



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 547A OF 1999

IN THE MATTER OF THE ESTATE OF NDUKU WAMBUA (DECEASED)

SAMUEL MUTEVU WAMBUA.....1ST OBJECTOR

NZOMO WAMBUA.....2ND OBJECTOR

VERSUS

NTHAMBI MULE.....PETITIONER/RESPONDENT

RULING

1. By chamber summons brought under Section 66 and 76 of the Law of Succession Act and dated 30.4.2001, the Applicants sought revocation of grant that was issued to Nthambi Mule on 2.6.2000 on the ground that the said grant was obtained by concealment of essential material facts. The applicants sought that the grant of the letters be issued jointly in the names of **Samuel Mutevu Wambua, Nzomo Wambua, Nthambi Mule and James Kyalo Zakayo**. The application was supported by Nzomo Wambua vide his affidavit sworn on 30.4.2001 wherein he stated that when the deceased died intestate on 31.2.79 a temporary grant was made to Nthambi Mule and that the application that precipitated in the said grant did not disclose the fact that there were other persons of equal priority to her and whose consent she had not obtained. The deponent averred that the applicants are grandsons of the deceased and are entitled as beneficiaries to the estate and further that he had already sold 11 acres from his portion of land in Masii/Utithini/552 to James Zakayo and sought that the interest therein be safeguarded and that the same will be possible if he is made administrator. The applicant attached copies of the sale agreement and proceedings of subdivision of the parcel of land **Masii/Utithini/552** that was done on 2.11.99.

2. The application was opposed by the respondent who filed a replying affidavit sworn on 26.11.2001. The Respondent denied that the grant was obtained fraudulently. Further that the applicants are not grandsons of the deceased but children of Wambua Nthiwa born by his sixth wife Nzisa Wambua who was a co-wife of the deceased. Further that she is a wife to the deceased; that the applicants seek to enforce an illegality for the division of the land was done without the consent of the deceased or the parties. The respondent averred that there is no basis for the applicants to be made administrators.

3. In support of the protest, Susana Muoti deponed an affidavit averring that the deceased was married to the petitioner in a woman to woman marriage who was in turn married to Wambua Nthiwa but because the said Nduku had no son, she married the petitioner so that the said petitioner may beget sons for her. She averred that the petitioner together with her children lived on the deceased's land until her death.

4. In further support of the protest, Makwava Muoki deponed an affidavit averring that Wambua Nthiwa who was the husband of the deceased was her uncle and thus the applicants are her cousins. She averred that the applicants together with their mother, Nzisa Wambua who was the 6th wife of Wambua Nthiwa moved to live on their fathers land in Mwea and reside there to date. She also averred that the petitioner was never a wife to Mule Wambua who was the brother to the applicants.

5. In reply to the application, Timothy Senge Wambua deponed an affidavit on 30.4.2002 averring that Wambua Nthiwa who was his father had six wives, among them the deceased who did not have sons and who married Nzisa Wambua as her iweto and begot 4 sons including the applicants, Mule Wambua and Ndunda Wambua. He averred that in 1944, Mule Wambua married the petitioner under customary law and he participated in taking the dowry to the petitioner's father who was called Mwai Muthuka and it is strange that the petitioner is disowning her husband. The deponent averred that in 1969 his father's land was shared out equally among the 6 wives and each house was represented by one of the sons. A copy of the agreement to share the land was attached. He averred that the 1st objector represented the house of the deceased and he was to share the land to his brothers and on 2.11.99 the land that belonged to the deceased was subdivided by the 1st objector into 4 equal portions and the 1st portion was taken by Mule Wambua (her late husband) and given to the petitioner. He averred that the petitioner was present during the subdivision and appended her signature to the agreement. He averred that the agreement gave all the recipients of the land liberty to sell and a copy of the agreement was attached to the affidavit. The deponent averred that it is not true that the 1st applicant has no capacity to sell his portion of land and he sold his portion to James Zakayo on 3.3.2000 as per the sale agreement annexed to the affidavit. The deponent reiterated that the petitioner was a wife to Mule Wambua who was a brother to the applicants.

6. In reply to the application, Paul Mutuku Wambua deposed an affidavit on 29.4.2002 averring that Wambua Nthiwa who was his father had six wives, namely, Kiluu Wambua, Ngwenze Wambua, Mumbua Wambua, Ndulu Wambua, Syong'aa Wambua and Nduku Wambua. He averred that his mother was Syong'aa Wambua who was a co-wife to the deceased; that the deceased who had three daughters and no sons entered into a woman to woman marriage with Nzisa to bear sons and the sons were the applicants herein. He averred that Mule Wambua who was one of the sons of Nzisa Wambua married the petitioner herein and it was not true that the petitioner was married by the deceased as iweto and as a result the applicants have an equal beneficial interest in the estate of the deceased together with the petitioner. The deponent was startled that the petitioner disowned her husband and the affidavits of Makwava Muoki and Susan Muoki are not correct. Further that Makwava Muoki and Susan Muoki are total strangers and cannot depone to matters regarding a family to which he does not belong. The deponent averred that the petitioner obtained the grant secretly by not disclosing her brothers in law.

7. The court directed that the protest be heard via viva voce evidence. Pw1 was Makwava Muoki who testified that the deceased was a wife of Wambua who was his uncle and who had 7 wives and 3 of them (Mumbua, Nzisa, Ndulu) migrated to Mwea. He testified that Nduku Wambua only had daughters and thus she married the petitioner in a woman to woman marriage and that Mule was not a husband to the deceased. He testified that Mule was not even married. On cross-examination, he testified that he is a son of Muoki Nthiwa and that he did not know when the petitioner married, neither did he know the names of the deceased's 2nd daughter or the names of the other daughter of Nzisa. He was also not aware that the land was divided by the elders between the petitioner and the applicants and that he was not present. He testified that the deceased was given land but it was not shared out. Further that it was not true that the deceased was an iweto to Nzisa and that Nzisa bore sons for the deceased. On re-examination, he testified that Mule could not have been allowed to take the petitioner as a wife because he came from another house.

8. Pw2 was Susan Muoti who testified that she knew the petitioner as she was married in her family. She testified that she witnessed when the petitioner married the deceased and it is not Mule whom she was married to. She testified that the deceased's children used Mule's name but this does not mean that Mule was their father and that Mule died young and was not married by the time he died. On cross-examination, she testified that she was present when the deceased was getting married but however she could not remember the year. She testified that the deceased and Wambua paid dowry which comprised of 3 goats, porridge, 4 bunches of bananas. She testified that she did not know how the petitioner came to be called Nthambi Mule but it was not true that the said petitioner was married to Mule. Further that Nzisa Wambua was a wife to Wambua and not an iweto to the deceased and hence she wanted the petitioner to inherit the property of the deceased because she was the daughter in law of the deceased. Further that she never heard that the deceased's land was shared out but that the deceased's property was given to the petitioner.

9. Pw3 was Nthambi Mule who testified that the deceased was her husband and married her in a woman to woman marriage. She testified that the deceased was married to Wambua and she had only daughters and she thus married her to get sons. She testified that the objectors are step sons of the deceased, further that Mule who was a brother to the objectors was not married to her. She however maintained that her children took on the name Mule because they needed a name so that they could be enrolled in school. She testified that the objectors are not entitled to the deceased's land as the same belonged to her by virtue of being a wife to the deceased; that the objectors should only inherit the land that belonged to their mother Nzisa and thus the objection should be dismissed. She further testified that the land belonged to the deceased and not Wambua and she is the only one remaining to inherit the land together with her children because the deceased's daughters were married elsewhere and are now deceased. The petitioners closed their case and the court proceeded to hear the objection.

10. Ow1 was Nzomo Wambua Nthiwa who testified that the deceased married his mother Nzisa Wambua as an iweto and her husband was Wambua Nthiwa. He testified that Wambua Nthiwa had 6 wives and the deceased had 3 daughters who were all married. He testified that he found himself in the deceased's house residing with his mother together with his three siblings Mule, Samuel Mutevu and Ndunda. He testified that his mother is Nzisa Wambua and his older brother Mule had a wife called Nthambi, the petitioner herein who did not involve him in the proceedings. Further that after the death of Wambua Nthiwa, each house received their properties and he was present because Wambua Nthiwa was like his father in light of the fact that his wife married his mother Nzisa, and in Kamba traditions, the husband of the husband is deemed to be his father. He testified that the children of the deceased are entitled to a share in her property and that it was divided into four portions among the four children of Nzisa but the daughters of the deceased were not considered because they were married. It was his testimony that the petitioner was not present in the subdivision since her husband was deceased but however she received her husband's share. He reiterated that the petitioner was a wife to his elder brother since dowry was paid to her parents. Further that he has three sisters who are alive. That the subdivision had been minuted as per the annexure 2 and later he sold his portion to James Zakayo. He testified that the land he sold belonged to the deceased and the title deed is yet to be changed. He testified that it is not true that the petitioner was married to the deceased. On cross-examination, he testified that Mule died when he was already married but he had no children and that the petitioner was staying with the deceased and by the time the deceased passed on he had already moved to Mwea. Further that the petitioner built a house on the deceased's land and she was a widow by that time, and his brother advised that the petitioner be left on the land temporarily. He maintained that he was a son to the deceased and therefore was entitled to inherit her property. On re-examination, he testified that the petitioner had no children with Mule as she conceived children after the death of Mule. He testified that at the time he moved to Mwea the properties of the deceased and Wambua Nthiwa had not been divided and that the deceased had to have someone to take care of her when they moved to Mwea. Further that he was present when the petitioner married Mule and Muoti was not there at all and that he was a son to Wambua Nthiwa and thus entitled to share in his property.

11. Ow2 was Timothy Senge Wambua who testified that he sought to rely on his affidavit dated 30.4.2002. He testified that he knew the petitioner as a wife to his cousin and not an iweto to the deceased. That the deceased was a wife to his father who was called Nthiwa Wambua and the deceased had three daughters whom he married off. He testified that he knew Nzisa Wambua was married by the deceased as she needed male children. He testified that there was no iweto at his father's home. He testified on cross-examination that the petitioner was taken to live in the home of the deceased, and she had one child with Mule who later died. He testified that his father had seven wives but rejected the seventh one called Mbula and that Nzisa being one of the wives of his father received her share of the land and so did the deceased. He testified that the petitioner resides on the land of the deceased together with her five children but it is not true that the petitioner was brought in to the deceased's home as an iweto. He testified that Nzisa's children are after the deceased's land as the deceased had no sons and that they had earlier got hold of the said land when Nzisa's family were living in Mwea and the petitioner came in to assist the deceased and lived with her until she passed on. Once she passed on, Nzisa's children moved on to claim her land and Nzisa's land is still there. On cross-examination, he testified that the deceased's land was shared among Nzisa's children and that the petitioner was not an iweto of the deceased but was only assisting the deceased.

12. The court directed that the parties file written submissions. The objectors filed theirs on 8th November, 2018 while the petitioner/respondent filed theirs on 2nd April, 2019.

13. The objectors in their submissions framed three issues for determination. Firstly, whether the grant issued herein should be revoked and/or annulled; secondly whether the Kamba Customary Law is applicable and thirdly who should bear costs.

14. On the first issue, counsel submitted that the petitioner failed to disclose that the objectors were beneficiaries of the deceased's estate contrary to Section 26(2) of the Probate and Administration Rules and that the evidence of Ow1 and Ow2 corroborate the fact that the deceased took the objector's mother as an iweto whereas the petitioner was a wife to the objectors' late brother and their evidence is more believable than that of Pw1 and Pw2 who are distant relatives and thus their evidence that the petitioner was an iweto to the deceased is not believable. Counsel cited the case of **Philipinus Njiru Kuura v Zakaria Nyaga M'mungori (2014) eKLR** where a grant was revoked for failure to disclose material facts. On the 2nd issue, counsel submitted that Article 2(4) of the Constitution entrenches the applicability of customary law save for repugnancy. In this regard, counsel submitted that the evidence of Ow2 that the sons of Nthiwa Wambua divided the land into six portions and that the four sons of Nzisa Wambua divided the deceased's parcel of land and the petitioner got her husband's share are indicative that the petitioner received land pursuant to Kamba customary law and the same is lawful. On the third issue, counsel buttressed the fact that the objector is entitled to costs by citing the provisions of **Rule 69 of the Probate and Administration Rules**.

15. Learned counsel Mulwa Isika & Mutia Advocates for the respondents in their submissions raised two issues for determination. Firstly, whether the objectors are the beneficiaries of the deceased's estate and secondly whether the grant issued to the petitioner should be revoked and/or annulled.

16. On the first issue, counsel submitted that the deceased was a 5th wife of Wambua and Pw1 corroborated this fact, and further that the deceased was an iweto to the petitioner. He cited the case of **Lucas Kiliku Ndolo & Another v David Musyoka & 4 Others (2017) eKLR** where the court explained an iweto marriage as defined in the book Restatement of African Law, Volume 1. Therefore counsel submitted that the deceased had no business sharing out her property with the petitioner because of the absence of proof of an agreement to that effect as was observed in the case of **Peeush Premla Mahajan v Yashwant Kumari Mahajan (2017) eKLR**. Learned counsel submitted that the property of the deceased is an entitlement of the petitioner and her children. On the 2nd issue, learned counsel submitted that in light of the submission on the first issue, the objector has not met the threshold to warrant revocation of grant envisaged in section 76 of the Law of Succession Act and the action of transfer of property other than in accordance with the Law of succession Act is void as was found in the case of **In Re Estate of Stephen Kurgat Kimwei- Deceased (2017) eKLR**

17. Having carefully read the contents of the application and the Affidavits and annexures thereto and addressed my mind to the oral evidence of all the parties, I find that the main issue for determination here is whether the objector has demonstrated that the petitioner excluded lawful dependents to the estate of the deceased.

18. **Section 71 of the Law of Succession Act, Cap. 160** of the Laws of Kenya provided that, *'the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.'*

19. The objector's case is that the petitioner was given a share of the estate of her late husband and that the deceased is a father to them and that the petitioner was a caretaker and not a wife to the deceased. Therefore they are entitled to share his estate. It is the petitioner's case that the deceased was her husband and therefore she and her children are entitled to share in the estate of the deceased and not the objectors for they are step children of the deceased. Because of these divergent views, the court will have to consider whether the parties have met their standard of proof as per section 107, 109 and 112 of the Evidence Act.

20. In the case of **Hortensiah Wanjiku Yawe v The Public Trustee, Civil Appeal No. 13 of 1976**, the court held:-

(i) The onus of proving customary law marriage is generally on the party who claims it.

(ii) The standard of proof is the one usually for a civil action namely "on the balance of probabilities."

(iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.

(iv) Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.

(v) Only cogent evidence to the contrary can rebut the presumption.

(vi) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.

21. According to the evidence on record, to wit the testimony of Ow1 and Ow2, and the exhibit NN2 that is the minutes of the meeting of division of the land of Wambua Nthiwa, the petitioner was allocated her share of land. The said minutes are in Kamba language and I am not satisfied with the translation thereof and though the petitioner has not objected to their being tendered in evidence, the court cannot rely on the same as evidence that the petitioner has got her entitlement to the share of land. According to the evidence of Ow1 as corroborated by that of Ow2, the petitioner was allowed to reside on the land of Wambua Nthiwa when the objectors had gone to Mwea, I am satisfied that she has demonstrated some interest with regard to the land. However her case is that she is a spouse to the deceased and not a caretaker. The evidence of Ow.1 and Ow.2 are that the petitioner was married to their late brother and dowry was paid to that effect. The evidence of Pw1, Pw2 and Pw3 are that an iweto was conducted and Pw2 testified that she saw dowry that comprised of three goats, porridge, and 4 bunches of bananas being paid to officiate the marriage. Nevertheless, Pw2 disputes that an iweto was conducted at his father's home. From this evidence, I am not satisfied that an iweto was conducted and I do not find the evidence of Pw2 convincing because she has been disowned as

being a stranger to the family and seems to have been the only one who saw a ceremony being conducted and yet the sons of the home deny this fact. This being the case I find that the petitioner has failed to discharge her burden of proof of a customary marriage, I expected more evidence to show that indeed she was married to the deceased and possibly evidence from the persons who attended the burial ceremony that she is recognized as a wife and I find that the evidence is not there. Nevertheless I am satisfied that she is in occupation of the land that belonged to the deceased and has been in occupation. I see the need to protect her interest with regard to the portion of land that she occupies.

22. I am satisfied with the evidence that the objectors' mother was married to Nthiwa Wambua. However I am not satisfied that the said objectors brother was married to the petitioner. A look at the petition indicates that the petitioner applied as a daughter and yet in her evidence she stated that she is an iweto. Therefore in this regard I find that the petitioner obtained the grant by concealment of material facts and on the basis of an untrue allegation. Consequently I revoke the grant that was issued to the petitioner herein for though the objectors have not satisfied the court that they meet the threshold for grant of a revocation or grant of annulment, the grounds are evident from the court record.

23. In the wider interests of justice and in consideration of the provisions of the **Constitution** and the **Law of Succession Act** I make the following orders : -

(a) The Grant made to Nthambi Mule on 2.6.2000 and confirmed on 9.2.2001 be and is hereby revoked.

(b) A Fresh Grant shall be issued in the joint names of the Petitioner and Samuel Mutevu Wambua.

(c) The Administrators' and/or any of them to file for the confirmation of the Fresh Grant within 21 days of issuance of the Grant.

(d) The fresh application for confirmation of the grant shall be served upon all the beneficiaries and shall be fixed for directions within 30 days of filing.

(e) Nthambi Mule to file accounts on the running of the estate of the deceased w.e.f. appointment to date

(f) This being a matter between family members, each party shall bear their own costs.

It is so ordered.

Delivered, dated and signed at Machakos this 4th day of June, 2019.

D.K. KEMEI

JUDGE