



**Gicuku & 4 others v Mbogo (Succession Cause 239 of 2009)
[2023] KEHC 1930 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 239 OF 2009
LM NJUGUNA, J
MARCH 15, 2023**

BETWEEN

**JACKBED GICUKU 1ST APPLICANT
PHILLIS WANGUI 2ND APPLICANT
ELIZABETH NKATHA 3RD APPLICANT
GRACE MUKIRI 4TH APPLICANT
JOHN GITONGA 5TH APPLICANT**

AND

SINEM IGOKI MBOGO RESPONDENT

RULING

1. The applicants moved this court vide an application dated August 12, 2014 and wherein they sought for orders that the grant of letters of administration issued to the petitioner/respondent be revoked. That the respondent was not a wife of the deceased but simply a concubine and further that, the applicants and other persons entitled to apply for the grant, their consent was never sought at the time of filing of the succession cause herein.
2. The application is supported by the affidavit sworn by the 1st applicant on his own behalf and on behalf of the other applicants.
3. In a nutshell, it is the applicants' 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. It is averred that the respondent is a stranger to the estate and that she was a concubine of the deceased herein and further that, the consent was never sought from the applicants at the time of filing the cause herein.



4. The respondent opposed the application via a replying affidavit sworn on September 1, 2014 and wherein she stated that she is a widow to the deceased and that the applicants are children of the deceased. That the distribution of the estate was done in a fair manner to all the deserving beneficiaries; further that, the applicants herein acquired Land Parcel at Nduva Kithimu area where they currently live and they already have their own shares of the estate.
5. The respondent filed a further affidavit sworn on August 16, 2016 wherein she reiterated that the previous administrator was Serina Itura Munyi, the mother of the applicants and that she only substituted her upon death. She stated that the land where the 1st, 2nd and 3rd applicants currently live forms part of the estate of the deceased herein. She contended that the applicants had previously disposed off some property owned by the deceased including motor vehicle KAZ 347 N. She denied concealing anything from the court as most of the succession documents were filed by the mother of the 3rd and 4th applicants. That the grandchildren James Muchangi and Dennis Munene were given their mother's share who had previously died and as a daughter of the deceased, the children were actually entitled. She averred that she got married to the deceased as a 4th wife in the year 1985 and the same was buttressed by the chief's letter which is factual and was not disputed by anyone. She argued that all the applicants participated in the confirmation of the grant and no one objected to the mode of distribution. She urged this court to dismiss the application herein as the same is devoid of merit.
6. Directions were taken that the application be heard by way of *viva voce* evidence and thereafter, parties were directed to file their written submissions.
7. The applicants submitted that not all members of the family were involved in the succession cause and that some members including the applicants herein were disinherited. It was contended that the respondent is not a wife as there was no formal marriage between her and the deceased herein. That the same was not controverted by the respondent as she did not present any evidence to prove that all the customary rites were performed. It was stated that a glimpse at the grant herein, shows that the distribution was not done in a fair manner as some beneficiaries especially 1st to 3rd applicants were given non-existent motor vehicle jointly. That it is clear from the respondent's evidence that, the said motor vehicle was already sold by the time of filing the succession cause herein. In the same breadth, it was evident that the respondent had inherited a lion's share of the estate to the exclusion of the applicants who are lawful beneficiaries to the estate of the deceased. It was submitted that in as much as the court record documented that some beneficiaries were present during the confirmation of the grant, it was argued that there was no indication that their consent was sought at the time of filing.
8. It was also submitted that the respondent was not a wife of the deceased and reliance was placed on the cases of *ASA v NA & another* [2020] eKLR and *Hortensia Wanjiku Yaawe v The Public Trustees*, Civil Appeal 13 of August 6, 1976. The applicants further stated that the chief's letter cannot be relied on to proof existence of a marriage as required by the law. It was thus prayed that the application herein be allowed with costs.
9. I have considered the application before the court, the response thereto, the evidence by both parties and the written submissions by the applicants. In my view therefore, two issues emerge for determination namely:
 - i. Whether the petitioner/respondent is a wife.
 - ii. Whether the grant issued to the petitioner/respondent herein ought to be revoked.



On Whether the Petitioner/Respondent Herein is a Wife

10. The applicants' case is that since the respondent claims to have been married to the deceased under Aembu Customary Law, the onus of proving a customary marriage rested on the respondent. In the case of *Njoki v Mathara and Others* Civil Appeal No 71 of 1989 (UR), Kneller J A reading the judgment of the court held that: -

- “ a) The onus of proving a customary marriage is on the party who claims it.
- b) The standard of proof is the usual one for civil action, balance of probabilities.
- c) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.”

11. Further, in the case of *Hortensiah Wanjiku Yawe v The Public Trustee*, Civil Appeal No 13 of 1976, the court held: -

“The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely “on the balance of probabilities.” Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage”.

12. In *Mary Wanjiru Gitbatu v Estber Wanjiru Kiarie* (Court of Appeal at Eldoret in Civil Appeal No 20 of 2009) the court stated:

“It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essential in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the ‘come we stay’ marriages which are neither customary nor statutory”

13. The Court of Appeal in *Gituanja Vs Gituanja* (1983) KLR 575 and in *Kimani v Gikanga* [1965] EA 735 held that the existence of a customary marriage is a matter of fact, to be proved through evidence.

14. Section 107 of the *Evidence Act* provides that: -

- “(1) 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.”

15. The cases of *In the Matter of the Estate of Karanja Kigo* [2015] eKLR and *Priscilla Waruguru Gathigo Vs Virginia Kanugu Gathigo* [2004] eKLR mention at least five elements:

- a. Capacity which includes age, physical and mental conditions and marital status;
- b. Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;



- c. The ceremonial slaughtering of a ram in a rite called Ngurario;
 - d. Ruracio (bride price) partly paid;
 - e. Commencement of cohabitation.
16. However, in the *Eliud Maina Mwangi* Case, the Court of Appeal opined that customary law evolves with time. The Court stated thus:
- “Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.”
17. In the instant case, the respondent in her evidence stated that she was married to the deceased, a union that brought forth five children. That the deceased herein took dowry to her parents in accordance with the Embu customary law and further that the area chief was in attendance. In rebuttal, the applicants submitted that the chief’s letter cannot be relied on to prove existence of a marriage as required by the law. I have had an opportunity to peruse the said letter dated January 23, 2009 and from the same, the only question that I ask myself is if indeed the respondent was not a wife to the deceased, why would the applicants take five years to realize that indeed the respondent was not their mother or the wife of the deceased herein and that the estate of their father was in the hands of a stranger? Further, I note that after the previous administrator passed on, the respondent herein applied for substitution in order to manage the estate of the deceased and it is clear from the record that no party opposed the same. In the same breadth, at the time when the grant herein was issued to the respondent and thereafter confirmed, no party ever raised an issue to the effect that the respondent was a stranger to the estate.

On Whether the Grant Herein Should be Revoked

18. The law on revocation of grants is section 76 of the *Law of Succession Act* which provides that:
- “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;”
19. The Section is very clear that 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.....(emphasis mine).



20. The question therefore is whether the applicants have satisfied any of the above conditions.
21. From the perusal of the application herein, the applicants' ground for seeking the revocation is mainly that the respondent obtained the grant fraudulently and did not disclose that the applicants were in existence and the correct beneficiaries of the estate. When the application came up for hearing, the applicants' witness reiterated that the respondent did not involve them in the filing of the succession cause, or even seek their consent. The respondent denied concealing anything from the court as most of the succession documents were filed by the mother of the 3rd and 4th applicants.
22. Further, the applicants deposed and further submitted that the respondent did not obtain their consent to be an administrator of the estate as required by law. 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.
23. The effect of the above provision is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or higher priority than him.
24. I have perused through the court record and I find that the said consent is missing; that notwithstanding, it is clear that the Succession Cause herein was filed by Severina Gituru Munyi who was also the wife of the deceased. The respondent substituted the late Severina Gituru Munyi as the administrator of the estate of the deceased herein.
25. Looking at the circumstances of the case herein, more so the fact that on the day when the grant that the applicants are now seeking revoke was confirmed, the 2nd, 3rd, 4th and 5th applicants were in court and they did not raise any objection. Further, in the said grant, I see that the applicants herein were catered for. The respondent submitted that the distribution of the estate was done fairly to all the deserving beneficiaries; further, that the applicants herein acquired Land Parcel at Nduva Kithimu area where they currently live.
26. From the reading of the application by the applicants, I note that their main contention is related to the fact that they feel that the administrator got a lion share of the estate of the deceased herein. They submitted that the distribution was not done in a fair manner as some beneficiaries especially 1st to 3rd applicants were given non-existent motor vehicle jointly. I note that the respondent averred that the applicants had benefited from other properties of the deceased before he died and that they sold the subject motor vehicle and benefitted from the process of sale. This has not been denied by the applicants.
27. The courts have in many occasions held that the power to revoke or uphold a grant is a discretionary one and guided by the decision in the case of *Albert Imbuga Kisigwa Vs Recho Kavai Kisigwa* Succession Cause No 158 of 2000 Mwita J stated that :-

“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.”



28. As a consequence of the above, it is my humble finding that the application herein is a clear example of an abuse of the court process and therefore the orders that are commendable to me are thus:

- i. The application herein is devoid of any merit and the same is dismissed.
- ii. The applicants to pay the costs of the application to the respondent.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Petitioner/Respondent

