



REPUBLIC OF KENYA



**In re Estate of Ayub Naboth Oganda (Deceased) (Probate & Administration
E105 of 2021) [2023] KEHC 1064 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION E105 OF 2021
RN NYAKUNDI, J
FEBRUARY 15, 2023**

**IN THE MATTER OF THE ESTATE OF AYUB NABOTH OGANDA –
DECEASED**

BETWEEN

EUNICE ADHIAMBO AMIMO PETITIONER

AND

GLADYS K OGANDA 1ST OBJECTOR

JULIUS MO OGANDA 2ND OBJECTOR

RULING

1. The Applicant approached this court *vide* a summons for revocation of grant dated April 28, 2022 seeking the revocation of the grant of letters of administration intestate to Eunice Adhiambo made on the January 25, 2022 be revoked on the grounds.
 1. That the proceedings to obtain the grant were defective in substance.
 2. That 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.
 3. The grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently
 4. The persons to whom the grant was made have failed after due notice and without reasonable cause either to and the grant has become useless and inoperative through subsequent circumstances.
2. The application was premised on the grounds contained therein and the affidavits of Gladys Oganda and Julius Oganda.



Applicant's Case

3. The Applicant's case is that she was married to the deceased and she produced a marriage certificate attached and marked "GKO 1". That they had been previously married under customary law in the year 1969 but later on solemnized their union at St Mathews Church Eldoret, Uasin Gishu. Further, that their marriage was properly registered and as such they were issued with a marriage certificate. The marriage was monogamous and they had 2 children during the subsistence of their marriage . the deceased had no capacity to contract another marriage as he was already in a statutory marriage which is monogamous. Since the deceased lacked capacity to marry, the purported marriage between the Petitioner/Respondent is void and is at best a sinful and an unlawful association only fit for penal purposes. She urged that the purported marriage between the deceased and Eunice Amimo was a sham.
4. In her submissions she stated that she was a married under a system of law that is potentially polygamous. She cited section 3(5) of the *Law of Succession act* and the case of *MNM vs DNMK & 13 others* (2017) eKLR and stated that Luo customary marriage being potentially polygamous, the petitioner established that she is a wife for purposes of succession.
5. The 1st Objector submitted that the Petitioner was not the spouse of the deceased and therefore she ought not to have been the proposed administrator of the estate. She stated that the estate was undervalued and the chief's letter was false and misleading. Further, that since the process to obtain the grant was made without the consent of all beneficiaries and the same done clandestinely it's only fair that the same be revoked and the Applicants be allowed to commence the process afresh.

Respondent's Case

6. The Respondent opposed the application and there were several affidavits filed in support of the response. The Respondent deposed that she came to know the Deceased in the late 1980s and they lived together as husband and wife since the year 1989. Soon thereafter they were blessed with three children and she annexed their birth certificates as evidence of the same. In an effort to formalize their union under Luo Customary Law, on July 14, 2002 they visited her uncle who stood in place of her deceased parents and introduced the deceased as her husband and he declared his intentions to formalise their union. Dowry negotiations commenced and payments were made. She annexed photographic evidence of the dowry ceremony. She was later referred to as his wife in his eulogy and attended his burial ceremony. The family members of the deceased recognized her as his wife.
7. The Respondent submitted that that the total net worth of the estate of the deceased was not undervalued but an estimate. That there is no property belonging to the deceased that was within my knowledge that was left out in the schedule of assets and liabilities. It was her case that the petition for grant complied with the requirements of the law and is not defective.
8. In support of her response, Leonard Ochola Oganda, a brother to the deceased swore an affidavit and deposed that he knew the Respondent as he facilitated their dowry payment and accompanied the deceased for the dowry negotiations. Wilfred Agutu Yim, the aunt to the Respondent deposed that she was present for the dowry negotiations and confirmed that they have since referred to the Respondent as her in-law. Dennis Oganda, the brother of the deceased, stated that the petitioner was the wife to the deceased who was his father.
9. The Respondent urged the court to dismiss the application accordingly.



Analysis & Determination

10. Upon considering the application, responses thereto and submissions tendered, I find that there is only one issue for determination;

Whether the grant of letters of administration dated January 25, 2022 should be revoked.

11. Section 76 of the *Law of Succession Act* provides as follows;
76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-
- (a) that the proceedings to obtain the grant were defective in substance;
 - (b) that 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) that 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;
12. The Applicants' contention is that the grant was obtained by fraud by making of a false statement and concealment of material facts. She maintains that she was married to the deceased and is a beneficiary to the estate. She produced a marriage certificate that indicates that they were married in September 1969. On the contrary, the Respondent produced photos of the dowry ceremony to show that she was the wife to the deceased.

Whether the Applicant Is A Wife For Purposes Of Succession

13. Section 3(5) of the *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.
14. Section 107 (1) of the *Evidence Act* it provides:
- 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 those facts exist.”
- Further, Section 108 provides thus:
- The burden of proof in a suit or proceeding lies on that person who will fail if no evidence at all were given on either side.”
15. The Applicant produced a marriage certificate as evidence that she was married to the deceased in September 1969. The same has not been rebutted by any evidence on the part of the Respondents. I have considered the evidence tendered and I find that the Applicant was a wife to the deceased for purposes of succession as per the provisions of section 3(5) of the *Law of Succession Act*. Equally, the petitioner is a wife for purposes of succession as she produced evidence that she was married to the deceased vide customary marriage.



16. It follows that in applying for the grant of letters of administration there was material non-disclosure on the part of the petitioner. Consequently, the application for revocation for grant succeeds on this grounds.

No orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF FEBRUARY 2023

R. NYAKUNDI

JUDGE

info@gallp.co.ke

