



In re Estate of Sapencia Omwalwe alias Sapencia Ibasha Omwakwe (Deceased) (Succession Cause 3070 of 2002) [2024] KEHC 14077 (KLR) (Family) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 3070 OF 2002
HK CHEMITEI, J
NOVEMBER 14, 2024
IN THE MATTER OF THE ESTATE OF SAPENCIA OMWALWE
ALIAS SAPENCIA IBASHA OMWAKWE (DECEASED)**

BETWEEN

EVERLYNE KATAMBANI MULAMA APPLICANT

AND

SUSAN JOYCE OMWAKWE 1ST RESPONDENT

STEPHEN ASSANGA OMWAKWE 2ND RESPONDENT

WINNIE ADA OMWAKWE 3RD RESPONDENT

RULING

1. This ruling relates to the application dated 2nd March, 2015 filed by Everlyne Katambani Mulama, the Applicant, seeking for Orders that:
 - (a) The grant of letters of administration issued to the said Susan Joyce Omwakwe and Winnie Ada Omwakwe in this matter on 23rd July, 2003 and confirmed to be revoked and or annulled.
 - (b) The Applicant herein with others be at liberty to apply for fresh letters of administration.
 - (c) Costs of this application be provided for.
2. The application is supported by affidavit sworn by Everlyne Karambani Mulama on 2nd March, 2015. She avers, inter alia, that she is a beneficiary of the deceased's estate by virtue of being her daughter.
3. That her sibling applied for a grant of letters of administration intestate and confirmed the same without including her as a beneficiary of the said estate. She only became aware of the instant



proceedings on 7th October, 2014 vide an order served upon Susan Joyce Omwakwe concerning the deceased's estate.

4. She averred that she confronted her when she became aware but she was adamant thus rendering her to file the instant application.
5. The application is opposed by a replying affidavit sworn by Stephen Omwakwe Assanga on 7th July, 2017. He avers, inter alia, that the Applicant is their step sister whose father is Joseph Pency Likono and that she left their parents' home in the year 1990 and never communicated with him until 2015.
6. He deponed that she has not stated whether she knew that the deceased had any properties and whether she has laid claim to them. He said that the administrators have given full disclosure of the assets and liabilities of the deceased's estate.
7. The Applicant's interest is in title number Nairobi Block 60/ 385 which belonged to their deceased father (Reuben Malanya Omwakwe) and their mother (the deceased herein) only acquired interest in it after his death. Everlyne was not therefore a beneficiary to their father's estate.
8. The Applicant has filed submissions dated 29th March, 2017, placing reliance on the following:-
 - a. In Re Estate of Thereki Wangunyu alias Thareka Wangunyo (Deceased) [HCSC NO. 1996 of 1999] where the court held that a widow who obtained a grant of representation without disclosing her step children merited the revocation of the grant but ordered that instead it would order that the step children left out be included in the list of beneficiaries without interfering with the grant.
 - b. In re Estate of Gathima Chege (Deceased) [HCSC No. 1955 of 1996] where the court quoted Section 35 (5) of the Law of Succession Act which states that in the event of the death of the surviving spouse, the subject of the life interest is to the children.
9. The 1st and 2nd Respondents have filed written submissions dated 22nd September, 2024. They have placed reliance on the following:-
 - a. In Re Estate of Nicholas Kaaka Kapore (Deceased) where the Court interpreted Section 35 (5) to be a provision to mean to cater for the surviving spouse and the children of the deceased.
10. The 2nd Respondent has filed written submissions dated 7th July, 2017. He has placed reliance on the following:
 - a. HCSC No. 62 of 2009: William Onkoba Matundura & Another Vs Julius Moracha Matundura & Another where the court stated, "From the pleadings on record, I do not find as alleged by the Applicants that the conduct of the proceedings in this case were conducted in secrecy or that the Respondents and in particular the 1st Respondent concealed any material particulars which if they had been revealed, would have made this court not to confirm the grant on 17th December, 2013.
 - b. HCSC No. 95 of 2014: Jesse Karaya Gatimu Versus Mary Wanjiku.
11. The 3rd Respondent has filed written submissions dated 26th April, 2017. She has placed reliance on the following:-
 - a. HCSC No. 976 of 1994: Kimani Mathenge Muriuki, Lucina Mithayo Wanjeri & Immaculate Nguku Wanyanga Vs Patricia M. Muriuki & Thomas Kihagi Muriuki where the court stated, "... Respondents dispute that she is a child of the deceased. Her certificate of birth shows that her mother did not give name of the deceased as her father. Deceased questioned the name



in his letter dated 11. 11. 83 in answer to a request by her mother for help. There is evidence that Lucina did not live with deceased although it is accepted that she used to visit deceased occasionally. There is no concrete evidence of direct assistance by the deceased. It is true that she accompanied the deceased abroad once and the deceased referred to her as his daughter in the affidavit to support the application for a passport.”

- b. Civil Appeal No. 114 of 2012” EMM VS IGM & RMM where the court of appeal held, “... The real issue before us on this appeal is whether the appellant proved before High Court on a balance of probabilities that he is a child of the deceased. Under section 29 (a) of the *Law of Succession Act*, if the appellant is able to prove that he is a biological child of the deceased, he would be a dependent of the deceased without having to prove that he was maintained by the deceased immediately prior to his death. Independent of being a biological child of the deceased, and therefore an automatic dependent, the appellant would also qualify as a dependent of the deceased if he can prove that he is a child whom the deceased had taken into his family as his own, and who was being maintained by the deceased immediately prior to his death. Unlike the dependant under section 29 (a), the dependant under section 29 (b) has to establish that the deceased had taken him or her into his family as his own child and that he or she was being maintained by the deceased immediately prior to his death.”
- c. HCSC No. 560 of 2015: Paul Kamundi Jotham Vs Janet Igoki & Others where the court stated, “... From the foregoing, a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”

Analysis and Determination

12. Having gone through the application, the responses and submissions filed by the parties and the issues for determination, as crafted by the 2nd Respondent and 3rd Respondents namely:-
 - a. Whether the grant of letters of administration was illegally obtained.
 - b. Whether the Applicant/Objector ranks in priority or pari pasu to the 1st and 3rd Respondents as to rights to apply for the grant.
 - c. Does the Applicant in this case have a right to inherit from the estate of the deceased, and if so under what circumstances can this right be waived?
 - d. Whether the application for revocation is meritorious.
 - e. Whether the grant of letters of administration was obtained fraudulently by concealment of material facts?
 - f. Whether Everlyne Katambani Mulama is a beneficiary of the estate of Sapencia Omwakwe?
 - g. Whether the Respondent failed to disclose all beneficiaries of the estate?
 - h. Whether the title deed of the estate property, currently retained in court, should be released to the Respondents?
13. I think the first issue to determine is whether the Applicant has any claim over the deceased estate herein. From the uncontroverted evidence on record, it is clear that the Applicant’s father was one Joseph Pency Likono and the deceased herein was her mother. She is therefore a step sister to the Respondents.



14. Secondly and more importantly is the question of whether the late Reuben Malenya Omwakwe the husband of the deceased herein took care or brought up the Applicant just like his children. The evidence before this court which has not been denied is that she left sometimes in the year 1990 and it appears that she only came later in 2015 after the death of Reuben his step father and the deceased herein.
15. There is no evidence of how she was sustained by either her mother or her step father. She cannot therefore claim any interest in either Reuben's estate and by extension her wife, the deceased herein. The burden in any case shifted on her to establish that she was a dependant to the estate.
16. That brings me to the contentious property namely Nairobi Block 60/385. The same was owned by the late Reuben and when he passed on the deceased herein inherited by virtue of being his wife. She simply had a life interest in line with Section 35(5) of Cap 160 which states that:

“Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

17. The deceased therefore could not pass any title outside Reuben's children or his dependents. Consequently, the Applicant having not proved that she was a dependant of Reuben and the deceased cannot benefit from his estate.
18. In view of the above observations, it is not entirely true that the Respondents failed to notify the Applicant. If she went away from the year 1990 until 2015, I do not think it was for the Applicants to search for her except by way of gazette of this cause which was done and the whole world including the Applicant was meant to have taken notice.
19. In essence the obtaining of the grant and confirmation thereof was not fraudulent as claimed by the Applicant.
20. I think it will be fair to suggest that the Applicant ought therefore, if able, to lay claim of what belonged to her real father and not the estate of Reuben and or his wife unless she is able to establish by way of cogent evidence.
21. In *James Kironyo Njoroge v Ruth Waithera Ngugi* [2022] eKLR the court stated as follows:-

“ 15. Section 76 of Cap 160 will allow revocation of a grant where the proceedings are defective; where the grant was obtained fraudulently by making false statement or by concealment to court of something material; or that the grant was obtained by means of untrue allegations.

16. In *In re Estate of David Omare Kimori (Deceased) (Succession Cause 4 of 2020)* [2023] KEHC 23286 (KLR) (28 September 2023) (Judgment) the court stated as follows:-

84. On whether the objections are dependants of the estate of the deceased, the commencement point is that whoever desires any court to give judgment as to any legal right or liability, depending on the existence of fact which he asserts, must prove that those facts exist.



85. 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. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person. See section 107 of the *Evidence Act*.
87. In *Lewis Waruiro vs Moses Muriuki Muchiri* (2012) CA 106, it was held that: “All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in *Rhesa Shipping Co SA vs Edmunds* remarked:- ‘no Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.’
86. Thus, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah J in *Britestone Pte Ltd vs Smith & Associates Far East Ltd* (2007) 4 SLR 855 as follows: “The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”
19. It is therefore a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is on the balance of probabilities. In the case of *Miller vs Minister of Pensions* (1947) 2 All ER 372, Lord Denning said the following about the standard of proof in civil cases: “The (Standard of proof) is Well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: ‘we think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.”
87. It is a fundamental principle of law that a litigant bears the burden or onus of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court a fact can be said to exist or not exist.
88. In this case, the objectors bear the burden of proving that they were and are dependants of the deceased and therefore of his estate and that therefore they are entitled to benefit from his estate.
89. A dependant is defined under Section 29 of the *Law of Succession Act* as: 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, grandparents, 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.

90. As correctly submitted by the Petitioner's counsel, a person claiming to be a dependant must prove such dependency in the degrees provided for under Section 29 of the *Law of Succession Act*.
 91. Further, other than biological children of the deceased or wives, the other categories of 'dependants' must prove dependency by establishing that such persons were being maintained by the deceased immediately prior to the demise of the deceased. It is not merely having a relationship with the deceased. See Beatrice Gamuta Rugamba vs Fredrick Nkari Mutegi & 5 Others [2010] eKLR and Sarah Kanini Thigunku vs Elizabeth Njoki Thigunku [2010] eKLR.
 92. Thus, the burden of proof lies on the person who alleges that they are dependants hence beneficiaries of the deceased's estate."
22. I think the court has been able to establish that the Applicant has not proved her connection and dependant upon the late Reuben and her deceased mother. She thus has no entitlement to the estate herein and the application is therefore dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 14TH DAY OF NOVEMBER 2024.

H K CHEMITEI

JUDGE

