



REPUBLIC OF KENYA



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**In re Estate of Amos Muhuri Koria (Deceased) (Succession Cause  
3 of 2019) [2024] KEHC 9662 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9662 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
SUCCESSION CAUSE 3 OF 2019  
SN MUTUKU, J  
JULY 24, 2024**

**BETWEEN**

**MARGARET KANYI MUHURI ..... 1<sup>ST</sup> PETITIONER**

**JAMES KORIA MUHURI ..... 2<sup>ND</sup> PETITIONER**

**GEORGE MUCIRI MUHURI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**CAROLINE ELIZABETH WANJIRU GICHEHA ..... PROTESTOR**

**JUDGMENT**

**Background**

1. The deceased in this succession cause died on 14<sup>th</sup> December 2017. Following that death, Margaret Kanyi Muhuri, James Koria Muhuri and George Muciri Muhuri, widow and sons, filed a Petition for Grant of Letters of Administration intestate on 28<sup>th</sup> January 2019. They listed the survivors of the deceased as five, the Petitioners, Peter Munyua Muhuri and Robert Karanja Muhuri. Among the documents they attached to that Petition is a letter from the Chief of Olochoro-Onyore Location, Mr. Ibrahim N. Sankaire, dated 10<sup>th</sup> September 2018. The letter has identified the heirs of the deceased as the five including the Petitioners as shown above.
2. Following gazettement of the matter through Gazette Notice No. 4530 dated 24<sup>th</sup> May 2019, an Objection was filed by Caroline Elizabeth Wanjiru Gicheha on 29<sup>th</sup> April 2019. The claim by Caroline is that she is the second wife of the deceased. She also attached a letter from the same Chief (Mr. Ibrahim N. Sankaire) bearing the same date 10<sup>th</sup> September 2018 as the letter of the Petitioners identifying her as traditional wife of the deceased. The said letter did not mention any children of Caroline.
3. A Grant of Letters of Administration Intestate was issued to the Petitioners by this Court (Mwita, J) on 4<sup>th</sup> October 2019 notwithstanding that there was an Objection. Caroline filed an application



for maintenance of the children on 9<sup>th</sup> September 2019. This court (Mwita, J) issued directions on 6<sup>th</sup> November 2019 directing the administrators to file Summons for Confirmation of the Grant and the Objector to file a Protest to that Summons so that the court could determine all the issues being raised in respect of this estate.

4. The administrators filed Summons for Confirmation of the Grant dated 9<sup>th</sup> November 2019 and proposed mode of distribution of the estate among the five beneficiaries.
5. The matter proceeded for hearing through viva voce evidence.

#### **Summons for Confirmation**

6. The administrators sought to have the Grant confirmed and the property shared among the five beneficiaries. The administrators listed the properties forming the estate of the deceased as follows:
  1. KJD/Olochoro-Onyore/24656
  2. KJD/Olochoro-Onyore/24657
  3. KJD/Olochoro-Onyore/24658
  4. KJD/Olochoro-Onyore/24659
  5. KJD/Olochoro-Onyore/24660
  6. KJD/Olochoro-Onyore/24661
  7. KJD/Olochoro-Onyore/24662
  8. KJD/Olochoro-Onyore/24663
  9. KJD/Olochoro-Onyore/24664
  10. KJD/Olochoro-Onyore/24665
  11. KJD/Olochoro-Onyore/24666
  12. KJD/Olochoro-Onyore/2264
  13. KJD/Olochoro-Onyore/1338
  14. Plot No. 256/Business – Kibiko T. Centre
  15. Plot No. 24/Olochororonyori Trading Centre
  16. Plot No. 59/Business – Olochoro -Onyori T.C
  17. Plot No 14 (B)/ Olochoro – Onyori T.C
  18. Motor Vehicle Registration No KAW 545V
  19. Motor Cycle Registration No. KMCQ 459C
7. The administrators proposed the mode of distribution as captured in the consent to the mode of distribution dated 19<sup>th</sup> November 2019 which was signed by all the beneficiaries. The table of distribution as contained in the consent to the mode of distribution document is reproduced in this judgment in the following table for ease of reference:



List of properties	Who to Inherit
1. KJD/Olochoro-Onyore/24660	Margaret Kanyi Muhuri
2. KJD/Olochoro-Onyore/24663	James Koria Muhuri
3. KJD/Olochoro-Onyore/24666	George Muciri Muhuri
4. KJD/Olochoro-Onyore/2264	Peter Munyua Muchuri
5. KJD/Olochoro-Onyore/1338	Robert Karanja Muhuri
6. Plot No. 256/Business – Kibiko T. Centre	Robert Karanja Muhuri & James Koria Muhuri in equal share
7. Motor Vehicle Registration No KAW 545V	
8. Plot No 14 (B)/ Olochoro – Onyori T.C	Peter Munyua Muhuri & George Muciri Muhuri in equal shares
9. Cash in Account No 1119258499 KCB Kiserian Branch	
10. KJD/Olochoro-Onyore/24656	
11. KJD/Olochoro-Onyore/24658	
12. KJD/Olochoro-Onyore/24661	
13. KJD/Olochoro-Onyore/24664	
14. Motor Cycle Registration No. KMCQ 459C	
15. KJD/Olochoro-Onyore/24657	
16. KJD/Olochoro-Onyore/24659	
17. KJD/Olochoro-Onyore/24662	
18. KJD/Olochoro-Onyore/24665	
19. Plot No. 24/Olochororonyori Trading Centre	
20. Plot No. 59/Business – Olochoro -Onyori T.C	

### **Affidavit of Protest**

4. Caroline filed an Affidavit of Protest on 10<sup>th</sup> December, 2019 claiming to be the second wife of the deceased and co-wife of the 1<sup>st</sup> Administrator. She opposed the mode of distribution of the estate. She also claimed that some properties belonging to the estate as shown below were left out and intentionally excluded from the list of properties listed for distribution:
1. Motor vehicle KAK 368B Toyota Dx;
  2. Kajiado/Mosiro/Ewuaso Kedong/811;
  3. Proceeds from rent due and payable by Safaricom Ltd to the estate pursuant to lease agreement between the deceased and Safaricom in respect of Title No. Kajiado/Olochoro-Onyore/1338, and
  4. Plot No. 77/Residential Ochoro-Onyore which was sold to Joseph Lemayian Solitei.



5. She claimed to have started cohabiting with the deceased in 2002 at the deceased's rental house in Kajiado/Olochoro- Onyore/24657/24656; that by 2011 the deceased had constructed their matrimonial home on title no Kajiado/ Olochoro- Onyore/2264 and ultimately performed a traditional wedding ceremony where her father was a witness. She claimed that she has three children BNM, SSM and CNM, two (2) of whom are deceased's biological children. She claimed that the deceased maintained all the children. She denied that the 1<sup>st</sup> Administrator contributed to purchase of land parcel no Kajiado/ Olochoro-Onyore/2264 and proposed to have the estate distributed equally amongst the children and the two wives of the deceased.
6. The 1<sup>st</sup> Administrator filed a Replying Affidavit to the Protest dated 29<sup>th</sup> January, 2020. She has refuted claims that the Protestor was married to the deceased and referred to her as a stranger to the estate. She has deposed that the title to property No. Kajiado/Olochoro-Onyore/24657/24656 was taken to the surveyor by the deceased for sub-division among the deceased, the 1<sup>st</sup> Administrator and their sons, but the deceased died before this was completed and the title remained with the surveyor.
7. She deposed that she inquired from the surveyor on the status of the sub-division and was informed that the surveyor had handed over the title to the Protestor who had been accompanied by the area chief and that the Chief had written a letter stating that the Protestor was the only wife of the deceased on which basis he handed over the title. The 1<sup>st</sup> Administrator claims that she suspected collusion and mischief by the Protestor and the area chief and decided to lodge a caution on the said land.
8. She deposed that Plot No. 77/Residential Olochoro-Onyore had been sold and is not up for distribution; that she did not know of the existence of parcel Kajiado/Mosiro/Ewuaso Kedong/811 or whether it belonged to the deceased; that the motor vehicle registration number KAK 368B Toyota belongs to Beatrizah Norah Wawudah as per the log book annexed as 'MKM 5.' She claimed that the protestor was a tenant at one of the premises belonging to the estate and denied that the deceased sired or adopted any of the Protestor's children.
9. The deceased brother Ndungu Koria filed a Replying Affidavit to the Protest dated 29<sup>th</sup> January, 2020 confirming that the 1<sup>st</sup> Administrator is a wife of the deceased and that he participated in dowry negotiations when the deceased married the 1<sup>st</sup> Administrator in 1975. He denied that the deceased was married to the Protestor through a customary marriage and stated that had this happened he would have known as the deceased was his brother.
10. He further stated that the area chief has no jurisdiction to determine marriages; that the union of the deceased and the 1<sup>st</sup> Administrator was blessed with four children: James Koria Muhuri, George Muciri Muhuri, Peter Munyua Muhuri and Robert Karanja Muhuri and that he did not know any other children of the deceased and therefor the allegations by the Protestor are false.
11. The 2<sup>nd</sup> Administrator also filed a Replying Affidavit to the Protest dated 29<sup>th</sup> January, 2020. It was his case that at no point did the deceased introduce him to the Protestor. It was his case that the Protestor was a tenant of the deceased and that after the death of the deceased, they formed a funeral committee, that one of the members of this committee was the Protestor's father Zacharia Nganga Gicheha. That he never mentioned that his daughter was the deceased's second wife. He stated that the Protestor has no legal rights on assets of the deceased.

### **Protestor's evidence**

12. This matter proceeded for hearing on 18<sup>th</sup> February, 2020 before Justice E.C Mwita. The Protestor Caroline Elizabeth Wanjiru adopted the contents of her witness statement and affidavits stated that she the second wife of the deceased; that she started living in the property owned by the deceased as a



- tenant and lived with him before they got married through Kikuyu customary law; that she had one child before she married him and they sired two children with the deceased. She changed this evidence during cross-examination to state that it is only one child, BNM who she sired with the deceased and that the other two are not his biological children.
13. She further reiterated that the deceased paid Kshs. 40,000/- to her father as part of the dowry in the presence of other people as witnesses. She produced the birth certificates of her three children as PEX 1, 2 and 3. Two of the certificates identify the deceased as the father of two of the children. She stated that the deceased accepted to have his name included in the children's birth certificates as their father and that the deceased used to support the children by paying school fees, buying food and medical care.
  14. She stated that the deceased had given her parcel no. KJD/Olochoro -Onyore/2264 but the deceased died before transferring the property to her. She also admitted that the funeral programme did not include her or recognize her as a widow of the deceased.
  15. The Protester called her father Zakaria Nganga Gicheha as a witness. His evidence is that her daughter was a wife to the deceased; that according to Kikuyu Customary law the deceased and the Protester visited him to report that they were living together; that they were only the two of them and that the deceased paid to him some Kshs 40,000 as part of the dowry. He testified that according to Kikuyu customs that was the first step of dowry negotiations.
  16. The Protester also called Ibrahim Njomo Sankaiye, the Chief, who testified that the Protester and the deceased were married and had three children. The Chief admitted writing two letters, one to the 1<sup>st</sup> Administrator and the other to the Protester identifying each of them as wives of the deceased. He stated that the letter he wrote to the Protester did not mention children because he was writing it for purposes of the Protester presenting to the Surveyor.
  17. Francis Kachonga Pulei was also a witness of the Protester. He testified that the Protester and the deceased got married in 2002; that the deceased visited the Protester's father in his presence and informed them that the Protester was his wife; that the deceased gave them Kshs. 40,000/-. He termed this visit as the first step towards dowry negotiations.

### **Administrators' evidence**

18. James Koria Muhuri and Margaret Kanyi Muhuri, two of the administrators, testified and reiterated the contents of their witness statements and affidavits on record. Their case is that the Protester was not a wife of the deceased but a tenant who had been living in two rental rooms belonging to the deceased. They denied that any of the three children belongs to the deceased. Margaret testified that the Protester had a husband whom she lived with in the rental house called Paul Odhiambo.
19. Their evidence is that the deceased had only one wife, Margaret Kanyi Muhuri, who married him under Kikuyu customary law and later in a church wedding as shown in the marriage certificate produced in court as exhibit 1. Their evidence is that the deceased and the 1<sup>st</sup> Administrator had had 4 children: James Koria Muhuri and George Muciri Muhuri who are twins, Peter Munyua Muhuri and Robert Karanja Muhuri.
20. The Administrators also called Ndungu Koria, brother to the deceased, to testify. Ndungu's evidence was confirmation that his late brother had only one wife, the 1<sup>st</sup> Administrator, with whom they had four children. He denied that the Protester was the wife or that the deceased had any other children of the deceased.
21. The Administrators called Francis Ng'ang'a Karonge as an expert witness on Kikuyu Customary marriage. He relied on his statement dated 22<sup>nd</sup> October 2021 and testified that the first step in a Kikuyu



customary marriage is for the bridegroom to visit the family of the bride for introduction with a few people from his family and friends. He seeks approval from the family of the bride and presents local brew and some money. If the father of the bride consumes the brew, it signifies acceptance and the two families share a meal together.

22. The second step involves the groom, his family and friends including elderly women visiting the home of the bride with one male lamb “ngurario” and two female goats with soft drinks and local brew. The lamb is slaughtered and shared into two portions for the family of the bride and the groom. Dowry, “ruracio”, is negotiated on this day and agreed upon and an elder from the groom’s side pays some money to the bride’s family.
23. He stated that a Kikuyu customary marriage is not complete without “ngurario” and “ruracio”

### **Submissions**

24. The Protestor’s submissions are dated 5<sup>th</sup> April, 2023 and those by the Administrators are dated 19<sup>th</sup> April 2023. Each party has submitted in support of their case as argued. I need not replicate the submissions in this judgment. I have understood the position held by either party and the issues they have identified for determination.

### **Analysis and determination**

25. I have considered the Summons for Confirmation of the Grant and the Protest to the same. I have considered the parties evidence contained in their witness statements, the affidavits, oral evidence in court and submissions. In my considered view, the following issues require my attention:
  1. Whether the Protestor was married to the deceased under Kikuyu Customary Law?
  2. Whether there is proof of a presumption of marriage between the Protestor and the deceased?
  3. Whether the Protestor had children with the deceased and if so, what is the extent of the children’s entitlement to the estate of the deceased as beneficiaries?

### **Whether the Protestor was married to the deceased under Kikuyu Customary Law?**

26. It is trite that the burden of proof rests on the party that alleges. Section 107(1) of the *Evidence Act* provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

27. The onus of proving that a Kikuyu Customary marriage existed between the deceased and the Protestor lies with the Protestor. The threshold to be met is “on a balance of probabilities” (see *Hortensiah Wanjiku Yawe -vs- The Public Trustee, Civil Appeal No. 13 of 1976*).
28. The evidence of the Protestor and her witnesses is that she was married to the deceased as the second wife through Kikuyu Customary Law. She told the court that she visited her parents with the deceased where Kshs 40,000 was paid to her father by the deceased as part of the dowry. Zakky Nganga Gicheha, Protestor’s father admitted on cross-examination that according to Kikuyu Custom, the deceased and the Protestor were the only two when they went to see him. He termed this visit as report and payment of part dowry stating that there were other procedures and rites that were to follow. He referred to that visit as the first step towards a Kikuyu Customary marriage.



29. Francis Kashonga Pulei, testified that the deceased went to visit the Protestor's father to inform him that he was married to the Protestor. He admitted that going to report, as the deceased did, was not enough to constitute a Kikuyu Customary marriage.
30. The Protestor and her witnesses including the Chief Ibrahim Njomo Sankaire told the court that the Protestor had children with the deceased. Her father Zakky told the court that two of the Protestor's children were sired by the deceased.
31. The administrators testified that the Protestor was a tenant at deceased's premises; that it is not true that the deceased constructed a matrimonial home for her and that she was moved to another house after the one she was living in started leaking. They denied that the Protestor had children with the deceased and that she was married to the deceased. They testified that she did not even participate in the burial arrangements, nor was the Protestor and her children included in the burial programme as a wife.
32. Francis Ng'ang'a testified as an elder conversant with Kikuyu Customary Law. He took the court through the steps that a couple must go through to become customarily married under the Kikuyu Customs. He told the court that a Kikuyu Customary Marriage is not complete without the slaughtering of a "ngurario" land and payment of dowry "ruracio". The evidence shows that none of these rites were performed by the deceased in respect of this case.
33. With the available evidence and authorities, I am not persuaded that there existed a marriage between the Protestor and the deceased. Only Kshs 40,000 is alleged to have been paid. During that time the deceased did not have his family members or a friend accompanying him. It has not been proved that this payment was meant to be part of the dowry or even the first step towards formalizing a Kikuyu Customary Marriage.
34. This leads me to the next issue: can the court presume that a marriage existed between the deceased and the Protestor? Two factors are considered by courts for presumption of marriage to exist-long cohabitation and acts of general repute. In *Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another* [2009] eKLR, the court had this to say on this issue:

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.”
35. The Protestor wants this court to presume a marriage existed between her and the deceased. She has claimed that she cohabited with him in the rental house she lived in and that he constructed a matrimonial home for her. She has stated that they sired two children with the deceased and that she acquired birth certificates for the two of her children showing that the deceased was their father. I find this evidence incredible. The Protestor contradicted herself in cross examination when she told the court that “I got one child with the deceased BNM. Although I said I got two children with the deceased, the fact is that I only got one child with him. The deceased was not the biological father of CN and SNM.”
36. The Protestor lied under oath. If she could lie about this, even after going to the extent of acquiring birth certificates of the two of the children in the name of the deceased, how far could she go with lies in a bid to claim from the estate? She said she got consent from the deceased to register him as the father of the children. This court will never know whether that is the truth.



37. It is not lost to this court that the birth certificate of BNM, who is admittedly the child of the Protestor and the deceased, shows that she was born on 4<sup>th</sup> February 2004. She is older than SSW who is shown to have been born on 26<sup>th</sup> November 2007 during the alleged marriage of the Protestor to the deceased. What does this court make of this? It is obvious, as admitted, that the Protestor sired this child with another man despite being in the alleged marriage with the deceased. This evidence creates doubts in the mind of the Court that the Protestor is lying, and therefore her evidence, that she was married to the deceased, was living with him and they had one child together, cannot be believed.
38. Her father and Francis Kashonga Pulei as well as Chief Ibrahim are not truthful witnesses either. They insisted that the Protestor was married to the deceased, and they had children together when they knew that marriage under Kikuyu Customary Law did not exist for failure to follow Kikuyu customary rites and procedures. Despite the witnesses stating that the Protestor had three children with the deceased, she herself has stated that she had one child with the deceased. The Chief wrote two letters to the 1<sup>st</sup> Administrator and the Protestor. He explained that he issued the letter to the Protestor to enable her pick the title deed being held by the surveyor and not for succession purposes.
39. This court is not able to understand why didn't the Chief indicate in any of the two letters that the deceased had two wives and name the 1<sup>st</sup> Administrator and the Protestor and their children? He claimed to have known both women and the deceased but failed to recognize them in the letters he wrote to each of them on the same day as co-wives. This action by the Chief confirms the doubts that the Protestor was not a wife to the deceased.
40. On the factors that would rebut a presumption of marriage, the Court in *Mary Njoki vs John Kinyanjui Mutheru* [1985] eKLR, underscored these factors when it stated that:
- “...The fact that the appellant and the deceased together visited the deceased father's home or that she attended the funeral of the deceased's father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity. That is how friends treat one another. And on account of the cohabitation the appellant could not help meeting and knowing and even assisting the relatives of the deceased including the respondents. The appellant's own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant's father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage”.
41. I have considered the evidence by the administrators that the Protestor was a tenant in the premises owned by the deceased and that the deceased did not construct a matrimonial home for the Protestor but that she moved houses because the room she occupied was leaking. I find that this evidence is sufficient to rebut that of the Protestor that she lived with the deceased. Her evidence and that of her witnesses is incredible and unreliable.
42. I also bear doubts about the child said to have been sired by the deceased. Only a DNA test could have cleared those doubts. The Protestor has claimed that the deceased had taken in her children as his own and was maintaining them and paying school fees. I have noted some documents attached to her pleadings. There are documents from Baraka Oontoyie Secondary School in reference to BNM, Kiserian Goodhope Educational Centre in reference to SWM and CN. None of those documents are addressed to the deceased as the provider of the requirements listed in those documents. The Protestor



has not provided any evidence including mpesa transactions or remittances to her or receipts for school fees addressed to the deceased to demonstrate that he was paying schools fees or buying food and other essential items for the children.

43. The Protestor and her children do not fit the definition of 'dependant' under section 29 of the [Law of Succession Act](#). This section 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.

44. Consequently, she cannot claim part of the estate of the deceased as she has through her Affidavit of Protest nor can she claim provisions as a dependant through an application as she has done through Summons dated 9<sup>th</sup> September 2019. It is not enough to claim to be a wife to the deceased and dependant. There must be tangible evidence proving those claims.

45. After giving this matter serious scrutiny and consideration, it is my conclusion that the Protestor has failed to demonstrate that she is a widow of the deceased; that her children are children of the deceased and therefore dependants or beneficiaries of his estate. She has not met the threshold and therefore her claim must fail.

46. Consequently, the Protest dated 10<sup>th</sup> December 2019 and the Summons dated 9<sup>th</sup> September 2019 are hereby dismissed. The Summons for Confirmation dated 19<sup>th</sup> November 2019 is hereby allowed. The distribution of the estate shall be in accordance with the proposed mode of distribution contained in the Consent dated 19<sup>th</sup> November 2019.

47. The Protestor is ordered to surrender title deed in respect of Kajiado/Olchor-Onyore/24664 and any other documents she may be holding in respect of the estate of the deceased to the administrators of the estate with immediate effect.

48. Each party shall bear own costs to this Cause.

49. Orders accordingly.

**DATED, SIGNED AND DELIVERED ON 24<sup>TH</sup> JULY 2024.**

**S. N. MUTUKU**

**JUDGE**

