



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**SUCCESSION CAUSE NO. 291 OF 2010**

**IN THE MATTER OF THE ESTATE OF THE BKM – (DECEASED)**

**BETWEEN**

**AMK.....1<sup>ST</sup> APPLICANT**

**JNM.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**AAG.....OBJECTOR**

**RULING**

1. The deceased herein, **BKM**, who was employed as an administration police officer, passed away on 29<sup>th</sup> January, 2010. After his death, **AMK** and **JNM**, in their capacity as the deceased wife and brother respectively petitioned for grant of letters of administration in respect of his estate on 23<sup>rd</sup> April, 2010. According to them the deceased was survived by **AMK** as his wife, **MMK** and his son aged 7 years and **CNK** also his son aged 2 years.
2. In support of the summons, the said petitioners relied on a letter dated 9<sup>th</sup> March, 2010 from the District Commissioner, Matungulu District in which it was confirmed that the aforesaid persons were the deceased's survivors. They also exhibited a copy of the Certificate of Marriage confirming that the deceased and the 1<sup>st</sup> Petitioner got married under Customary Law which marriage was solemnised in the civil registry on 10<sup>th</sup> February, 2006.
3. On 1<sup>st</sup> February, 2011, a Grant of Letters of Administration Intestate was issued to the said petitioners.
4. By a Notice dated 21<sup>st</sup> June, 2010, the Objector herein, **AAG**, objector to the making of the said Grant on the ground that she was a legal wife of the deceased having gotten married to him under the Borana Traditional Customary Law out of which union they got two children **PM** and **MK** who are also beneficiaries of the estate of the deceased. In support of her objection she exhibited copies of their Certificate of Birth.
5. In her affidavit, which she relied on as her evidence, the Objector deposed that she was married to the deceased since 1987 as a result of which they sired two children **MK** and **PM** born on 3<sup>rd</sup> April, 1989 and 17<sup>th</sup> December, 1995 respectively. During his lifetime, it was deposed that the deceased worked gainfully at [Particulars withheld] Chief Camp as an Administration Police Officer and that they initially resided in [Particulars withheld] Chief Camp and Mathare Chief Camp before the deceased's demise.
6. It was deposed that the deceased secured as his assets Plot No. [xxxx] Phase IIA – Mlolongo Mavoko Municipality, Harambee Sacco Shares, Proceeds in Barclays Bank Account No. [xxxx], Death Gratuity Benefits, NSSF Dues and **Mukaa Mukuu** Plots Nos. [xxxx].
7. The Objector acknowledged that the deceased may have had a relationship with one **AM**, the 1<sup>st</sup> Petitioner herein, which relationship caused a rift between them and she expressed surprise that the 1<sup>st</sup> Petitioner petitioned for grant without including her as the legitimate wife of the deceased. It was her evidence that the 2<sup>nd</sup> Petitioner had expressed surprise about these proceedings.
8. In cross-examination the Objector stated that she saw the properties in the petition and she was unaware that the 1<sup>st</sup> Petitioner had a

marriage certificate. According to her they got married in 1995.

9. In support of her case, the Objector called **JMK**, her daughter who testified that the deceased was her father while the Objector was her mother. According to her they stayed with the deceased at [Particulars withheld] Chief's Camp during her earlier childhood before the deceased and the 1<sup>st</sup> Petitioner separated during which time she was still very young. She expressed surprise at the development since she did not expect to be called upon to prove that she was the deceased's daughter. She disclosed that she even offered to have the matter settled as she had accepted the 1<sup>st</sup> Petitioner's sons as her brothers. It was her hope that the court would at the end of the day find that they were a family.

10. On her part the 1<sup>st</sup> Petitioner relied on her statement filed herein on 18<sup>th</sup> September, 2020 and her replying affidavit sworn on 20<sup>th</sup> November, 2020 and filed the same day.

11. According to her, she was legally married to the deceased on 10<sup>th</sup> February, 2006 as evidenced by the marriage certificate exhibited in these proceedings as confirmed by the letter from the Matungulu District Commissioner. At the time of their marriage, she stated that the deceased was a bachelor while she was a spinster and the deceased did not at any one time mention to her any other wife and they stayed as husband and wife till the deceased's demise, a marriage which was blessed with two children, **MMK** and **CNK**.

12. In cross-examination, the 1<sup>st</sup> Petitioner stated that she had not denied the Objector's children but had only applied for administration of the Estate of the deceased. According to her she was not aware that the Objector was a wife to the deceased.

13. In his testimony the 2<sup>nd</sup> Petitioner testified that the deceased was his younger brother who passed away in 2010. He confirmed that the 1<sup>st</sup> Petitioner was the deceased's wife who was married in accordance with Kamba Customary Law in 2006. He also acknowledged that he knew the Objector whom he used to see in the company of the deceased. However, the deceased informed him that the Objector was just a friend and that when his time to marry came the deceased would inform him. Later the deceased brought the 1<sup>st</sup> Petitioner home and marriage arrangements were made in accordance with customary law. He however denied seeing any children of the Objector since he was not the one staying with the deceased. He asserted that as far as he was concerned the 1<sup>st</sup> Petitioner was the deceased's legal wife.

14. In cross-examination, he disclosed that he heard that there were children but he never saw them.

15. PW3, **JM**, the deceased's sister testified that before the deceased died in 2010, he was married to the 1<sup>st</sup> Petitioner having gotten married in 2006. According to her the Objector was the deceased's girlfriend but she never heard that they got married. She testified that the 1<sup>st</sup> Petitioner was brought home and introduced as the deceased's wife in accordance with Kamba Customary Law. She however knew the Objector as the deceased's friend. She was also aware that the Objector had children but could not say whether they were sired by the deceased.

16. In cross-examination, she confirmed that the Objector was staying in Mathare.

### **Determination**

17. I have considered the evidence on record. The first issue for determination is who between the 1<sup>st</sup> Petitioner and the Objector was the deceased's wife. According to the Objector, she got married to the deceased under the Borana Customary Law and they had two children. Apart from that allegation, there was no evidence of such ceremony having taken place. She did not call any witness to support that fact. Marriage is a factual matter and unless facts are adduced that can reasonably lead the court to find that there is a presumption of marriage, it is upon the party alleging that there was marriage to adduce satisfactory evidence to that effect.

18. On the other hand, the 1<sup>st</sup> Petitioner has produced the marriage certificate which confirms that she was married to the deceased. Apart from that evidence was adduced by the deceased's siblings that the deceased and the 1<sup>st</sup> petitioner got married under Kamba Customary Law. The said siblings testified that they knew the Objector as the deceased's girlfriend.

19. In light of the foregoing, I find that the 1<sup>st</sup> Petitioner proved that she was the deceased's legal wife. As for the Objector, it was acknowledged that there was relationship between her and the deceased but there is no evidence that the said relationship was concretised into a marriage. Though the witnesses denied that the said relationship resulted in children, the Objector has placed before this Court two Certificates of Birth whose contents show that the deceased was the father of the said children. Therefore, in the absence of any evidence to the contrary I find that the deceased was legally married to the 1<sup>st</sup> Petitioner but also cohabited with the Objector. Out of the 1<sup>st</sup> Petitioner's marriage with the deceased, two children were born, **MMK** and **CNK**. On the other hand, out of the cohabitation between the deceased and the Objector I find that two children were similarly born, **PM** and **JMK**.

20. Section 35 of the *Law of Succession Act* provides that:

**(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—**

**(a) the personal and household effects of the deceased absolutely; and**

**(b) a life interest in the whole residue of the net intestate estate:**

**Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.**

21. That section has been the subject of various judicial pronouncements. In Tau Katungi vs. Margrethe Thorning Katungi & Another [2014] eKLR where **Musyoka, J** at page 4 paragraph 15-18 stated that:

“15. The deceased person in this cause died intestate in 1991. His estate therefore fell for distribution in accordance with Part V of the Law of Succession Act, Cap 160, Laws of Kenya. He was survived by a spouse and children and therefore the relevant provision is Section 35 of the Law of Succession Act. Section 35(1) provides as follows:-

“... where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

- a. The personal and household effects of the deceased absolutely and
- b. A life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

16. “Life interest” is not defined in the Law of Succession Act. *Black’s Law Dictionary*, ninth edition, West, 2009, defines it as “an interest in real or personal property measured by the duration of the holder’s or another person’s life.” In the context of Section 35 it is an interest held by the surviving spouse during their life “in the whole of the residue of the net interest estate.” Its effect is that the surviving spouse first enjoys rights over the property and at his or her death the property passes to other persons. In the context of Section 35, the widow is entitled to enjoy rights over the residue of the net intestate estate, that is after taking away the chattels and settlement of liabilities, during her life time with the property passing to the children upon her demise or remarriage of she be a widow.

17. The effect of Section 35(1) is that the children of the deceased are not entitled to access the net intestate estate so long as there is a surviving spouse. The children’s right to the property crystallises upon the determination of the life interest following the death of the life interest holder or her remarriage. Prior to that, the widow would be entitled to exclusive right over the net estate. This means that if the net estate is generating income she would be the person entitled exclusively to the income so generated.

18. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.”

22. Similarly, In the Matter of the Estate of Basen Chepkwony (deceased) Nairobi HCSC No. 842 of 1991, **Koome, J** (as she then was) held that where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she only enjoys a life interest and holds the same in trust for the children and other heirs. Further in The Matter of the Estate of Gathima Chege (deceased) Nairobi HCSC No. 1955 of 1996, **Kamau, J** stated that the ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse.

23. The same principle was restated in Re Estate of Rosemary Mukwanjeru Kiria (Deceased) 2016 eKLR where it was observed that:

“Under the above provisions, the surviving spouse only gets the chattels absolutely, and is only entitled to a life interest on the rest. The ultimate destination of the property the subject of the life interest is to the children in the event of the demise of the surviving spouse as provided in Section 35(5) of the Law of Succession Act and also as was held in *the Matter of the Estate of Gathima Chege (deceased)*...Section 37 of the Act allows the surviving spouse during life interest, subject to the consent of all the co-trustees and all the adult children or the consent of the court, to sell any of the property the subject of the life interest for their own maintenance. Where the subject property is immovable, the consent of the court is mandatory. The surviving spouse holds the property during life interest as a trustee and stands in a fiduciary position with relation to the property. The property does not pass to the surviving spouse absolutely. Where the property in issue is land, it cannot be registered in the name of the surviving spouse absolutely since she/he only enjoys a life interest and holds the same in trust for the children and other heirs. This was the holding in *the Matter of the Estate of Basen Chepkwony (deceased)*.”

24. What these authorities provide is that upon the death of a spouse, the surviving spouse is entitled to the personal and household effects of the deceased absolutely. However as regards, the whole residue of the net intestate estate, he/she is only entitled to a life interest. This means that the surviving spouse’s interest in the said residue is commensurate to the duration of her life. In other words, he/she holds the same in trust for the children and other heirs who are the ultimate beneficiaries thereof.

25. I therefore direct the Petitioners herein to proceed and apply for the confirmation of the grant issued herein taking into account the legal provisions mentioned above and in so doing to consider **MMK, CNK, PM** and **JMK** as the deceased’s children.

26. There will be no order as to the costs of this protest.

27. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 11<sup>TH</sup> DAY OF MARCH, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

The Petitioners

CA Geoffrey