



**In re Estate of Isaac Sote Injerah (Deceased) (Succession Cause
83 of 2005) [2024] KEHC 4769 (KLR) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4769 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 83 OF 2005**

PJO OTIENO, J

MAY 6, 2024

BETWEEN

GODFREY NEWTON SOTE 1ST PETITIONER

GILHARD KIVALULI SOTE 2ND PETITIONER

AND

ROSSY GALIHAMUTWE SAKALI OBJECTOR

RULING

1. For my determination is the petitioners' affidavit of protest against the Summons for Confirmation of Grant dated 19.6.2012. The Affidavit of Protest was sworn on 31st October, 2012.
2. In the said affidavit, the petitioners contend that the objector, who is listed as a wife of the deceased in the summons for confirmation of grant dated 19th June, 2012 is a stranger to the estate of the deceased. They argue that the objector had an affair with the deceased which resulted in a child by the name of Boniface Amukuma Sote and that the objector is now married to one Sekosela Macheso alias Khalai and thus not entitled to the estate of the deceased.
3. In the supplementary affidavit of Rossy Galihmutwe Sakali sworn on 17th October, 2013, she responds to the affidavit of protest by claiming that she got married to the deceased in the year 1977 and that together they resided at their matrimonial home in Murumba village on parcel of land No. Butsoso/Shikoti/647.
4. In canvassing to the Affidavit of Protest, parties have filed their respective written submissions by which the Petitioners submit that the objector lost her right to a share of the estate of the deceased under section 35(5) of the Law of Succession Act the moment she remarried, if ever she was a wife of the deceased.



5. For the Objector, the Submissions filed contends that no proof has been availed to confirm that indeed she had remarried to one Methusela K. Kacheso to disinherit her from the estate of the deceased.

Issue for determination

6. I have looked at the affidavits and the submissions by the parties and the issues that arise for my determination is whether Rossy Galihmutwe Sakali is a wife of the deceased for purposes of this succession cause.

Analysis

7. Persons entitled to the estate of a deceased person have been listed under section 29(a) of the Law of Succession Act to include 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.
8. Whether or not Rossy Galihmutwe Sakali is a wife to the deceased is the subject of contention in the subject application with the petitioners/applicants arguing that the deceased only had one wife that is Phoebe Sote who is since deceased. This court took viva voce evidence from three witnesses to determine whether the objector/respondent was a wife of the deceased and since the objector alleges that she was married in the year 1977 when PW1, the 1st petitioner/applicant was barely a year old and PW2, the 2nd petitioner/applicant was yet to be born according to their evidence, I will consider the evidence of PW3, Elisha Avuova who knew the deceased and his family. It was the testimony of PW3 that the deceased only had one wife that is Phoebe Sote. On cross examination he stated that he had been in Nairobi in the 1900s and 1990s when he retired. If at all the deceased and the respondent married in 1977, it would have been possible for the information not to be within the knowledge of PW3 since he was in Nairobi. It is trite law under section 107 of the Evidence that he who alleges must prove and this being a court of evidence, I find that the applicants have failed to prove the allegation that the respondent was not a wife of the deceased.
9. In the Respondent's Supplementary Affidavit sworn on 17th October, 2013, she has adduced an agreement between herself and the late Phoebe Sote in which they seem to agree on how to distribute the estate of the estate. The agreement has not been controverted or questioned by the petitioners/applicants in their replying affidavit to the supplementary affidavit sworn on 30th October, 2013 and this muteness appears to confirm that indeed the respondent was a wife to the deceased.
10. Having established that the respondent was a wife to the deceased, the next question that this court is called upon to determine is whether the respondent has since been remarried thereby denying her a share of the deceased's estate in line with the provisions of section 35(5) of the Law of Succession Act.
11. In support of the claim that the respondent has since remarried, the petitioners have adduced pleadings in CMCC Civil Suit No. 56 of 2012 in which one Methusela K. Kacheso claims that the respondent is his wife in his witness statement. In my view, pleadings are mere statements which ought to be proved through the production of evidence or this case, through the cross examination of the witnesses alleging a fact. In the absence of that, the pleadings are just mere allegations.
12. In this matter, apart from alleging that the Protestor had remarried, the Petitioner did not adduce any evidence in support of that assertion. The evidence of the Protestor remains uncontroverted and the allegations by the administrator remains mere allegations. The law at Sections 107 and 108 of the Evidence Act is clear that he who asserts or pleads must support the same by way of evidence. See *Janet Kaphiphe Ouma & Another v Marie Stopes International (K)*.



13. The Court thus finds that the objector/respondent was a wife of the deceased and remained such wife of the deceased for purposes of this succession cause. The application of protest is thus disallowed with no order as to costs.
14. I further direct that the Petitioners do file a fresh proposal for distribution in light of this Ruling within thirty (30) days from today, listing all the assets of the deceased and all the beneficiaries of the deceased including Lydia Mmera, a daughter to the deceased. If any of the beneficiaries wishes to denounce their right of inheritance, let them swear affidavits to that effect and file in Court within 30 days from today. Matter is stood over for hearing of the application for Confirmation of Grant on the 29.7.2024.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF MAY, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Nyikuli for Getanda for the Petitioners

No appearance for Khayumbi for the Objector

Court Assistant: Polycap Mukabwa

