



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1779 OF 2016

IN THE MATTER OF THE ESTATE OF FRED MUGIVANE INUANI ALIAS FRED INUANI MUGIVANE (DECEASED)

MARY CHAO BABU MUGIVANE.....PETITIONER

-VERSUS-

MARY VODEMBEKE MUGIVANE.....OBJECTOR

JUDGMENT

PETITION

The deceased **FRED MUGIVANE INUANI ALIAS FRED INUANI MUGIVANE** died intestate on 8th December 2015. He was survived by a widow Mary Chao Babu Mugivane and two daughters, Janet Iminza Inuani and Tavita Joy Alividza Inuani. On 26th October 2016, Mary Chao Babu Mugivane Inuani, widow to the deceased petitioned the court for grant of letters of Administration.

Mary Chao Babu Mugivane Inuani (**the Petitioner herein**) swore an affidavit dated 26th October 2016 in support of the Petition stating that the deceased died on 8th December 2015, as appears in the Certificate of Death marked "**Exhibit A**" which she had written her names at the time of swearing the affidavit.

The Petitioner stated that at the time of her husband's death they lived together in Nairobi, and that the deceased died intestate and left the following persons surviving him.

- a. Mary Chao Babu Mugivane Inuani – widow
- b. Janet Iminza Inuani – daughter
- c. Tavita Joy Aliviza Inuani – daughter

She stated that she was the surviving spouse/wife of Fred Mugivane Inuani (deceased).

The Petitioner gave the full inventory of the assets and liabilities of the deceased at the date of his death as follows;

- | | | |
|--------------------------------|---|---------------|
| a. Bungoma/Ndalu/477 | - | Ksh 3,000,000 |
| b. South Maragoli/Buyonga/1428 | - | Ksh 500,000 |
| c. Nairobi/block133/154 | - | Ksh 2,500,000 |
| d. Daihatsu Terios KAU 346W | - | Ksh 600,000 |
| e. Toyota Wish KBY 838 J | - | Ksh 800,000 |

f. Cooperative Bank of Kenya Ltd

A/C No. [...]

g. Standard Chartered Bank Kenya

A/C No. [...]

Total - Ksh 8,400,000

On 6th February 2017, the grant of Letters of Administration intestate was issued to the Widow (**The Petitioner**) Mary Chao Babu Mugivane by consents of their two daughters; Janet Iminza Inuani and Tavita Joy Alividza Inuani.

REVOCATION OF GRANT APPLICATION

On 3rd August 2017, the Applicant filed Summons for revocation of grant under **Sections 26 and 76(b) of Law of Succession Act**.

Mary Vodembeke Mugivane (**the Objector**), Evelyn Mettah Sayo and Marjorie Irene Volege the daughters of the deceased deposed that they are beneficiaries of the deceased's estate. /Administrator did not include, consult or inform them of the succession process and yet they were beneficiaries in the Estate of the deceased. They requested the court to revoke the grant of letters of Administration issued to Mary Chao Babu Mugivane Inuani on 6th February 2017 as it was obtained fraudulently through concealment of the fact that they were part of deceased's family and part of the assets were omitted.

Mary Vodembeke Mugivane (**the objector**) by an affidavit dated 25th April 2016, deposed that she was a widow of the late Fred Mugivane Inuani.

That they were married in 1977 through Luhya Customary Law and dowry was paid. They were blessed with two children of their marriage namely Evelyn Nettah Sayo and Marjorie Irene Volege.

The Objector's Supplementary Affidavit filed on 16th October 2017 has annexed copies of birth **certificates No [...]** of Evelyn Nettah Sayo born on 4th December 1978 to Mary Vodembeke Mugangasia and Fred Mugivane Inwani at St Elizabeth Hospital Mukumu.

There is also attached birth **certicate No[....]** of Majorie Irine Volege born on 20th March 1980 to Mary Vodembeke Muganagasia and Fred Mugivane Inuani at St Elizabeth Hospital Mukumu.

At paragraph 3 of Summons for revocation; the Objector added the following assets that she was of the view comprised of deceased's estate and were omitted;

- a. Shares, Dividends & Funeral Fund held by Chuna Sacco University of Nairobi
- b. Pension of the deceased held by University of Nairobi
- c. Sugar cane proceeds held by West Kenya Sugar Company
- d. Cash held by Mamuka Valuers

The Objector deposed that in 1979, her husband went to USA for further studies and because he was not on sponsorship, they organised for fundraising to raise money for his school fees and on top of that Mary Vodembeke, the Objector borrowed money in form of a loan for the deceased's air ticket.

That her husband came back to Kenya in 1989 i.e after 10 years and was employed as a Senior Lecturer at the Faculty of Agriculture, Department of Agricultural Economics, Upper Kabete Campus University of Nairobi where he worked until his death.

That while at the University of Nairobi he married Mary Chao Babu the Petitioner, who was a lecturer at the University of Nairobi being at Kenya Science and Upper Kabete Campuses and out of their marriage were blessed with two children namely Janet Iminza and Tavita Alividza.

She claimed that her husband passed away leaving two widows and four daughter who are entitled to his Estate ; which estate includes Pension, Shares in the Sacco, pieces of land, Funeral Expenses, Money from sugarcane, a house in Nairobi/Komarock and plots.

She added that she is sick with hypertension and diabetes and requested the court that the Estate of the deceased be shared among the beneficiaries.

By a chamber Summons application dated 7th February 2018, pursuant to **Section 45 &76 of the Law of Succession Act and Rules 59 and 73 of the Probate and Administration Rules** and all enabling Provisions of Law, the Objector sought orders;

a. The Court sets aside orders granted to the alleged Petitioner, Mary Chao Babu Mugivane Inuani on 6th February 2017 to be the administrator of the Estate of the late Fred Mugivane Inuani alias Fred Inuani Mugivane (deceased);

b. That in its place, the Court to grant letters of Administration in respect of the Estate of Fred Mugivane Inuani alias Fred Inuani Mugivane (deceased) jointly to the Applicant/Objector and the Petitioner since both were widows of the deceased.

The Application was based on grounds;

a. That the Petitioner removed the name of Fred Mugivane Inuani alias Fred Inuani Mugivane (deceased) from West Kenya Sugar Company where he was a shareholder and replaced it with the Petitioner's name without any court order.

b. Rent from the house, **Nairobi/Komarock/133/154** used to be sent to deceased's account by the Agent Mamuka Valuers until November 2015 when it was transferred to the names of Mary Chao Babu Mugivane Inuani (**the petitioner**) without court order

c. That the deceased had three motor vehicles **KAK 955T Nissan/Datsun, KBY 838J Toyota Station Wagon and KUA 346W Diahtsu Station Wagon** registered in his name.

d. That the Petitioner has removed the name from the deceased motor vehicle registration number **KAK 955T** and also the vehicle were not included among the assets.

e. That the Petitioner has removed the vehicle model from motor vehicle registration number **KBY 838T**.

By a Chamber Summons Application dated 29th May 2018, the Applicant Mary Vodembeke Mugivane sought Orders;

a. That the Court grants an order allowing Mary Vodembeke Mugivane – the applicant here in to access and withdraw Ksh 100,000/- from the deceased's account **No. [...]** held with Standard Chartered Bank Kenya Limited, Kenyatta Avenue Branch for purposes of enabling the applicant to cater for her treatment for eye infection and diabetes.

b. That the Court issues such and or further Orders as it thinks fit in the circumstances.

The Petitioner filed Summons for confirmation of grant on 1st September 2017.

REPLYING AFFIDAVIT

The application for revocation of Grant of Letters of Administration is opposed by an affidavit dated 5th June 2018, sworn by Mary Chao Mugivane Inuani (**the petitioner herein**). She avers that she was the only wife to the deceased, the Late Fred Mugivane Inuani also known as Fred Inuani Mugivane who passed away on 8th December 2015 and that her husband was not married to Mary Vodembeke as his first wife and he did not have two houses as is alleged.

She said that having undertaken further studies in the United States of America the deceased came back to Kenya in the year 1989 and found that Mary Vodembeke with whom he had two children namely **Everlyn and Majorie** had entered into another relationship out of which she had two or three other children and of those, one known as Diana still survives to date.

That when the Petitioner's late husband realized that Mary Vodembeke (**the objector**) had remarried and had moved on, he married the Petitioner in the year 1990 and thereafter they did everything together as married persons do including attending occasions like weddings and funerals. At no time was she ever introduced to the Objector as a wife to the deceased and she was never in attendance at those occasions and it is within her knowledge that Mary Vodembeke never related with the deceased from 1989 going forward until his death.

She states that although her late husband related with and paid school fees for Everlyn and Majorie and confided in her that they were his children they were not the dependants of the deceased at the time he passed on.

She further states that she lived with the deceased since their marriage in the year 1990 and they then celebrated the formal marriage on 7th October 1995 and the union between them was blessed with two children **Janet Iminza** born in the year 1992 and **Tavita Joy Aliviza** born in the year 1998.

That the deceased stayed away from Kenya for several years undertaking his studies and during that period he did not own any property. When he came back and married the Petitioner, they purchased **L.R. No Nairobi/Block 133/154** jointly as their residence and matrimonial home and it belongs exclusively to her by operation of law and it is not estate of the deceased's property.

That the deceased and the petitioner purchased **L.R. No. Bungoma/Ndalu/447** to set up their rural matrimonial home in September, 2012 and the Objector – Mary Vodembeke did not contribute to the purchase because she never related with the deceased since the year 1989.

That she was the only lawful wife to the deceased and in accordance with the practices of his Maragoli sub-community of the larger Luhya community began building a home for her on **L.R. No. Bungoma/Ndalu/447**. They subsequently completed building it together and the deceased did not build any home for the Objector/Applicant and he could not have failed or neglected to do so if indeed she was his wife. It would be grave and unspeakable taboo for the deceased to build a house for the Petitioner and not do so for Mary Vodembeke if indeed she was his first wife as alleged.

That with regard to the house constructed upon the parcel of land in **South Maragoli/Buyonga** and the Applicant's/Objector's exhibit 17(a) being the plan of a residential house; the information recorded there clearly shows that the plan was approved on 30th October 1995 and is in the name of Mary Vodembeke and this is unassailable proof that it had nothing to do with the deceased and that he did not build that house.

APPLICANT/OBJECTOR'S SUBMISSIONS

The Applicant submitted that the Respondent (**the Petitioner herein**) in paragraph 4 of the Affidavit in support of the Grant of letter of Administration listed only the Respondent and her two children as Beneficiaries of the deceased's Estate failing to make any mention of the Applicant and her children namely; Mary Vodembeke Mugivane (Widow), Evelyn Nettah Sayo (Daughter) and Marjorie Volege (Daughter) although they too are beneficiaries of the deceased's Estate by operation of the law.

It was her submission that under **Section 66 the Law of Succession Act** that spouses rank highest in priority. The case of ***Musa –vs- Musa (202) IEA of 182*** explains the position of spouses in the law of succession in the following self-explanatory terms.

“.....it may be straight away that as the widow if the deceased she had priority in petitioning for the grant as virtue of Section 66 of Succession Act (cap 160) and she did not require the consent of any other person under ((7) of the Probate and Administration Rules as no other person was entitled to apply for the grant in priority to her (emphasis added)”

In the case of Ibrahim Hussein in the High Court of ***Kajiado Cause No. 3 of 2017*** the court held that;

“Because the Respondent” was aware of the other family, it was ruled that she had all the intention to disinherit three other beneficiaries. She deliberately left out their names on the list of the beneficiaries when she petitioned for the Grant of letters of Administration and the subsequent confirmation of the same in the above case, the court ruled that the Grant was obtained fraudulently and by concealment of material facts. The court found out the beneficiaries were left out.”

She submitted that she effected change at Mamuka Valuers (Management) Ltd who were Agents to the deceased on receiving rent from the Tenant on **Land/House No. Nairobi/Komarock /133/154** and depositing on his accounts. She replaced her name removing the deceased's name without the consent of the other beneficiaries. Even the receipts to the tenant are residing her name.

SUBMISSIONS BY THE PETITIONER/RESPONDENT

The Petitioner submitted that the objector Mary Vodembeke filed three(3) applications. They are:-

- a. Dated 1st August 2017 and filed on 3rd August 2017 being summons for Revocation of Grant supported by the Affidavit in support sworn on 1st August 2017 and a Supplementary Affidavit sworn on 16th October 2017;
- b. Dated 7th February 2018 and filed on 9th February 2018 being a Chamber Summons to set aside orders of 6th February 2017, annul the Grant of Letters of Administration, that the Grant of Letter of Administration be issued to both the Petitioner and that the deceased's estate be shared by the two families supported by an affidavit sworn by the Objector on 7th February 2018;
- c. Dated 29th May 2018 and filed on 29th May 2018 praying that the Objector accesses and withdraws Ksh 100,000/- from the Standard Chartered Bank Kenya Limited Account No. 44025800500 Kenyatta Avenue Branch supported by the Objector's affidavit sworn on 29th May 2018.

OBJECTOR'S EVIDENCE

The Objector testified that;

- a. She and the deceased married in the year 1977 under Luhya Customary Law. On 4th December, 1978 Everlyne Sayo was born and 20th March 1980 Maureen irene Volege was born;
- b. The deceased proceeded for further studies at the **Ohio State University**, in the **United States of America** where he was for Ten (10) years and came back in the year 1989;
- c. On his coming back the deceased organized to visit her family in Sabatia and pay bridewealth. This was a bare statement denied by both Eliud Stanley Muyonga Omino and Fred Esau Omido. The Objector did not produce any evidence either by way of a written document or the testimony of another witness to support the assertion.
- d. Her children went to live with the deceased and the Petitioner. That the deceased gave Everlyne and Majorie money for the fees, shopping and pocket money. She asserted that the funeral notification was published by the Petitioner who deliberately and maliciously excluded the name of the Objector and her children.

IS THE OBJECTOR A WIFE TO THE DECEASED?

It was the petitioner's submission that the provisions of **Section 35 of the Law of Succession Act** employs the phrase **“surviving spouse”**. The term **“spouse”** is not defined by that said Act but it is defined in the Blacks Law Dictionary 6th Edition as;

“ones husband or wife , and “surviving spouse” is one of a married pair who outlives the other”

She stated that courts in Kenya have upheld the existence of a marriage where there is a presumption of marriage. The law presumes a marriage where a couple has cohabited for such a long period of time so that a presumption of marriage arises. This position was laid down and settled by the Court of Appeal in the celebrated decision of *Yawe –vs- Public Trustee Civil Appeal No. 13 of 1976 (Unreported)*. That position has been consistently applied and restated in the cases;

- a. T –vs- W (2008) 1KLR, 276 (G & F)
- b. M –vs- V (2008) 1KLR, 313 (G & F)
- c. MW –vs- Murigi (2008) 1 KLR, 348 (G & F)
- d. Mbogoh –vs- Muthoni & Another (2008) 1KLR, 357 (G & F)

She submitted that having failed the test in issue No. 1, the Objector has no business being an administrator or co-administrator of the deceased’s estate. As for Evelyn and Majorie, their challenge is addressed by **Section 3(2)** read with **Section 26, 27, 28 and 29** of the **Law of Succession Act**. First and foremost the word “child” in **Section 3 (2)** is informed by the following interpretation;

“reference in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

DETERMINATION

After considering the evidence on record pleadings and submissions this Court identified the following issues for determination;

- a. Was the Objector married to the deceased and is she a beneficiary of the deceased’s estate?
- b. Are the 2 children of the deceased by the Objector beneficiaries of the deceased’s estate?
- c. Should the grant of letters of administration issued on 6th February 2017 be revoked **Under Section 76 of Law of Succession Act?**

ANALYSIS

The gist of the Objector’s testimony and reliance on pleadings comprised of 3 applications and submissions, The Objector testified she was married to the deceased in 1977 under Luhya customary law. She produced an Affidavit Exhibit 1.

The Objector and Deceased had 2 children as shown by birth certificates annexed to her affidavit. The Objector produced photograph Exhibit 4 that shows, the Deceased, Fred, the Objector Mary and their 1 month old child.

The Deceased left for USA for further studies to the University of Ohio, the Objector obtained a loan to assist the deceased buy the air ticket to travel for studies in USA. The Objector was to follow him but circumstances changed and she never pursued further studies. The Objector produced letter dated 1st August 1984 that the deceased wrote to her while he was abroad. The deceased came back after 10 years and joined University of Nairobi. He lived with the Petitioner, they later married and had 2 children.

The Objector claimed that on coming back, the deceased sent people who paid dowry at her home in Sabatia to her mother as her father died.

After their KCPE, the 2 children moved and lived with the deceased and the Petitioner, He paid school fees and school expense for their daughters.

During the deceased’s funeral, she was excluded to participate and/or be recognized.

Fredrick Esau Omido (DW1) and Eliud Stanley Oronga (DWII) testified as cousins of the deceased that the Objector lived with the deceased at their home and they were both teachers. The deceased left for studies when they had 1 child and the Objector was pregnant with the 2nd child. They alleged that the Objector left the deceased’s home and went to live with another man, had 2 children who died and remained with 1 child called Diana. DW1 in the witness affidavit filed on 29th November 2018 admitted and confirmed that the deceased and Objector were married under Customary Law.

The Petitioner stated she did not know of or about the Objector and had never met with her. She was married to the deceased after he came back from the US for further studies. The Deceased had no properties, they worked and purchased and developed the properties that comprise of deceased’s estate.

From the evidence above, it is true the deceased and Objector cohabited and are parents of the 2 daughters of the deceased by the Objector.

They lived and worked together as teachers before the deceased left for studies in US in 1979 and came back in 1990 to join University of Nairobi as lecturer and thereafter married the Petitioner.

The Court is curious about the deceased's conduct on his return from abroad for further studies. He did not physically contact, visit or interact with the Objector it is not clear why whether during his time abroad they grew apart and were now different in status due to the deceased's exposure or experience or if the deceased was angry, upset about conduct or took an issue with the objector. There was pregnant silence on this issue, through the proceedings.

The 2 cousins who testified DW1 and DW2 seemed hostile to the Objector in Court and they gave damning evidence against the Objector, orally that she was not married to the deceased, after the deceased went to USA for further studies, the Objector left deceased's home to Majengo, lived with another man who was not identified or named. It was also intimated that the Objector had 3 other children with either another man or other men. These children were not named or identified. No single document was produced to prove existence of the said children. The witness stated that 2 of the children died and one called Diana remained and is alive. Surely, Birth certificates, death certificates, Chief's letters would aid in confirming these sets of facts. Better still, it is curious to note that immediate members of the deceased's and/or Objector's family and/or neighbours were not called to testify on such intricate matters. Surely, marriage, and birth of children are celebrated community events that the immediate family would know and be involved in.

In all civil matters, he who alleges must prove the alleged facts as prescribed by **Section 107 of the Evidence Act**. Secondly, all parties and the Courts are bound by pleadings filed and served by and to parties. In the instant case, I find no proof of alleged misconduct by the Objector that warranted her to be abandoned; 10 years while the deceased went for further studies and on his return until his death. The fact of the deceased or his immediate family members not testifying on the matter creates doubt as to the alleged misconduct by the Objector.

I am satisfied, that the Objector lived with and worked with the deceased before he left for further studies. The Objector was married under Luhya customary law and/or by virtue of the cohabitation and birth of 2 daughters as confirmed by birth certificates filed. The fact of Objector who took a loan to purchase the Deceased's air ticket to travel abroad was not controverted. The Photograph and letter produced as exhibits confirm a union of the deceased and the Objector were not controverted. The fact that she was left at the deceased's home when the deceased left for further studies confirmed marriage/union of deceased and Objector. These facts cumulatively, depict a presumption of Luhya customary marriage between the deceased and the Objector. The Objector is a beneficiary of the deceased's estate.

Section 3 of the Succession Act provides;

“wife includes a wife who is separated from her husband and the terms “husband” and “spouse” “widow” and “widower” shall have a corresponding meaning.”

Section 5 of the Succession Act provides;

“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.”

Section 29

“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.”

In the case of *Hortensia Wanjiku Yah weh vs Public Trustee C.A. 13 of 1976* the Court stated;

“The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually married.”

The Objector was married under customary law and/or had a presumed marriage to the deceased prior to his leaving to the USA for further studies. This is demonstrated by cohabitation and birth to 2 daughters when the Objector lived at the deceased's home and was left there when the deceased left for USA. The daughters of the deceased by the Objector were acknowledged and they resided with the deceased and the Petitioner, he catered for their school fees and expenses. The issue of their paternity was not contested during the deceased's lifetime. The Petitioner deposed in her pleadings that the deceased confided in him about the 2 children. She did not object or cast aspersions during the deceased's lifetime, she knew of the daughters of the Objector and deceased and was aware the deceased catered for them she cannot deny them after their father's death.

The Court disagrees with the Petitioner's assertion that her daughters with the deceased are beneficiaries of deceased's estate but the children of the deceased with the Objector cannot be beneficiaries as they were not dependants. With respect, all children of the deceased are adults. Practically adult children depend on parents for one thing or another, monetary or otherwise, it may be advice, moral support, communication, referrals and of course monetary contribution. If the Petitioner's children with the deceased are beneficiaries and are adults they should also be omitted from the list of beneficiaries as they are not dependants. The truth is the law recognises the children of deceased as beneficiaries of the estate irrespective of age, gender or other considerations. By virtue of **Section 3 and 29 of Law of Succession Act**, the Objector and her children are beneficiaries of the deceased's estate.

The court has considered that most of the assets were purchased and developed during the pendency of the 2nd marriage from joint contributions and efforts and possibly not all assets may comprise of estate of the deceased but may comprise of matrimonial property.

The Court has also taken into account the Objector's advanced age and state of health. Therefore, in light of these considerations and to ensure that both families are represented in the distribution of deceased's estate, the Court shall appoint the Objector's eldest daughter as Co administrator in place of the Objector.

DISPOSITION

- 1. The revocation of grant application is granted under Section 76 of Law of Succession Act.**
- 2. A fresh/new grant shall be issued in the names of Petitioner Mary Chao Babu Mugivane and the deceased's eldest daughter with the Objector Evelyn Netah Sayo as administrators of deceased 's estate.**
- 3. The List of beneficiaries shall comprise of ;**
 - a. Mary Chao Babu Mugivane – widow**
 - b. Mary Vodembeke Mugivane- widow**
 - c. Evelyn nettah Sayo – daughter**
 - d. Marjorie Irene Volege- daughter**
 - e. Janet Iminza Inuani- daughter**
 - f. Tavita Jot Alivista Inuani- daughter**
- 4. The Administrators and beneficiaries shall file summons for confirmation of grant after they agree on the assets that comprise the estate of the deceased and the mode of distribution and give written consents.**
- 5. In the event any party is aggrieved by the distribution process and/or orders; they are at liberty to file application(s) for hearing and determination in any court within Family Division.**
- 6. Each party to bear own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 7TH FEBRUARY 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. AMOLO FOR PETITIONER

EVELYN SEYO FOR THE OBJECTOR

COURT ASSISTANT: MR.TUPET