



REPUBLIC OF KENYA



In re Estate of Jacob Mwalekwa Mwambewa (Deceased) (Succession Cause 116 of 2009) [2024] KEHC 8785 (KLR) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 116 OF 2009**

**G MUTAI, J
JULY 22, 2024**

BETWEEN

MOSES MWAMBEWA MWALEKWA OBJECTOR

AND

KASIAN MWAMBEWA KEKE 1ST PETITIONER

MATUNDA MWAKAWI KIWO 2ND PETITIONER

RULING

1. The Petitioners filed a petition for letters of administration intestate on 30th March 2009. The Objector then filed a Chamber Summons on 14th December 2009 vide which he sought to have of grant of letters of administration intestate issued to the Petitioners on 29th May 2009 revoked or annulled. The Petitioners, in response, filed a replying affidavit on 1st March 2010 in which they, in part, clarified that no grant of letters of administration intestate had been issued on the said date and that there was none to be revoked or annulled. The Objector filed an objection dated 31st August 2012 to the application for a grant filed by the Petitioners.
2. The objection was canvassed by way of *viva voce* evidence.
3. The first witness for the Objector was the Objector himself. Moses Mwambewa Mwalekwa testified that he was the biological son of the deceased and that his mother was Mercy Nzai. He produced his Birth Certificate and Identity Card. He averred that he used to live with the deceased and his mother at Kwa Hola in his father's plot and that his parents got married in 1984, and he was born on 26th February 1985. It was his evidence that his parents separated in 1995 and that he remained with his father in Kwa Hola. He, however, used to visit his mother. He stated that the deceased provided for all his needs which included school fees and medical expenses. He further testified that he moved to Malindi to work and that he used to visit him from time to time. He stated that he was not present



when the deceased passed away as he was in Lamu. The Objector averred that he has a right to inherit from his father's estate.

4. The second witness for the Objector was Mzae Mwawase Mzae. Mr Mzae told the court that he is the father to the Objector's mother. He testified that the deceased married his daughter on 6th October 1984 under Taita Customary Law and paid the bride price in accordance with Taita customs. He then took her to his home and later to Mombasa, where they used to run a business. He produced an exercise book in which the proceedings regarding the payment of the bride price were recorded. It was evidence that the two were blessed with a son (the Objector); however, at the time of marriage, the daughter had two children out of wedlock, a boy and a girl, whom the deceased took as his children. Upon the demise of the deceased, a family dispute arose, and the family chased away the Objector's mother. He further testified that his daughter and the deceased were parted by death and that the daughter never remarried. He averred, however, that the deceased had another wife before marrying his daughter, but that they were not blessed with children.
5. The third witness, John Mwangecho Mwadanga, told the court that the deceased was his cousin and that the Objector was a son of the deceased. The deceased married his first wife, Malenyo. Her first child died at six months, while the second one died after six days. The deceased married a second wife, Manga, in 1960; however, the first wife chased her away while pregnant. The deceased denied the pregnancy. The deceased and his first wife parted ways in 1980, and he then married a third wife by the name of Priscilla, whom they parted ways after 9 months. He then married his 4th wife, Mercy, in January 1984 and, later in the year, performed all marriage rites under the Taita Custom. They were blessed with a son (the Objector) in 1985, a fact that is known to the family. However, Mercy had two children at the time of marriage whom the deceased accepted as his. They separated in 1996 and both never remarried. The deceased used to take care of the Objector. The Objector went to him two months after his father's burial and told him Kasian (the deceased's nephew) had sold his father's land at Kwa Hola, whereas he was aware of his existence.
6. He stated that the deceased left behind a plot in Kwa Hola, 2 plots in Taita and a shamba in Taveta, which now belongs to the son (the Objector) and that he oversees the said properties until the case is over. He urged the court to give the Objector his rightful inheritance as the son of the deceased herein.
7. He stated that after the deceased's accident in 2006, his sister, Scola, was the one who used to care for him and not the deceased's sister's child. He testified that during the family meeting, they did not agree that the deceased's sisters would administer his estate.
8. Scholastica Mghoi was the fourth witness for the Objector. Ms Mghoi testified that she was a cousin of the deceased, and the Objector is a son of the deceased. She said that after the deceased got involved in an accident, she would visit him often and care for him at his home, together with her nephew Kibo Mwakali.
9. She stated that the deceased never took the Objector's mother to his rural home as he did not have a house there. The deceased had four wives with whom they were not blessed with children except the fourth, who is the mother of the Objector. After the separation between the deceased and the Objector's mother, the deceased would provide the Objector with money for food.
10. It was her evidence that the Objector is the rightful heir of the deceased.
11. The first witness for the Respondent was Kasian Mwambewa Keke. Kasian testified that he is a nephew of the deceased and that the deceased had two siblings, Mwalugha Keke (his mother) and Malenda Makowe Kilo. He lived with the deceased in Moshi, Tanzania, in 1967 when he was 8 years old. At that time, the deceased had two wives, Wanguola Mugalo and Manga Mwamula. The deceased and his two



- wives were not blessed with any child. In 1969 he returned to Taita to his parents to start school. In 1975 the deceased returned to Kenya with his first wife as he had parted ways with the 2nd wife. In 1980, he parted ways with his first wife and in 1981, he married a third wife, Scholastica Nolowi, with whom they were not blessed with a child; however, she came into the marriage with two children. They lived together for one year and parted ways. In 1983, the deceased married a fourth wife, Frida Mghanga, who came into the marriage with a son and was not blessed with a child. In 1985, the deceased began to live with Mercy Mzae, his fifth wife, who came into the marriage with three children, including the Objector, who was three months old at the time and was not blessed with a child. They parted ways in 1993 after a forceful eviction from the house by the deceased.
12. He stated that the deceased got involved in an accident on his way from Kongowea Market, sustaining injuries on his left leg. When he got better, he called him together with Matunda Kiwo and Apollinaris Mwakavu Kiwo and told them he was no longer able to provide for himself and showed them a letter from the auctioneers that his plot was to be sold for a debt of Kshs 22,700/-. They contributed Kshs 17,000/- through his lawyer. However, the plot was still sold as the advocate did not submit the money to the auctioneers.
 13. He disputed the allegation made to the effect that Scholastica was the one caring for the deceased and stated that it was his niece who was taking care of him. He produced a letter dated 9th October 2008 (Exhibit 12) showing that the deceased appointed him and his sister, Matunda Kiwo, as the administrators of all his properties in case of death.
 14. He stated that after the deceased's burial, he went to the Mombasa Municipal Council to find out if the deceased had arrears on rates and established that he had arrears of Kshs 64,000/- which he paid in full. They were due from 1997 to October 2009.
 15. He denied that the Objector is a son of the deceased and stated that the Objector came with his mother at the age of 3 months, that the two birth certificates produced are different and not clear which one is genuine, and that both the birth certificates and identity card are forged. The location and sub-location in the Objector's identity card differs from that of the deceased. It was his evidence that he never looked for the Objector or his mother to inform them of the deceased's death. The objector has no right to inherit from the deceased as he is not a son of the deceased.
 16. It was his evidence that they took all the items inside the deceased's house to a rural home in Taita and that he had everything that the deceased possessed.
 17. The Respondents' second witness was Appolinary Kiwa Mwakawi. Mr Mwakawi testified that Matunda Mwakawi, her mother, is a sister to the deceased and that the Objector is a son to Mercy, who was once married to the deceased.
 18. She stated that the deceased married his first wife, with whom they lived in Moshi, Tanzania, in 1960. He then married a 2nd wife Manga Mwambula. In 1981, he married Scholastic Ndawiro, who came into marriage with two children and parted ways with him after a year. In 1983, he married Fridah Maghanga, who came into the marriage with one child and also parted ways after a year. The deceased, together with his four wives, were never blessed with any children. In 1985, the deceased married Mercy, the Objector's mother, who came into the marriage with three children, including the Objector, who was three months old then. They also parted ways later in the year 1993.
 19. It was her evidence that the deceased never supported the Objector in any way. She denied that she was in Court in her own interest.



20. The third witness was Peter Mutau. Mr Mutau is from the Office of Registrar of Births and Deaths. He testified that he received a letter to compare the two Birth Certificates Serial Number 486589 and 497851. He confirmed that the two certificates are genuine as they were registered by a Register of Birth from Changamwe Maternity Hospital received on 26th February 1985 for a child born in that hospital on the said date by the name Moses Mwambewa. The Birth Register entry is No 250XXXX of 1985. The date of birth is 26th February 1985. It was submitted to their office on 27th February 1985 and signed by Mrs S. M. Chao.
21. His evidence was that three birth certificates were issued in this case, and there was no change of particulars except the serial numbers. The 1st Certificate, Serial No 486589, was issued on 16th January 1986; the 2nd, Serial No 497851, was issued on 11th June 2010; and the 3rd, Serial No 2501718, was issued on 12th January 2017. He produced a certified copy of the Register of Birth. It was his evidence that serial numbers differ from certificate to certificate and that that does not mean that there is forgery.
22. Upon closure of their respective cases, the Court directed parties to file their written submissions.
23. The Objector, through his advocates C. A. Odhiang & Co. Advocates, filed written submissions dated 13th August 2023.
24. Counsel submitted that through the evidence tendered before the court, the Objector had proved that he is the son of the deceased within the provisions of the *Law of Succession Act* and that he is, therefore, entitled to apply for letters of administration intestate in respect of the estate of the deceased herein.
25. Counsel further submitted that it was evident that the Petitioners did not seek the Objector's consent and that the deceased did not leave any written will.
26. The Petitioners, on the other hand, also filed written submissions through their advocates, Munyithya, Mutugi Umara & Muzna Co. Advocates.
27. Counsel relied on Section 29 of the *Law of Succession Act* and reiterated that the Objector is not a son of the deceased as alleged.
28. It was further submitted that the claim that the Petitioners are not suitable to be administrators since they applied as mother and son is baseless, as the same was clarified during the hearing, and that it was a mistake by the advocate who filled out the forms.
29. Counsel submitted that the Objector refused to subject himself to a DNA test, which meant that he feared being exposed for lying to the court that he is a son of the deceased.
30. Counsel submitted that the objector did not prove his objection and urged the court to dismiss it, issue letters of administration intestate to the Petitioners, and confirm it, considering the long period it took for this case to be heard.
31. The main dispute in this case is whether the objector is a son/dependant and or beneficiary of the deceased. The Petitioners have argued that he is not and that his mother came into marriage with him. They have also contested his birth certificates and identification card produced before the court. The Objector, the other hand, argued that he is a son of the deceased, produced his birth certificate and Identification Card and called several witnesses to support his case.
32. Section 29 of the *Law of Succession Act* provides;
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.
33. The court in the case of *Ngengi Muigai & another v Peter Nyoike Muigai & 4 others* [2018] eKLR stated,

“So that, a child as defined under section 3 (2) of *LSA*, that is to say, a biological child as well as any child whom a man “has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility” shall be an automatic dependant under section 29 (a). Mugo, whom we have found to have been a biological son, although the deceased had not expressly recognized him as such, would be entitled to automatic provision of reasonable dependency provision. Nyoike, on the other hand, would also be entitled to reasonable dependency provision if he could prove that the deceased had taken him into the family as his own child and was maintaining him immediately prior to his death. That is section 29 (b) above.... That the birth certificate exhibited by Nyoike in his evidence had the deceased's name was of no moment since section 12 of the *Births and Deaths Registration Act* provides that:

“No person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom”.

34. The evidence of the Objector was corroborated by that of his third witness and that of the fourth witness. These witnesses testified that the objector was a son of the deceased, born during the subsistence of marriage between the deceased and his mother. The Petitioner's third witness confirmed the authenticity of the birth certificates produced before the court by the Objector. Although birth certificates are not conclusive proof of paternity, they are prima facie evidence of it. The evidence of the witness, when taken together with the birth certificate, leads me to the conclusion that, indeed, the Objector was the son of the deceased.
35. Based on the foregoing I find and hold that the Objector is the son of the deceased and a dependant under section 29(a) of the *Law of Succession Act* and, therefore, the rightful heir of the deceased.
36. On whether the Objector is qualified to be an administrator of the estate of the deceased, Section 66 provides:-

“when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- a. surviving spouse or spouses, with or without association of other beneficiaries;



- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- c. the Public Trustee; and
- d. creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

- 37. Having found that the Objector is a rightful beneficiary of the estate of the deceased, being a child of the deceased, it is my view that he is qualified to be an administrator and that he is also the most suitable person to administer the estate of the deceased. Therefore, in the exercise of the discretion that this court has under Sections 47 and 66 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules, and in the interest of justice, I hereby appoint him as an administrator of the estate of the deceased and direct that letters of administration intestate be issued to him forthwith.
- 38. Since the deceased had a child, I find and hold that the Petitioners are not the beneficiaries of the deceased's estate.
- 39. This being a succession matter, I will make no orders as to costs. The parties will, however, bear their own costs.
- 40. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF JULY 2024.

DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Mutugi for the Petitioners/Respondents;

No appearance for the Objector/Applicant and

Arthur – Court Assistant.

