



**In re Estate of Musyoka Muli (Deceased) (Succession Cause
352 of 2013) [2023] KEHC 20439 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 352 OF 2013
RN NYAKUNDI, J
JULY 21, 2023
IN THE MATTER OF THR ESTATE OF MUSYOKA MULI (DECEASED)**

BETWEEN

**ELIZABETH WANZA MUSAU 1ST PETITIONER
AGNETA MATETE MUSAU 2ND PETITIONER**

AND

BEATRICE AJANGA OBJECTOR

RULING

- 1 On November 12, 2013 the objector herein lodged a notice of objection against the issuance of the letters of administration in respect of the estate of Musyoka Muli (hereinafter referred to as “the deceased”) to Elizabeth Wanza Musau and Agnes Mateta Musau, the deceased’s widow and sister-in-law respectively the proposed administrators to the deceased’s estate herein.
- 2 The necessary notices were issued on November 13, 2013 and on December 11, 2013 the present objection to making of grant dated December 6, 2013.
- 3 The objector, Beatrice Ajanga lays a claim to the estate of the deceased on the basis that she is a widow of the deceased. The objector was not notified of the institution of these proceedings and that the petitioners in their application for grant omitted the objector’s name and the names of the objector’s children as beneficiaries. The objector also contends that Agnes Mateta Musau is a stranger to these proceedings.
- 4 As per the directions given by the court, the objection was canvassed by way of written submissions. In that regard, necessary affidavits were filed by both sides.



5 The objector's submissions dated May 3, 2023 were filed on her behalf by her advocates, M/s Njiru Kinaru & Co while the petitioners submissions dated 12th May, were filed on their behalf by M/s Kilonzo & Company Advocates.

The Objector's Case

6 The objector's case is that she got married to the deceased herein in the year 2012 and that the deceased together with his mother and two aunties visited her home in the year 2013 for introduction purposes and paid some dowry solemnizing their marriage.

7 According to the objector prior to her marriage to the deceased, she was married to one Joseph Karanja now deceased. The objector maintains that her relationship with deceased herein begun during the subsistence of her marriage to Joseph Karanja (deceased) due to their inability to have children with the said Joseph Karanja (deceased). The objector further deposed that she and her former husband agreed to have a child with the deceased herein which resulted in the birth of her first-born child PNK.

8 The objector maintains that she and deceased herein lived together in Machakos and their union was blessed with a second child, WP. The objector produced their birth certificates as exhibits and testified that the deceased herein provided for their needs and school needs and that the 1st petitioner herein was well aware of her existence and that of her children.

9 The objector contends that the petitioner herein involved her in preparation of the eulogy but only choose to deny the same after the burial of the deceased.

10 The objector maintains that the deceased herein left behind properties that the 1st petitioner has been managing and utilizing single handily without considering the need of the minors herein.

11 According to the objector, she was a wife to the deceased having been married to the deceased under customary law. The objector urged the court to declare her a wife and an administrator of the estate herein.

12 The objector contends that despite there being a birth certificate of the first minor bearing the name of the late Karanja the same was changed by the deceased herein who proceeded to process another birth certificate for the first minor bearing his name as the father. The objector maintains that the petitioners herein did not tender any evidence to the contrary to prove that her children are not the children of the deceased herein.

13 The objector contends that being previous married is not reason enough to deny her an opportunity to enter into a subsequent marriage especially after the demise of her husband.

The Petitioners' Case

14 The petitioners maintain that the objector herein alleged that she conducted a customary marriage with the deceased in August, 2013. That this was done pursuant to the Kamba traditional marriage and payment of dowry was made and a celebration held (Ntheo) but failed to adduce any collaborating evidence. The petitioners contend that no photos were produced to collaborate her story of the alleged marriage between her and the deceased. Further that no witnesses were called to support her assertion that a traditional marriage was ever conducted if any.

15 The petitioners maintain that even though the parents of the deceased were alive at the alleged time when the marriage was conducted, they did not take part in the marriage ceremony nor were there any elders to conduct the said ceremony, therefore no Kamba Traditional Marriage was conducted. The petitioners contend that the objector's parents who were allegedly present during the said marriage



were not presented as witnesses and further that the objector conceded that there was no dowry payments done.

- 16 The petitioners contend that the objector herein did not have any evidence showing that she ever lived with or acquired any property with the deceased nor have any evidence to show that she was ever supported or maintained by the deceased.
- 17 The petitioners maintain that during cross-examination it was demonstrated that the objector herein in a previous Eldoret High Court Succession Cause No 150 of 2007 adduced a birth Certificate bearing the name of her first child as PNK who inherited in that cause. That the said Succession cause was in respect of the objector's late husband Sammy Gikonyo Karanja. Further that the child PNK was born (2) months after the death of her father and was included as beneficiary in the estate therein hence the rebuttable presumption of law that she is a child of the late Sammy Gikonyo Karanja.
- 18 The petitioners further contend that the objector did not have evidence showing an application for change of names of her first child from PNK to PW. The petitioners' thus argue that the second birth certificate herein is a product of fraud there being no evidence to show the process of attaining the new birth certificate. In present cause the petitioners contend that the objector in her evidence adduced in court a different birth certificate for her first child bearing her father's name as Muli.
- 19 The petitioners argue that although the objector herein stated that she and her late husband had an agreement to sire children with the deceased herein as her late husband could not sire children. The said agreement was never adduced and that no medical evidence was produced to show that the objector's late husband could not sire children. According to the petitioners the objector herein only seek unjust enrichment for her first child who has already inherited from her late father's estate.
- 20 The petitioners contend that the second minor VPM is alleged to have been born on April 27, 2012 whereas the objector is alleged to have been married in August 2013. The petitioner maintain that the said child is not the deceased's child as the deceased herein died on September 27, 2013.
- 21 The petitioners further contended that on cross-examination, the objector herein conceded that no ceremony was ever conducted but only an introduction to a few relatives.
- 22 The petitioners maintain that the objector herein is not a wife of the deceased as no customary marriage was ever conducted. The petitioners relied on the following cases in support of their arguments on the issue: *K.O & another v J.O* [2018] eKLR, *Samwel Ndgewa Waitbaka v Agnes Wangui Mathenge & 2 others* [2017], *Kimani v Gikanga* [1965] EA 735 and lastly *Stephen Kimuyu Ngeki* [1998] eKLR.
- 23 In the end the petitioners maintain that the objectors children herein are not the deceased's children and therefore not dependants under the Law of Succession. The petitioners relied on the case of *Preston – Jones v Preston Jones* [1951] 1 All ER 124.

Analysis and Determination

- 24 I have considered the evidence of both parties and their submissions and the applicable law. I find the following to be the issues for determination.
- 1) Whether the objector was the wife of the deceased.
 - 2) Whether the objector's children are beneficiaries and or dependants of the deceased.
- 25 The objector herein claims to be a wife of deceased having conducted the said marriage under Kamba Customary law. The objector has also exhibited birth certificates of children she claims to have had



- with the deceased. The petitioners on the other hand contend that the objector was not a wife of the deceased and neither are her children, the children of the deceased.
- 26 The objector herein testified in August, 2013, she and the deceased conducted a Kamba Customary marriage. On cross-examination however, the objector conceded that it was not a ceremony but rather an introductory meeting. The objector did not also adduce any evidence to show that the alleged ceremony ever took place, further the objector did not call any witnesses who was present during the alleged ceremony. The objector also conceded that no dowry was ever paid.
- 27 With the foregoing in mind it is clear that apart from what the objector stated herein, there is no evidence to prove that a marriage whether customary or otherwise was contracted between the deceased and the objector in the year 2013 or any other year. Most likely than not, she was his girlfriend or lady friend or secret lover or an unmarried partner with whom he may have or have not sired children out of wedlock.
- 28 It must be remembered that the children of a male deceased person would include his children born out of wedlock to women who were not married to him. The fact that the objector was not married to the deceased does not prevent his children inheriting him in intestacy. Marriage is not a factor in determining a child's right to inherit his father.
- 29 It the present cause however, the petitioners have disputed the objector's assertions that the children herein belong to the deceased. At this juncture it worth rehashing the circumstances that surround the objection proceedings herein. It is not disputed that the objector herein was previous married to one Sammy Gikonyo, whom she maintains that they did have any children with. The petitioners have in fact alleged that the certificate of birth in relation to the objector's child one PN has been fraudulently altered as the said child was only (3) months old when the objector's first husband died and that she has in fact inherited from the estate therein. The objector maintains that the deceased herein later took the said certificate away and that she later obtained a new birth certificate for PW previously known as PN on September 13, 2011 with the name of the deceased herein as his alleged father. The petitioners further contend that the second minor VPM is alleged to have been born on April 27, 2012 whereas the objector is alleged to have been married in August 2013. The petitioner maintain that the said child is not the deceased's child as the deceased herein died on September 27, 2013.
- 30 It must be noted that where the issue of paternity cannot be proved but there is evidence that the deceased took in a child and accepted him as his own, such child would be treated as a child of the deceased for the purposes of succession (section 3(2) *Law of Succession Act*). It therefore follows that the deceased sired children with the objector whatever their relationship was, those children would be treated as beneficiaries of his estate. The same position would apply if the deceased took in the children of the objector with any other person and accepted them as his own. The objector herein also submitted that the deceased herein used to carter for the said children's needs including school fees. She however did not produce any proof to support the said assertions.
- 31 The petitioners position regarding the two issues herein is that she sired them with the deceased a notion that has been vehemently opposed by the petitioner due the circumstances surrounding their births and the changes that were effected in view of the objector's first child. hereby creating the possibility that they may not be genuine and could have been obtained for purposes of lending credence to the objector's case against the petitioners.
- 32 In my view the most that the objector could have done was to request for a DNA test to establish her children's paternity. She also did not avail in evidence any credible document to show that these children and probably herself depended entirely on the deceased for their general welfare and for the payment of school fees and medical bills for the children.



33 In the upshot, the finding of this court is that there was no marriage relationship between the objector and the deceased. If anything, the two were friends and secret lovers. Whether the objector's children are as a result of that relationship is a factor which was not herein established by cogent evidence.

34 With that said I hereby invoke the inherent powers of this court granted under section 76 of the Law of Succession Act and direct that for purposes of progress in this matter and the only way to put the issue of the objector's children identity at rest is if a DNA test is conducted between her children and the 1st petitioner's children. I find that it is not necessary to exhume the body of the late Musyoka Muli for purposes of conducting a DNA test. It is possible for sibling DNA to be conducted to establish whether the objector's children were sired by the deceased herein.

35 I therefore, direct that both the 1st petitioner children and the objector's children be subjected to DNA test to ascertain the issue of the paternity of the objector's children before this court can make a finding whether or not the said objector's children are entitled to a share of the deceased's estate.

36. Accordingly, I hereby order as follows: -

- i. That a DNA examination shall be done on both the petitioner's children and the objector's children in order to determine the issue of the identity of the objector's children herein.
- ii. That the DNA to be done by Kenya Medical Research Institute (KEMRI).
- iii. That matching samples shall be taken from the bodies of the petitioner's children and objector's children in (i) above within (45) days from the date of this ruling.
- iv. That the costs of conducting the DNA test be shared equally between the objector and the 1st petitioner.
- v. That the Kenya Medical Research Institute to submit their report within (30) days from the date of submission of samples.
- vi. That this case will be mentioned on October 9, 2023 to monitor compliance.
- vii. Costs of the application to abide the outcome of the DNA result.

37 It is ordered so.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF JULY , 2023.

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R. NYAKUNDI

JUDGE

