



In re Estate of Hannington Mwasaru Mlughu (Deceased) (Succession Cause 4 of 2023) [2024] KEHC 2698 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 4 OF 2023
G MUTAI, J
MARCH 8, 2024
IN THE MATTER OF THE ESTATE OF
HANNINGTON MWASARU MLUGHU (DECEASED)**

BETWEEN

KASYOKA MUTEMI OBJECTOR

AND

AVRIL ACHIENG 1ST PETITIONER

CLARIS MWASARU MLUGHU 2ND PETITIONER

RULING

Introduction

1. Hannington Mwasaru Mlughu (hereafter “the deceased”) died on 29th May 2021. At the time of his death he worked as a Procurement Officer with the Kenya Ports Authority and lived in Jomvu in Mombasa.
2. Vide a Petition for Letters of Administration Intestate dated 20th January 2023, Claris Wanjala Mwasawa, his widow, and Avril Achieng, the mother of his son, RN, sought the grant of representation intestate of his estate. They listed his dependants as being:-
 1. Claris Wanjala Mwasawa- as the widow;
 2. GM – son – 13 years;
 3. GW – daughter – 8 years;
 4. RN – son – 7years;
 5. HC – daughter – 2 years; and



6. Rodgers Mlughu Mndwanjala – father - 86 years.
3. The Petitioners listed the Assets of the deceased as being:-
 1. House situated in Mikindani, Alidina Kijiweni Area, Mombasa;
 2. (Particulars withheld) Academy situated at Mikindani Alidina kwa Mzee wa Mtaani Area, Mombasa;
 3. Main House at Mikindani, Alidina kwa Zera Area, Mombasa;
 4. White House at Mikindani, Alidina kwa Zera Area Jomvu, Mikajuni Jitoni Area, Mombasa
 5. House at Jomvu, Mikajuni, Jitoni Area, Mombasa;
 6. House at Jomvu, Mikajuni, Jitoni Area, Mombasa;
 7. House at Jomvu, Mikajuni, Jitoni Area, West Gate, Mombasa;
 8. House at Miritini, Vikobani, Mbuyuni Area, Mombasa
 9. The Old House, Miritini, Vikobani, Mbuyuni Area, Mombasa;
 10. The Village Market at Miritini, Vikobani Area, Mombasa;
 11. The Village Market at Miritini, Vikobani Area, Mombasa; and
 12. Motor vehicle registration number (Particulars withheld) 105G Toyota Succeed.

The total estimated value of his assets was Kes. 54,400,000.00. The court was provided with a valuation report prepared by the firm of Musyoki & Associates dated 8th December 2022, which provided a basis for the estimate. According to the Petitioners/Respondents, the deceased had no liabilities.

4. Before the Petition was gazetted, the objector, Kasyoka Mutemi (hereafter “Kasyoka” or “the Objector”), the mother of two of the deceased’s children, filed an objection to the Making of Grant under Rule 17 of the Probate & Administration Rules, 1980, on the basis that:-
 1. That the Objector is a dependant of the deceased and mother of 2 of the listed children of the deceased, namely GM , a son and GW , a daughter, but she herself has been deliberately left out of the application for a grant whereas she is entitled to the estate as a beneficiary;
 2. That the proposed Petitioners have deliberately sought to mislead and made grave misrepresentations to this Court by including one child, namely, HC , who is not a biological child nor an adopted child of the deceased and was only adopted by the 1st Proposed Petitioner long after the death of the deceased and is not a legally recognized beneficiary of the estate in law;
 3. That the proposed Petitioners have included the personal properties of the Objector in the List of Assets whereas the same do not form part of the deceased’s estate.
5. Under Rule 17 of the Probate & Administration Rules, anyone who wishes to object to the issuance of the grant may do so within 30 days of the publication of the notice of the Petition in the Kenya Gazette. Rule 7(4) of the said Rules requires publication in the Gazette. In this case, however, the objection was filed on 24 March 2023, whereas the Notice of the Petition was published in the 6 April 2023 edition of the Kenya Gazette (Kenya Gazette Notice No 4544, dated 24 February 2023).



6. The objection was opposed by the 1st Applicant. She filed a Replying Affidavit sworn on 3rd May 2023, vide which she averred that she was the only legal wife of the deceased. She attached their marriage certificate, showing that they got married on 20th December 2003 at Jet Ministries Sanctuary Mombasa. She denied that the Objector was a dependant of the deceased. She, however, conceded that Kasyoka's children were beneficiaries having been sired by her deceased husband out of wedlock. She averred that HC was the child of the deceased, having been adopted by him prior to his untimely death. Ms Mwasawa denied that the Objector's personal properties had been included in the list of assets owned by the deceased.

Answer to the Petition and Petition by Way of Cross Application for Grant

7. The Objector filed an Answer to the Petition for a Grant dated 26 June 2023, vide which she claimed to be the deceased's second wife, having undergone a customary marriage to him. She averred that she was the mother of two of his children. In her view, the first Petitioner was going against an agreement reached by the family on how the estate would be distributed.
8. She denied that HC had been adopted by the deceased. She stated that some property belonging to her situated at Miritini had been wrongly listed as belonging to the deceased. On the other hand, the first Petitioner had not listed all the assets of the deceased.
9. Kasyoka filed a Petition by way of Cross Application for a Grant of Letters of Administration Intestate in which she identified the assets of the deceased as being:-
1. Residential house at Vikobani(Miritini);
 2. Residential house at Mbuyuni (Miritini);
 3. Alidina Main House;
 4. Alidina Swahili House;
 5. Alidina Gorofani House;
 6. Residential house at Mikindani Kijiweni;
 7. Premises at Westgate;
 8. Premises at Village Market (Miritini);
 9. Plot at Mbulia, 5 acres;
 10. Taveta Plot, 2 acres;
 11. Voi Plot;
 12. Msharini Plot;
 13. High Rise Property (half share);
 14. Taveta Sesi plot;
 15. Motor vehicle registration number (Particulars withheld)105G Toyota Succeed
 16. Bank account. She estimated his wealth as being Kes.55,000,000.00



10. Regarding his liabilities, she listed them as the balance of the purchase price for the High Rise property (Kes.50,000.00), the balance of the purchase price of the Taveta Property (Kes.80,000.00), and the unstated KRA tax on rental income.
11. The objector listed herself, the 1st and 2nd Petitioners, GM , GW , and RN as the beneficiaries of the estate of the deceased. The Court, however, notes that the letter of the Assistant Chief, Kwa Shee Sub-location Changamwe, dated 26 August 2021, which she attached, lists Baby HC as a beneficiary.

Response by the Petitioners

12. The Objector's averments were denied by the 1st Petitioner in the affidavit she swore on 11th July 2023. She reiterated that she was the sole wife of the deceased. In her view, she had made full and frank disclosure of the deceased's estate. The 2nd Petitioner was included as she is the mother of Roy Ndiro, not as the wife of the deceased. Regarding the house in Miritini, the 1st Petitioner averred that it belonged to the children of the deceased. She urged the Court to dismiss the objection.

The Hearing

Evidence of the Objector

13. The Objector's case was heard on 15th November 2023. The objector reiterated the contents of her affidavit. She testified that the name on the marriage certificate produced by the 1st Petitioner/ Respondent differed from that on her national identification card, raising doubt as to her identity. She testified that she was listed as a wife in one of the letters written by the chief. Regarding the alleged adoptive child. She denied that the deceased adopted her and that the adoption was done after he died.
14. On cross-examination, she admitted that her children were named as dependents. She also admitted that she didn't have a marriage certificate. She stated that family members had convened a meeting at home to discuss the deceased's properties. Although she claimed to own some of the properties listed by the Petitioners, she conceded that she had not produced documents of title to back up her claim. She admitted to being in control of one house belonging to the deceased and that she collects rent from it.

1st Petitioner's Oral Testimony

15. The 1st Petitioner testified that she was the wife of the deceased. She produced their marriage certificate, a letter from the chief and adoption documents. She averred that the law only recognizes lawful wedded wife and no other. She prayed that the objection be dismissed. She explained that the name on her marriage certificate has her marital name, whereas her national identity card does not. She stated that the adoption process began before the deceased died. She opposed the addition of the objector as a co-petitioner, saying that she is difficult and fights them in cohorts with family members.
16. On cross-examination, she stated that her name is Claris Wanjala Mwasaru. She admitted that the wife's name in the marriage certificate is given as Claris. M. Mwasaru. She explained that Mwasaru was the husband's name. She admitted that neither Wanjala nor Mwasawa had been written in the marriage certificate. She admitted that the objector had 2 children with the deceased. She further admitted that the objector was named as a beneficiary in one of the letters written by a chief but explained that that was done at the behest of the family. Claris showed a willingness to have Kasyoki Mutemi incorporated to represent the interests of her children. She reiterated that the deceased signed the adoption papers. When asked for evidence, she stated that the same got burned when her house was set on fire.



2nd Petitioner's Oral Testimony

17. The second witness for the Petitioners was Ms. Avril Achieng. Avril is the second Petitioner. She stated that Claris was the deceased's wife, while Kasyoka was the mother of the deceased's children. It was her testimony that she had a child with the deceased. She prayed that the objection proceedings be dismissed. She accused Kasyoka of being slippery and not wishing to cooperate with them as she wanted the deceased's properties to be shared with members of his family.
18. On cross-examination, she stated that the Objector does not want to cooperate with them. However, she indicated that if she (Kasyoka) changed, she wouldn't have a problem with her.
19. At the close of the case, parties were directed to file Written Submissions.

Written Submissions of the Objector

20. Messrs. Wangari Wahome & Co. Advocates, learned counsels for the Objector, submitted that the Objector had 2 children with a problem with the deceased. Whereas she didn't have a problem with the Petitioners being appointed as administrators she took great exception to being left out as a Co-administrator. In her view, the deceased had 3 wives. It was submitted that although Claris Wanjala Mwasawa purports to be a sole wife the marriage certificate is in the name of Claris M. Mwasaru.
21. As Avril Achieng had been named as a co-administrator, the Objector submitted that what was sauce for the goose was also sauce for the gander and that she, too, should be named as a co-administrator for and on behalf of her 2 children. She objected to the adopted child being made a beneficiary of the estate.

Written Submissions of the Petitioners

22. The Petitioners submitted that the Objection lacks merit. Their main point is that the objection proceedings commenced before the petition was gazetted. As earlier indicated, the objection was filed on 24th March 2023, whereas the petition was gazette on 6th April 2023. This Mr. Omwenga, learned counsel for the Petitioners, urged is a fatal defect. The Court was referred to the decisions of the Court in Nyamira Succession Cause No E001 of 2021; David Ogega Ochwangi versus Rudiah Kemunto Ochwangi & Another, Busia Succession Cause No. E011 of 2020, Annetriza Ekesa & Another and Monica Wambui Njunge in support of the said contention.
23. It was submitted that the Objector wasn't the wife of the deceased. Counsel submitted that the meeting in which she was held out as a wife was convened by intermeddlers. It was urged that no assets were left out. Regarding Baby HC, he submitted that the deceased was in the process of adopting her at the time he died. Counsel relied on the case of *In re Estate of Stephen Kimotho Karanja* [2022]eKLR.
24. The Court was urged to dismiss the objection on the ground that the Objector wasn't the deceased's wife or dependant. In support of this contention, the Court also referred to the case of Kitale Succession Cause No 175 of 2008: *Catherine Matei Chena versus Pradeep Harish Hindocha*.
25. It was urged that Baby HC was in the process of adoption at the time the deceased died and that she was, therefore, the deceased child.

Analysis and Determination

26. I have considered the objection, the Answer to the Petition and Petition by way of Cross Application, the Replying Affidavit, and the Oral testimonies of the parties herein. I must now make my determination based on the evidence and the law.



27. In my view the following are the issues that fall for my decision.
1. Whether the objection was premature?
 2. Was the Objector the deceased's wife and or dependant?
 3. Whether the Petition was coloured with fraud?
 4. Whether Baby HC is the dependant of the deceased?
 5. What orders should be issued?

Was the Objection Premature?

28. Rule 17(1) of the *Probate & Administration Rule* provides as follows:-

“(1) Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection”

29. Rule 7 (4) of the said *Rules* provides as follows:-

“(4) The registrar shall cause to be inserted, at the cost of the applicant, in the Gazette and, if he so decides, in a daily newspaper, and to be exhibited conspicuously in the courthouse attached to the registry where the application is intended to be made, a notice of the application for the grant in Form 60 inviting objections thereto to be made known to that registry within a period, to be specified in the notice, of not less than thirty days from the date of the last of such publications”

30. From the foregoing it is quite clear that the Rules provide that objections may only be made after a notice of the filing of the petition has been published in the Kenya Gazette. Publication in the Gazette serves a very important public purpose; it notifies all those who have a claim against the estate of the filing of the petition and invites them to lodge their claims. Since succession is a Court process, and with a view to the best use of the Court's limited time, Objectors, if any, are given 30 days to state their case. Filing objections before the publication in the Gazette would not result in the best use of the Court's time, and it is for that reason that Courts have frowned on such actions.

31. In this case, the objection was filed about 2 weeks before the notice in the Kenya Gazette was published. What should the Court do? Article 159(2) (d) of the *Constitution* of Kenya, 2010 lists as one of the principles that the Courts in Kenya should bear in mind when exercising judicial authority, that:-

“Justice should be administered without undue regard to Procedural technicalities”

32. It is clear that the Objector acted with undue haste in filing her objection before its publication in the Kenya Gazette. That notwithstanding, was any injustice thereby caused? I am unable to think of any. The Petition was subsequently published on 6th April 2023. Anyone who could have objected



to the grant got an opportunity to do so. This is what, in my view, distinguished this case from the circumstances in *In re Estate of Quintius Ekesa(deceased)* [2021] eKLR.

33. Our Lord, in Mark 2:27, tells us that “the Sabbath was made for man, and not man for the Sabbath.” The spirit of the Saviour’s remarks also applies to the Rules of the Court. Rules serve a purpose: to ensure that all have access to justice irrespective of status and that litigants get fair hearings. I, therefore, find and hold that there is a valid objection before this Court.

Was the Petition made without full disclosure of material information?

34. This Court notes that the 2 Petitioners listed all the known children of the deceased, even those born by the objector. In the circumstances, I am unable to agree with the objector that the 2 Petitioners withheld material information or otherwise misled the Court.
35. Although the Objector listed some assets, most of which are situated in Taita Taveta County, she did not provide this Court with proof that these belonged to the deceased. Without copies of titles and most recent searches this Court is unable to decide if the said properties were actually owned by the deceased, and therefore the Petitioners, assuming they knew about them, withheld that information from court,

Was the Objector the wife of the deceased?

36. The 1st Petitioner was married under the *African Christian Marriage & Divorce Act*, Cap 151 Laws of Kenya (now repealed) on 20th December, 2003. Although the bride is indicated as being Claris M. Mwasaru, there can be no doubt that Claris M. Mwasaru is the same person as Claris Wanjala Mwasara. This Court is persuaded by the Oral evidence of the 1st Petitioner that the Minister Celebrating Marriage used the name of her new husband in the marriage certificate as she was then newly married to the deceased. Her status as a spouse was confirmed by the 2nd petitioner and also by the letter of the chief that was filed in Court. Her marriage to the deceased was monogamous by law. That being the case the deceased could not have lawfully contracted another marriage to the Objector. In light of that this Court is not persuaded that the Objector was the wife of the deceased.
37. Although she claimed to have contracted a customary marriage to the deceased, which marriage would have been void for the reasons I have given above, no evidence to back the said allegation was produced. In view of the foregoing, I find and hold the Objector wasn’t married to the deceased and cannot therefore be his dependant at law, upon his demise.
38. Although she wasn’t married to the deceased she had children with him. These children GM and GW are the dependants of the deceased and thus entitled to benefit from his estate.

Was Baby HC a Dependant of the Deceased?

39. Section 29 of the *Law of Succession Act* provides that:-

“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.”

Section 2(4) of the [Law of Succession Act](#) defines a child as being:-

- (2) “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.”
40. I have seen the letter from Little Angels Network dated 30th April 2011. This letter would appear to confirm that the deceased and accepted Baby HC had his own child prior to his death on 29th May 2021, a month later. In the circumstances, I am unable to agree with the objector on this ground.
41. In the circumstances of this matter it matters not that the adoption proceedings had not been completed. It sufficient that the deceased had prior to his death accepted HC as his child and had assumed permanent parental responsibility.

Was a full inventory of the Assets of the Deceased Given?

42. I have looked at the list of assets produced by the Objector. The same is broadly similar to what the Petitioners produced. The values given for the assets are almost the same. The Objector did not produce ownership records for the properties she claims the Petitioners left out. This Court is not therefore able to determine if the said assets belong to the estate. The court is therefore unable to agree with the Objector on this ground and the same must similarly fail.

Disposition

43. What order should be issued? It is undoubted that the Objector had 2 children with the deceased. The 2 children are minors. Since a continuing trust in favour of the minors is created by the operation of the law, the objector is the best person to safeguard the interests of her children. Therefore, this Court finds and holds that she should be an administrator with the Petitioners. For the avoidance of doubt, she, just like Avril Achieng, is not a beneficiary on her own account.
44. The orders that will therefore be issued are as follows:-
1. The Objection filed by the Objector is dismissed
 2. Letter of administration intestate to issue forthwith to Claris Wanjala Mwawasa, Avril Achieng and Kasyoka Mutemi.
45. This being a family matter this Court makes no orders as to costs.
46. Orders accordingly.

DATED AND SIGNED THIS 8TH DAY OF MARCH 2024 AT MOMBASA.

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GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Omwenga for the Petitioners/Respondents;



Ms. Wahome holding brief for Mr. Mboha for the Objector/Applicant;
Arthur - Court Assistant.

