



REPUBLIC OF KENYA



**In re Estate of James Wainaina Ngige (Deceased) (Succession Cause
2828 of 2014) [2024] KEHC 8112 (KLR) (Family) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2828 OF 2014
PM NYAUNDI, J
JUNE 21, 2024
IN THE MATTER OF THE ESTATE OF JAMES WAINAINA NGIGE (DECEASED)**

JUDGMENT

1. James Wainaina Ngige (the Deceased) died on 9th April 2012. Lucy Nyakinyua Ngigi, petitioned this court for grant of letters of administration intestate, as the as the deceased's wife. The said grant was issued on 24th March 2015 and confirmed on 30th November 2015. The confirmed grant was subsequently amended on 5th September 2016.
2. In her Petition, the Deceased is said to be survived by the following and his Estate comprise the following assets;
 - a. Lucy Nyakinyua Ngigi – wife.
 - b. James Ngige Ngigi- son.
 - c. James Njenga Ngige- son.
 - d. James Ndungu Ngige- son.
 - e. Teresia Wamaitha Ngige - daughter.
 - f. Peter Kahiu Ngige- son.
 - g. George Kiarie Ngige- son.Assets
 - a. Ngong/Ngong/49977.
 - b. Ngong/Ngong/49978.
 - c. Kitengela Group No. 50 Kajiado- 10 Acres.
 - d. Ngong Plot No. 647 (“B”) -residential.



- e. ONgata Rongai Plot No. 636 (“B”)- Residential.
 - f. Ngong Plot No. 193.
 - g. Ongata Rongai Plot No. 118.
 - h. Ole Gasasi Plot No. 191.
3. Jane Wambui, the objector, states that she is the 2nd wife of the deceased. She filed an application dated 30th January 2023 seeking the following orders;
- a. That the Certificate of Confirmation of Grant amended on 5th September 2016 be revoked and or annulled.
 - b. Costs of this application be provided for.
4. The Summons is presented pursuant to Section 76 of the *Law of Succession Act*, Administration Rules and all enabling provisions of the law and is supported by the Applicant’s sworn affidavit of even date. The Objector avers that she was the 2nd wife of the deceased and they had four children together. It is her contention that the grant was obtained by making false statement and/or non-disclosure of material facts, and that therefore the proceedings to obtain the grant were defective in substance. She deposed that she was not notified or invited to participate in the Petition.
5. In support of her claim that she ought to have been notified she submits that the chief’s letter (Lemelepo location) dated 22nd November 2011 indicates that the deceased was survived by two wives and that he had sub-divided the parcels of land to his two wives. She further alleges that by letter dated 29/11/2011 the deceased indicated that he had two wives.
6. The Administrator has sworn an affidavit in opposition on 14th March 2023, she states that she filed for letters of administration and no one filed an objection for close to 9 years. She averred that the objector has not proved that she was married to the deceased or that she had children with the deceased. She avers that the deceased hailed from Ongata Rongai and not Lemelepo as alleged by the Objector. That the objector and the chief of Lemelepo attempted to fraudulently and illegally remove restrictions placed over one of the deceased’s properties.
7. She argued that the Objector did not explain why she did not petition for letters of administration yet she had the letter from the chief introducing her as a widow. It is the Petitioner’s contention that she obtained the grant of letters of administration and the confirmed grant legally she followed due procedure, her Petition had the rightful beneficiaries and they attended Court She urged the court to dismiss the objector’s summons for revocation.

Evidence

8. OW 1, Jane Wambui Wainaina (the Objector) adopted her witness statement as her evidence in chief. She told the court that the deceased was her husband. They were blessed with four children. She stated that she had been excluded from her husband’s estate.
9. During cross examination, she stated that they formalized their marriage in 1987. Their eldest child was born in 1986. At the time she was married to the deceased she had a child from a previous relationship. She had the consent of her children to lodge the application for revocation. She was aware that the deceased had another wife. She lived with the deceased in Ongata Rongai until his death. She took the deceased to hospital and paid the hospital bill. She had the chief’s letter but she didn’t lodge a petition since the deceased had a first wife. She learnt of these proceedings while attending a case in Kajiado.



- She stated that she wanted a share of the deceased's estate. That she helped the deceased develop all his properties.
10. In re-examination, she testified that her brother in law, Kiarie and her mother were present during her ruracio.
 11. OW2 was Dennis Ngige Wainaina. He stated that he was the third born son of the deceased in the second house. He adopted his witness statement dated 4/7/2023 as his evidence in chief. His evidence was that the deceased lived with them. The deceased took him to the house of the 1st wife. The Administrator's daughter lived with them at one time and schooled with OW1's son George Kiarie.
 12. During cross-examination, he stated that the deceased was his father. He testified that he accompanied the deceased to pay dowry for the Objector. They experienced challenges when the deceased died because the first family took control of his property. They were unable to attend the deceased's burial because of the hostility of the first wife. He told the court that he was willing to undergo a DNA test to prove his paternity.
 13. In re-examination, he stated that the deceased was indicated as his father in his birth certificate. That the deceased was accompanied by his elder brother and an elder when he went to pay dowry.
 14. OW3 was Benard Salaash Lewetta. He stated that the Objector is a sister to his wife. He adopted his witness statement dated 4/7/2023 as his evidence in chief. He told the court that he contributed some money when the deceased went to pay dowry at the Objector's home and that he accompanied him on that occasion. He knew the deceased and objector as husband and wife since they lived together. He also contributed towards the medical bill and funeral of the deceased. When the deceased died, there was a burial dispute.
 15. During cross-examination, he stated that he attended the dowry negotiation as an elder. The deceased's brother George was also present. He was aware that the deceased had another family.
 16. OW4 was Kennedy Wanyoro Wainaina. He stated that he was the deceased's son. He adopted his witness statement dated 5/7/2023 as his evidence in chief. His evidence was that they took the deceased to hospital when he fell ill. When the deceased died, there was a burial dispute between the first wife and his mother, the Objector.
 17. During cross-examination, he stated that the deceased related well with the two families. Lucy had even visited their home. The deceased paid his school fees in primary and high school. They did not file a petition because they thought they would resolve the issue as a family.
 18. OW5 was Margaret Wairimu Njuguna. She told the court that she was the mother of the Objector. Her evidence was that, the deceased and objector cohabited a and later formalised their marriage. The deceased took a goat to her according to Kikuyu Customs. The deceased later went back for the second ceremony with elders and his brother. She was aware that Lucy was the deceased's first wife.
 19. During cross-examination, she stated that the Children of the deceased, by the Objector, brought goats to her before the dowry negotiation ceremony. According to her, children do not participate in dowry negotiations.
 20. OW6 was Paul Kiarie, the deceased's elder brother. He adopted his witness statement dated 5/7/2023 as his evidence in chief. His evidence was that the deceased was married to one wife, the Objector. The deceased paid dowry which included 2 sheep and Kshs. 42,000 in 1987. The deceased was accompanied by some elders and him. The deceased also lived with Lucy although he did not pay her dowry. The



deceased built two houses for the Objector and Lucy at Kandisi. Lucy demolished her house and went to live at Quarry. She later came back to occupy the house of the Objector.

21. The deceased had settled the Objector at Olekasasi. The deceased lived with the Objector until his death. The Objector had five children with the deceased while Lucy had 6 children. When the deceased died, a burial dispute between the Objector and Lucy arose. He also filed a suit to be allowed to bury the deceased. He helped offset the medical bill and morgue bill. He was not involved in the deceased's burial and none of the family members attended the deceased's burial. The deceased sold 1 acre of land at Kandisi and gave Lucy proceeds from the sale. He stated that the Objector was excluded from the deceased's estate.
22. During cross-examination, he stated that the deceased did not leave Lucy at any point. When the deceased was in hospital, he stated that Lucy should not visit him. According to him, the Objector's first born was sired by the deceased. The deceased left a will which was recorded by Kimani.
23. The Administrator testified as the sole witness for the Respondent. She adopted her witness statement dated 5/10/2023 as her evidence in chief. She also produced documents marked as Exh 1-8 as her evidence. Her testimony was that the deceased was her husband and together, they had nine children. That the Objector was married to a Kariuki and later a Mburu. She was not sure if the deceased and the Objector had any children. She did not involve the Objector in these succession proceedings because she acquired all the assets that the Objector was laying claim. The assets were bought through business proceeds and registered in the deceased's name because she did not have an Identity Card then.
24. During cross-examination, she stated that the property in Quarry belongs to her. She cohabited and lived with the deceased at Quarry as husband and wife. The deceased's mother visited her home. Dowry was paid to her father. The deceased's brothers did not visit her home. She was the breadwinner because the deceased never worked. She and her children took the deceased to hospital when he fell ill. She always visited him in hospital. She never met the Objector or the deceased's brother in hospital. She paid the deceased's medical bill of Kshs. 500,000. Kiarie, the deceased's brother filed a case in court to be allowed to bury the deceased. The court ordered that she and the Objector participate in burying the deceased.
25. At the close of the trial both parties complied with the Court's directions and filed their respective submissions.

OBJECTOR'S SUBMISSIONS.

26. The Objector file written submissions dated 28th February 2024. She reiterated what was in the affidavits, her evidence and reproduced the evidence of her witnesses. She urged the court to find that she is entitled to the orders sought.

ADMINISTRATOR'S SUBMISSIONS.

27. In her submissions, the Administrator/ respondent submitted that the Applicant had met the threshold set out under Section 76 of the *Law of Succession Act* which gives the court powers to revoke a grant. Relying on the decision in *Albert Imbuga Kisigwa, Succession Cause No. 158 of 2000*, she argued that revocation of a grant is discretionary and should be exercised with caution. She argued that the Objector had failed to prove that she and her children were beneficiaries or dependants of the deceased. She sought to rely on the decisions in *In re Estate of Benjamin Kiregenyi Muiri(deceased) [2022] eKLR*, *Jeff Suleiman Abdalla & another v Duncan Otieno Ogwang [2011] eKLR* and in *re Estate of RJW(deceased) [2020] eKLR*.



ANALYSIS AND DETERMINATION

28. I have carefully considered this summons for revocation of Grant, the Reply filed thereto as well as the written submissions filed. The issue which arise for determination are as follows: -
- i. Whether the Objector and her children are beneficiaries to the Estate of the Deceased
 - ii. Whether the Court should revoke the grant
 - iii. Depending on the answer to i) and ii) above what are the consequential orders
 - iv. Who should pay costs
29. On the first issue, whether the objector and her children are beneficiaries to the Estate of the deceased? -
30. The Objector contends that the Administrator failed to disclose to the court that the deceased had two wives. She argued that she was not involved in the administration of the estate of the deceased and she and her children were disinherited. Her argument is that she was married to the deceased under Kikuyu Customary Law.
31. I will start by considering whether there was a valid Kikuyu customary law marriage between the deceased and the objector. Customary law is unwritten, and because of that its existence must be established by way of evidence, by having it proved as a matter of fact. Since the existence and application of an alleged custom is subject to proof, it is incumbent upon or the burden of proof is on the person alleging the existence of the custom and its application to the set of circumstances that he places before the court. In the instant case, the burden would be on the objector to establish the custom upon which she anchors her case. See Ernest Kinyanjui Kimani v Muiru Gikanga & another [1965] EA 735 (Newbold VP, Crabbe & Duffus JJA), Gituanja v Gituanja [1983] KLR 575 (Potter, Kneller JJA 7 Chesoni Ag JA) and Atemo v Imujaro [2003] KLR 435 (Omolo, Shah & Waki JJA).
32. The essentials of a Kikuyu customary law marriage were detailed in two writings by Eugene Cotran on customary law, the Restatement of African Law: Volume I, The Law on Marriage and Divorce, Sweet & Maxwell, 1968 and the Casebook on Kenyan Customary Law, Nairobi University Press, 1995. They have also been discussed in a number of cases such as Edith Wagithi Chiira vs. Rebecca Wangui Gichuhi [1998] eKLR (Akiwumi, Shah & Lakha JJA), Jane Mbere Komu & 3 others vs. Leah Ngendo Komu & another [1999] eKLR (Githinji J), In Re The Matter of the Estate of Samuel Kiarie Kirimire (Deceased) [1999] eKLR (Githinji), Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi [2013] eKLR (Nambuye, Karanja and M’Inoti JJA), In re Estate of Johnson Githaiga Joshua Ng’ang’a (Deceased) [2019] eKLR (Kimondo J), In re Estate of Kihara Thatu Gatu (Deceased) [2019] eKLR (Ndung’u J), In re Estate of Boniface Njenga Mweru (Deceased) [2020] eKLR (Ougo J), among others. The requisite ceremonies include the offering of the njohi ya njurio by the man to the woman’s parents, payment of mwati na harika on the day following the ceremony of njohi ya njurio. Mwati na harika symbolize the uthoni or the marriage relationship, and the couple may start cohabiting thereafter. Other ceremonies, such as ngurario, guthinja ngoima and ruracio are also in the mixture.
33. The courts have observed that customary law is dynamic, elastic and fluid, and not static, and much of the ceremonies referred to in the writings by Cotran and in the older court decisions do not necessarily happen in exactly the manner narrated in those materials, with some of the ceremonies and practices even becoming obsolete. They involved a lot of slaughter and offering of animals, but much of them have since been replaced by exchange of money. What is critical is that the essential steps and ceremonies under custom must be observed in some form or other. See Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi [2013] eKLR (Nambuye, Karanja and M’Inoti JJA).



34. The objector claims that she and the deceased got married sometime in 1987. The deceased, his elder brothers and some elders visited her parents' home and paid dowry. However, she did not have photos or any proof that indeed the customary marriage was performed. The burden was on the applicant to prove that indeed there was a customary marriage. She called her sons, the deceased's brother, her brother in law, her friend and her mother who all testified in her favour.

35. Having considered the totality of the evidence, I am not persuaded that a marriage was formalized in accordance with Kikuyu Customary law. I am however obligated to also consider whether in the circumstances I can presume the existence of a marriage based on cohabitation; I am guided by the dicta in *V R M v M R M & Another* [2006] eKLR where the Court had this to say

For it matters not whether the statutory or customary marriage are strictly proved in a marriage. The Court must go further and consider whether on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant's favour.

36. The Supreme Court in the decision of *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021)* [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) has laid down the strict parameters within which a court will presume a marriage.

These include

[64]

2. The parties must have lived together for a long period of time
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both the parties
5. The parties must have held themselves out to the outside world as being a married couple
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive
8. The standard of proof is on a balance of probabilities

37. In *MWK v A M W* [2017] eKLR Ngugi J (as he then was) summarised it thus; 'To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage'.

38. It was the evidence of the Objector that she and the deceased had cohabited as man and wife and bore children together. From her testimony and that of her witnesses, the two started living together in 1987 and were seen in public as husband and wife. There are two letters from the chief suggesting that the deceased was married to two wives. The first letter is dated 18/8/2012 and the second letter is dated 4/9/2012 written by the Chief of Lemelepo Location. Both letters indicated that the deceased was survived by two wives. The Objector also produced another letter dated 22/9/2011 stating how the deceased had distributed his property between the two wives.

39. Witnesses, OW3, OW4, OW5 and OW6 all gave evidence that the deceased and the objector carried themselves in public as husband and wife. They lived together and had children. In order issued in



Milimani CMCC No. 2188 of 2018, the two were recognized as wives to the deceased and directed to bury the deceased. Based on the totality of the evidence, I find that this is an appropriate case to presume a marriage. The Objector is therefore a beneficiary to the estate of the deceased.

40. The second limb on the 1st issue is whether the children of the Objector are beneficiaries to the estate. The Administrator denies that they are the children of the deceased. The Objector concedes that her eldest child was not sired by the deceased. It is her evidence that her other children are the children of the deceased. Both the brother of the deceased and her mother recognize the children as the children of the deceased. In addition, the Objector has presented birth certificates for her children, that show that the deceased was the father.
41. In *Joachim Ndaire Macharia Vs Mary Wangare & Another* [2008] eKLR the Court found that a birth certificate was prima facie evidence of paternity. The only way the Administrator/ Respondent could dislodge this evidence was through a DNA Test which she did not call for or mount a credible challenge to the validity of the birth certificate. Although David Mbugua is not the biological child of the deceased, he is a dependant by virtue of Section 29 (b) of the *Law of Succession Act*.
42. In the circumstances I find that
- a. David Mbugua Wainaina
 - b. Kennedy Wanyoro Wainaina
 - c. Dennis Ngige Wainaina
 - d. Faith Wamaitha Wainaina

Are children of the deceased and therefore in accordance with Section 29 of the *Law of Succession Act*, are beneficiaries of the estate of the deceased.

43. Having found that the Objector and her children are beneficiaries of the estate of the deceased. The issue is whether the grant should be revoked.
44. A Grant may be revoked as set out in section 76 of the *Law of Succession Act* which provides as follows:-

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. that the person to whom the grant was made has failed after due notice and without reasonable cause either—



- i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. to proceed diligently with the administration of the estate; or
 - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.”

45. This provision of the law was expounded upon by the court in the case of *Re Estate of Prisca Ong'aya Nande (Deceased)* 2020 eKLR where it was held as follows: -

“A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstance, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore becomes unqualified to hold any office of trust.”

46. From the above it is evident that a basis has been laid for revocation of the Grant. The power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000* where Mwita J stated: -

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take



into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

47. In re Estate of the Late Mwaura Makuro (Deceased) [2021] eKLR, Ogola J, reiterated that the overarching duty of the Court is to uphold substantive justice and invoked rule 73 of the Probate and Administration Rules in declining to revoke a grant where and Administrator had failed to administer the estate.
48. The grant herein was issued on 24th May 2015. The Applicant in the summons for revocation is principally challenging the omission of herself and her children from the list of beneficiaries. Their concern can be addressed by including the legitimate beneficiaries to the schedule and requiring a redistribution of the assets to make provision for the additional beneficiaries.
49. Based on the foregoing, I decline to revoke the grant and I make the following orders
 - i. That
 - a. Jane Wambui Wainaina
 - b. David Mbugua Wainaina
 - c. Kennedy Wanyoro Wainaina
 - d. Dennis Ngige Wainaina
 - e. Faith Wamaitha Wainainabe added to the list of beneficiaries of the deceased.
 - ii. The orders of 30th November 2015 confirming the grant and amended on 5th September 2016, along with all the consequential orders are hereby set aside and/ or vacated
 - iii. The Administrator, Lucy Nyakinyua Ngigi to apply afresh within 45 days for the distribution of the Estate of the deceased considering Sections 38 and 41 of the [Law of Succession Act](#)
 - iv. Each party will bear their own costs
 - v. Mention on 21st August 2024 before the Deputy Registrar Family Division to confirm Summons for Confirmation filed and take directions on its hearing

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF JUNE, 2024.

M NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

