



In re Estate of Nelson Veronica Njoki (Deceased) (Succession Cause E2039 of 2021) [2024] KEHC 4427 (KLR) (Family) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E2039 OF 2021
HK CHEMITEI, J
APRIL 11, 2024**

BETWEEN

EDITH NYAMBURA MAWIRA APPLICANT

AND

NAHASON MAWIRA ADMINISTRATOR

RULING

1. This ruling relates to the application dated 22nd December, 2022 filed by the Applicant, Edith Nyambura Mawira; seeking for ORDERS THAT:
 - (a) Spent.
 - (b) Spent.
 - (c) This Honourable Court be pleased to disqualify and declare the Respondent, Nahason Mawira, as unfit to be the administrator of the Estate of the late Nelson Veronica Njoki (Deceased).
 - (d) This Honourable Court be pleased to issue an order for the Respondent, Nahason Mawira, to be substituted with Jane Grace Nyaguthi in the Petition for Grant of Letters of Administration Intestate, filed on 12th October, 2021.
 - (e) The Applicant be granted leave to amend the Petition to reflect the changes in her name, from Edith Nyambura Mawira to Edith Nyambura Njoki and the substitution of the Respondent, Nahason Mawira, with Jane Grace Nyaguthii.
 - (f) Costs of this application be provided for.



2. The application is supported by supporting affidavit sworn by Edith Nyambura Mawira on 22nd December, 2022 and further affidavit sworn on 25th April, 2023. In a nutshell, she avers that the respondent has intermeddled with the deceased's estate by illegally transferring motor vehicles and funds from the deceased's bank accounts to himself. She prays that he be declared unfit to be an administrator of the deceased's estate and he be substituted with Jane Grace Nyaguthii, the deceased's sister.
3. The application is opposed by replying affidavits sworn by Nahason Mawira on 10th February, 2023 who avers inter alia that the deceased was his wife under Meru customary law. The applicant, Faith Gakii Mawira (minor) and Gabriella Nuna (minor) are his daughters and grand child who lived with him and the deceased and that the applicant moved out, on her own volition, on 2nd October, 2022.
4. He averred that the applicant was in possession of motor vehicle registration number KCF 336J which he gave to her on her birthday and that he purchased at Kshs. 780, 000/=.
5. That all the properties were registered under the deceased's names for ease of access to loans from her employer since he is a businessman with no steady source of income.
6. That the case under OB NO. 60/ 09/ 08/ 21 was withdrawn by the ODPP vide letter dated 28th October, 2021 for lack of sufficient evidence to sustain a charge of obtaining registration by false pretense and for the matter to be canvassed under succession laws.
7. He went on to depose that the proceedings under Criminal Case No. 2461 of 2022 Republic vs. Nahason Mawira are still pending hence he should be presumed innocent until proven guilty.
8. That the rental income was paid to an account he jointly owned with the deceased.
9. He denied having any intention to disinherit her step daughter and as a matter of fact he has been trying to attempt a settlement which has not been forthcoming from her.
10. He deposes that Jane Grace Nyaguthi is a stranger and not entitled to the estate of the deceased. The chief's letter indicates that they are all beneficiaries of the deceased.
11. The applicant has filed written submissions dated 21st August, 2023 and has placed reliance on the case of RE ESTATE OF GURDIAL KAUR SIHRA (DECEASED) (2018) eKLR where the court stated that, "It is trite that among the duties an Administrator is supposed to perform is to protect, collect and preserve the Estate and in case of a suit defend or institute one for and on behalf of the estate. In the instant case, the 1st cross petitioner (objector) is a litigant in LEC case No. 216/ 2013 where he sued his late mother (deceased) and Jagjeet Singh. The suit is still pending. What will happen if he were appointed as an Administrator? How will he balance the two interests where one is a plaintiff and at the same time the defendant by virtue of being an administrator? It is my finding that there will be a conflict of interest if Kulwant Singh (1st Objector) is appointed an Administrator. For these reasons, Kulwant Singh Sihra is disqualified in the interest of justice."
12. The Respondent has filed submissions dated 23rd June, 2023 placing reliance on:
 - a. Section 66 of the *Law of Succession Act* Cap 160 Laws of Kenya.
 - b. Section 119 of the *Evidence Act* of Kenya.
 - c. *MNK vs. POM: INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) (Amicus Curiae)* (Petition 9 of 2021) KESC 2 (KLR) where the court stated that, "...if a man and a woman cohabited and held themselves out as husband and wife, that in itself raised a presumption that they were legally married. Section 119 of the *Evidence Act* provided that



courts could presume the existence of any facts which it thought likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Courts were permitted to make a prima facie legal inference that certain facts existed without proof, regard being taken to the common cause of natural events and human conduct in relation to the facts of a particular case.

The court further established the strict parameters within which a presumption of marriage could be made as:

- a. The parties must have lived together for a long period of time.
- b. The parties must have the legal right or capacity to marry.
- c. The parties must have intended to marry.
- d. There must be consent by both parties.
- e. The parties must have held themselves out to the outside world as being a married couple.
- f. The onus of proving the presumption was the party who alleged it.
- g. The evidence to rebut the presumption had to be strong, distinct and satisfactory.
- h. The standard of proof was on a balance of probabilities.

The court continued and noted that, “Whenever two parties by their joint efforts acquired property to be used for their joint benefit, the court may impose or impute a constructive or resulting trust. The legal owner was bound to hold the property in trust for them both. That trust did not need any writing. It could be enforced by an order for sale, but in a proper case, the sale could be postponed indefinitely. It applied to husband and wife, or engaged couples and to man and mistress and maybe to other relationships too. Their contribution, financial and otherwise, to the purchase of furniture and the making of their home, were on the basis of, and for the purpose of that joint relationship.”

- d. *IN RE ESTATE OF GEORGET MURIITHI GITAH (DECEASED)* eKLR the court held that, “...it is clear that under Part V referred under Section 66 (b), the persons given priority over an intestate are the surviving spouse and children. Despite the earlier arguments that the Respondent applied for letters of administration under Section 39 of the *Law of Succession Act*, Counsel for the respondent in his submissions acquiesced that in accordance with the law as cited above, the objector held a higher priority than the respondent. This is the correct position in law. Being a surviving spouse of the deceased, the objector herein ought to have been considered before the respondent. As established in the (Ojodeh case) under succession law, parents are not in the same footing with widows and children. In extensor, the sister of the deceased in the instant matter is not on equal footing with the surviving spouse and children of the deceased.”

ANALYSIS AND DETERMINATION:

13. I have carefully considered the application, the responses as well as the written submissions filed by the parties and the issues for determination are:



- a. Whether the Respondent should be disqualified and declared unfit to be an administrator of the estate of the later Nelson Veronica Njoki (Deceased)?
 - b. Whether the Respondent ought to be substituted with Jane Grace Nyaguthii in the Petition for Grant of Letters of Administration Intestate, filed on 12th October, 2011.
 - c. Whether the Applicant ought to be granted leave to amend the Petition to reflect the changes in her name, from Edith Nyambura Mawira to Edith Nyambura Njoki and the substitution of the respondent, Nahashon Mawira, with Jane Grace Nyaguthii?
 - d. Who should be awarded costs.
 - e. Whether the respondent is fit to be a co – administrator in the petition of letters of administration intestate in the estate of the later nelson Veronica Njoki.
14. In re Estate of James Mwangi Gakure (Deceased) [2019] eKLR the court, in finding that the applicant was the deceased’s wife, stated:

“*In re Estate of DMM (Deceased)* [2018] eKLR, this court stated as follows:

‘In the case of *Njoki vs. Mutheru and Others* Civil Appeal No. 71 of 1989 (UR), Kneller JA reading the judgement of the court held that: -

- a) The onus of proving a customary marriage is on the party who claims it.
- b) The standard of proof is the usual one for civil action, balance of probabilities.
- c) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.

Further in the case of *Hortensiah Wanjiku Yawe vs. The Public Trustee*, Civil Appeal No. 13 of 1976, 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.” Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage [Emphasis mine].”

15. Looking at the matter at hand vis a vis the above cited authorities I am persuaded that there is a prima facie evidence that the Respondent was married to the deceased herein or at least lived together as husband and wife till her demise. Any contrary view could of course be raised at a later date.
16. Secondly the Applicant has not denied that she was a step daughter to the respondent or at all. There could have been misunderstanding after the deceased passed on but generally they stayed together as a family.
17. In the premises and taking into account that the applicant is already an adult and the estate belonged to her mother, I think it is only logical that she be involved in its administration. This is for her sake and that of her child as well.
18. The other issues of how the assets were acquired shall be determined at the distribution stage. The same goes with whether or not the respondent intermeddle with the estate after the deceased passed on and without the authority of this court.



19. The request to include the deceased sister as an administrator in my view is not necessary for the reasons given above. In any event there is no evidence of how she related with her or the applicant and the respondent herein.
20. This is a case that ought to be determined quickly so as to allay any fears of wastage in the estate. The earlier orders of opening an account to take care of the rental income still stands and I suppose both the applicant and the respondent shall manage well and be able to provide accounts as and when required.
21. The application is therefore allowed as follows;
 - a. The applicant is granted leave to amend the petition within 14 days from the date herein to reflect the changes in her name from Edith Nyambura Mawira to Edith Nyambura Njoki.
 - b. The petition for letters of administration intestate filed on 12th October, 2021 be amended so that the applicant, Edith Nyambura Njoki and the respondent, Nahason Mawira are appointed as joint administrators to the Estate of Nelson Veronica Njoki.
 - c. The two administrators are hereby directed to keep proper accounts of the estate.
23. Each party shall bear its own costs.

Dated signed and delivered via video link this

11th day of April 2024.

H K CHEMITEI.

JUDGE.

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