



**Wambua v Ngari & another (Civil Appeal E010 of 2023)
[2024] KEHC 1333 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E010 OF 2023
LM NJUGUNA, J
FEBRUARY 14, 2024
IN THE MATTER OF THE ESTATE OF JOHN NJUKI NJUE (DECEASED)**

BETWEEN

NGUNDI WAMBUA APPELLANT

AND

ETHAN EVELUSHYAH NGARI 1ST RESPONDENT

TERESIA THUKA WAMBOGO 2ND RESPONDENT

JUDGMENT

1. The appellant herein has filed a memorandum of appeal dated 06th March 2023 seeking judgment against the respondents for orders that the appeal be allowed, the respondents are not wives of the deceased for purposes of inheritance, the entire estate of the deceased be inherited by the appellant and costs of the appeal be given to the appellant. The appeal is premised on grounds that the learned trial magistrate erred in law and facts by:
 - a. Finding that the respondents were wives of the deceased without any evidence of the type of marriage they contracted;
 - b. Finding that the only matrimonial property the appellant had acquired with the deceased comprised in Runyenjes Plot K. 30 was subject to distribution between the appellant and the respondents in equal share;
 - c. Putting too much reliance on the information in the chief's letter as though there is a form of marriage contracted by a chief's letter;
 - d. Finding that since the appellant had indicated the respondents as wives in the P&A forms, then she could not deny them and the magistrate failed to appreciate that the appellant being a lay person had no alternative but to use the chief's letter as the reference point; and



- e. Distributing the estate inequitably.
2. The brief background of the case is that the trial court issued a grant of letters of administration to the appellant on 23rd June 2014. The same was confirmed and a certificate of confirmation of grant was issued by the same court on 23rd July 2014, indicating that the beneficiary of Runyenjes Plot K. 30 was one Samuel Mugendi Kathei, a purchaser. The respondents herein moved the court vide chamber summons dated 06th January 2015, seeking revocation of the grant on the grounds that the appellant had failed to disclose to the court that the respondents were also beneficiaries of the named property, which had since been transferred to a 3rd party.
 3. The appellant filed a replying affidavit to the summons for revocation, stating that the respondents were merely concubines of the deceased who was involved in extra-marital affairs due to the nature of his work. That they had no right to his inheritance as they are strangers to this estate. The parties presented their evidence and arguments before the court and the magistrate proceeded to revoke the grant vide ruling delivered on 31st July 2018. Following this ruling, the court issued another grant of letters of administration to the appellant on 13th September 2021.
 4. The appellant filed summons for confirmation of the said grant and in the supporting affidavit thereof, stated that the only beneficiaries of the estate of the deceased were herself and her 2 children. She proposed that the property Runyenjes Plot K. 30 be wholly given to the purchaser and the death benefits of the deceased that are being held by the Public Trustee Embu, to be given to her (the appellant). Following this proposed mode of distribution, the respondents filed an affidavit of protest stating that they, too, were the widows of the deceased and were entitled to the estate. That the 1st respondent had 2 children with the deceased while the 2nd respondent had one child with the deceased and they produced birth certificates of the children as evidence. They produced affidavits of marriage indicating that they were married to the deceased as well as photographic evidence showing that they both spent time with the deceased. They also stated that they had been acknowledged as wives of the deceased through the chief's letter introducing them as such.
 5. The appellant filed a reply to the protest, stating that the respondents were not known to her and that they only met at the chief's office after the death of the deceased. That all the evidence they produced though their replying affidavit amounts to nothing because it does not prove their marriage to the deceased. That the deceased's employer had indicated her as the next of kin for purposes of the work benefits that would become due upon the death of the deceased. The court took viva voce evidence and also directed the parties to file their written submissions.
 6. PW1 was the 1st respondent who stated that she was married to the deceased prior to his death on 07th July 2002 and they had 2 children together. That the chief's introduction letter, which was written in the presence of the appellant, acknowledged both the respondents as wives of the deceased but the appellant filed the succession proceedings without them. That the property Runyenjes Plot K. 30 has been sold to a third party without the respondents' involvement and so they want to be given the death benefits of the deceased that are being held by the public trustee.
 7. On cross-examination, it was her testimony that she got married to the deceased under Kiambu customary law and after payment of dowry, they took out an affidavit of marriage. That she later learned that the deceased had another wife but at the time she got married, the deceased took her to his parents' home. That the deceased purchased the property Runyenjes Plot K. 30 from one Kariuki and he made the decision to purchase the property alone without consulting anyone. That the money being held by the public trustee is Kshs. 1,600,000/= and it should be given to the respondents. That



- she obtained the children's birth certificates for the children after the death of the deceased. That the 2nd respondent got married to the deceased in the year 2003 and they lived together for 7 years.
8. PW2, the 2nd respondent, stated that she supports the testimony of PW1. On cross-examination, she stated that at the time she got married to the deceased in the year 2003, she knew that he had another wife. That she does not have a marriage certificate to prove the marriage. That she once resided on the property Runyenjes Plot K. 30 until the year 2014 before the appellant sold it to a third party. That the respondents took interests in the matter when the property was sold and they are also seeking the deceased's death benefits held by the Public Trustee.
 9. DW1 was the appellant who stated that she is the legal wife of the deceased and they were married in 1986 under customary law before they legalized the marriage in 1993. That she and the deceased, together bought the property Runyenjes Plot K. 30 in 1995 from one Dionisio Gatumbi and that she contributed to the said purchase. She disputed that she agreed with the respondents that they be included in the succession proceedings as wives of the deceased. That out of respect, she agreed for the respondent's names to be added to the chief's introduction letter and that she did not know the respondents prior to the day they met at the chief's office.
 10. On cross-examination, she stated that in the form P&A 38, she did not recognize the respondents as wives of the deceased. That the deceased was treated at Embu, KNH, Kieni and Kijabe Hospitals but she does not know who paid the hospital bills. That she only saw the respondents after the death of the deceased but she did not see them at the funeral of the deceased. That she sold the property Runyenjes Plot K. 30 for Kshs. 750,000/= and used the proceeds thereof for her children's medication.
 11. After the hearing, the court delivered its ruling with orders that the property Runyenjes Plot K. 30 be registered jointly in the names of the appellant and the respondents, the property be valued and sold and the proceeds thereof be shared equally amongst the appellant and the respondents and the death benefits being held by the public trustee be shared equally amongst the appellant and the respondents.
 12. In this appeal, the court directed the parties to file their written submissions and only the respondents complied.
 13. In their submissions, the respondents stated that the letter from the chief introduced them as wives and the trial magistrate acknowledged as much. That the evidence adduced shows that the respondents were wives of the deceased and their children were the children of the deceased. That the appellant did not present form P&A 38 to the respondents to enable them sign the consent and she did not disclose that the deceased had other wives and children, these being grounds for revoking the grant as was done by the trial court. That since the time the succession cause was instituted, the appellant knew that the respondents were beneficiaries of the estate of the deceased. They urged the court to re-evaluate the evidence and uphold the findings of the trial court.
 14. From the foregoing, the issues for determination are as follows:
 - a. Whether the respondents are legitimate wives of the deceased; and
 - b. Whether the respondents and their children should benefit from the estate of the deceased.
 15. The first appellate court is expected to re-evaluate the evidence adduced at the trial and make its own finding, aside from that of the trial court. In the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...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 retrial and the principles upon which this court acts



in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

16. The respondents filed an affidavit of protest, seeking to be included in the list of beneficiaries of the estate of the deceased. The trial court took their evidence and listened to the arguments made. PW1 and PW2 stated that they were bona fide wives of the deceased and they even produced affidavits of marriage as evidence. They also produced photographic evidence showing that they spent time with the deceased and their children. It was their case that when the appellant initiated the succession cause, she knew that the respondents were beneficiaries of the estate but failed to involve them. That they got involved in the case when they learned that the property Runyenjes Plot K. 30 had been sold to a 3rd party.
17. On the other hand, DW1 stated that when she met with the respondents at the chief's office, it was their first encounter and she had not known them before then. That the chief told her that the respondents were her co-wives and that they must be acknowledged as such and that she only accepted this out of respect for the chief. That she used the same chief's letter to initiate succession proceedings. She also stated that she did not know that the consent forms were to be signed by the respondents, and that if she had known, she would have instructed the counsel to draw them without that provision.
18. The appellant produced a copy of marriage certificate issued on 04th July 1993. She testified that she got married to the deceased under Kiambu customary law in 1986 and then the marriage was registered under the *African Christian Marriage and Divorce Act* Cap. 151 (now repealed), on the said date and a marriage certificate was issued. The 1st respondent produced a copy of an affidavit dated 10th July 2003, which indicated that she was married to the deceased under Kiambu customary law. The 2nd respondent produced a copy of affidavit dated 14th April 2010 stating that she was married to the deceased under Kiambu Customary law and have been cohabiting as husband and wife.
19. On the question of whether the respondents are to be regarded as legitimate wives of the deceased, Section 3(5) of the *Law of Succession Act* provides that:

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this *Act*, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this *Act*.”
20. For purposes of succession, the respondents are indeed to be regarded as legitimate wives of the deceased, considering the above-cited provision. Superior courts have previously held that marriage is a matter of fact and is proved through evidence. In the case of *Joseis Wanjiru v. Kabui Ndegwa Kabui & another* [2014] eKLR, the Court of Appeal stated thus:

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded.....”
21. According to Section 3(5) of the *Law of Succession Act*, the scope of marriage as established under other statutes is acknowledged but for purposes of succession the same is broadened to accommodate parties like the respondents herein. That provision expressly accepts and supersedes the provisions of other laws that establish marriage between parties. For instance, the appellant was married under the



African Christian Marriage and Divorce Act Cap. 151 (now repealed) in 1993. This is before any of the respondents were married to the deceased. However, in light of the provisions of Section 3(5) of the *Law of Succession Act*, the respondents are also regarded as wives of the deceased, even though the deceased procured a monogamous marriage before he married the respondents under customary law.

22. Moreover, the respondents provided copies of affidavits deposing that they were married by the deceased under customary law and they also produced photographic evidence which was considered by the trial magistrate. In the case of *In re Estate of D M M (Deceased)* [2018] eKLR, the court was faced with a similar question and the learned judge placed reliance on the case of *Hortensiah Wanjiku Yawe v The Public Trustee*, Civil Appeal No. 13 of 1976, where the court held:

“The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely “on the balance of probabilities.”...If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.”

23. On the second issue of whether the respondents and their children should be allowed to inherit from the estate of the deceased, the same provision in Section 3(5) of the *Law of Succession Act* legitimizes the respondents and their children as beneficiaries of the estate of the deceased. This being intestate succession, the distribution of the estate is subject to section 40 of the *Law of Succession Act* which provides as follows:

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

24. The distribution must account for the number of beneficiaries in each house. In this case, the first house consists of the appellant and her 2 children, the second house consists of the 1st respondent and her 2 children while the 3rd house consists of the 2nd respondent and her child. The appellant and the respondents are all interested in the property Runyenjes Plot K. 30, and or the proceeds from it. The trial magistrate ordered that the same be registered in the names of the 3 widows and then be sold and the proceeds be shared equally amongst them. In the circumstances, I find that this is a fair and equitable way of dealing with the distribution of that property. As regards the death benefits being held by the public trustee, the trial magistrate ordered that the same be share equally amongst the 3 wives. I also find this to be fair and just.

25. One of the appellant’s grounds of appeal is that the trial magistrate focused too much on the chief’s letter which acknowledged the respondents as wives of the deceased which averment influenced his decision. The chief’s introductory letter has no legal significance in a succession cause but it plays an important role in identifying the beneficiaries of the estate of the deceased on behalf of the courts. This was elaborated in the case of *In re Estate of Mukhobi Namonya (Deceased)* [2020] eKLR where it was held:

“... it is critical that I deal with the importance of the letter from the Chief. It is not a requirement of the law, for it is not provided for in the *Law of Succession Act*, Cap 160, Laws of Kenya, nor in the *Probate and Administration Rules*. It was a device resorted to by the court to assist it identify the persons who survived the deceased, for the court has no



mechanism of ascertaining the persons by whom the deceased was survived save by relying on officers of the former provincial administration, who represent the national government at the grassroots and are in contact with the people, and therefore, the best suited to assist the court identify the genuine survivors of the deceased.”

26. In conclusion, having considered the evidence on record, the arguments made and the relevant laws, I find that the appeal lacks merit and it is hereby dismissed. Each party shall bear their own costs.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

