In re Estate of Samson Kagunda (Deceased) (Succession Cause 378 of 2005) [2023] KEHC 181 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEHC 181 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE 378 OF 2005

LM NJUGUNA, J

JANUARY 18, 2023

IN THE MATTER OF THE ESTATE OF SAMSON KAGUNDA (DECEASED)

BETWEEN

RAHAB WANJA MICA ..... APPLICANT

AND

NAUMI WAMBUI KAGIRI ..... RESPONDENT

RULING

1. Before this court is the summons dated June 20, 2008 and filed in court on 26.062008 which seeks for the orders;

    i. Spent.

    ii. Spent.

    iii. Spent.

    iv. That the grant of letters of administration issued to Naumi Wambui Kagiri on May 5, 1997 and its confirmation made on February 2, 1998 be revoked.

    v. Costs be in the cause.

2. The said application is based on the grounds on its face and it's supported by the affidavit annexed to the application.

3. In a nutshell, it is the applicant's case that the said grant was obtained by means of untrue allegations of facts, fraudulently by making of a false statement or by concealment from court of something material to the case and the proceedings to obtain the grant were defective in substance; in that, the

respondent herein misrepresented facts to the court that she was the wife of the deceased herein and further proceeded to acquire letters of administration in respect of the estate of the deceased secretly, without informing her.

4. The application is opposed by the respondent vide a replying affidavit sworn on October 28, 2008 and wherein the respondent deponed that she is the widow of the deceased herein and therefore the rightful administratrix of the deceased's estate. That she got married to the deceased in 1980 and solemnized their marriage in 1994 and further, the union was blessed with three children. It was her contention that the two parcels of land namely LR 437 and 460 were subdivided following a succession cause instituted by the administrator to the estate of the deceased and the beneficiaries. That the new resultant titles from parcel No 460 gave rise to 1275, 1276, 1277 and parcel No. 437 gave rise to parcels No 1672, 1673 and 1674.It was her case that the parcel numbers 1276 and 1672 are still registered in the names of the applicant's mother (deceased) and the parcel numbers 1277 and 1673 are registered in the names of her deceased husband while 1275 and 1674 are still registered in the name of the applicant's eldest brother.

5. The respondent deponed that it is apparent that the applicant does not oppose the properties that the deceased herein inherited from his deceased father but contends that the respondent should not have petitioned for the letters mainly because she was allegedly not married to the deceased herein. It was her contention that parcel numbers T27, T29 and T30 and T31 belonged to the deceased herein and that she has been cultivating the same. It was deponed that the applicant and her brothers namely Titus Kamau and the deceased herein had agreed on a mode of distribution of the estate of Waithira Chege, wherein they agreed that the applicant would inherit parcel No Loc 2/Gacharage/1672; whereas the deceased was to inherit parcel No Loc 2 /Kinyona/1276 and on the strength of the said agreement, she proceeded to develop parcel number Loc 2/Kinyona/1276 where she planted 10,000 tea bushes. It was her case that she was not bound to seek for the applicant's consent given that she ranks first in priority to apply for the grant.

6. Directions were taken that the summons be disposed off by way of viva voce evidence and later parties filed written submissions.

7. The applicant reiterated that the respondent has never been married to the deceased herein and that she may have been one of the deceased's girlfriends but not a wife. In the same breadth, the respondent conceded that she was never married to the deceased under Kikuyu Customary Marriage and further, the deceased never introduced her to his family as his wife. That section 6 of the *Marriage Act* lists the kinds of marriages considered legal in Kenya and that the respondent's alleged marriage does not fall under any of the given categories. That the alleged marriage certificate was a forgery and given that the respondent did not contest it, the same thus was proved by the expert witness. The applicant thus contended that the respondent in the first place lacked the necessary standing to petition the court for grant of letters of administration intestate of the estate of the deceased herein and as a result, she prayed that the said grant issued to the respondent on February 2, 1998 be revoked.

8. The respondent submitted that the estate herein belonged to the deceased Samson Kagunda Chege and not the applicant's parents. That the applicant challenged the marriage certificate as evidence of marriage between the respondent and her deceased husband given that the document examiner stated in his report that the signature on the certificate of marriage was different from the signatures on the documents purportedly obtained from the deceased's office at National Social Security Fund. The respondent submitted that the expert failed to obtain the signatures from a person who knew the deceased but instead obtained the same from the applicant's advocate. It was her contention that the applicant's advocate did not know or recognize the deceased's signature and neither did the applicant know or attest to recognize her brother's signature. Reference was made to Section 68 of the *Evidence Act* in that it was imperative to have a witness who had worked with the deceased and who was

familiar with the signature and handwriting to testify as to the signatures contained in the documents purportedly obtained from NSSF office and/or the contested marriage certificate. In the end, this court was urged to dismiss the application herein.

9. The applicant further filed a reply to the respondent's submissions and submitted that the respondent's evidence did not address the only issue for determination before this court which is; whether the respondent had the standing to move the court for grant of letters of administration intestate in respect of the deceased's estate. It was her contention that the deceased died intestate and given that the respondent was a stranger to the deceased, the applicant ought to inherit the estate of the deceased instead. That if the respondent did not want the documents by the examiner to be considered by the court, then she ought to have objected to their production and as such, it is too late in the day to submit that the documents be excluded from these proceedings.

10. I have perused the application herein, the response thereto and the rival submissions by the parties and I find that the issue for determination is whether the orders sought herein can be granted.

11. As I have already noted, the application herein seeks revocation of the grant made to the petitioner/respondent herein.

12. But before I can address whether the grant ought to be revoked, I will determine whether the respondent had locus to acquire the grant in respect of the deceased's estate as a wife.

13. Section 6 of the *Marriage Act, 2014* lists the kinds of marriages that are recognized under the law; it states as follows:

> "Kinds of marriages
>
> (1) A marriage may be registered under this Act if it is celebrated—
>
> (a) in accordance with the rites of a Christian denomination;
>
> (b) as a civil marriage;
>
> (c) in accordance with the customary rites relating to any of the communities in Kenya;
>
> (d) in accordance with the Hindu rites and ceremonies; and
>
> (e) in accordance with Islamic law.
>
> (2) A Christian, Hindu or civil marriage is monogamous.
>
> (3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous."

14. The respondent in this case presented a marriage certificate registered under cap 150 (Repealed) which showed that she was married to the deceased herein on March 23, 1994. It is apparent that a public document can either be produced in evidence as an original document or a copy, but the latter would require to be duly certified.

15. Section 79 of the *Evidence Act* states as follows;

> "Distinction between public and private documents
>
> (1) The following documents are public documents-
>
> (a) Documents forming the acts or records of the acts-

(i) of the sovereign authority; or

(ii) of official bodies and tribunals; or

(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;

(b) Public records kept in Kenya of private documents.

(2) All documents other than public documents are private."

16. It is trite that the standard of proof in civil cases is on a balance of probability. Such burden rests on he who alleges. [See Section 107 of the *Evidence Act*].

17. The applicant in an attempt to impeach the credibility of the alleged marriage between the respondent and the deceased submitted that the alleged marriage certificate was a forgery and therefore urged this court to find so and thereafter revoke the grant issued to the respondent herein. The applicant's case generally is hinged on the fact that the respondent was not married to the deceased and that the family of the deceased only saw her for the first time during the burial of the deceased; that had the respondent been the wife of the deceased, then a customary marriage could have been celebrated involving the two families in order for dowry to be negotiated and thereafter paid. That in the alternative, had there been a church wedding, then the two families could still be involved and the same would ensure that both families get to know one another; which was not the case here. Further, it was stated that given that the respondent still uses her maiden name 'Kagiri' instead of 'Kagunda', it could not authoritatively be said that the respondent was married to the deceased. In regards to the photos produced before the court, the applicant admitted that she knew the children of the respondent but could not identify the respondent for the reason that she did not know her. Additionally, it was submitted that in as much as the deceased lived in Murang'a but worked in Embu, he only lived with the respondent as a girlfriend and not as a wife.

18. PW4, a document examiner testified in this matter in support of the applicant's case; he identified himself as a trained document examiner at the CID Headquarters laboratories in Nairobi, National Police Headquarters in Jerusalem, Israel, Interpol Headquarters in Lyon France and Moshi Tanzania. He stated that upon retiring in the year 2015, he resolved to private examination and in reference to the case herein stated that after examining the alleged marriage certificate, reached a finding that he could find no agreement between the signatures on the questioned document with the known signatures that he examined. That there were no similarities on the signatures to show that they are from a common origin. He concluded that the signature in the marriage certificate was a forgery. Similarly, the signature on the statutory declaration was also a forgery.

19. Section 48 of the *Evidence Act*, Cap 80 under which opinion of experts is catered for, contemplates that the expert must testify; that section provides as follows:

"48. Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts."

20. The above observation notwithstanding, this court draws guidance from the determination in the cases of *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* Civil Appeal No 203 of 2001 [2007] 1 EA 139; and *Juliet Karisa v Joseph Barawa & Another* Civil Appeal No 108 of 1988, that a Court is entitled to reject expert opinion if upon consideration of such an opinion in conjunction with all other available evidence on the record, there is proper and cogent basis for doing so, and secondly, that a court must form its own independent opinion based on the entire evidence before it and such evidence must not be rejected except on firm grounds.

21. The respondent on the other hand submitted that the applicant failed to impeach the alleged marriage certificate that she was married to the deceased and that they were blessed with children; it was her case that even when the deceased passed on, she fully participated in the burial together with her children and her relatives. She stated that in the obituary and the funeral programme, she was listed as the wife of the deceased and further, the photos produced before the court showed the family of the deceased together with the respondent herein. DW2 testified that she participated in the solemnization of the marriage between the deceased and the respondent. She stated that she saw the duo append their signatures on the marriage certificate in question and in the same breadth, she equally appended her signature as required and that she was a witness to the said marriage. The respondent and her son who testified as DW1 and DW3 submitted that the applicant is a person well known to them and further, that they have not only met severally but also know one another well.

22. Looking at the evidence adduced before this court in totality, it is evident that indeed the respondent herein was not a stranger to the applicant and her family. The applicant admitted that she knew that the respondent lived with the deceased but only as a girlfriend and not as a wife and her only reason was that the respondent was never introduced to their deceased mother and that there were no negotiation of dowry and or a church wedding and if any such events had happened, then the two families could have come together. Of importance to note is the fact that the alleged marriage was conducted under the *Marriage Act* Cap 150 (Repealed) and the same could not have ultimately be celebrated as demanded by the applicant herein. I say so for the reason that the statutory requirements of such a marriage does not demand that the families of the parties solemnizing their marriage must seek approval from family members. The same therefore does not demand that the applicant and her sisters or family members be informed; and the fact that they were not informed could not have meant that the marriage did not take place or that it was a nullity.

23. In the same breadth, the photos produced by the respondent showing herself and her children during the procession to the grave at the deceased's home, were not challenged or denied. As to how a girlfriend could take over and actively participate in the funeral arrangements of the deceased without an uproar from the applicant and/or her family members given the patrilineal nature of most families in this country, is unimaginable. From their own evidence, the siblings of the deceased did not participate at all in the planning of the deceased funeral and no reason was given for the non-participation. In my considered view, the only logical conclusion is that they all knew that the respondent had taken charge of the same and they trusted her to do so. I hold that the applicant is being economical with the truth and is insincere.

24. Section 80 of the *Evidence Act* requires that the custodian of such documents (as the marriage certificate herein) are the ones to authenticate the said copies. Section 80 of the *Evidence Act* states as follows;

" 80.

(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section."

25. Section 108 of the *Evidence Act* provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Accordingly, the burden of proof was on the applicant to adduce evidence impeaching the contents of the impugned photocopies and the original marriage certificate document of which the same was not done on a balance of probability. Further, it would have been prudent for the applicant to summon the registrar to authenticate the marriage certificate which could have been not only the required practice but also less time consuming of the judicial time. [See *Anthony M Nyamu & 12 others v Attorney General & 3 others* [2019] eKLR; *In re Estate of George Muriithi Gitahi (Deceased)* [2019] eKLR].

26. The court has also perused the report that was made by Hezron W Wamalwa dated the October 11, 2016 and though the same was substituted with the one dated June 22, 2021 by Emanuel Karisa Kenga, the opinion made by Wamalwa cannot escape the attention of this court wherein he stated that the questioned signature was merely in similarly made style, but in a different form lacking details to which to rely for giving an opinion as to its genuineness. He could not give a conclusive find on the impugned signature as opposed to Karisa Kengo yet the two hold the same qualifications, one cannot help but ask why?

27. In the end, it is my finding that the applicant's attempt to impeach the respondent's marriage certificate was thus not successful for the above reasons given. I will therefore proceed and determine whether the grant issued to the respondent ought to be revoked.

28. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the *Law of Succession Act* and include;

a. Where the proceedings to obtain the grant were defective in substance;

b. Where 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. Where 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. Where 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. Where the grant has become useless and inoperative through subsequent circumstances.

29. These conditions have been subject to many judicial decisions. (See *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR).

30. The courts have further held that the power to revoke or uphold a grant is a discretionary one. In *Albert Imbuga Kisigwa v Recho Kavai* Kisigwa Succession Cause No 158 of 2000 where Mwita J stated:-

> " Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

31. The question therefore is whether the applicant has satisfied any of the above conditions.

32. From the perusal of the application herein, the applicant's ground for seeking the revocation is mainly that the respondent obtained the grant fraudulently as she was not the wife of the deceased herein.

33. In dealing with this issue, I find guidance in section 51 of the *LSA*. The said section has provisions on the application of a grant. Sub-section 2 provides on what ought to be included in the application. It provides that an application shall include information as to amongst other things and in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased. (See section 51(2)(g)).

34. Further, Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

35. The effects of the above provisions is that where a person is applying for a grant of letters of administration intestate, she must get consent from persons of equal or higher priority than him.

36. It is not disputed that the estate herein belongs to one Samson Kagunda, the brother to the applicant and the husband to the respondent herein. Under the *Law of Succession Act*, the respondent ranks higher than the applicant given that Section 66 of the *Law of Succession Act* bestows this court with the 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. The court in exercise of the said discretion is mandated to 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:

37. In Nairobi Succession Cause No 2015 of 2012 *In the matter of the Estate of Joshua Orwa Ojode (Deceased)* discussing the issue of who ought to benefit from the estate of a deceased, Musyoka J opined that:

> " 6. Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child."

38. At paragraph 13 of the same judgement, Musyoka J went on to hold that:

> " 13. This duty to maintain a wife and children extends to protection of widows and orphans following the death of the person who is legally bound to maintain them. The law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives, including parents, are relegated to a secondary position, and only access the property in the event that there is no widow or child, or if they convince the court in a proper application that they were dependent on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child. These provisions are designed to obviate the possibility of widows and orphaned children being rendered destitute, as they would be if they are forced to share their inheritance with the parents and siblings of the deceased. Quite clearly therefore under succession law, parents are not in the same footing with widows and children."

39. As such and considering all the above, it is my finding that:

i. The grant of letters of administration made to the respondent herein on May 5, 1997 and confirmed on February 2, 1998 was valid and the same is upheld.

ii. The summons dated the June 20, 2008 is hereby dismissed.

iii. Parties bear their own costs.

40. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Petitioner/Respondent****