



REPUBLIC OF KENYA



KENYA LAW

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**In re Estate of RNN (Deceased) (Succession Cause 234 of 2014)
[2021] KEHC 6140 (KLR) (10 June 2021) (Judgment)**

In re Estate Robert Ngundo Nyiva (Deceased) [2021] eKLR

Neutral citation: [2021] KEHC 6140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 234 OF 2014
RB NGETICH, J
JUNE 10, 2021**

IN THE MATTER OF

EKM PETITIONER

JUDGMENT

1. The petitioner EKM petitioned for a grant of letters of administration of the deceased estate of RNN vide a petition dated filed on 2nd April 2014, in her capacity as widow of the deceased. She averred that the deceased left behind the following children/beneficiaries: -
 - 1) EKM -widow

Children

 - 2) JKN
 - 3) HNN and
 - 4) JNN
2. The petitioner listed assets comprising the estate of the deceased as follows: -
 - 1) Motor Vehicle Registration No. KAR xxxS
 - 2) Pension benefits from the department of defence.
3. In response by ZMN filed objection dated 5th November 2014 stating that she is the only wife of the deceased, and the petitioner is a stranger to the estate of the deceased and opposed grant being issued to the petitioner citing that the applicant was not the proper person to be granted with the grant as she will administer the estate oppressively.
4. The objector averred that she was blessed with 3 children with the deceased namely: -



- 1) JKN,
 - 2) HNN and
 - 3) JNN
5. The above children are the same children listed as beneficiaries by the petitioner in her petition. She however did not disclose that they are not her biological children.
6. This court directed that the objection does proceed by way of viva voce evidence.

Objector's Case

7. PW1 ZMN, testified that she was the only wife to the deceased and stated that they married in 1992 in a Civil Marriage before the Registrar of Marriages. She produced a copy of the marriage certificate, defence part 2 order, copy of the medical insurance, a gate pass and an AFCO purchase permit EXB.6 to confirm that she was the legal wife of the deceased.
8. The objector stated that her union with the deceased was blessed with 3 children listed in paragraph 4 above. She produced birth certificates in respect to the 3 children.
9. She further testified that at the time of the deceased death, she was living in Nakuru and she was informed of the death of the deceased by one Brigadier Matiri. She further testified that she came to learn about the petitioner in the obituary and when she inquired, she was informed the brother to the deceased had given the details.
10. She Further stated that since the death of her late husband, DM (brother in law) became hostile to her. She said she had filed documents in order for the pension to be released to her but it did not go through because the petitioner had obtained a temporary grant as a beneficiary to the estate of the deceased.
11. She informed court that she learned of the current succession cause when she went to the court registry and realized that the petitioner had listed her children as her own while petitioning the court for letters of administration of the estate of the deceased prompting her to file the objection. She stated that she is the only legal wife to the deceased and prays that she be issued with letters of administration to the exclusion of all others.
12. On cross examination She testified that she has lived with the deceased happily for 21 years and have never separated with the deceased. She denies the contents of the affidavit sworn by her in support of children Case No. 99 of 2005 in which she had sworn that she had separated with the deceased in the year 1999. She stated that she was introduced to the deceased family on the year 1992 and no Kamba ceremony was conducted but the deceased family visited their family in the year 1993.
13. She stated that the petitioner was named in the eulogy as a wife to the deceased. She stated that she never attended the burial of the deceased and confirmed that the last time she ever saw the family of the deceased was in the year 2000 and that she never attended her mother in law's burial neither did she visit her husband when he had an accident in the year 2012 as she was threatened by her brother in law.
14. On reexamination by her Advocate, she confirmed that she had a civil marriage registered with registrar of marriages, and there is no order of divorce or separation.



Petitioner's Case.

15. The petitioner EKMN filed affidavit dated 30th August 2020. She testified and availed three witnesses in support of her case. She testified that the deceased was her husband and that they were married in December 1999 and the Kamba ceremony was conducted in September 2004.
16. She testified that when she got married to the deceased, they did not have a house and they were housed by the brother in law and later the father in law gave them land to build a house she produced photos to show the house built.
17. She produced a gate pass from Kenya defense forces PET EXB 3 which she stated that the gate pass was renewed yearly and hers was renewed from 25th May, 2009 to 30th May, 2015. She testified that she lived with the deceased as husband and wife for over 15 years. She stated that from the year 2008, she lived with her step children, the children of the objector and that she took the 2nd born to high school; and from the time they started living together as a family, she catered for all their needs and attended occasions with the deceased as husband and wife.
18. She testified that the deceased passed on 22nd December 2013 at Entebe Uganda while enroute to Nairobi for Christmas holiday and that she was informed of his death by 3 of his colleagues who came to her house to report his death being Col. Moiywa, Col. Ngei, and Major Maingi at around 7 p.m.
19. She testified that the burial took place in Makueni and she attended with the children and produced a copy of the eulogy showing she gave tributes to the late husband as the wife and immediately after the burial of the deceased, the objector called the children to go and live with her and produced an agreement written at the chief's office showing that the children would stay with their mother.
20. She further testifies that after the children left, the objector went to court and instituted Succession Cause No.90 of 2014 but did not use original documents while filing succession case. She said the objector used death certificate No.1448 while hers had a different serial no.1328. She said she obtained the death certificate through email sent by UN and stated that she has the birth certificate of the son of the objector.
21. On cross examination, the petitioner stated that she got married to the deceased in December 1999 under Kamba Customary Law and stated that the Kamba Customary Marriage entails family members of both bride and bride groom being present and 3 goats are slaughtered. She said the ceremony took place at her place in Nakuru and that her in laws, parents and brother in laws and some of her friends were present.
22. She confirmed to have been living with the children of the deceased and even helped the deceased to pay for their school fees. She lived with the deceased as husband and wife as they attended all family functions and burials at home while the objector did not attend any.
23. DW2, ADMN, a brother to the deceased testified in support of the petitioner as her brother in-law. He testified that he has known the objector ZMN since 1992 when she joined their family while expecting and stayed for a month and relocated to Nairobi and only returned in the year 1997 for the sister's funeral; and that was the last time she visited Makueni.
24. He testified that the petitioner EK joined the family in the year 1999, when the deceased wedded her as he had separated with Z the objector.
25. He testified that the wedding was done in accordance to the Kamba tradition. He further confirms that the deceased lived together with the petitioner and the objectors' children. He testified that deceased



lived with E in his house before they build their own. He further stated that the objector did not attend any other family function from since the year 1997.

26. He testified that no one blocked Z from attending Robert's funeral; her children and E did attend the burial. After the burial the deceased children opted to go live with their mother and an agreement was written at the chief's office. He testified that as a family they recognize E as the legal wife.
27. On cross examination, he stated that he is not aware if the deceased and Z married under statutory marriage, but he recalled he had heard there was a case of separation. He further confirms not having met the parents of Z.
28. He confirms to have known Z as a wife to the deceased when he was brought by the deceased home. He was in the funeral committee but most organizations were done by the KDF and he did not disclose anything about the marriage of the deceased. He said that he had not in any way threatened the objector not to attend the funeral.
29. DW3: BMN a brother to the deceased and neighbor testified that he knows ZM as his brother's wife since 1992; that she went home in 1992 while pregnant and were accommodated by his brother DW2; he said they lived together in DW2's house and after 2 months she went away. He confirmed that the deceased and the objector were blessed with 3 children 1992, 1993 and 1997.
30. The deceased and Z had conflicts. The deceased later married E after his separation with Z in the year 1999. He brought E home and now E is her neighbor. The deceased introduced E as his wife and a customary marriage was done. All the necessary arrangements were conducted by DW2.
31. He testified that he last saw Z in 1997 when she came for funeral of his last born sister and no one refused Z to attend the funeral of the deceased.
32. He further stated that his father died on 13th May 2020, and Z never attended but E attended and participated fully during the funeral. He said E was staying with the children of the objector with the deceased before they left after the deceased death.
33. On cross examination, he confirmed that he did not know the parents of Z despite her being a wife to the deceased.

Submissions by Objector

34. In submissions filed on 15th January 2021, the objector submitted that she is the legal wife of the deceased having married him on the 4th September 1992. She further submitted that no annulment of the marriage was done and she remains a wife to the deceased. She submitted that the petitioner is not a wife to the deceased as she failed to prove any customary marriage having taken place. She submitted that the eulogy consists of errors as it states that the deceased was divorced with the objector and she disagrees with the fact that the eulogy describes the petitioner as the wife to the deceased.
35. She further submitted that that despite her separation with the deceased, she was still entitled as a beneficiary of the estate of the deceased and relied on Section 3(1) of the Succession Act. She stated that the petitioner has failed to prove her case of being a wife to the deceased as required by the law. She submitted that the deceased had no capacity to contract any other marriage having solemnized the marriage under statutory law marriage. In conclusion the objector submitted that the deceased was not in any polygamous family and the petitioner is thus not a wife to the deceased nor a beneficiary to the estate of the deceased.



Petitioner's Submissions

36. The petitioner filed written submissions dated 20th January 2021. She submitted that she was a lawful wife to the deceased having been married under Kamba Customary Law, and urged the court to be guided by the case of Hotensia Wanjiku Yawe vs The Public Trustee Court of Appeal Case No. 13 of 1976.
37. She further submitted that she cohabited with the deceased as husband and wife from the year 1999 until his demise. She submitted that the deceased had replaced the name of the objector as her wife with that of the petitioner and that was the information with the Department of Defense.
38. She further submitted that the deceased and the objector separated in the year 1999 as per the affidavit of the objector that was filed in the children case and thus the objector does not qualify as a wife to the deceased. She submitted that the gate pass produced as evidence was last renewed in the year 1997; and the deceased proceeded to re-marry the petitioner and proceeded to conduct himself as husband of the petitioner.
39. She further submitted that she and the children of the deceased should be treated as the only beneficiaries to the estate of the deceased and the objector should not be treated as a wife as she had divorced the deceased.

Analysis and Determination.

40. Section 29 of the Law of Succession defines a 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.”
41. There is no dispute that the objector got married to the deceased through a statutory marriage and that their union was blessed with 3 children; the three children are the same children listed by petitioner as beneficiaries of the deceased’s estate.
 42. The objector produced a marriage certificate and documents to confirm that she was recognized by the deceased’s employer as the deceased’s wife. The petitioner confirmed that the objector is the mother of the 3 children she listed as the beneficiaries of the deceased. Upon consideration evidence adduced, I identify the following as issues for determination: -
 - 1) Whether the petitioner was the legal wife of the deceased?
 - 2) How should his estate be distributed?



(i) Whether the petitioner was the legal wife of the deceased

43. The petitioner testified that she got married to the deceased under Kamba Customary Law. She testified that the ceremony was celebrated in her house in Nakuru and that her parents and friends attended. She however failed to avail any other witness apart from the deceased's brother whom from evidence adduced had bad blood with the objector.
44. She further said her name was in the records of deceased's employer at the department of defence and her name was also in the eulogy of the deceased; she further showed photographs taken with the deceased and the children.
45. There is no doubt that a man who has contracted statutory marriage does not have capacity to contract a second marriage before the first civil marriage is dissolved. Apart from the petitioner saying that the deceased divorced the objector, no evidence was adduced to confirm that the marriage between the objector and the deceased was dissolved. The deceased did not therefore have capacity to contract a second marriage.
46. Evidence however shows that the petitioner lived with the deceased for a long period of time together with his children and was granted access to his work place. However as observed above, under the Marriage Act, the deceased did not have capacity to contract a second marriage before dissolving the statutory marriage and even if the petitioner's marriage was conducted under the customary law as stated by DW2 and DW3, the same was a nullity as there existed a civil marriage between the deceased and the objector which has not been dissolved under the Marriage Act.
47. There is no doubt that the deceased and the petitioner lived together for long and presented themselves to their relatives as husband and wife; they were known as husband and wife by general repute.
48. Section 3(5) of the Succession Act Cap 160 Laws of Kenya provide as follows: -
- “(5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”
49. From the foregoing, the succession Act under section 3(5) comes in to protect women or children in unions contracted with a man after statutory marriage. The woman in such a union who is able to prove marriage is considered as a wife for purposes of succession. In the case of Irene Njeri Macharia v Margaret Wairimu Njomo and another Nairobi Court of Appeal Number 139 of 1994, Justices Omolo, Tunoi and Bosire held that section 3(5) of the Law of succession Act is meant to protect women who marry men under customary law, who are already married to or who subsequently marry another woman under statute. The woman married under customary law is regarded as a wife for succession purposes, notwithstanding that by virtue of Section 37 of the Marriage Act the man had no capacity to marry her.
50. The Court of Appeal further stated that Section 3(5) of the Law of Succession Act was introduced in 1981 by the Statute Law (Repeals & Miscellaneous Amendment Act, No. 10 of 1981 and the purpose of the amendment was to mitigate the rigorous of decisions in Re Ogola's Estate and Re Ruenji's Estate which did not recognize as beneficiary, widows and children born from a union of a man already married under statute and another woman during the subsistence of the statutory marriage.



51. The court in its finding limited recognition of such marriage for succession purposes; Section 3(5) recognizes such marriage for purposes of succession only. She is recognized as a wife for the purpose of the Act, and in particular Sections 29 and 40 thereof and her children are considered children within the meaning of the Law of Succession Act.
52. In view of the above, to the extent that there is a marriage arising from presumption of marriage, the prior monogamous marriage of the deceased to ZMN would not preclude EKM from being recognized as a beneficiary of the deceased. In my view, the petitioner is a wife for the purposes of succession by virtue of Section 3(5) of the Law of Succession and therefore a beneficiary of the deceased.

(ii) How should the deceased's property be distributed**

53. From the foregoing, the position is that the deceased died intestate and as a polygamous man for purposes of succession. Section 40 of Succession Act Cap 160 Laws of Kenya provide as follows: -

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”

54. I note that the petitioner herein never had children with the deceased and she therefore remains one unit while the objector together with her 3 children form 4 units. The objector's house being the first house has 4 units while the petitioners house being the second house has one unit. The property to be distributed in the ratio of 4:1

55. Final Orders

- 1) Grant of letters of Administration do issue jointly to the Objector ZMN and the petitioner EKM.
- 2) The deceased's assets to distributed between the 1st and 2nd house in the ration of 4:1; the objector's being the first house and petitioner's being 2nd house.
- 3) Each party to bear own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 10TH DAY OF JUNE, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

Ms. Njoroge Counsel for Petitioner

Mr. Kibwooga Counsel for protestor absent

