



REPUBLIC OF KENYA



**In re Estate of Njokoya Ole Magelo (Deceased) (Succession Cause 75 of 2015) [2024] KEHC 9871 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
SUCCESSION CAUSE 75 OF 2015  
F GIKONYO, J  
JULY 9, 2024**

**IN THE MATTER OF**

**DANIEL LOISHORUA NJOKOYA ..... 1<sup>ST</sup> PETITIONER  
BENARD LEDAMA NJOKOYA ..... 2<sup>ND</sup> PETITIONER**

**JUDGMENT**

**Ascertainment of dependants**

1. The 1<sup>st</sup> Objector filed an affidavit of protest to the making of a grant. In the affidavit, the objector seeks for revocation of grant. Contrary to the submission by the objectors, there is no Chamber Summons Application for revocation of grant before this court as has been alluded to in the opening paragraph of the objectors' submissions reproduced below: -  
  
    'Before this honourable court is a chamber Summons Application for revocation of the grant issued herein supported by an affidavit sworn by the 1<sup>st</sup> Objector....'
2. Another goof. In the submissions, the objectors pray for revocation of the grant issued on 7.2.2003, and 'confirmed' on 28.11.2019. From the record, the grant herein has not been confirmed.
3. Where legal counsel has been employed, proper citation of and reference to pleadings is expected.
4. Be that as it may, it is discernible from the affidavit of protest that, the objectors intend the court to declare them to be dependants of the deceased. They have also sought for revocation of grant.
5. The reasons stated by the objectors are; i) that they are children of the deceased and therefore, beneficiaries of the estate; and ii) that the petitioners intend to distribute the estate of the deceased without including them.



## Objectors' case

6. According to the objectors' and their witnesses' account (OB1, OB2 & OB3), the deceased had three wives and left known assets including Cis Mara/Nairegie-Enkare/645. They claim that their mother was married to the deceased.
7. According to OB1, her mother married the deceased and lived together until 1996 when she left due to the cruelty from the deceased. At the time of the marriage, she already had three children. But, out of the relationship between the deceased and her mother was born two issues; one boy and one girl. The boy died but the girl is living; her name is Nyambura.
8. It was his testimony that, he was very young when they moved in with their mother to the home of the deceased. He lived with the deceased for 5 years and they recognized him as their father. He took care of them and paid school fees for him. When their mother died, they were taken away by their uncle. They did not attend the burial of their father because they were not informed of his death.
9. OW2, Hannah Waithera, identified herself as the sister in law of the deceased, for she is the wife of the eldest brother of the deceased. She stated that, the deceased respected her as the eldest wife in their family.
10. She stated that, the deceased had married 8 wives at different times. Five left. Susan was the second wife. When she married the deceased, she had three children, but, was blessed with two other children of their marriage with the deceased; a girl and a boy. The boy died and was buried in the farm of the deceased. But, the girl is living. Her name is Nyambura, and is an adult now.
11. She stated that she and OW3 Milka Njeri visited the sister of Susan Wangari known as Mama Shupi at Eka Ishirini, Nairegie-Enkare, to report that Susan had been married to the deceased. They took Kshs 5000 to report the marriage and as a sign of her marriage. She stated that this was not dowry but a sign of marriage which is called 'kuhanda ithigi' in kikuyu language. Upon taking the token of appreciation, they went back with Susan to the home of the deceased.
12. According to her, Susan was married to the deceased and cohabited together as husband and wife. They regarded them with courtesy as husband and wife. They lived for 8 years. She stated that the two were married even if dowry had not been paid as dowry is never finished; you pay as you are blessed.
13. She said to the court that, the objectors are children of the deceased as the deceased also considered them as his children, lived with them and took care of them. She stated also that, the mother of the petitioner was married with three children and gave birth to two others. But, all are the children of the deceased.
14. It was her testimony that, the objectors did not attend the burial of the deceased because they were not notified of the death of their father. To her, the fact that the objectors did not attend the burial does not disinherit them.
15. She testified that, Sankale subdivided the estate land into 15 portions and gave each beneficiary including the objector. But, she passed judgment upon Daniel, the 1<sup>st</sup> petitioner; that he is the trouble-shooter, as he received 7 plots and sold all of them, and now wants to deprive others of their portions.
16. OW3, Milka Njeri Magero was married to the step brother of the deceased in 1974. She stated that the deceased had three wives; mama Warui (1<sup>st</sup> wife), Susan Wangui (2<sup>nd</sup> wife) and Naomi Nyambura (3<sup>rd</sup> wife). She was already married when the three were married by the deceased. She and OW2 took Ksh. 5,000 to the home of Susan upon marriage as dowry. Her sister accepted the money because their



- parents are deceased. She considered this to be kikuyu customary marriage as they were sent by the deceased. She stated that they went there on two occasions. The first time, they took sugar. The second occasion, they took Kshs 5000. She stated that OW2 may have forgotten when they took the Kshs 5,000. Susan stayed with the deceased as husband and wife for a long time. She said she knew the family well.
17. She stated that John Sankale, brother to the deceased convened a meeting of the two houses. She invited Naomi but she declined to attend. Her son Daniel also refused to attend. So Sankale, subdivided the land amongst the families of the deceased.
  18. She also stated that she went to the petitioners' advocate with John and told the advocate that the deceased had 10 children. And, that the deceased left John in charge of his estate.
  19. OW4, Samwel Leposo Kondonyo, chief at Kekonyoki location, testified that he knows the deceased and his family. The deceased was a close friend of his father, who was his predecessor. He stated that the deceased was polygamous with three wives. He also had children with his wives.
  20. He stated that he authored the two letters in question; the one dated 2.7.2015 and another dated 30.11.2018. He explained that the first letter was written on the basis of information given by Daniel Leshorua who requested for the letter, and in his information, excluded other children of the deceased. He stated that in polygamous families, houses may provide incomplete information. The second letter is accurate and includes all children of the deceased. He emphasized that, he knew the deceased well as well as his children. He regretted the error. He also stated that all the children live in the estate property which was subdivided to all of them.
  21. OW5 and OW6, Oscar Obidi Ochieng and James John Saitoti, respectively, spoke to a survey report (OBS Exh. 3) which showed that the estate property had been subdivided into 23 portions of land, there were portions that were developed and others undeveloped. They stated that, some people on the land claimed to be buyers of the some of the portions of land.

### **Respondents' case**

22. Pw1, Daniel Oloshurua Magelo, the 1<sup>st</sup> petitioner, told the court that, the co-petitioner was his brother and the deceased was their father. He said that his father left only his mother and 5 children as dependants. His father did not tell them he had another wife. He does not know the objectors as he has never seen them before they came to court. The Objectors have never lived with them in the farm-the estate property herein. They did not also come to see the deceased when he was sick.
23. According to him, he went to the chief with Milka Njeri (OW3), John Sankale, Mwanyinyi who are brothers of the deceased when the chief wrote the letter dated 2.7.2015.
24. He testified that the objectors took six plots in the estate property which was illegal action on their part. But, he said that he did not take any action because he did not have letters of administration, and the chief offered no help except telling him to await the decision of this case.
25. PW2, Esther Magelo, a step-sister of the deceased stated that the deceased had one previous wife who left as she was a drunkard; and that she did not have any children. According to her, the deceased thereafter married only once; the mother of the petitioners whose dowry payment she was involved. She told the court that she does not know the objectors and has never seen them. She stated that she buried the deceased and no one came to claim were children of the deceased.



26. She confirmed that the mother of the petitioners came with two children into the marriage with the deceased; a girl and Daniel, the 1<sup>st</sup> petitioner. And, she gave birth to three children out of the relationship with the deceased.
27. She said that she does not know Susan Wangari or Naomi Nyambura or as wives of the deceased.
28. Pw3, Peter Kerore, a nephew of the deceased, stated that, he knew the deceased. He was the chairman of the funeral committee. He said that the deceased left only one wife called Naomi Nyambura and five children. The deceased did not have any other wife or children. He did not, however, attend any marriage ceremony for Naomi Nyambura.
29. He said that he does not know the objectors; and they did not even attend the funeral for the deceased. According to him, he was very close to the deceased who told him to help Daniel to uphold his family. He told the court that if the deceased had another wife or children, he would have told him. He claimed that Milka brought the objectors into the estate of the deceased.
30. He stated that he learnt that the estate property had been subdivided amongst the children of the deceased, but, he did not know whether it included the objectors. He also sees many houses on the estate property.

### **Directions by the court**

31. Parties filed their respective submissions.

### **Submissions by objectors**

32. The submission analysed the evidence by the parties and concluded that; i) the objectors are children of the deceased and therefore dependants under section 29 of the *Law of Succession Act*; ii) the objectors have equal rights to inherit the estate of the deceased; iii) they should be provided for in the estate; iv) have made out a case for revocation of the grant. They also cited judicial authorities in the submissions to support their position.

### **Submissions by the petitioners**

33. The petitioners, in their submissions, analysed the evidence and applied the law to the facts and concluded that: i) the objectors are strangers; ii) they have not proved their mother was married to the deceased nor there are children of the deceased, thus, not beneficiaries of the deceased; iii) the petitioners are the only bona fide children and dependants of the deceased, thus, beneficiaries of the estate of the deceased.
34. They cited cases in support of their position.
35. They sought dismissal of the protest.

### **Analysis And Determination**

#### **Issues**

36. The court has considered the pleadings, affidavits filed, the rival submissions of the parties and case law cited therein. The two major issue here are: -
  - i) Whether Susan Wagari was married to the deceased.
  - II) Whether the objectors are dependants of the deceased.



## Of Marriage

### Customary law marriage

37. Marriage between Susan Wangari and the deceased is at the centre of the protest. A claim of customary law marriage was made.
38. ‘The existence of marriage is a matter of evidence which is proved with evidence’ (*Gituanja v Gituanja* [1983] eKLR). The objectors bore the onus of proof.
39. OBW3, Milka Njeri claimed that, Susan Wangari was married under Kikuyu customary marriage. She stated that, they went to the home of Susan Wangari on two occasions-but, it was her sister’s place because her parents were deceased. On the first occasion, they took sugar and bread. It was accepted. On the second occasion, they took dowry of Kshs 5,000. It was accepted. She claimed that the sisters and brothers of the deceased, wazees as well as women attended the second ceremony; ruracio- a kikuyu ceremony in which a marriage is contracted. She claimed to understand ruracio ceremony.
40. The evidence by OBW2, Hannah Waithera, however seems to contradict that by OBW3. The former stated that, they went to the home of Susan once and took a token of appreciation in the sum of Kshs 5,000 which was not dowry but, an act of ‘kuhanda ithigi’- a sign that the girl has been betrothed. According to OBW2, only she and OBW3 were present when they took the said Kshs 5,000.
41. OBW3, attempted to explain that OBW2 may have forgotten that the sum of Kshs 5,000 they paid was dowry and that it was paid during the second occasion of the visit to Susan’s sister home.
42. The two are close family members of the deceased. OW2 was married to the elder brother of the deceased. She was regarded as the elder wife in the homestead and was respected by the deceased. OW3 was married to step brother of the deceased in 1974 and witnessed the deceased marriage to all his wives including Susan. They claim that Susan was married to the deceased, and that they participated in the marriage between the two. Their evidence on this aspect is however contradictory.
43. OW3 stated that, she understood the Kikuyu Customary marriage, and according to her, they paid dowry of Kshs 5000. Wazees, women, brothers and sisters of the deceased were present during the ruracio ceremony. The deceased was not however present. According to OW2, the deceased or any other family member of the deceased apart from her and OW3 was not present in the ceremony.
44. In Kikuyu custom and practice, ruracio ceremony is solemn practice that involves elaborate procedures for negotiation and payment of dowry before a marriage is contracted. It follows well-articulated, particular, specific and essential steps with specific meaning and significance. Elders who are qualified under the Kikuyu tradition together with selected women conduct this ceremony. The ceremony is never conducted by sisters in law of the bridegroom and the sister of the bride alone. (Nyamu-Njoka. D, 1951 Njuuria, Ngwire: Kihumo, Mitugo na Miikarire ya Agikuyu)
45. The petitioners correctly submitted that a customary marriage should be established in accordance with the custom and practice claimed. And, therefore, a customary marriage cannot be inferred. They cited Eugene Contran, Casebook on Kenya Customary Law, on the essentials of a Kikuyu customary marriage of ruracio and ngurario.
46. From the analysis above, there was absolutely no evidence of a kikuyu customary marriage between the deceased and Susan Wangari.
47. But, before exiting this point, some scholars advise caution that, the splendid work by Eugene Contran, should not be seen as shaping one-size-fit-all customary law, as customary laws and practices in Kenya



are as varied as there are communities, and are quite organic, dynamic, evolutionary and adaptive in nature, in time, gaining new or modified elements or discarding others.

### **Presumption of marriage**

48. That notwithstanding, the petitioners' legal counsel again, asked the next critical and correct question. Can a presumption of marriage be inferred from the parties' conduct? Put differently; Are there circumstances or conduct of the parties upon which a marriage may be presumed?
49. Presumption of marriage is a common law practice. The substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date, apply to Kenya with such modifications, adaptations, exceptions and alterations as are necessary (s.3 of the *Judicature Act*). This is commonly known as 'the reception clause'.
50. Presumption of marriage is, nonetheless, a matter of proof by evidence.
51. A marriage is presumed between two consenting parties of capacity or legal right to marry, who have intended to marry, have cohabited for a long period of time, have held themselves out to the world as and are known to be of repute as a husband and wife. (Supreme Court *Mary Nyambura v Paul Ogari Mayaka* [2023] eKLR)
52. According to the objectors and their witnesses especially OW2 and OW3, Susan was married to the deceased and cohabited together for a long period of time. They stated that she cohabited with the deceased for 8 years. They were not sure however, of the exact date when the cohabitation started.
53. The witnesses stated that, during the cohabitation, Susan gave birth to two children; a girl and a boy. But the boy died and was buried in the farm belonging to the deceased. The girl is living. Her name is Nyambura.
54. Evidence show that Naomi, the mother of the petitioners was married after Susan had left and that she occupied the house where Susan was living. The petitioners' claim that they have never seen the objectors and their mother should be seen within this context. The evidence by the petitioners' witnesses seemed to had been calibrated to deny knowledge of the marriage between the deceased and Susan Wangari. It appeared to the court they were simply denying the truth to support the petitioners' case.
55. The objectors' witnesses stated that, Susan left due to constant beating by the deceased. The deceased is said to have been a drunkard and had been married to eight wives. Susan fell ill while away and died. The two were not divorced.
56. The two witnesses (OW2 & OW3) appeared to be credible and knew the deceased well. They knew of his life escapades and gave details of his marriages as well as violent behaviour towards his wives. They were determined to tell the truth. The court believed them.
57. The two were also involved in taking sugar, tea and Kshs 5, 000 as a token of appreciation to the parents of Susan- represented by her sister as they were deceased. They were sent there by the deceased. They came back with Susan who cohabited with the deceased for a considerable period of time. Evidence adduced by the objectors show that Susan and the deceased were also of the reputation of living as husband and wife. The two were of the age of majority with capacity to marry, intended and consented to marry; and got married.
58. Consequently, the objectors proved that Susan was married to the deceased through a long cohabitation. Accordingly, this court presumes a marriage between the two.



### **Whether the objectors are dependants?**

59. The next hurdle. Are the objectors, dependants of the deceased as to be beneficiaries of the estate?
60. They must prove that, they are; ‘...such of the deceased’s...children whom the deceased had taken into his family as his own,...as were being maintained by the deceased immediately prior to his death’ (s. 29(b) of the *Law of Succession Act.*)
61. Evidence show that, their mother moved in with them when she got married to the deceased. The deceased took them in as his own children and maintained them. The objectors claim that the deceased continued to maintain them. They were only taken away from the deceased after their mother died. They are, therefore, dependants of the deceased.
62. There is also evidence that Nyambura was borne out of the marriage between the deceased and Susan. There is nothing to disprove this fact. She is therefore a dependant of the deceased in accordance with section 29(a) of the *Law of Succession Act.*
63. The chief who wrote the letters herein confirmed that the objectors were also children of the deceased. The court so holds.
64. For avoidance of doubt, it is not disputed that the petitioners and their siblings are dependants of the deceased.
65. As parties did not address the court on distribution of the estate, the Summons for Confirmation of Grant herein, shall be listed down for hearing so that parties can file their lists of distribution.
66. Given that the parties are dependants of the deceased, each party shall bear own costs.
67. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT ONLINE APPLICATION THIS 9<sup>TH</sup> DAY OF JULY 2024.**

**F. GIKONYO M.**

**JUDGE**

In the presence of:

- 1 Ms. Mogere, advocate for the petitioners
- 2 Kilele for the objectors absent
3. Otollo C/A

