



REPUBLIC OF KENYA



In re Estate of Emmanuel Wanyonyi Makhanu (Deceased) (Succession Cause 2 of 2019) [2023] KEHC 18387 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18387 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 2 OF 2019**

WM MUSYOKA, J

JUNE 2, 2023

IN THE MATTER OF THE ESTATE OF EMMANUEL WANYONYI MAKHANU (DECEASED)

RULING

1. The deceased herein died on May 26, 2017. The letter from the Chief of Sinoko Location, dated December 5, 2018, indicates that the deceased died a polygamist, having married 2 wives, Benedetta Mukhaya Wanyonyi and Juliana Namalwa Makhanu. Representation was petitioned for by Juliana Namalwa Makhanu, vide a petition filed herein on January 16, 2019, disclosing survivors from the 2 houses, as listed in the Chief's letter of December 5, 2019. Agatha Makhanu, a daughter of the deceased from the 1st house, filed an objection on September 10, 2020. Her principal complaint was that the petitioner had not sought her consent and that of her siblings, presumably from the 1st house. That objection was struck out, on October 29, 2020, for it was incompetent, for having been filed before gazettment of the cause, contrary to sections 67, 68 and 69 of the Law of Succession Act, cap 160, Laws of Kenya.
2. The cause was published in the Kenya Gazette of May 6, 2022, under Gazette Notice No 5118. Letters of administration intestate were made to Juliana Masika Muhatia, which I presume is by mistake, for the petitioner was Juliana Namalwa Makhanu, on June 13, 2022, and a grant was duly issued, dated July 15, 2022. I shall refer to her as the administratrix.
3. Unrelenting, Agatha Makhanu, filed the application, the subject of this ruling, dated July 7, 2022. I shall refer to her hereafter as the applicant. She seeks to be joined to the proceedings as a co-administratrix. Her case principally appears to be that her side of the family is not represented in the administration, for the administratrix is from the 2nd house. She seeks to be appointed to protect the interests of her side of the family. The application is resisted by the administratrix, on grounds that she had prior right to administration over the children.
4. Although no directions were given on the disposal of the application dated July 7, 2022, both sides have placed on record written submissions. The administratrix has cited In re Estate of Manfred John Onyango [2019] eKLR (Ali-Aroni, J). I have read through the written submissions, and the cited authority, and I have noted the arguments made.



5. Going by *In re Estate of Manfred John Onyango* [2019] eKLR (Ali-Aroni, J), and *In re Estate of Aggrey Makanga Wamira (Deceased)*[2000] eKLR (Waki, J), based on section 66 of the *Law of Succession Act* and Rules 7(7) and 26 of the Probate and Administration Rules, widows have prior right to administration, over the children, and do not even need the consent of the children, or even to notify the children that they are applying for representation. However, according to *Kimari and another vs. Kimari* [1988] KLR 587 (Platt, JA, Gicheru & Kwach, AJJA), the preference given to widows is not absolute, and in proper cases, the court may allow the widow to administer the estate in association with other members of the family.
6. It was quite proper for the administratrix, therefore, to be appointed the sole administrator of the estate, for she had prior right or entitlement to administration, as surviving widow, over the children of the deceased. However, although the law entitles her to administer the estate exclusively, in some cases discretion may be exercised to permit a child to join her as co-administratrix. Would the circumstances in this case allow that? I believe they should. The deceased died a polygamist. He had 2 houses. The stance adopted by the applicant, in filing the objection that was struck out and the instant application, is that she distrusts the administratrix. No reasons have been advanced, but such distrust is not uncommon in polygamous situations. There could be a sense of a feeling of exclusion, which could be unfounded, for the mere fact that 1 house is not represented in the administration does not mean that the estate would be distributed in a manner skewed against that house. It would be democratic, though, to have both houses represented, for an appearance of parity, balance and inclusion. See *Obadiab Ndung'u Mungai vs. Veronica Wanjiru* [2015] eKLR (Muigai, J), *Loise Selenkia vs. Grace Nanu Andrew & another* [2017] eKLR (Muigai, J), *In re Estate of the late Nelson Ndara Koibita (Deceased)* [2018] eKLR (Musyoka, J), *In re Estate of Kariuki Gachenga (Deceased)* [2018] eKLR (Musyoka, J) and *In re Estate of Caleb Oluchina Opuka (Deceased)* [2021] eKLR (Musyoka, J).
7. In view of what I have stated above, I shall dispose of the application dated July 7, 2022 in the following terms:
 - a. That I hereby appoint Agatha Makhanu an administratrix of the estate herein, alongside the current administratrix, Juliana Masika Muhatia;
 - b. That the grant of letters of administration intestate, issued on June 15, 2022, shall be amended to include the name of Agatha Makhanu;
 - c. That if reference to Juliana Masika Muhatia in that grant was by error, which appears to go back to Gazette Notice No 5118, let the administratrix make a formal application for rectification of that grant, to correct that name, if at all there is an error;
 - d. That the 2 administratrices shall apply for confirmation of their grant within 6 months of the date of this ruling; and
 - e. That the matter shall be mentioned after 6 months to confirm compliance.
8. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2ND DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.



Appearances

Ms. Andia, instructed by Andia & Company, Advocates for the applicant.

Mrs. Muleshe, instructed by Phoebe Munihi Muleshe & Company Advocates for the administratrix.

