



In re Estate of Elijah Onyango Abeka (Deceased) (Succession Cause 54 of 2021) [2024] KEHC 8783 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8783 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 54 OF 2021**

G MUTAI, J

JUNE 5, 2024

IN THE MATTER OF THE ESTATE OF ELIJAH ONYANGO ABEKA (DECEASED)

BETWEEN

SHADIA CAROLINE ABEKA APPLICANT

AND

SARAH CHELAGAT 1ST RESPONDENT

STAFFORD ONYANGO ABEKA 2ND RESPONDENT

RULING

1. The Petitioners herein moved this court vide petition for grant of letters of administration intestate filed on 20th May 2021 stating that the deceased was survived by 1st Petitioner/Respondent, as the widow and Stafford Onyango Abeka, Shadia Caroline Abeka, Collins Onyango Abeka, Ibrahim Minawa Abeka, Reynolds Abeka and Stephanie Abeka as the children of the deceased. The court then issued a grant of letters of administration intestate to the Respondents on 13th September 2021.
2. The Applicant was aggrieved. She thus filed the Summons for Revocation of Grant dated 4th November 2021 seeking to have the grant issued to the Petitioners/Respondents on 13th September 2021 revoked on the grounds that the procedure used to obtain the grant was defective in substance, in that no consent was obtained either from the Applicant, or of other beneficiaries of the estate of the deceased to the appointment of the administrators herein; that the grant was obtained fraudulently by the making of false statement or by the concealment from the court of material particulars, in this case by adducing a fake letter from the chief that did not capture all the beneficiaries of the deceased; that the grant was obtained by concealment of material facts that there exist other beneficiaries to the estate of the deceased; and, that the grant was obtained by means of incorrect statement of facts because the Applicant was never informed or served with copies of the Petition filed in court, which could



have afforded them the earliest opportunity to challenge the application for the grant of letters of administration.

3. The Summons is supported by the Applicant's affidavit sworn on 4th November 2021. In the said affidavit, she stated that the Petitioner/Respondents herein failed and or refused to disclose material facts to the court at the time of petitioning for the grant, in particular of the existence of beneficiaries ranking equally or in priority to them, all of whom have equal beneficiary interests to the estate of the deceased by being a spouse and or children of the deceased.
4. She further stated that the deceased had three families. However, the second spouse separated from the deceased during his lifetime and remarried, therefore giving up any interest in the deceased's estate. The three wives were blessed with two children each.
5. She deposed that after the burial of the deceased, a family meeting was held to discuss the issue of distribution of the deceased's estate.
6. She averred that the 1st Petitioner/Respondent proceeded to petition for letters of administration without the knowledge of the other beneficiaries and omitted Muhaymina, the mother of the Applicant, from the list of beneficiaries. She contended that Muhaymina was married to the deceased and was living with him as husband and wife up to the time the deceased died. She further contended that Respondents did not serve them with a petition for letters of administration intestate nor seek their consent as persons ranking equally to them.
7. She urged the court to revoke the subject grant of letters of administration intestate, have Muhaymina included as a beneficiary, and appoint administrators from each household.
8. She averred that the letter allegedly from the chief, filed by the Respondents, was not legitimate as the chief did not sign it.
9. The 1st Petitioner/Respondent filed a replying affidavit in which she denied that Muhaymina was the deceased's first wife and, thus, one of the widows and a beneficiary of the estate.
10. She denied the contents of the summons and the supporting affidavit and stated that the petition was filed pursuant to a court order. In her view, the dispute between her and the Applicant was caused by the latter's insistence on having Muhaymina included as a co-administrator and a beneficiary as a wife to the deceased, whereas the marriage between her and the deceased ceased to exist long ago.
11. She stated that the Applicant and other beneficiaries refused to cooperate with her in applying for letters of administration intestate and declined to sign the forms she sent to them.
12. The Applicant filed a supplementary affidavit sworn on 14th March 2022 in response to the Replying Affidavit, together with a list of witnesses and witness statements, all dated 14th March 2022, vide which, in the main, she reiterated her previous positions.
13. She stated that none of her family members signed the Petition because they were not involved in the process through which it was ultimately filed. The 1st Respondent also refused to include Muhaymina as a beneficiary of the deceased, hence omitting her from the list of beneficiaries.
14. She termed the 1st Petitioner/Respondent uncooperative and one who does not involve any family member in managing the deceased's estate, nor does she share the profits accrued from the said estate.
15. She averred that no bride price was ever paid, nor was a wedding celebrated, in respect of any 3 of the three wives.



16. The 2nd Petitioner/Respondent filed a replying affidavit sworn on 13th July 2023 supporting the Applicant's application. He stated that they cited all the widows of the deceased vide Citation Cause No. 14 of 2020, whereby the 1st Respondent was granted leave to petition the court for letters of administration intestate. He stated that he wished to have a member from the Applicant's family appointed as a co-administrator and urged the court to revoke the grant issued to him and the 1st Petitioner/Respondent. He averred that his deceased father was married to three wives, each blessed with two issues, and it was in the interest of justice to have each family represented.
17. He further stated that the 1st Petitioner/Respondent had frustrated his efforts as a co-administrator of the estate by being uncooperative and running the estate in a non-accountable manner.
18. He urged the court to distribute the estate fairly among the three households and to compel the 1st Petitioner/Respondent to give a complete statement of accounts of the deceased's estate from the time of his demise.
19. The Summons for Revocation of Grant was canvassed by way of viva voce evidence.
20. The Applicant was the first witness for the Applicant. She testified that the deceased was a polygamous man with three wives and 6 children, two from each household. Muhaymina, the 1st wife, got married to the deceased in the year 1985 and was blessed with two children, herself and her brother Ibrahim Minawa Abeka. The 2nd wife was blessed with two children also, namely Stafford Onyango Abeka and Collins Onyango Abeka, while the 3rd wife (the 1st Petitioner/Respondent herein) was blessed with two issues, Reynolds Abeka and Stephanie Jane Abeka.
21. She stated that she would like to be included as an administrator, have her mother recognized as the deceased's wife, and have the estate distributed equitably.
22. It was her evidence that she lived with her parents for the better part of her life until she was 18, when she left for tertiary education in Nairobi. She testified that she occasionally mingled with other family members and said that there were differences from time to time due to hostility from the 1st Petitioner/Respondent. She referred the court to several photographs she produced as exhibits 3 to 15.
23. She further testified that her mother and the 1st Petitioner/Respondent were recognised wives of the deceased herein in her grandmother's obituary, programme and eulogy, after the latter died on 12th July 2018.
24. The family held a family meeting on 28th July 2019 with the area chief and in the presence of their uncle Judah Abeka, after the deceased's funeral, during which the 1st Petitioner/Respondent indicated that the deceased did not leave any will. Her testimony was that the meetings held after the funeral were meant to reconcile the families as there was tension.
25. It was her further evidence that she was absent when the chief's letter was issued; however, she attended the deceased's funeral. She testified that according to Luo traditions, a Luo man is buried in his 1st wife's home, but in this case, the deceased was buried in his mother's home as he died without building the 1st wife a home. The deceased's home is within the grandmother's home, and the 1st Petitioner/Respondent occupies the same; however, he had two homes in Mombasa.
26. The second witness for the Applicant was John Otieno Chano. Mr Chano is a retired Senior Chief of the Kowidi Location in Kasipul Division, Homabay County. He told the Court that he knew the deceased and wrote the letter of 18th July 2019 upon the request of the 1st Petitioner Respondent. He testified that he issued the letter to Judah Abeka in the presence of family members and listed all



beneficiaries from the three households. It was his testimony that at the time he issued the letter to Judah Abeka, all family members were present, except for the 1st Petitioner/Respondent.

27. It was his evidence that the meeting held was to discuss the distribution of the estate. During the meeting, the 1st Petitioner/Respondent did not recognise Muhaymina as the wife of the deceased and claimed that she was the only wife.
28. He stated that most of the deceased's properties are in Mombasa and that they distributed the deceased's estate as agreed during the meeting held on 8th September 2019.
29. He denied giving the 1st Petitioner/Respondent any letter and averred that what she got was pursuant to a court order. It was his evidence that the letter dated 18th July 2019 was for the purpose of clarifying the identity of the deceased's heirs. It was his evidence that all he did was to arbitrate a dispute between members of his family.
30. He told the court that during the deceased's burial, Muhaymina was recognized as his wife. The deceased used to visit his rural home from time to time with his two wives, Muhaymina and Sarah. Muhaymina was married in 1985, Beth in 1987, and Sarah in 1992. It was his evidence that the 1st Petitioner/Respondent never recognized her co-wives, who, unlike her, were properly married.
31. Ms Cynthia Genga Odhiambo, a sister of the deceased, was the third witness for the Applicant. She testified that the deceased lived with her, in her household, for three years, from 1983 or 1984. During this period he introduced Muhaymina as his wife. He later on moved out and rented his place. The deceased and Muhaymina were blessed with two children, the Applicant and Ibrahim. She testified she, together with her brother, met Muhaymina's parents (now deceased). She further testified that Muhaymina visited their rural home and was known by the deceased father.
32. It was her evidence that in Luo culture, dowry is paid by taking cows from the boma, and in this case, cows were taken to her brother's home as a symbol of dowry payment. She further testified that according to the said culture dowry is paid continuously.
33. She stated that two years later, the deceased married a second wife, Beth Ojowi, with whom they were also blessed with 2 children; however, she later left and is now remarried. In 1992, he married Sarah, which caused differences in the family.
34. It was her evidence that on retirement, the deceased relocated to Oyugis, where he was running a hotel, leaving his wives in Mombasa who would visit him there. Upon his demise, the deceased was buried next to his mother as he did not have a home, just a Simba. She testified that the deceased intended to build a house for his first wife, Muhaymina. However, there was a dispute as the 1st Petitioner/Respondent did not want the 1st wife to be recognised. It was her evidence that when the 1st Petitioner/Respondent went to take the news of the deceased's death she also got a letter from the chief to be recognised as the only wife of the deceased.
35. She further told the court that there was no divorce in Luoland. That was the reason Beth was indicated as being the deceased's wife in the obituary. She testified that the 1st Petitioner/Respondent pushed the deceased to divorce his other wives so that she would be the only wife. She further testified that Muhaymina's house in Oyugis was demolished and a new house built in its place and that the most important house in a household was that of the 1st wife. The new house was a neutral house for all his wives however, the 1st Petitioner/Respondent is the one who used to live there.
36. Samwel Ogweni Onget, a nephew of the deceased, was the 4th witness. He testified that he worked with the deceased at his hotel as a watchman and that Muhaymina used to stay in the said hotel in room no.



- 8, which was the deceased's room. The deceased had 6 children. He further testified that said hotel has been under the management of the Applicant since 2019.
37. It was his evidence that the Applicant paid the hospital bill for the deceased in Kisumu and that Muhaymina would visit him from time to time. That the deceased was buried next to his Simba, as he did not have a home.
 38. Judah Ochieng Abeka, brother to the deceased, was the 5th witness of the Applicant. He stated that Beth Ojowi's bride price was paid and that there was a symbolic payment of the bride price for Muhaymina. The deceased had three wives who used to visit their home regularly, except Beth, who had remarried. That first two wives attended the deceased's father's burial and when Muhaymina's father died the deceased's family also attended his burial.
 39. He stated that upon the deceased's death, he came to Mombasa for funeral preparations, and before leaving, he asked the 1st Petitioner/Respondent for death notification and the ID of the deceased, which was denied. When the 1st Petitioner/Respondent went home, she went to the chief. He, together with his elder brother, also went to the chief. The meetings held were meant to have an amicable settlement of matters out of court. He further testified that the deceased did not have a home but a Simba, hence the reason why he was buried in his mother's compound.
 40. He told the court that it would only be fair to have a representative of Muhaymina's household as an administrator. Muhaymina was left out of the list of beneficiaries. He urged the court to ensure fair distribution of the estate of the deceased to all the beneficiaries.
 41. Muhaymina Ebrahim Abeka, was the 6th witness of the Applicant. She stated that she was a wife to the deceased and was blessed with two children with him, the Applicant herein and Ibrahim Minawa Abeka. She met the deceased in 1984 when she was 16 years old while the deceased was 30 years old. They entered into a relationship, and she conceived in 1985 when she was in Form Three but suffered a miscarriage; she conceived again after Form Four, which resulted in the birth of the Applicant. She then moved to stay with the deceased in Changamwe after he had secured employment with the Kenya Ports Authority.
 42. It was her evidence that the deceased visited her relatives and also introduced her to his relatives. In 1987, the deceased introduced to her the second wife, Beth, and told her that his mother had insisted he take in a second wife, which caused differences between them. She went back to school and conceived again while in Form Six, resulting in the birth of Ibrahim. She moved in again with the deceased.
 43. She stated that the 1st Petitioner/Respondent came into the picture in 1992 when she was having differences with the deceased. She said they lived separately; however, they had not separated.
 44. She further told the court that the deceased invested in real estate and cared for the children. In 2014, the deceased took her to Oyugis and showed her the matrimonial home. Whenever they visited Oyugis, they would stay in the Green Hotel, which was the deceased's home as she waited for the construction of her home. The deceased had a Simba. Further, there was bad blood between her and the 1st Petitioner/Respondent; thus, she couldn't stay in Utange.
 45. She stated that the deceased's health started deteriorating before his retirement and that despite having control of two commercial buildings, the 1st Petitioner/Respondent never supported the deceased. She also stated that the deceased used her medical cards and that she attended the deceased's burial, and was recognized as his wife. She further testified that although the deceased lived in Utange with the 1st Petitioner/Respondent before retirement; they used to see each other every weekend. After retirement, he left everything to the 1st Petitioner/Respondent and relocated to Oyugis.



46. It was her evidence that she wished to have the interests of her household taken care of.
47. The 1st Petitioner/Respondent adopted her Replying Affidavit sworn on 14th January 2022 and witness statement filed on 12th May 2022 as her evidence, as well as a list of documents dated 5th and 18th April 2023 and 20th July 2023.
48. She told the court that she met the deceased in 1992 in Mombasa and that they moved in together in March of the same year, next to the Stadium where he was staying with a house girl, Stafford and Collins, children of the second wife. She went to Oyugis same year when Judah lost his wife. That was when she met Beth. She returned in 1993 when her son was a few months old and stayed for four months. In August of the said year, the deceased visited Oyugis with four children, and that was the first time she met Muhaymina's children. When they came back, Muhaymina went to the house to pick up her children, which resulted in an exchange of words, and from then, she never saw her again until 1998. She testified that whenever they visited Oyugis, they used to stay with their mother-in-law until the Simba was built. It was her evidence that in 1998, her mother-in-law attended Muhaymina's father's burial.
49. She stated that they bought the Utange land in 2003 after the deceased returned from France so that they could put up a home. They took a loan facility to develop the same and moved in in 2005. The home in Oyugis was developed in 1994/1995, and the Simba was demolished. In 2006, the deceased bought another plot and constructed a house and a commercial building in Kidarajani. The purchase price of the land was Kes.700,000/- and the construction cost was around Kes.5,000,000/-. She was given a Posho Mill and a shop. The deceased used his retirement money to build the Green Hotel in Oyugis. They also took a loan facility of Kes.4,000,000/-, which he used to construct another floor in Kidarajani and to complete the construction of the hotel in Oyugis. It was her evidence that the hotel is owned by a company called Green Hotels Ltd, in which she and the deceased are directors, each with 300 shares.
50. She further stated that the income from Kidarajani repaid the loan, which they completed in 2017. The deceased had a plot in Guu and a house in Boyi village, which was rented out and whose income was used to take care of the mother-in-law. She stated that in 2015, there was tension between the deceased and his family due to a piece of land.
51. It was her evidence that when the deceased developed a stroke in 2018, she took care of him and brought him to Mombasa, where he was until his demise. Before his demise, the deceased used to take off all his children.
52. She stated that she did not accept the deliberations made after the funeral of the deceased. That the deceased never recognised Muhaymina as his wife and that she tried to include everyone in the succession proceedings but they refused to sign the documents.
53. Lucie Mildred Akinyi told the court that she has known the deceased's family since 1982 as her husband and the deceased come from the same village, and her mother-in-law is a relative of the deceased's family. The deceased was first married to Beth and then thereafter to the 1st Petitioner/Respondent after Beth left. They stayed together in Kizingo, Mvita and the Stadium during the Kaya Bongo clashes. They then moved to Utange in 2005.
54. It was evidence that when the deceased got sick, they visited him in Oyugis and Utange. Together with her husband, they were involved in the funeral arrangements of the deceased in Mombasa, with her husband acting as the chairman of the funeral committee while the deceased's brother, Judah was coordinating the village side. She never saw Muhaymina during the planning except for her son



- Ibrahim. She testified that there was tension between Sarah and the family. She further testified that she only met Muhaymina during the burial of the deceased's mother and that of the deceased.
55. She stated that wrangles started 4 to 5 days after burial, and when they went to the chief to get a letter, that's when they learnt that Judah had already been issued with one before burial.
 56. Upon the closure of the 1st Petitioner/Respondent's case, the court directed the parties to file their written submissions.
 57. The Applicant, through her advocates, Waweru Kihara & Co. Advocates LLP, filed written submissions dated 30th November 2023.
 58. The Applicant's counsels identified 3 issues as coming for determination, namely, whether the letters of administration issued to the Petitioners/Respondents on the 13th day of September 2023 should be revoked, whether Muhaymina Ebrahim is a widow and a beneficiary/dependant of the estate of the deceased and who should administer the estate of Elijah Onyango Abeka.
 59. On the first issue, counsel relied on Section 76 of the *Law of Succession Act* and submitted the Applicant's application was brought on the grounds that the procedure to obtain the grant was defective in substance; the grant was obtained fraudulently by making a false statement or concealing material facts from the court; and that that the grant was obtained using untrue allegations.
 60. Counsels submitted that the Petitioners/Respondents did not obtain the consent of all the adult beneficiaries of the estate of the deceased and referred the court to the consent dated 18th May 2021. Counsel relied on Rule 26 of the Probate and Administration Rules and submitted that consent is mandatory, and failure to comply renders any proceedings thereon a nullity, and thus, the grant herein ought to be revoked. The essence of the notice under the said rule is to accord every member a chance to know how the estate is to be administered.
 61. On the second ground, the counsel submitted that the respondents failed to disclose to the court that the deceased had three families.
 62. On the second issue for determination, counsel submitted that the 1st Petitioner/Respondent acknowledged Muhaymina as the 1st wife of the deceased; however, her argument was that the two had separated and thus she was not a wife of the deceased. Counsel submitted that none of the two ladies proved their marriage to the deceased through Luo customary law. Counsel relied on Section 43 of the *Marriage Act* and submitted that because the deceased did not pay a dowry for any of the two women, there did not exist any marriage between the deceased and the two ladies under Luo customary marriage. Thus the 1st Petitioner/Respondent could claim to be the only wife of the deceased. That the evidence tendered before the court speaks to the fact that Muhaymina was a wife to the deceased.
 63. Counsel relied on Section 119 of the *Evidence Act* and urged the court to consider the presumption of marriage between the deceased and Muhaymina and declare her a wife and beneficiary of the deceased's estate.
 64. On the third issue, counsel relied on Section 66 of the *Law of Succession Act* and submitted that the estate of the deceased should be administered by representatives from each of the three families.
 65. In conclusion counsel urged the court to allow the Summons as prayed.
 66. The 1st Petitioner/Respondent, through her advocates J. O. Magolo & Company Advocates, filed written submissions dated 9th February 2024. Counsel submitted on four issues for determination, namely, whether Muhaymina is a wife to the deceased; whether the separation between the deceased and Muhaymina could be considered to have raised the presumption of divorce; whether the 1st



- Petitioner/Respondent has a beneficial interest in the properties by the deceased in the subsistence of their marriage; whether the court should revoke the grant issued to the 1st Petitioner/Respondent on 13th September 2021.
67. On the first issue, counsel submitted that the presumption of marriage only applies to limited cases, and the burden of proof is on the applicant to prove marriage between Muhaymina and the deceased. Counsel referred the court to the evidence of Muhaymina on whether she was a wife or not and argued that the same does not support the presumption of marriage. Counsel submitted that no evidence was tendered to prove that Muhaymina was a wife to the deceased and urged the court to hold so.
68. On the second issue, counsel submitted that the separation between the deceased and Muhaymina was tantamount to divorce as it was long, and the intentions and conduct of the deceased after separation inferred that he had divorced her. Counsel referred the court to Section 33(e) of the *Evidence Act* and the letter from the deceased employer, Kenya Ports Authority, dated 24th July 2023 and documents attached which include a letter from the Assistant Chief Konyango Sublocation dated 2nd September 1992 and a statutory declaration dated 11th December 1992 where declared that he was married to the 1st Petitioner/Respondent only.
69. On the third issue, counsel submitted that the 1st Petitioner/Respondent's marriage to the deceased is not in dispute, nor is the fact that they acquired properties during their marriage that form part of the estate. The proprietary interest arose in the form of implied, constructive, and resulting trust in the properties due to the fact that she contributed both directly and indirectly towards the acquisition of the same.
70. On the fourth issue counsel submitted that the Applicant had not proved her case against the 1st Petitioner/Respondent and that the 1st Petitioner/Respondent complied with the law in applying for the grant and urged the court to uphold the validity of the grant.
71. I have considered the summons, the responses, the oral evidence and the rival submissions by both counsels and the issues that emerge for determination are;
- a. Whether Muhaymina is a wife and a beneficiary for succession purposes; and
 - b. Whether the grant should be revoked.
72. Section 2 of the *Law of Succession Act* defines wife as follows;
- “wife” includes a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and “widower” shall have a corresponding meaning;
- It further defines spouse as follows;
- “spouse” means a husband or a wife or wives recognised under the *Marriage Act* (No. 4 of 2014);
73. Was Muhaymina the wife of the deceased. This to me is the crux of the matter. The Applicant and her witnesses content that she was. The 1st Petitioner/Respondent denied that she is.
74. The Court notes that the deceased did not contract a statutory marriage to any of the women in his life. Witnesses who testified cast doubt as to whether traditional marriage rites were completed in respect of any of the three women. In the circumstances, it cannot be said that the deceased was married to any of his three putative wives under customary law.



75. If the marriages of the deceased weren't statutory or customary, was he married at all? In my view, given the manner in which he conducted himself, the deceased must be presumed to have been married to the three.
76. Presumption of marriage through long cohabitation can be made by the Court in certain circumstances. The Supreme Court of Kenya set out the test to be applied by the Courts when determining whether a marriage should be presumed in the case 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)
77. The Apex Court set out an 8 point test at paragraph 64 to wit that: -
- “We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:
1. 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 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.”
78. In *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR the Court of Appeal stated as follows:
- “Before presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.
79. In *Mary Wanjiku Gitbatu v Esther Wanjiru Kiarie* [2010] eKLR Bosire JA held as follows:
- “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. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife.”
80. The evidence that was adduced by the Applicant, was corroborated by that of Judah Ochieng Abekah, Cynthia Genga Odhiambo, Samuel Ogwen Onger and Muhaymina Ibrahim Minawa. It was their



evidence that the deceased and Muhaymina were married to each other and that their marriage subsisted until his demise.

81. The conduct of the deceased's mother, the photographs that Muhaymina and the 1st Petitioner/ Respondent and the manner in which their relationship was described in the funeral programs of the deceased's mother and that of the deceased, when taken together, corroborate the evidence of the above-stated witnesses.
82. I am thus convinced that Muhaymina lived together with the deceased and the 1st Petitioner/ Respondent in what was clearly a polygamous setting.
83. As the deceased never entered into a statutory marriage, he had the capacity to marry. From their conduct, it is evident to me that the deceased and Muhaymina intended and freely consented to the marriage. They held themselves out as being married, and their relationship was understood as such by their relatives.
84. The upshot of the foregoing is that this Court finds and holds that the deceased was married to Muhaymina and that the marriage was subsisting at the time of his demise. The submissions by the Respondent that they had divorced is not supported by the evidence.
85. As a spouse she ought to have been involved in the process vide which the grant was obtained.
86. Should the grant be revoked? Section 76 of the [Law of Succession Act](#) provides for grounds of revocation as follows;

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.



87. The court in the case of *In re Estate of DKB (Deceased)* [2020] eKLR stated,

“From the wording of the above provision, it is apparent that authority to revoke a grant is a matter of discretion by the trial court. In recognizing these wide powers conferred upon the court under Section 76 of the *law of succession Act*, the Court of Appeal in the case of *Nyaga Cottolengo Francis vs Pius Mwaniki Karani* (2017) eKLR had this to say;

“The combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis.

The discretion excisable is in terms unfettered but, of course, it must be guided by the law and reason but not whims or caprice”

However, revocation of a grant is not a mechanical act but a product of clearly defined legal parameters. It is incumbent upon the applicant to prove one or more of the conditions set out under section 76 of the *law of succession Act*.”

88. The court in the case of *Re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR observed as follows on non-disclosure of material facts from the court,

“Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.”

89. I have already found that Muhaymina was the wife of the deceased. It is common ground that she was not named as a beneficiary in the Petition filed by the 1st Petitioner /Respondent. In those circumstances, it is evident that the grant was obtained without disclosure of material information or by the giving of false information. The grant is thus one that ought to be revoked.

90. The 1st Petitioner/Respondent’s counsel submitted at length that some of the properties in the name of the deceased were acquired by the 1st Petitioner/Respondent and the deceased during coverture and presumably now belong to her. I am unable to agree with this argument. These are succession proceedings, not a cause under the *Matrimonial Properties Act, 2013*. This Court cannot possibly make such a finding in these proceedings.

Disposition

91. Based on the evidence adduced, it is clear that the deceased held Muhaymina out as his wife. This is evident from her participation in family activities right up to the time the deceased died.

92. The deceased never contracted a statutory marriage. His marriages were, therefore, potentially polygamous. Thus, by marrying the 1st Petitioner/Respondent, his previous marriage to the Muhaymina was in no way extinguished.

93. The affidavit in support of the petition sworn on 18th May 2021 made no mention of Muhaymina. This was a material disclosure on the part of the petitioners which justifies the revocation of grant under Section 76 of the *Law of Succession Act*.



94. The court notes that not all the beneficiaries consented to the petition. Under the *Law of Succession Act*, consent is a mandatory requirement without which no valid grant can be issued. Thus, proceedings commenced without the consent of all the beneficiaries are defective.
95. In the circumstances, it is fair and just that the grant of letters of administration intestate issued on 13th September 2021 be revoked for having been procured without full disclosure of all material facts and for being incurably defective.
96. I order that Sarah Chelagat, Stafford Onyango Abeka, and Muhaymina Ebrahim Minawa jointly petition for letters of administration intestate within 60 days of the date hereof, failing which the court will issue the grant to the Public Trustee.
97. I make no orders as to costs as this is a dispute between close family members.
98. I warn members of the extended family against intermeddling with the estate of the deceased. Issuance of this warning as it was apparent during the hearing that some family members had unlawfully arrogated to themselves the duty of sharing out the estate of the deceased to the beneficiaries.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF JUNE 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Magolo for the Petitioner/Respondent;

Mr Amuyunzu holding brief for Mr Waweru Kihara for the Objectors/Applicants; and

Arthur – Court Assistant.

