as follows: it is not in dispute that the deceased was polygamous; he had two wives. The petitioner submitted that the two issues for determination are: whether the deceased is entitled to a share of the deceased's estate and whether her two children, Grace Anekeya and Aswani, whom she sired in her previous marriage, are also entitled to a share of the deceased's estate. On the first issue, it was submitted that from the chief of Kabuyefwe's letter produced by the petitioner dated 9.5.2023, the applicant remarried immediately after the deceased's demise. From sections 35, 41, and 42 of the Act, the applicant cannot be a beneficiary of the deceased's estate. The applicant did not tender evidence to dispute the petitioner's evidence that she remarried the late Joseph Cheki Lutai.
9. On the 2<sup>nd</sup> issue, it was submitted that Grace and Aswani are children of her former marriage before she married the deceased. There was no tangible evidence to show that the deceased maintained the two or that the deceased recognised them as his children. Reliance was made on the case of [Sarah Kanini](#)



*Thignku v Elizabeth Njuki Thiguku* [2016] eKLR. It was further submitted that the petitioner and his siblings and Grace Khasiro Njuya from the 2<sup>nd</sup> house, are the rightful beneficiaries with priority to the estate of the deceased.

10. Lastly, it was submitted that if the court considers the applicant as the wife of the deceased, then the court should anchor the distribution of his estate as stipulated under section 40 of the Act.

### **Analysis and Determination**

11. I have considered the evidence adduced by the parties as well as their submissions and the law too. It is not in dispute that the applicant was married to the deceased as a 2<sup>nd</sup> wife and that she sired two children with the deceased, one is still alive (Grace Khasiro- DW2) and another (Maloba) died. It is also not in dispute that she has 2 children from her previous marriage who are still alive. The issues for determination are; did the applicant remarry after the death of the deceased, and are the 2 children of her previous marriage entitled to inherit from the deceased's estate, and should the court revoke the grant of letters of administration intestate issued to the petitioner on the 12.6.2003 and confirmed on the 17.7.2019.
12. On the issue of whether the applicant remarried after the death of the deceased, it is the applicant's evidence that she did not remarry and that she was chased from the deceased's home after his death. The petitioner, on the other hand, was adamant that the applicant remarried. That she married one Joseph Cheki. The applicant, in cross-examination, acknowledged that she was a friend to Joseph Cheki Lutali and that they have three children together. She stated as follows: " I know Joseph Cheki Lutali. He was my friend. We did not get married. I have 4 children with Joseph Cheki Lutali. I had 3 children with Joseph Cheki. Joseph Cheki died. I sired children with him as a friend". The statement of Gladys Khasiro, her daughter with the deceased, supports the petitioner's claim that her mother remarried and that she lived with her grandmother. The petitioner further relied on letters from the chief of his area to show that the applicant remarried. The letter, dated 9.5.2023, indicates that the applicant was married to the late Joseph Cheki Lutali, and they have 3 children. The letter dated 10.5.2023 from the Office of the Senior Chief Kabuyefwe indicates that the deceased had 2 wives and that his 2<sup>nd</sup> wife, the applicant, left soon after the death of her husband in 1967. These two letters were admitted in evidence and not challenged. The applicant completely denied she remarried, yet she admits that she knows Joseph Cheki, with whom she had 3 children. I find she was not honest on the issue of her remarriage. The petitioner was more candid on this issue, and I believe him and his witnesses. The applicant stayed away from the time the deceased died in 1967 and chose to pursue the issue of succession in 2023. Where was she? She did not demonstrate that she went to the chief or even filed suit after her alleged eviction. I am persuaded that she did remarry after the deceased died. It was not upon the petitioner to produce a marriage certificate or evidence of dowry to prove her remarry. The applicant in her evidence admitted being a friend to Joseph Cheki and that they have 3 children. In my view, this explains why she never pursued the succession. Further, Dw2, her child, told the court that she went to live with her grandmother after her father's death. She did not retract her statement that her mother remarried. I therefore find that the applicant remarried after the death of the deceased, and she left the deceased's home. The petitioner, therefore, cannot be blamed for failing to include her in the succession cause. DW3 and DW4 told the court that under their customs, once a wife remarries than she is not entitled to inherit the deceased's property.
13. The applicant claims that her children, whom she brought into the marriage, are entitled to a share of the deceased's estate. It is not in dispute that she had 2 children from her previous marriage, namely, Grace Anekeya Njuya and Aswani Njuya in her previous marriage. As correctly submitted, Section 29 (b) of the *Law of Succession Act* provides a window through which any other dependent other than the



ones listed under section 29 (a) of the Act could benefit from the deceased's estate. Dependency has to be proved. He who alleges a fact has to prove it (see Section 107 (1) & (2) of the *Evidence Act*, Cap 160). I appreciate that children born out of wedlock can inherit, too, however, dependency has to be proved. In the case of Re Estate of Francis Wekesa (Deceased) (supra, the court held that it was necessary for the beneficiaries to prove the fact of dependency and to show that the deceased had maintained them before his death. The applicant's evidence is that Grace and Aswani were cared for and maintained by the deceased. This was her only evidence. In the case of Re Estate of Francis Wekesa, there was evidence on how the children born out of wedlock were welcomed into the deceased's family, maintained and acknowledged even by the clan. I find that the applicant has failed to show that her two children were dependent on the deceased or that the deceased maintained them. One has to prove dependency. I find that Grace and Aswani were not dependents of the deceased.

14. The late issue is whether the court should revoke the grant. The applicant alleges that the grant was obtained fraudulently by making of a false statement and or concealment from the court material fact. The petitioner explained that they did not include the applicant because she had remarried. I have already made a finding on this that I am persuaded that the applicant remarried after the death of the deceased. There was no proof that the petitioner concealed material facts or that he deliberately left out the applicant. Gladys, the applicant's daughter, told the court that the issue was discussed at home, and she was given a portion of the shamba, and she is satisfied. The applicant has failed to prove her allegation of fraud and concealment of fact. I find no solid ground upon which to revoke the grant or to set aside the certificate of confirmation of the grant as sought. The objection has no merit, and it is dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 9<sup>TH</sup> DAY OF APRIL 2025.**

**R.E.OUGO JUDGE**

In the presence of :

Mr. Masiga For the Objector / Applicant

Respondent - Absent

Wilkister C/A

