



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 881 OF 2016

IN THE MATTER OF THE ESTATE OF EPHANTUS MIRIE MBAGU - DECEASED

PAULINE KATAMPOI.....OBJECTOR

VS.

PETER MAKARIO NYAMBURA.....1ST RESPONDENT

JACKLINE WANJIRU NGECHU.....2ND RESPONDENT

JUDGMENT

1. The Deceased herein EPHANTUS MIRIE MBAGU (Deceased) died on 22.9.2007.
2. The Deceased had two wives namely ANASTACIA SALOME(now deceased) and SARAH NYAMBURA (also now deceased).
3. ANASTACIA SALOME, the 1st wife separated with the deceased in 1997 and in 2002 the deceased married SARAH NYAMBURA.
4. ANASTACIA SALOME had the following children:

(i) PAULINE MUTHONI

(ii) WINNIE WANJIRU

(iii) GEORGE MBAGU

(iv) ERIC NDEKI

(v) DOMINIC GITUNGO AND

(vi) CATHERINE NJAMBI

5. The 2nd wife SARAH NYAMBURA (now deceased) also had four children as follows:

(i) PETER MAKARIO

(ii) BARNABAS NGUGI

(iii) MOSES MBAGU and

(iv) ANTONY MWAURA.

6. The Objector herein PAULINE MUTHONI KATAMPOI filed this Objection in respect High Court Succession Cause No.64 of 2015 filed by the Respondents in Naivasha on the grounds that the grant was made by means of concealment of material facts and further that the Respondents are strangers to the estate of the deceased.

7. The objector also deposed in her Affidavit that after the demise of the deceased who was her father, of a Limited grant of Letters of Administration made to ANASTACIA SALOME WANJIRU (now deceased) and DOMINIC GITUNGO MIRIE on 11.12.2007 and that the rightful beneficiaries of the estate are herself and her siblings.

8. The 1st Respondent PETER MAKARIO NYAMBURA filed a Replying Affidavit to the affidavit of Protest and stated that Succession Cause No. 3296 of 2007 was filed without involving them and yet they knew the existence of the 2nd house.

9. I have considered the Affidavits filed by both parties together with the submissions filed herein. I find that both families have traded accusations about taking letters of administration without informing the other.

10. The objector submitted that the deceased had no capacity to enter into a marriage with SARAH NYAMBURA while the marriage with ANASTACIA SALOME was still subsisting.

11. I find that there is evidence that upon parting ways with the first wife ANASTACIA SALOME (deceased) the deceased married SARAH NYAMBURA (Deceased) who had three children and they got one child.

12. The deceased who was the step father to the three and was maintaining the children of Sarah Nyambura accepted them as his own and they are entitled to inherit as his dependents.

13. **Section 29** Meaning of dependant;

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."

14. While considering the meaning of a dependant under **section 29** of the Act in the case of **Beatrice Ciamutua Rugamba .v. Fredrick Nkari Mutegi & Others Chuka Succ. Cause No. 12 of 2016 (UR)**, the court held:-

"From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

15. I accordingly find that the children of the 1st and 2nd wives who are now both deceased are entitled to inherit the estate in equal shares.

16. On the issue as to whether the deceased had capacity to enter into another marriage while married to the first wife Anastacia, I find that the second wife was a wife for purposes of **Section 3(5)** Law of Succession Act and thus her children are beneficiaries of the estate.

17. In the case of **ROSEMARY AOKO MUNJAL VS NOEL NAMENYA MUNJALSUCCESSION CAUSE 4 OF 2008 HIGH COURT BUSIA [2015]**, the Trial Court considered the import of **Section 3(5)** Law of Succession Act which states;

"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 Section 29 & 40 thereof, and her children are accordingly children within the meaning of the Act."

18. See the case of **IRENE NJERI MACHARIA vs MARGARET WAIRIMU NJOMO & ANOTHER [1996] eKLR** where the Court of Appeal interpreted **Section 3(5)** of Law Of Succession Act as follows in line with other cases;

"Our understanding of Section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in a situation in which Josephine found herself, Mutua previous to his union with Josephine, had contracted a statutory marriage which remained undissolved upto the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba customary law. Kamba customary law recognizes polygamy and Josephine was telling the Court that she was a woman married under a system which recognizes polygamy.....Parliament in its wisdom and whatever it might have intended to do, provided that; Notwithstanding the provisions of section 37 of the Marriage Act....."

19. 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.

20. I find that the two wives are now deceased but their children are beneficiaries of the estate of the deceased.

21. I direct that fresh letters of administration be issued to both the Protestor and the 1st Respondent to administer the estate jointly.
22. The Protestor and 1st Respondent are directed to file a joint summons for confirmation within 30 days of being issued with the grant of letters of administration.
23. The Property of the deceased to be shared equally amongst the 10 beneficiaries as follows:
- (i) **PAULINE MUTHONI**
 - (ii) **WINNIE WANJIRU**
 - (iii) **GEORGE MBAGU**
 - (iv) **ERIC NDEKI**
 - (v) **DOMINIC GITUNGO AND**
 - (vi) **CATHERINE NJAMBI**
 - (vii) **PETER MAKARIO**
 - (viii) **BARNABAS NGUGI**
 - (ix) **MOSES MBAGU and**
 - (x) **ANTONY MWAURA.**
24. This being a family matter, each to bear its own costs.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 18TH DAY OF OCTOBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.