



REPUBLIC OF KENYA



**In re Estate of John Njeru Mucee (Deceased) (Succession Cause
3 of 2018) [2023] KEHC 2552 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 3 OF 2018
LW GITARI, J
MARCH 23, 2023**

BETWEEN

AGNES KANJIRU MUGAMBI APPLICANT

AND

SALOME KANANA KINOTI RESPONDENT

RULING

1. This cause relates to the estate of the late John Njeru Mucee (deceased) who died intestate on October 23, 2017. The matter before this court is a summons application by the applicant that is dated September 23, 2019. The applicant sought several prayers but i shall only reproduce prayers 3 and 6 as prayers 1, 2, 4 and 5 are spent.
 - “3. That the letters of administration and confirmation of grant issued to Salome Kanana Kinoti in Chuka High Court SUCC 3 of 2018 be revoked.”
 6. That the cost of this application be provided for.”
2. The application is premised on the grounds on the face of it and is supported by the affidavit of Agnes Kanjiru Mugambi sworn on September 23, 2019 and her further affidavit which she swore on October 14, 2019. The applicant deponed that she is the 1st wife of the deceased herein and the respondent is her co-wife and they were both married to the deceased under the Meru Customary Law. That the respondent filed this cause without the informing the applicant or getting her consent. Further, that the respondent’s failure to involve the applicant in this cause was meant to disinherit the applicant and her daughter of their rightful shares in the estate of the deceased.
3. The application was opposed by the respondent vide the replying affidavit sworn by the respondent on October 12, 2019. She denied that the applicant was her co-wife and deponed that she is the only widow of the deceased. She however acknowledged that Rose Mwendu Njeru was the deceased’s daughter and



- stated that she had included the said child as a beneficiary of the deceased's estate. She maintained that the applicant's claim in the estate was unfounded and prayed for the application to be dismissed.
4. The application was disposed off by way of *viva voce* evidence.
 5. The applicant testified as PW1. She adopted as her evidence her affidavit which she swore on November 9, 2019 and filed in court on November 11, 2019. The applicant maintained that she was married to the deceased and that the respondent was her co-wife. That the deceased paid dowry to her father sometime in 2001 and her union to the deceased bore Rose Mwendu who was born on April 15, 2013. She relied on a copy of the deceased's NHIF card which indicated her name as the deceased's spouse. Further, she relied on a land sale agreement between one Njeru Katheru Mwendu and the deceased which she alleges she witnessed on December 16, 2004 in her capacity as he wife of the deceased. It was thus her case that the respondent secretly filed these proceedings in order to disinherit her.
 6. PW2 was Justus M'Mwari Mugambi, the applicant's father. He adopted as his evidence his affidavit which he swore on November 9, 2019 which corroborated her daughter's testimony that the applicant got married to the deceased sometime in 2001. He stated that the deceased, accompanied by his brother Michael Njeru, went to their home and paid dowry for the applicant, the same including Kshs 50,000/= cash, 50 Kilogrammes of sugar, and some other things. On cross examination, PW2 stated that he did not know that the applicant and the deceased had a dispute at the Children's Department or that the deceased married a second wife. He however stated that he had given the applicant a place to stay on his shamba.
 7. Rose Kanini Musee (PW3) is the sister to the deceased while PW4 was Douglas Njoka M'Mbwiria, a first cousin to the deceased. They corroborated the Applicant's testimony that the deceased had two wives. It was their testimonies that they were both present when the deceased took dowry to the Applicant's home. According to PW4, the deceased never paid for the dowry of respondent, who PW4 acknowledges as the deceased's second wife. PW3 and PW4 confirmed that both the applicant and the respondent were present at the burial of the deceased.
 8. In support of her case, the respondent testified as DW1. She stated that she got married to the deceased in 2008 and they started living as husband and wife until the demise of the deceased. The respondent confirmed that she was the one who filed the instant succession cause. It was her testimony that while the deceased had a relationship with the applicant which resulted in the birth of their daughter Rose Mwendu, the relationship did not materialize into marriage. She further stated that she was aware of the parental responsibility agreement between the deceased and the applicant. On the issue of the details on the deceased's NHIF card, the respondent stated that the deceased updated his information in 2013 and indicated the respondent's name as his spouse.
 9. DW2, Jacob Nthiga Chambari, is a cousin to the deceased. He denied that Agnes was the deceased's wife stating that the deceased only had a child with the applicant but did not marry her.
 10. DW3 was Patrick Muthendi who stated that the deceased was his neighbour, personal friend and confidant. According to him, the deceased had indicated that he wanted to marry the applicant but they later disagreed. That the families of the applicant and the deceased made attempts to reconcile the two but the same did not bear any fruits.

The Applicant's Submissions

11. It was the applicant's submission that she presented a credible case that proves that she was the deceased's wife. As such, she urged this court to find that in obtaining the grant issued in these proceedings, the respondent concealed from the court essential and material facts which warrant the



revocation of the confirmed grant issued to the respondent. Further, that the respondent should be condemned to pay cost for allegedly occasioning unnecessary litigation.

The Respondent's Submissions

12. On her part, the Respondent relied on the cases of *LKK v JK* [2012]eKLR, *David Kiraithe Magambo v Dorothy Ciakaura David* [2012]eKLR, and *In re Estate of Justus M'Murithi M'bagiri (deceased)* [2019]eKLR. She submitted that for a party to prove marriage under the Ameru Customary Laws, the party had to prove payment of dowry in form of livestock or its equivalent thereof, and establish that there was an agreement on how much should be paid. The respondent stated that none of the applicant's witnesses indicated how the alleged dowry that was paid for the applicant was negotiated. That there were contradictions on the identities and number of persons who attended the alleged dowry ceremony and that there was no documentary evidence to prove that the ceremony took place. Further, she pointed out the two letter from the area chief had conflicting information on whether the applicant was the deceased's wife. It was thus her submission that the applicant had failed to prove the existence of her alleged marriage to the deceased under the Ameru customary law. She thus urged this court to dismiss the present application with costs to her.

Analysis

13. I have considered the summons application for revocation grant dated September 23, 2019 and the grounds in which the same is premised. I have also considered the affidavits made in support and opposition of the application as well as the evidences adduced and the submissions by the parties. The central dispute between the applicant and the respondent revolves around the distribution of the estate of the deceased. To this end, it is in dispute whether she was entitled to being informed of the institution of the proceedings on account of allegedly being the first wife of the deceased. As such the main issues for determination are:
- a. Whether the applicant was married to the deceased under Ameru customary laws; and if so,
 - b. Whether the confirmation of the grant made to the respondent should be revoked on account of non-disclosure of material facts.

a. Proof of marriage

14. It is trite that he who alleges must prove section 107, 108 & 109 of the *Evidence Act* provides:

- “(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 that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden; 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.
109. Proof of particular fact; The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

On proof of her alleged marriage to the deceased, the applicant annexed to her affidavit evidence sworn on November 11, 2019, which she adopted as her evidence, the annexures marked as “AKM5(a)”



and “AKM5(b)” which are letters dated January 5, 2018 and December 22, 2017 respectively. Both letters were written by the Chief of Tunyai Location, one Matthews Kabira. The second letter which is marked as “AKM5(b)” confirmed that the applicant was the deceased’s wife alongside the respondent while the second letter which is marked as “AKM5(a)” indicates that the respondent was the only legal wife of the deceased. It is the respondent’s contention that failure to call the said chief to clarify the contradiction dented the applicant’s claim that she was married to the deceased. I am inclined to agree with the respondent’s sentiments on this. The chief who authored the letters should have been called to present his evidence so as to afford the respondent an opportunity to examine him on the same. This evidence is therefore not credible. Although the applicants states that the applicant failed to use the chief’s letter issued in 2017, in my view the letter dated December 22, 2017 may have been back dated because even herself she never used it anywhere. The burden was on the applicant to prove its authenticity which she never did. Be that as it may, the chief’s letter is not the only documents the applicant has relied on in her contention that she was the wife of the deceased. She annexed a documents dated 1/2/2018 which was a meeting held by the chief and it was concluded that the applicant was a wife of deceased. The applicants annexed photographs she had taken with the deceased and their daughter and that deceased had referred to her as his wife, see NHIF card and the agreement she witnessed as deceased’s wife. She also relied on a parental responsibility agreement between her and the deceased with respect to their child. It is the applicant’s contention that herself and the respondent were married to the deceased under Meru Customary Law.

15. The applicant alleges to have been married to the deceased under the Ameru customary laws. Section 43 of the [Marriage Act](#) provides on proof of customary marriages:

“Governing law for Customary marriage

1. A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.
2. Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

16. Ameru customary laws on marriage, just like the customary laws of other tribes, are not documented in writing. What constitute a Meru Customary Marriage has however been considered by Eugene Contron in the Restatement of African Law of Marriage and Divorce Volume 1 in which he highlighted 4 standard procedures regarding the Meru Customary Law of Marriage as follows:

- i. The boy selects his bride and proposes to her.
- ii. If the proposal is favourable the boy’s parents invite the girl’s parents to their home to have the beer known as Ncobi ya Kuria Uthoni, i.e. the beer of asking the girl’s hand.
- iii. Payment of dowry(*ruracio*)
- iv. Marriage ceremonies – taking and formalities the girls to the boy’s home.

17. In this case, it was the evidence of PW1, PW2, PW3, and PW4 that the deceased took dowry to the Applicant’s father (PW2) sometime in 2001 and started living as husband and wife. That the two later had disagreements and went their separate ways. According to them, the Applicant was the deceased’s first wife.

18. The Respondent contends that from the above excerpt on Ameru customary law by Eugene Corton, it is evidence that Ameru marriages are not contracted by a one-day occasion. That there must first



be exchange of proposals, consideration and granting of consents before it can be termed as marriage. In my view, the evidence of PW1, PW2, PW3 and PW4 was well corroborated to the effect that the deceased took dowry to the Applicant's father who accepted the same. That it is after the dowry ceremony that the Applicant and deceased lived as husband and wife until disagreements arose between them. The applicant was only supposed to prove the contention that she was a wife of the deceased on a balance of probabilities. That burden was discharged.

19. On her part, the Respondent did not deny knowledge that the deceased had a relationship with the Applicant. She confirmed that she got married to the deceased in 2008. This was way after the Applicant and the deceased had disagreement and parted ways and explains why the Applicant was not living with the deceased at the time of his death. In addition, DW2, on cross-examination, stated that he was never called when the deceased is alleged to have gone to the Applicant's home to pay dowry. His testimony does not therefore assist the Respondent's case as DW2 never attended the dowry payment ceremony for the applicant.
20. Considering evidence on record in totality, it is my view that the Applicant proved that she was married to the deceased but the two separated at some point. There being no evidence to prove that they formally divorced, the Applicant was therefore a wife of the deceased at the time of his death.

The law:

The pre-ambule to the [Law of Succession Act](#) (Cap 160 Laws of Kenya) states that it is –“ An Act of parliament to amend define and consolidate the law relating to intestate and testamentary succession and administration of estates of deceased persons and for the purpose connected there with and incidental thereto.”

It is therefore the law that applies in these proceedings. Section 3 of the Act defines a wife as follows:

“ Includes a wife who is separated from her husband and the terms “husband” and “spouse” “widow” and “widower” shall have the corresponding meaning.”

on the other hand, Section 2 (5) provides as follows:

“ 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 purpose of this Act and in particular Section 29 & 40 thereof, and her children are accordingly children within the meaning of this Act.”

Section 29 defines dependant to include the wife or wives Section 40 provides for the distribution of the estate of a deceased who was polygamous. Section 40 of the [Law of Succession Act](#) provides:

- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

From these provisions, it is clear that the fact that a wife had separated from her husband at the time of his death is no bar from her being considered as a dependant who is lawfully entitled to benefit from the estate. This also



applies to a husband. It follows that the applicant is a wife for the purpose of the Act despite the fact that she had separated with her husband. In addition under Section 66 of the Act being a wife as defined, she ranks in priority of the persons to whom a grant of letters of administration shall be made. See Section 66 of the Act.

Revocation of Grant

21. The law on revocation of a grant is provided under Section 76 of the Law of Succession Act (Cap.160 of Laws of Kenya) and Rule 44 of the Probate and Administration Rules. Section 76 provides as follows:

“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 court of something material to the case.
 - c. that the grant was obtained by means of an untrue allegation of the fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”
22. For the court to order revocation of grant, a party must prove to that:
- a. Proceedings to obtain the grant were defective in substance;
 - b. The grant was obtained fraudulently by the making of a false statement or concealment from court of something material to the case;
 - c. That the grant was obtained by means of untrue allegations.
23. A party need not prove all the above matters, prove of any one of them will lead to the revocation of the grant. In this case, the Applicant contends that the grant issued to the Respondent was obtained by non-disclosure of material facts. Having found that the Applicant was the first wife of the deceased, it follows that under the laws of succession she had beneficial interests the Estate of the deceased. As such, the Respondent ought to have informed the Applicant of the institution of this succession cause so that the Applicant could have a chance to ventilate her rights before the court. Failure to disclose that the Applicant was a widow of the deceased was a material non-disclosure that should warrant this Court to revoke the grant made to the Respondent.
24. Furthermore the proceedings were defective due to the fact that the respondent was the sole Administrator and yet there were minor children in which case there was a continuing trust. Section 58(1) provides no grant shall be made to one person alone.
- (1) Where a continuing trust arises-
- (a) no grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation.
 - (b) no grant of letters of administration with the will annexed shall be made to one person alone except where-
 - (i) that person is the Public Trustee or a Trust Corporation; or
 - (ii) in the will the testator has appointed one or more trustees for the continuing trust who are willing and able to act.”



The respondent could therefore not administer the estate single handedly. To this extent I find that the procedure to obtain the grant was defective in substance.

Conclusion

25. I find that the Applicant's application for the revocation of the grant issued to the Respondent herein is merited. I allow the application and order that:
1. The grant issued to the respondent on 8/6/2018 and confirmed on 15/11/2018 is hereby revoked.
 2. I order that a fresh grant shall be issued to the applicant and the respondent jointly.
 3. The two shall file summons for confirmation of grant within 30 days.
 4. If they are not able to file summons for confirmation of grant jointly, the respondent to file a summons for confirmation of grant and applicant to thereafter file a protest. The court to give direction on how the summons and the protest shall be disposed off.
 5. In the event that the respondent fails to file the summons for confirmation of the grant within 30 days, the applicant shall be at liberty to file the summons.
 6. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 23RD DAY OF MARCH 2023.

L.W. GITARI

JUDGE

23/3/2023

The ruling has been read out in open court.

L.W. GITARI

JUDGE

23/3/2023

