



REPUBLIC OF KENYA

IN THE HIGH COURT OF JUDICATURE OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 57 OF 2015

IN THE MATTER OF THE ESTATE OF JOHN MACHARIA NGETHE (DECEASED)

who died intestate on 28.6.2009

BETWEEN

JANE MUTHONI NJOGU..... PETITIONER

AND

VIRGINIA WANGARI KAMAU.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mureithi for the Petitioner

Marubu for the Respondent

JUDGMENT

Introduction

John Macharia Ngethe hereinafter referred as the deceased died on 28.6.2009. He was stated to be survived by two wives and eight children namely: Jane Muthoni Njogu (spouse), Ann Nyambura Macharia (daughter), Francis Ng'ethe Macharia (son), Julius Njogu Macharia (son), Virginia Wangari Kamau (spouse), Patrick Kamau Macharia (Son), Francis Ng'ethe Macharia (son), Ann Nyambura Macharia (daughter), Simon Gakuru Macharia (son). The issue of survivorship and dependency is in dispute in so far as this objection proceedings are concerned.

The deceased hailed from Hindi in Lamu County. The deceased owned a parcel of land **LR LAMU/HINDI/MAGOGONI/327 – (suit land)**.

As the deceased died intestate on 28th June 2009 **Jane Muthoni Njogu** and **Virginia Wangari Kamau** petitioned the court for grant of Letters of Administration on diverse dates to administer the estate. According to the initial petition the necessary affidavits in support were duly filed, a letter from the Assistant County Commissioner dated 20.4.2015 and corresponding death certificate of the deceased. The necessary consent for the making of the grant were also signed by some of the beneficiaries.

Following the petition, a gazette notice to the Government printer dated 5.6.2015 was published identifying **Virginia Wangari Kamau** as the deceased widow having authority to petition for grant of Letters of Administration to the estate of the deceased. The petition had been lodged before the Principal Magistrate Court at Lamu in Cause No. 3 of 2014.

On 29.10.2015 **Virginia Wangari Kamau** in a turn of events moved the court by way of Chamber Summons under Section 67, 68 & 69 of the Law of Succession (Cap 160) seeking the following orders:

- 1. That the honorable court be pleased to issue an order for the striking out of the petition for this entire succession cause.**
- 2. That alternatively, the honorable court be pleased to issue a grant of letters of administration to the objector/applicant VIRGINIA WANGARI KAMAU to the exclusion of the petitioner or to make any other consequential or appropriate order in the circumstances of this case.**

Further in addition, the applicant pleaded and deposed in his affidavit the following grounds in support of the application that:

- 1. The deceased died on 28.6.2009 at Hindi Sub-location Lamu, as appears from the attached certificate of death annexed as GKN – 1.**
- 2. That the deceased was at the date of his death domiciled in Kenya and his last known address of residence was at Lamu.**
- 3. That she is related to the deceased by reason of being a wife.**
- 4. That the deceased died intestate.**
- 5. That the suit papers petitioning for grant of Letters of Administration at Lamu Court citing her name in Cause No. 4 of 2014 was filed without her knowledge and consent.**
- 6. That the petition is defective and improperly before the court.**

On the basis that the cause was filed without being notified or involved in signing the requisite affidavits.

- 7. That the purported signatories making reference to her name were a forgery.**
- 8. That the Death Certificate attached to the petition was fake as the original is still in physical in her physical custody.**
- 9. That she never signed any affidavits in the presence of Marube Berir Advocates.**

As a rejoinder to the chamber summons application the respondent Jane Muthoni Njogu filed replying affidavits in court dated 7.5.2016 and 12.5.2016, where she stated on oath interalia as follows:

- 1. That she is the 1st wife of the deceased whereas the applicant is the second wife.**
- 2. That I filed the Succession Cause No. 57 of 2015 with the full knowledge.**
- 3. That the applicant is my co-wife with all the dependants and beneficiaries of the deceased identified and named in the petition.**
- 4. That before the Grant of Letters of Administration could be issued the present objection proceedings was filed and served.**
- 5. That the court issued a joint order for the grant of administration in the names of Jane Muthoni Njogu and Virginia Wangari.**
- 6. That I was not aware of Succession Cause No. 4 of 2014 in the Principal Magistrate in Lamu by the applicant, a fact which was neither disclosed to her or other family members of the deceased.**
- 7. That the deceased John Macharia Ngethe was the registered proprietor of Parcel No. Lamu/Hindi/Magogoni/327 and it is the only property attached at the time of his demise.**
- 8. That at no time has the respondent intermeddled with the property of the deceased as alleged by the applicant.**
- 9. That no inheritance of the suit land has taken place before or during the preceding of this proceedings.**
- 10. That due to the previous family conflict over the suit property, a earlier meeting convened by the father in law – Francis Ngethe resolved.**
- 11. That the property be subdivided into two equal portions for either house and their children.**
- 12. That the court do intervene in the matter to bring to a closure this long standing dispute on Succession intestate.**

In this particular trial, the applicant and objector's evidence in court was a complete replica of the averments in their respective affidavits.

I therefore find no prejudice will be suffered if their viva voice evidence is not reproduced in this Judgment.

According to Virginia testimony she was married to the deceased in the year 1998 with whom she cohabited at their matrimonial home located at Hindi Magogoni/327. That at no time was the deceased married to any other wife let alone the respondent Jane Muthoni further to her testimony she told the court that during her marriage with the deceased they were blessed with four children namely as particularized in paragraph 1 of this Judgment. She further testified that in the year 2014 she had petitioned for letters of administration before the Lamu Principal Magistrate but whose grant of letters of administration were declined for reason that the respondent Jane Muthoni had claimed a share of the estate as a wife and beneficiary to the deceased property. According to Virginia, Jane was never married to the deceased nor did

she live at their matrimonial home during his lifetime. That she came to learn of Jane in 2012 in a meeting involving her father in law. She also objected to the deceased having been the biological father of Jane's last two children.

The respondent gave evidence on oath relying on her affidavits already filed in court. It was her testimony that she got married to the deceased under Kikuyu Customary Law where all customs and rites to ceremonies the marriage was observed. She further told the court during the subsistence of the marriage they were blessed with four children namely; Ann born in 1988, Francis born in 1992, Julius born in 1993 and Gladys born in 2001. According to the respondent she was aware and did acknowledged the existence of her co-wife the applicant herein. That initially, during the marriage they lived in Kikuyu before the deceased establishing another home at Hindi/Magogoni in Lamu.

The other witness summoned by the respondent was Ahmed Mohamed of Hindi Location. In his testimony DW 2 confirmed that the deceased and his family were residents of his location whom he did interact with for a long time till the demise of the deceased. He gave further evidence that the deceased was married to both Jane and Virginia as his lawful wives whereby each of them was blessed with children of the marriage. DW 2 further confirmed that the letter issued from the office of the presidency dated 20th April 2015 provides the beneficiaries to the estate of the deceased.

Submissions by the applicant

Mr. Mureithi counsel for the objector submitted that the respondent never at any one time contributed to the acquisition or improvement of the suit property in Hindi/Magogoni. He therefore contended that it will inequitable for her to be given a share or a portion of the property in question. Learned counsel further argued that going by the letter issued by DW 2 on 17th July 2009 it does confirm that the deceased was stated to have left behind only one wife by the name of Virginia. Counsel further delved in his submissions as to the paternity of Julius and Gladys has having been sired by the deceased. Counsel argued and submitted that the two birth certificate stated to belong to the two siblings are suspect in view of the fact that they were issued after the demise of the deceased. For this proposition he cited case of **MWG v RMK [2003] eKLR**.

On the issue of distribution of property counsel submitted that it would be unfair and unjust for the court to apply Section 40 of the Law of Succession Act. The basis of asking this court to depart from applying this provision argued counsel was due to the fact that the last two children of the respondent paternity is in dispute and secondly the respondent never contributed in acquisition or development of the property. For this legal proposition he cited the case of **Esther Wanjiru Githatu v Mary Wanjiru Githatu [2019] eKLR, In the Estate of the Late George Cheriro Chepkosiom (deceased)[2017]eKLR , Scolastica Ndululu Suva v Agness Nthenya Suva [2019] eKLR**

Submissions for the respondent

According to **Ms. Marubu** counsel for the respondent, she submitted that there is no dispute that Succession Cause No. 4 of 2014 at Lamu was fraudulently and mischievously filed by the applicant in order to deprive the respondent and her children a rightful share to the estate. Learned counsel contended that the respondent was married to the deceased under Kikuyu Customary Law and it was during her cohabitation they were blessed with four issues of the marriage. The fact therefore that the last two birth certificates were issued after the death of the deceased unless the contrary has been shown by the applicant is not ground to challenge paternity. Counsel further submitted that from the copies of the chief letter and district officer from Lamu County it is acknowledged that the deceased left behind two wives and children who are entitled to inherit the estate. Learned Counsel placed reliance on Section 40 of the Law of Succession and the dictum in the case of **In the matter of the estate of Mwangi Giture (deceased) High Court Succession Cause Number 1033 of 1996 (Koome J), In the matter of the estate of Benson Ndirangu Mathene (deceased) Nakuru High Court Succession Cause No. 231 of 1998 (Ondeyo J)** based on this learned counsel urged this court to distribute the property between the two houses and their respective children.

Analysis

I have considered the objection proceedings, the answer provided by the respondent and submissions by both counsels. The way I see it the following issues are discernible from the contest between the applicant and the respondent.

The pivotal issues to determine this dispute are:

- 1). *Whether the petition for grant of Letters of Administration with annexed affidavits duly filed at the Principal Magistrate Court at Lamu in Cause No. 4 of 2014, should be revoked?*
- 2). *Whether in Succession Cause No.57 of 2015 the respondent and her two children Gladys and Julius should be omitted from inheriting any share of the suit property on grounds of marriage and paternity respectively?*
- 3). *Whether the deceased solemnized a monogamous or polygamous marriage?*

The Law and Analysis

Issue no. 1

The relevant provisions of the Law of Succession Act on revocation of grants are to be found under Section 76 of the Act. For purposes of this discussion they are herein stated in extenso (insert page 459)

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decided either on application by any interested party or of its own motion: -

- a) *That the proceedings to obtain the grant were defective in substance.*
- b) *That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
- c) *That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
- d) *That the person to whom the grant was made has failed, after due notice and without reasonable cause either:*
 - (i) *To apply for confirmation of the grant within one year from the date thereof, or such period as the court has ordered or allowed; or*
 - (ii) *To proceed diligently with the administration of the estate; or*
 - (iii) *To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or*

That the grant has become useless and inoperative through subsequent circumstances.”

The above legal parameters provide the framework upon which a grant of letters of administration can be annulled or revoked by the court in the circumstances where any one of these grounds is manifested in the impugned grant. The purpose of Section 76 and the provisions therein under is for the protection of the beneficiaries to the estate who for one reason or another may be disinherited by other siblings for lack of notification, non-disclosure, misrepresentation, deliberate omission so as to deny them their rightful share to the property. In construing and interpreting the provisions of Section 76 courts have laid down various principles in exercise of jurisdiction in order to meet the ends of justice under the Law of Succession.

In the matter of the **Estate of Isaac Kireru Njuguna (Deceased) Succession Cause No. 1064 of 1994 at Nairobi (Family Division)**

“The court in a cause where the parties seeking revocation of the grant were complaining about the distribution of the estate, that they were not being involved in the process, that not all of them had consented to the proposed mode of distribution and that all the assets making up the estate had not been distributed. The grant was revoked for lack of consent by all of the heirs and the properties not included in the asset inventory.”

In the matter of the estate of **Yusuf Mohamed at Succession Cause at Mombasa High Court No. 434 of 1995** *“The court in this case held and revoked the grant of Letters of Administration under Section 76 and Rule 44 (2) of the Probate and Administration Rules on grounds that the petitioner falsely alleged that the deceased was survived by three children only and that he did not consent to the issue of the grant to the petitioners. The court found there were other survivors who were not disclosed in the petition and who were not notified of the same and proceeded to revoke the grant.”*

In the matter of the **Estate of Wilson Wamagara (deceased) at Nairobi Probate and Administration Cause No. 261 of 1998** in that case *“the complaint was that the grant was confirmed fraudulently as the purported consent of two of the beneficiaries was forged.”*

In the matter of the estate of **Thariki Wangunyu alias Tharika Wangunyo HCC Cause No. 1996 of 1999**, *“in this case a widow obtained a grant of representation without disclosing one of her stepchildren and some of her own children as beneficiaries. The court held that matter merited revocation of the grant.”*

Consequently, from the above principles, after examining the evidence given by the witnesses of both parties and attached material, I am of the following conceded view.

In the instant application the glaring deficiency is the evidence by the objector Virginia Wangari Kamau that she was never the purported petitioner in Succession Cause No. 4 of 2014 in the Principal Magistrate Court at Lamu.

The declaration sought by the petitioner as supported by the Kenya Gazette notice of 5.6.2015 could not have been published without a petition being lodged before the Principal Magistrate registry at Lamu.

According to the Gazette notice the objector sought to be issued with grant of Letters of administration intestate to administer the estate of the deceased -**John Macharia Ngethe** in exclusion of the respondent **Jane Muthoni** and her children.

Whether the notice was served upon all the beneficiaries to the estate of the deceased in that **Cause No. 4 of 2014** at the Principal Magistrates Court at Lamu is not very clear from the material attached in **Succession Cause No. 57 of 2015**.

It is clear from the affidavit evidence of Virginia that she had disowned any petition made in her own name petitioning to be appointed as an administrator to her late husband estate. There can be no doubt that **Succession Cause No. 4 of 2014** was tainted with legality, misrepresentation and non-disclosure of material fact as to the correct dependants of the deceased.

Accordingly, I declare any such purported grant of administration applied for and if issued in Succession Cause No. 4 of 2014 to be fatally

defective and must be struck out as of right.

The second controversy submitted by Mr. Mureithi, for the objector was in respect of the fact that in Succession Cause No. 57 of 2015, the deceased was only married to one wife (Virginia Wangari Kamau).

That on the death of the deceased she was the only one entitled to be issued with grant of Letters of Administration in exclusion of Jane Muthoni Njogu. The applicant's main contestation as deduced from the affidavit evidence and her testimony on oath in court when she got married in the year 1998 to the deceased, the claimant Jane Muthoni was not domiciled and staying in the matrimonial home as alleged.

According to the objector, she cannot therefore qualify as a first wife to the deceased. It was further the evidence of the objector that the said Jane Muthoni surfaced within the family in 2012 after the demise

of the deceased. This meant that she does not qualify to be a spouse or dependant of the deceased to inherit any share of the estate.

The respondent Jane Muthoni co-joinder to this issue was swift through her affidavits and testimony in Court. Concerning, marriage she contended that her marriage with the deceased was celebrated under Kikuyu Customary Law that when the deceased died they already had two children namely Julius Njogu born on 15.02.1996 and Gladys Waruguru born on 24.4.2001.

Further, counsel for the respondent submitted and urged this court to recognize her as the widow to the deceased entitled with her children to inherit the property of the estate.

In this appeal I have reviewed the evidence and submissions by counsel and I make the following findings: Although the applicant maintained she was the only wife of the deceased in exclusion of the respondent she placed no evidence in court as to the fulfilment of all ceremonies of celebrating Kikuyu Customary Marriage.

First as already observed by the DW 2 – **Chief Lausia** of Hindi location, the deceased was married to two wives being the applicant Virginia and the respondent Jane. There is nothing cogent under the evidence of the respondent as to when she celebrated the Kikuyu Customary Law marriage with the deceased. As far the evidence shows out the deceased had cohabited with both wives and they were all blessed with children. It is therefore common ground that the children were undoubtedly issues of the union. The failure by the applicant and respondent to place cogent evidence on when they went through Kikuyu Customary Law of marriage with the deceased does not invalidate their marriage with the deceased.

In the instant case the evidence has feature which makes it exceptional. It is the aspect of the respondent being the first wife of the deceased and yet the applicant seemed to have no knowledge of her dispute being married to the deceased for such a long time.

I was of the view that the applicant was economical with the truth because her interest and focus is preferably on the nature of the property of the deceased they have to share equally or as the court may decide.

The dispute is more on how the property left behind by the deceased is to be shared out between the applicant, the respondent together with their respective children.

Since there is absence of essentials of what constitutes Kikuyu Customary Marriage on both sides take it that prescription of marriage gives each of the widows a valid recognition of their relationship with the deceased.

The Law

Section 3 (1) of the Marriage Act defines marriage to mean:

***“The voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. Therefore, a presumed marriage is a marriage that is based on prove of some facts. Blacks law dictionary defines presumption to mean a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.*”**

Further Bromley in his book on Family Law 5th Edition puts this way.

“If a man and woman cohabit and hold themselves one as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove that there was no marriage and are on those who rely on it to prove that it was solemnized.”

The Evidence Act tries to show that presumption of marriage is a question of a fact, a position that is appreciated by **Nyarangi JA** in **Mary Njoki v John Kinyanjui Muthuru [1985] KLR 487** states:

“The doctrine of presumption of marriage has a statutory foundation, in Section 119 of the Evidence Act, Cap 80 Laws of Kenya The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

Also **Hortensiah Wanjiku Yahwe v Public Trustee, Civil Appeal 13 of 1976** the court held that parties seeking to rely on the presumption

of marriage must prove the following elements:

- 1. Prolonged cohabitation.**
- 2. That they held themselves out to the public as a married couple**

In **Re Estate of Patrick Kibunja Kamau [2008] eKLR**

“It would be unconscionable for this court to hold that the applicant was a mere impostor looking out to enrich herself as the petitioner has described her. All those years (19 years) the applicant must have held legitimate expectations that she was the wife of the deceased and thus entitled to a share of his estate. Denying her a share of the deceased estate is tantamount to denial of the fundamental rights as regards fair treatment and equality before the law. Courts have also held that even months can amount to long cohabitation, such was the decision that was rendered in Peter s/o Mikhayo, the accused cohabited with a lady for a period of between 4 and 8 months, then one day he found his lady performing a sexual act in the bush with a man and proceeded to kill the man. In his defense on charge of murder, he said that the lady was his wife and he had been provoked to kill the man. The court had to consider whether that period of cohabitation was long enough to trigger a presumption of marriage. Again this is one of the case relied on customary law and it held that under Customary Law, that period was enough and in fact stated that under customary law, the moment you start cohabiting the presumption is triggered.”

I, therefore that the deceased had the capacity of contracting the two marriages by presumption and accordingly the two wives are entitled to a share in the deceased Estate as wives and their children. As recognized in the Law of Succession under Section 3(5) of the Law of Succession provides as follows:

“Notwithstanding the provisions of any other written law a woman married under a system of law which permits polygamy is, where her husband had cohabited a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act and in particular Section 29 and 40 thereof and their children are accordingly children within.”

The meaning of this Act, I am of the considered view that the applicant and respondent who categorically qualify under the presumption of marriage are entitled to inherit the estate of the deceased. I appreciate the difficulty the applicant and respondent they must have had to recollect the events with regard to the ceremonies conducted towards fulfilment of Kikuyu Customary Law. The obvious answer to their predicament is to take refuge in this system of marriage by presumption. It is a system which does permit polygamy, notwithstanding its non-registration as a requirement under the Marriage Act 2014.

The next outstanding issue to consider is how the estate of the deceased ought to be shared out between the two families

Under Section 40 (1) of the Act, the deceased died intestate. I have already established that he was a polygamist. The provisions in this section of the Law states as follows:

“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.”

I therefore find, that contrary to the submissions by counsel for the applicant, contesting the inclusion of the respondent as wife to the deceased she does qualify under Section 29 and 40 of the Act as a beneficiary and dependant of the deceased.

The property in question was registered in the name of the deceased, unless the contrary is shown he held it in trust for his dependants. Mr. Mureithi for the applicant lamented that the property should not be shared equally because the respondent never contributed to its acquisition nor improvement. While also holding that the applicant was the only surviving widow of the deceased entitled to inherit the property at Hindi Magogoni. Even; if the respondent had not contributed towards its purchase, development or whatever the case may be by virtue of being a widow she is entitled as of right unless there are compelling reasons to disinherit her of the property.

In the instant case, the deceased was polygamous with two wives. The only identifiable asset declared in the petition for grant of letters of administration is the property located in Hindi Location Lamu County.

For my part, I do not agree with submissions by Mr. Mureithi for the applicant challenging birth rights and paternity of the two issues of the marriage referred to as Julius and Gladys.

I am of the conceded view that the submissions being made going by letter of the District Officer Hindi on survivorship of the deceased is in contradiction of Section 29 (1) of the Law of Succession Act which provides:

“For 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

Applying these legal provisions to the facts of this case with regard to **LR/Hindi/Magongoni 327** I am persuaded that the property be shared equally between the two houses. The Law as its I believe quite properly that each children may be entitled to equal share of the estate.

Accordingly, and for the reasons above stated the following orders shall abide:

- 1. That the grant of Letters of administration be issued in the four names of Jane Muthoni and Virginia Wanjiru Kamau as two co-administrators to the estate of the deceased.**
- 2. That the initial grant of Letters of Administration in Succession 4 of 2014 lodged at the Principal Magistrate Court at Lamu be and is hereby revoked.**
- 3. That the distribution of the estate be in conformity with Section 40 (1) of the Law of Succession Act.**
- 4. The costs of this litigation be in borne by each party.**

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Atyang for Marubu for the Petitioners