



**Mokua v Omoto (Succession Cause 255 of 1996)
[2023] KEHC 22372 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 255 OF 1996
RN NYAKUNDI, J
SEPTEMBER 20, 2023
IN THE MATTER OF THE ESTATE OF THE LATE FREDRICK AYUKU
MUKOKO OMOTO (DECEASED)**

BETWEEN

MARY ROSE MOKUA PETITIONER

AND

REBECCA MISROSE OMOTO OBJECTOR

RULING

1. The Objector approached this court vide a Summons for Revocation of Grant dated February 14, 2013 seeking for revocation of grant of the letters of administration made on June 10, 1997. The application was premised on the grounds set out therein.

Objector's Case

2. The Objector submitted that she is one of the beneficiaries of the estate of the deceased. The basis of the application is that no provisions were made for the beneficiaries of the estate, namely; Jackline Ayako daughter (32 years) Lilian Autho daughter (29 years) Nelson Ayuku son (24 years)
3. It is the Objector's case that total acreage of the deceased property is 30.9 acres and further, that only beneficiaries/heirs are entitled to farm on subject land not leasing the same for gain purposes. She urged that whereas the petitioner did not make provisions for the interested parties herein, the petitioner has however taken possession of part of the deceased estate's land herein and has leased to third parties and the true beneficiaries of the deceased estates suffer.
4. The Objector submitted that the presumption of marriage between the deceased and Objector existed, and was established during the hearing by way of evidence and the said presumption of marriage was not ousted. She cited the case of *Hortensiah Wanjiru Yawe vs. Public Trustee* Civil Appeal No 13 of



1976 in support of this submission. She urged that the Objector testified that the deceased married her as his second wife under Luhya customary law in the year 1978 which was before the Law of Succession Act case into force. That he paid dowry and brought her to his compound and/or matrimonial home at Kapwaren settlement scheme. Further that the deceased constructed a house for her where both lived as husband and wife and which home exists to date which evidence was corroborated by PW-2. She also testified that the deceased and herself had children and cohabited for a very long time until the demise of the deceased in circumstances, which taken into account, give rise to a presumption of marriage in law. She maintained that the deceased used to take care of her and her children by providing for all their needs including maintenance, medical provision etc until his demise. She submitted that, being a retired teacher contributed towards the acquisition of some of the properties forming part of the estate of the deceased.

5. The Objector submitted that having proved that she is a wife in accordance to section 3(5),29 and 40 of the Law of Succession Act and so she is entitled to inheritance as a wife. It was her case that the Objector has proved that she was a dependant of the deceased in terms of section 29 of the Law of Succession Act.
6. The Objector submitted that, in distributing the 30.9 acres estate belonging to the deceased who was a polygamous man, the court should apply section 40 of the Law of Succession Act where the properties / net estate is to be divided among the two households according to the number of children in each house. In support of our proposed mode of distribution based on units. She urged that her and her children come from the second housing comprising of three children together with the Objector and as such their house consists of four units. The petitioner comes from the 1st house comprising of five children together with the petitioner comprising of six units. She submitted that one of the children listed by the petitioner in the summons for confirmation of grant called Vincent Michael of German nationality has never been maintained by the deceased given that immediately after birth he relocated to German with her mother. Further, that there is no birth certificate or documentary evidence that was adduced by the said Vincent to prove that he is a son of the deceased. She urged the court to adopt her proposed mode of distribution.
7. It is the Objector's case that it is in dispute that the said Vincent Michael was child or dependant of the estate of the deceased given that no evidence was adduced in court to confirm that he was son or dependant of the estate of the deceased. Further, that it is on record that the said Vincent Michael was summoned to appear virtually in court to inform the court as to whether he was interested in any share in the estate of the deceased whereby he made it clear that he was not interested in any share and as a matter of fact he even looked surprised as to what was going on.
8. The Objector urged that the summons be allowed with costs.

Respondent's Case

9. The Respondent opposed the application, urging that the Objector during the hearing never produced any evidence to show that she was married to the deceased. Further your lordship the Objector did not call any witness to testify from their mothers' side and/or their fathers' side to verify that customary marriage took place. The Objector is caught by the reiterations in Eugene Cotran's Restatement of African Customary Law Vol. 1 (the Law of Marriage and Divorce). At page 50 (chapter 5 on the Luhya Marriages) has this to say;-

'Definition of marriage considerations (Bukhwi). Bukhwi is a payment or payments of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father or other guardian of the bride, which is necessary for the validity of the marriage and to



establish the affiliation or legal control of the issue of the union and which may be repayable in whole or partial dissolution of the marriage’

10. The Respondent submitted that whereas the essentials of a Luhya customary marriage entails dowry payment (bukwi) there was no evidence of consent of union and dowry payment hence, no valid Luhya customary marriage took place. It was incumbent upon the Objector to clearly demonstrate marriage under the Luhya customs. Counsel for the Respondent cited the case of *Njoki Vs Muteru* 1985 KLR 874 in support of his submissions.
11. On presumption of marriage, counsel for the Respondent submitted that said issue is guided by the factors as was held in the case of *Edwin Maina Manyasa vs Pamela Nnzala Kanusu and 2 others* eKLR (2014). It is the Respondent’s case that there was no evidence on record that the deceased stayed with the Objector in the alleged matrimonial home. It was the Respondent’s testimony that the said parcel of land was majorly used for farming and they could often visit the Kapwaren scheme together with her late husband and at no given point did she find the Objector living in the said parcel of land. There are also issues whom according to the Objector are products of the cohabitation.
12. The Respondent is of a contrary view. The birth certificates produced by the Objector were obtained after the deceased had passed away and therefore, the authenticity and validity of the said birth certificates are put to doubt. The birth certificates would have been prima-facie evidence and have a lot of bearing in issues of presumption of marriage, though not conclusive evidence of marriage. Counsel relied on the case of *Mary Njoki vs John Kinyanjui Mutheru and 4 others* Civil Appeal No. 71 of 1998 (unreported).
13. The Respondent submitted that to have a look at the relationship between the Objector and the deceased’s family. First, she never visited the deceased’s family, home and/or farm in Kakamega to an extent that she did not attend the deceased’s burial. Secondly, the Objector was not known to the deceased’s family. The Objector’s son was to be circumcised by his alleged dad as per the Luhya custom which was not done. Thirdly, there was no co-operation and recognition between the deceased’s family and the Objector herself. This aspect came out clearly when the Respondent testified that during the deceased’s life time he brought him a son born out of wedlock one Michael Vincent and that she was not introduced to the Objector or knew of her existence. Counsel maintained that there is no evidence that the Objector adopted the deceased’s name in her official documents like the identity card or passport or in any other such documents. However, an attempt to adopt the deceased name was when she filed this cause.
14. The Respondent submitted that it is clear that the Respondent and the deceased married each other under statutory marriage which therefore does not allow any other marriages. A party who alleges a fact must prove it and the Respondent proved the same by production of a marriage certificate. It is the Respondent’s case that the deceased had no requisite capacity to contract any other marriage and/or alleged marriages.
15. The Respondent urged that there is no such evidence that the deceased and the Objector cohabited on the alleged said parcel of land. Further, that there was no consent or intention to marry that can be established as during the deceased’s lifetime he did not make any efforts to introduced the Objector to his family as he did with the case of Michael Vincent. The Respondent urged that there was no cohabitation of the deceased with the Objector and thus, there are no parameters at all to safely presume any marriage between the two of them.
16. The Respondent maintained that the certificates produced by the Objector were registered a year after the death of their alleged father. This therefore raises questions as to how the same were obtained and



the validity of the entries therein. Further, that although the Objector claimed that the deceased used to provide for them, she did not produce any direct or circumstantial evidence to show that they were maintained or supported by or lived with the deceased. There was nothing from school in form of documentary or least of any oral evidence that the deceased presented himself as a parent to any of the children. Neither was there any evidence of a neighbour or such family friend to buttress the Objector's allegations of such relationship. Counsel relied on Section 29 of the Law of Succession Act which defines who dependants are and the case of Jane Nyambura Vs. Beatrice Wangari Ndungu, Tabitha Wairimu Ndungu, Lucy Nyamuna Ndungu Civil Appeal No. 35 of 2018 and Beatrice Ciamutua Rugumba vs Fredrick Nkari Mutegi and others 2016 eKLR.

17. The Respondent submitted that the summons for revocation of grant are unmerited. She urged that the affidavit in support of petition for letters of administration intestate filed by the Respondent indicated the surviving dependants which position was reiterated in the affidavit in support of summons for confirmation of grant. The Respondent maintained that the Objector was not a wife to the deceased and her children were not deceased's children. Further, if at all they resided at Kapwaren scheme, although there was no proof of such, then it was at the volition of the deceased. If they claim any right or claim over the said parcel of land the same should be litigated elsewhere and not in this cause. The Respondent cited the case of *In the matter of the Estate of Wilson Wamagata deceased* Nairobi High Court Succession cause number 261 of 1998, *Re estate of Gitau (Deceased)* 2002 and *In the Estate of John Kamau Gichuki Deceased* and urged this honourable court to find that this is not a proper case for revocation or annulment of the grant.
18. The Respondent maintained that Section 66 Law of Succession Act is clear that in cases where one dies intestate, the surviving spouses with or without the other beneficiaries have the first priority in taking out the grant of representation. This right can only be waived in the event such a person exercises any of the following options under rule 7 of the Probate and Administration rules. In this case the Respondent clearly stated that she has not exercised any of the above options and remains ready to administer the estate of the deceased.
19. The Respondent urged the court to dismiss the application with costs.

Analysis & Determination

20. Upon Considering the application and submissions tendered, the following issues arise for determination;
 1. Whether the Grant of Letters of Administration of the estate of the deceased should be revoked

Whether the Grant of Letters of Administration should be revoked

21. Revocation of grant is governed by Section 76 of the Law of Succession Act which states as follows:

76. Revocation or annulment of grant

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;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

22. The application for the revocation of grant is premised on the grounds that the petitioner failed to include Rabeca Misrose Omoto, Jackline Ayuko, Lillian Autho and Nelson Ayuko as beneficiaries to the estate yet they were defendants of the deceased. Further, that the petitioner failed to distribute Land Parcel No. Nandi/Kapwarren/65.

Whether the Petitioner excluded beneficiaries of the estate

23. Section 29 of the *Law of Succession Act* sets out the meaning of the term ‘dependant’ as follows:
 For the purposes of this Part, "dependant" means—
- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
24. In her further replying affidavit dated June 10, 2013, the Objector produced a letter from the chief dated May 19, 1997. The letter named her as the wife of the deceased and stated that Jackline Ayuko, Lillian Autho and Nelson Ayuko were children to the deceased. The Objector also produced birth certificates as evidence of their dependency all of which were registered on May 21, 1996. I note that the deceased passed away on November 3, 1995 yet the birth certificates of the dependants were registered in 1996, after his death.
25. Section 8 of the *Births and Deaths Registration* Cap.149 Laws of Kenya bars a late registration save with a written authority of the Principal Registrar. It provides

Registrar shall not register a birth or death after the expiration of six months from the date of such birth or death except upon receiving a written authority of the Principal Registrar issued in accordance with the Rules and upon payment of the prescribed fee.”



26. The Objector has not provided any proof that the birth certificates were registered in accordance with the provision above. Further Sections 11 and 12 provide as follows;
11. Upon the birth of any child, the registration of whose birth is compulsory, it shall be the duty of the father and mother of a child, and, in default of the father and mother, of the occupier of the house in which to his knowledge the child is born and of every person present at the birth, and of the person having charge of the child, to give notice of the birth, within such time prescribed, to by the registrar of the registration area in which the birth occurs.
 12. No persons shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or in accordance with some recognized custom.
27. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act* 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.”
28. In the absence of written authority from the principal registrar, the late registration of the birth certificates was unlawful and therefore, the same cannot be considered as proof that the deceased was the father to the children of the Objector.
 29. The Objector claims to be a wife to the deceased but she did not produce any marriage certificate as evidence of the same which is a requirement under section 34 of the *Marriage Act*. There was no evidence tendered as to whether the marriage was customary or civil, or if it existed at all. It is my considered view that a chief’s letter is not conclusive proof of the existence of a marriage. The upshot of the foregoing is that the Objector failed to prove that she was a wife to the deceased.
 30. In the premises, the application fails in its entirety and is hereby dismissed.
 31. Each party shall bear its own costs.
 32. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF SEPTEMBER 2023

R. NYAKUNDI

JUDGE

