



**In re Estate of Johnson Maweu Kieti alias Johnson Maweu Kietti (Deceased) (Succession Cause E004 of 2020) [2024] KEHC 12500 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12500 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE E004 OF 2020**

**MW MUIGAI, J**

**OCTOBER 15, 2024**

**IN THE MATTER OF THE ESTATE OF JOHNSON MAWEU  
KIETI ALIAS JOHNSON MAWEU KIETTI – (DECEASED)**

**IN THE MATTER OF**

**JOYCE MWENDE WAMBUA ..... 1<sup>ST</sup> PETITIONER  
CHRISTOPHER MWANIA KIETI ..... 2<sup>ND</sup> PETITIONER  
JANE MWENDE MAWEU ..... 3<sup>RD</sup> PETITIONER  
EUNICE SOILA MAWEU ..... 4<sup>TH</sup> PETITIONER**

**RULING**

1. Johnston Maweu Kieti alias Johnstone Maweu Kietti died on 19/2/2020.
2. Angelista Nanginyi Ene Olobora & Jane Mwendu Maweu petitioners filed Petition on 22/10/2020 and listed beneficiaries of the estate and assets available for distribution. Among them, Pauline Mwikali Cosmas as 3<sup>rd</sup> Wife/Widow of the deceased.

**Certificate of Urgency / Summons**

3. Vide the Summons dated 26/09/2024 filed in Court under Certificate of Urgency, the Petitioners/Applicants herein sought the following orders: -
  1. Spent
  2. That this Court issue an order allowing the Petitioners to withdraw a sum of Kshs.485,107/- from the deceased Equity Bank Account Number 0600293254161 to clear medical bill and cater for funeral expenses of Pauline Mwikali Cosmas – deceased.
  3. That the cost of this application be in the cause.



4. The Summons is supported by the Affidavit by Eunice Soila Maweu the 4<sup>th</sup> Petitioner/Applicant sworn on even date stating that:
  - a. The deceased beneficiary one Pauline Mwikali Cosmas was the 3<sup>rd</sup> wife of Johnson Maweu Kieti.
  - b. The deceased beneficiary Pauline Mwikali Cosmas had no children who could take care of her during her lifetime and solely relied on the estate of her late husband for upkeep and wellbeing.
  - c. The deceased beneficiary Pauline Mwikali Cosmas fell ill and was taken to various hospitals amongst them Kenyatta National Hospital where she succumbed to her illness on the 16/09/2024 leaving behind a huge medical bill.
  - d. The Kenyatta National Hospital mortuary subsequently detained the deceased body pending clearing of the hospital bill.
  - e. The beneficiaries of the estate of Johnson Maweu Kieti have been trying to put together funds to clear the hospital and mortuary fees and organize a decent sendoff which is budgeted to cost Kshs.485,107/- but the same has borne no fruits.
  - f. The Petitioners resorted to the Application for orders for release of funds held in the bank for purposes of clearing the hospital and mortuary fees and organize a decent sendoff.
  - g. Eventually the estate of Johnson Maweu Kieti will be distributed and all beneficiaries will get their share and since the deceased beneficiary Pauline Mwikali Cosmas will not be there to receive her share the part entitled to her from the estate be used to clear her accrued medical bill, mortuary fees and funeral expenses.

### **Replying Affidavit**

5. Joyce Mwendu Wambua the Respondent herein swore a Replying Affidavit and deposed;
  - a. The said deceased one Pauline Mwikali Cosmas was not a wife of the late Johnson Maweu Kieti but is a sister to their late mother Anosiata Mwikali Maweu (deceased).
  - b. The issue of whether the said Pauline Mwikali Cosmas was a wife is a matter that is still pending determination before this Court.
  - c. The Petitioner's application for release of funds held in the bank for purposes of clearing the hospital and mortuary fees of the aforementioned deceased person is in bad faith and premature as the issue is still pending in court.
  - d. The said Pauline Mwikali Cosmas (deceased) is not a beneficiary and is not entitled to any share of the late Johnson Maweu Kieti's estate.
  - e. The issue of the rightful beneficiaries of the estate of Johnson Maweu Kieti has not been fully determined and there are three different Chief's letters to this matter hereby attached and are subject of complaint and investigations. The Respondent relied on her Witness Statements marked JMW1 and annexed to the Replying Affidavit.
  - f. A complaint was lodged at the Machakos County Commissioner against the Chief for issuing multiple letters which are contradictory.



## Written Submissions

### Applicant's Submissions

6. The Applicants raised two issues for determination;
  1. Whether Pauline Mwikali was a wife to Johnson Maweu Kieti?
  2. Whether the orders sought should be granted?
7. On the issue of whether Pauline Mwikali was a wife to Johnson Maweu Kieti it is not in dispute that the deceased died intestate and therefore his estate is subject to the procedure of distribution according to the provisions of Section 29 of the [Law of Succession Act](#) which defines a dependent as;

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;
8. The Applicant deponed that Pauline Mwikali Cosmas was a wife and therefore a dependent married under customary law or presumed as a 3<sup>rd</sup> wife on the doctrine of presumption of marriage due to long stay and evidence shows that deceased whose estate is the subject of administration & distribution and the deceased Applicant lived as husband and wife. The basis of her claim for presumption are basically the following;
  1. That she knew the deceased had a 1<sup>st</sup> and 2<sup>nd</sup> wife.
  2. That the other wives knew of the relationship between the deceased and herself.
  3. That she stayed with the deceased at the deceased's plot Oloitoktok; where also the 2<sup>nd</sup> wife resides and he built her a house where they stayed together until his death. They however did not have children.
  4. The neighbors and relatives knew they were staying together as husband and wife and when he died, she was recognized as a wife in the funeral arrangements and program.
9. The concept of presumption of marriage in our jurisdiction is no longer in doubt. In fact, that concept has a statutory underpinning and this was recognized by the Court of Appeal in *Mary Wanjiru Gitbatu vs. Esther Wanjiru Kiarie* (2010) 1 KLR 159 where it was held that:

“There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the [Evidence Act](#), Cap 80, Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”
10. In the case of *In M N M Vs. D N M K & 13 Others* (2017) eKLR, it was held:

“The presumption of marriage has been recognized in our jurisdiction for a long time. In *MWG v. EWK* [2010] eKLR, this Court explained that the existence or otherwise of a marriage is a question of fact and likewise, whether a marriage can be presumed is a question of fact.”



See also *Njoki vs Mutheru* [2008] 1KLR (G& F) 288

Re Estate of Adriano Welikhe Muliali (Deceased) 2020 eKLR on the same point of presumption of marriage.

11. Section 3(5) of *Law of Succession Act* provides;

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

12. See also *Estate of Robert Ngundo Nyiva (Deceased)* 2021 eKLR.

13. On the issue of whether the orders sought should be granted, it is submitted that the main order sought herein is for access of funds for purposes of clearing hospital bills, Morgue charges and funeral expenses of the deceased beneficiary. The Applicant prays that this Court be guided by Rule 36 of the Probate and Administration Rules and finds this as special circumstance to warrant the sought orders.

Rule 36 of the *Probate and Administration Rules* provides that:

“Where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.”

14. The deceased being a 3<sup>rd</sup> wife with no children will not benefit from the estate and the only thing this estate can do is to give her a decent send off. This can be achieved through using a part of her share to the estate to send her off decently.
15. It is finally submitted that the application dated 26/9/2024 is merited and the same should be allowed in its entirety to allow the estate of Jonson Maweu Kieti to put to rest one of their own.
16. The Respondent through Counsel on record waived their legal right and opted not to file Written Submissions.

### **Determination/Analysis**

17. The Court considered the pleadings oral written submissions the Court record and finds the issue for determination is whether the Court shall grant orders for funds for payment of Ksh 485,107 to clear hospital, mortuary fees and give the deceased a decent sendoff.
18. At the outset, the Court record discloses serious contest on determination of beneficiaries of deceased's estate as he died intestate. The issue also informs who Administrators of the estate ought to be. Despite consent to 4 proposed Administrators appointed by the Court under Section 66 LSA there is still contest and parallel claims by parties on who is wife/widow of the deceased and who is child of the deceased.
19. On the one hand, the Applicant seeking above set out application relied on the issue of dependency as provided by Section 29 of *Law of Succession Act* that defines dependent as follows;

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;
20. The Applicant deposed that the deceased knew the deceased had 1<sup>st</sup> & 2<sup>nd</sup> wives and they knew of her relationship with the deceased. They lived in Oloitoktok where she lived with deceased until his death. They did not have children.
21. The Applicant also relied on the doctrine of presumption of marriage as espoused by the celebrated case of *Hortensia Wanjiku Yawe vs Public Trustee* 1976 I KECA KLR;
- “The appellant had testified that she was married to the deceased; the deceased had told Christopher Malavu that the appellant was his wife, and the deceased in an application in 1966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died in an accident, and during that period the appellant bore him four children. Evidence was led on behalf of the appellant that a Kikuyu customary marriage between her and the deceased took place and that various ceremonies and rituals were duly performed. The deceased’s mother appeared to deny that any such ceremonies took place in her presence as alleged by the appellant and her witnesses.....
- Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption, see re: *Taplin - Watson v Tate (1937) 3 ALLER 105*.....
- In this case there was evidence of the deceased’s oral and written declarations that the appellant was his wife, and the visit to the appellant’s parents’ home by the deceased’s mother, which was probably of some matrimonial significance.
22. The Court record confirms that in issue for hearing and determination is who are the beneficiaries of the deceased’s estate. The matter proceeded with evidence of PW1 Joyce Mwende Wambua & PW2 Jane Mutave Nzwele and remains parheard todate.
- The evidence proving Pauline Mwikali Cosmas was wife/widow of the deceased either as dependent or under presumption of marriage is not yet on record.
23. Section 29 (a) *LSA* provides for wives married under statute or other forms of marriage customary or muslim marriages that recognize polygamy to prove one form of marriage that they were validly married to the deceased and also includes a judicially separated wife. This fact has not yet been proved.
24. With regard to the presumption of marriage being applicable to this case, there should be proof of long cohabitation, living together with deceased in the matrimonial home, neighbors, friends and/or colleagues identifying the couple as married couple and evidence of declarations by the deceased that the Applicant is wife of the deceased. The Cohabitee has to prove customary marriage or convince the Court by cogent evidence of prolonged cohabitation to give rise to presumption of marriage.
25. The Applicant submitted that they lived together at various homes confirming to public and neighbours that they were husband and wife and the Respondent acknowledged her as Aunt and thus she was no stranger to the deceased’s family.
26. The Applicant relied on Section 3 (5) LSA that recognizes marriage by a woman to a man under a system of law which allows polygamy even where the husband contracted a previous or subsequent marriage to another woman, the wife will be recognized under Sections 29 & 40 LSA. Section 3(5) LSA amendment was intended to cater for the woman who contracts a marriage with a man who is already



married to another woman under statute and therefore lacking capacity to contract another marriage under any family law system. The import of Section 3(5) *LSA* & Section 37 of the *Marriage Act* are extensively discussed in Hon. W. M. Musyoka J's Law of Succession 2<sup>nd</sup> edition 2022 Pg 452.

27. In this case, Section 3 (5) *LSA* is not applicable at this stage as the evidence on record is of the 1<sup>st</sup> wife's customary marriage under Kamba customary law as per PW 2 testimony. The deceased married the Respondent's mother in 1983 and PW2 witnessed traditional/customary ceremony that took place in Oloitoktok. The evidence regarding traditional marriage to late Pauline Mwikali Cosmas by the deceased herein such evidence has not yet been adduced.
28. Long Cohabitation and holding Pauline and Johnson as man and wife under presumption of marriage has not been proved yet. The period the sisters of 1<sup>st</sup> wife lived with her and deceased husband are not clear and in what capacity /role, when was one was helping in the home or being educated by deceased, when one was in an affair with deceased, when one was married by the deceased.
29. The Respondent's Replying Affidavit, daughter of the deceased, attached 3 Letter from the Chief of Lumbwa Location which are subject of complaint and investigation. The Chief's letter of 31/8/2020 lists Joyce, Christopher, Lukas (deceased) & Jane children of deceased as beneficiaries of the deceased's estate.
30. The Chief's letter of 8/9/2020 referred to dependents of deceased's estate and declared letter of 31/8/2020 null and void.
31. The Chief's letter of 9/9/2020 listed the dependents of the deceased as follows;  
Anosiata Mwikali Maweu- 1<sup>st</sup> wife (deceased)  
Joyce Mwende Wambua  
Christopher Mwanja Kietti  
Lukas Maingi Kietti \_(deceased)  
Angelista Nanginyi Ene Olobora- 2<sup>nd</sup> Wife  
Patrick Sirere Maweu  
Jane Mwende Maweu  
Eunice Soila Maweu  
Pauline Mwikali Cosmas- 3<sup>rd</sup> wife
32. The Respondent deposed that the issue of beneficiaries has not been fully determined and there are 3 different Chief letters subject of investigations.
33. This Court commenced hearing of the dispute and took evidence of PW1 Joyce Mwende Wambua, Respondent and PW2 Jane Mutave Nzwele. PW1 testified that her late mother Anosiata Mwikali MaweuAngelista, Nanginyi Ene Olobora& Pauline Mwikali Cosmas are/were sisters. They were her Aunties who came to live at their home at different times to help take care of them as Nanny. They lived in Eastleigh Nairobi Machakos and Loitoktok. Angelista lived with them and then went to Loitoktok as their mother was old and aged and needed care. Pauline came in to care for them and worked at the Bookshop.
34. Earlier on, unknown to her, her late mother Anosiata Mwikali Mweu fell sick, in 2016 when she went to inform her of her wedding and did not find her mother. She was told she was in Loitoktok and was



unwell. The deceased, her father attended her wedding and told her he left to take her mother to USA and later India for medical treatment. Her mother did not attend her wedding as she had 3 strokes.

35. In September, 2018 her Auntie Jane Mutave Nzwele came to the Bookshop looking for friend, her mother and she was not there. PW2 asked Pauline Mwikali Cosmas where her mother was, she said PW2 was to ask the father deceased herein. PW2 called her and she travelled from Tala to Machakos and found Pauline Mwikali Cosmas and asked to see her father. She said he went to Loitoktok.
36. PW1 reported her mother missing to the Police. Investigations revealed that her mother was taken to Bishop Kioko Hospital according to medical records in September 2015. PW1 went to Machakos Funeral Home the next day. PW1 was shown her late mother's body and her late brother's body in the Mortuary. The DCI/Police came and conducted investigations.
37. Later, Joseph Maweu Kieti (deceased) and the Applicant Pauline Mwikali Cosmas (deceased) were taken into custody over the death of Anosiata Mwikali Mweu. The deceased was charged in Court he was very sick, PW1 forgave him and he died in 2020. The property that comprises of deceased's estate included PW1's mother effort/contribution since 1983.

Section 96 LSA provides;

1. Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.
38. The evidence adduced was direct testimony subjected to cross-examination to confirm its veracity and credibility of the witness. The Applicant younger sister of the deceased's wife now deceased was brought into her late sister's matrimonial home to help, instead she failed to disclose any untoward behavior that made her sister's health deteriorate or help her to seek medical care. Pauline Mwikali (deceased) did not take care of her sister which her health deteriorated but was in her home; taking care of her children and businesses. Pauline Mwikali and Angelista Nanginyi sisters to the deceased's 1<sup>st</sup> wife stepped in her shoes and carried out their sister's role in the home and in the process allowed and/or acquiesced to her late sister's disappearance, neglect, seclusion, mistreatment and eventual untimely death. The evidence on record shows that Pauline Mwikali and Johnson Maweu Kieti were arrested during investigations of Anosiata Mwikali Maweu's death.
  39. It cannot be just, fair or equitable in the circumstances that as an accomplice who aided the deceased herein in causing her elder sister's death that Pauline Mwikali be a beneficiary of the deceased's estate which must have included his 1<sup>st</sup> wife's effort work and contribution to the matrimonial property of her family. This sentiment is what is prohibited by Section 96 LSA, that Joseph and Pauline facilitated 1<sup>st</sup> wife's disappearance and/or death from 2015-2018 and culminated with their arrest and charge against the deceased husband of 1<sup>st</sup> wife -deceased.
  40. Therefore, from the abovementioned reasons at this stage, when the issue of beneficiaries of the deceased's estate has not been resolved, it is premature for the Court to grant orders to withdraw funds from deceased's account. In the absence of written consents by beneficiaries/Administrators or determination of the same, it would amount to the Court intermeddling with deceased's estate which is prohibited by Section 45 LSA.

## **Disposition**

1. The Certificate of Urgency & Summons for the Court to grant payment of Ksh 485,107 to clear hospital, mortuary fees and give the deceased a decent sendoff is dismissed.



2. The parties/Counsel to obtain hearing dates of the matter in the next year 2025 as this Court is on transfer.
3. Each party to bear own Costs.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT AT MACHAKOS HIGH COURT ON 15<sup>TH</sup> DAY OF OCTOBER, 2024 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

