



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HC SUCC NO. 131 OF 2017**

**IN THE MATTER OF THE ESTATE OF D M M (DECEASED)**

**FRANCISCA SYOMBUA NZUVI**

**YVONE TAABU MULI .....ADMINISTRATORS/RESPONDENTS**

**VERSUS**

**ANGELA MUE MAKAU.....PROTESTOR/APPLICANT**

**RULING ON PROTEST**

**INTRODUCTION**

1. The matter herein relates to the estate of D M M who died intestate on 08/01/2006.
2. The administrators herein petitioned for letters of administration and subsequently the same was issued on 25/01/2012.
3. The protestor herein then filed an affidavit of protest dated 19/09/2013 protesting to the confirmation of the letters of administration.
4. The matter proceeded by way of viva voce evidence. The protestor testified alone while the 2<sup>nd</sup> Petitioner testified and called one witness.
5. Parties were ordered to file submissions on the protest.

**PROTESTOR'S CASE**

6. The protestor herein gave her testimony that she was married to the deceased herein through Kamba customary law. She stated that the deceased before his demise also married other two wives.
7. The 2<sup>nd</sup> wife was Rose Kalekye while the 3<sup>rd</sup> wife was Fransisca Syombua. The 2<sup>nd</sup> Petitioner is a daughter to the 1<sup>st</sup> Petitioner and who is the 3<sup>rd</sup> wife.
8. She testified that she was alive when the other two co-wives were being married. She gave testimony that she was married under Kamba customary laws and dowry price was paid in the year 1976. They sired four children with the deceased.
9. She produced a letter from the District Commissioner introducing her as the 1<sup>st</sup> wife to the deceased herein together with her children.
10. She stated that family members returned her to her parents where she had lived up to date. She further stated that she has never been divorced by her husband. She stated that there was no goat to seal the divorce commonly known as "*Mbui ya Ulee*". She disputed a letter from the area chief which stated that the deceased had only two wives to her exclusion.
11. She testified that her husband before death had properties to wit.

***A. Pension held by Public Trustee Kshs. 1,078,662/= pension scheme no. APN/PC 231667.***

***B. Harambee SACCO shares valued at Kshs. 88,000/=.***

*C. Land parcel No. Makueni/Kikumini/547.*

*D. A share of land parcel no. Makueni/Kikumini/260.*

12. She stated that her proposal was that the property be equally divided among the three houses of the deceased. She stated that the Petitioners herein had already withdrawn the shares of Kshs. 88,000/= from Harambee SACCO. She stated that her husband had not divorced her and neither made any written and signed piece of evidence to show divorce.

13. She further testified that she did not appear for photo session during the burial of her husband and neither did her name appear at the eulogy. She stated that she went back to her parents and was never remarried.

14. During cross examination by the 2<sup>nd</sup> Petitioner, she stated that the deceased never officially divorced her but they were still together while he was alive. She stated that she had been allocated a house by the deceased and that the other wives also had been allocated land and house to live in.

**PETITIONERS CASE**

15. On 28/09/2017 the 2<sup>nd</sup> Administrator testified as PW1 and told this Honourable court that the 1<sup>st</sup> Administrator unfortunately died when this petition was on progress and she opted to rely on the two affidavits sworn by the 1<sup>st</sup> Administrator, one sworn on 27/04/2015 and another one sworn on 29/04/2015. Both in reply to the Protestor's claim.

16. The 2<sup>nd</sup> Administrator testified that in Kamba culture and customary law and for a woman to be recognized as a wife there are binding customary rituals and ceremonies which are a must where two are regarded as Husband and wife. This includes payment of dowry, (Ntheo) among others. Families of both parties have to make agreement on such ceremonies in the presence of both the husband and wife.

17. She testified that in reference to the witness filed statement dated 09/05/2017 it is clearly stated that the Protestor was proved to be sick a few days soon she was brought home by the deceased in the year 10/02/1975. Then they lived as a boy and a girlfriends for two weeks before the Protestor's condition became worse. The deceased was about 16 years old taking to consideration that he (deceased) was born in the year 15/06/1958 as per the eulogy.

18. PW1 stated that on March 1975 the Protestor was taken back to her maternal home by the deceased family. After the family of the deceased lived with the Protestor in their home only for about 20 days in her sickly conditions.

19. PW1 testified and told court that the Protestor is aware that the family of M M had taken her back to her parents 42 years ago and to date she is living at her maternal home as their daughter and has established her home there as a single mother. Meaning that she has been accepted by her maternal parents as one of their dependents.

20. PW1 in reference to the Kamba English translated letter dated 06/05/1997 attached to the affidavit sworn on 27/02/2015 by Francisca Syombua, the Protestor had no children by the time she was taken back.

21. PW1 testified the fact that the deceased was born in the year 15/06/1958 by the time the Protestor was taken back to her parents' home in the year March 1975 the deceased was about 16 years old. The Protestor was taken back to her maternal home by the family of the deceased because the deceased was under age by then and unable to maintain a wife nor make a decision by himself at such age.

22. She also told court that having been taken back to her parents home the deceased has never gone for the Protestor neither made any arrangement to return the Protestor back to his home meaning that there was no marital status existed in between the two.

23. PW1 stated that before the deceased died and especially in the year 1999, the deceased had already sub-divided his two parcels of land **MAKUENI/KIKUUMINI/260** and **MAKUENI/KIKUUMINI/547** in between his two wives namely **ROSE KALEKYE KING'OLA** and **FRANCISCA SYOMBUA NZUVI** and at the same time build permanent houses for each of the two wives.

24. The 2<sup>nd</sup> Administrator referred to a structured Kamba English written will signed by the deceased dated 03/11/1999 and marked PKM 1 attached in the witness statement of PAUL KILUNGYA MAKUU.

25. PW1 said that the fact that the Protestor has no share of land allocated to her or any physical house build on her behalf it's a clear indication that the Protestor was not known by the deceased and the Protestor had no cover in the two parcels of land owned by the deceased.

26. The 2<sup>nd</sup> administrator's witness (P K M) testified as PW2 and told this Honourable Court that the Deceased was his step brother and known him since he was born.

27. PW2 also told this court that he is the chairman in the family of the deceased and overseer of the said family of the deceased. He states that the deceased brought the Protestor at their home on 10/02 /1975 soon he left primary school.

28. In the year March 1975, the deceased was about 16 years old having been born on 15/06/1958.

29. PW2 testified that the deceased had no permanent house but lived in constructed semi build structure at that time being a simple boy and minor. Both lived in that structured cube as a boy and a girlfriend for only 20 days before the Protestor was taken back to her maternal

home.

30. PW2 testified and informed the court that the Protestor collapsed two weeks after she was brought at home by the deceased and was taken to Makueni Hospital for treatment when her conditions worsened.

31. PW2 also said that within the time the protestor was sick the deceased left the protestor under the care of his mother and fled to Mombasa in search of a job but in most likely the deceased was avoiding the protestor at her serious sick condition.

32. PW2 testified that he was informed by the mother of the deceased that in the month of March 1975 the family of the deceased had taken the Protestor back to her parents on condition that:-

***(i) The Deceased was too young to marry a wife and the deceased had no basis to maintain a wife when he was not working.***

***(ii) The family of the deceased had feared that in case the Protestor by bad luck dies at their care they were to be held responsible for such misfortune.***

***(iii) No Customary dowry had been taken to the Protestor's home (parents) at such an early state of relationship so the deceased family had it in mind that it was illegal to maintain a woman in such condition at their home when she was not officially handed over to them under any official Kamba Customary Law.***

33. PW2 testified that the deceased married his first wife Rose Kalekye King'ola at a time when he (deceased) was living at Mombasa under Kamba Customary Laws.

34. Further, PW2 said that the Deceased later on married the 2<sup>nd</sup> wife Francisca Syombua Nzuvi under Kamba Customary Law when the deceased was working at Nairobi and lived with them as his wives till the time he died in the year 08/01/2006.

35. PW2 further testified that the deceased had distributed his two parcels of land among his two wives and build permanent home for them.

36. Parcel No. **MAKUENI/KIKUUMINI/260** was allocated to the 1st wife while **MAKUENI/KIKUUMINI/547** was allocated to the 2nd wife Francisca Syombua Nzuvi where their children are still living in to date.

37. PW2 testify that during the burial ceremony of the deceased the protestor attended the burial just like any other neighbour, the protestor never appeared in any occasion e.g. in the programme and photograph taking as one of the deceased wife neither her children appeared.

38. PW2 likewise told the court that a special announcement was made in public during the burial as to whether there was anybody with any claim or an issue and/or had an affair with the deceased or his family.

39. The Protestor was present but she never made any comment or claim that she was a wife to the deceased neither did she say that her children were dependents of the deceased.

40. Lastly PW2 testified that some officials from Makueni office in the company of Hollings Mutisya a Chief in Kikumini Location visited him at his home whereby they persuaded PW2 to agree with their proposal that the Protestor was a wife to the deceased but he (PW2) declined and insisted that the Deceased had two wives namely Rose Kalekye King'ola and Francisca Syombua Nzuvi.

#### **SUBMISSIONS BY PROTESTOR**

41. The issues for determination in this matter are:-

***a) Whether the protestor was married by the deceased.***

***b) Whether she and her children are entitled to inherit the property from the deceased.***

***A) Whether the protestor was married by the deceased.***

42. In the case of **Njoki –vs- Mathara and Others Civil Appeal No. 71 of 1989** (UR), Kneller J. A reading the judgement of the court held that:-

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

***(ii) The standard of proof is the usual one for civil action, balance of probabilities.***

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

43. Further in the case of **Hortensiah Wanjiku Yawe –vs- 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.**

44. It was the evidence of the protestor that she was married by the deceased and allocated a house before the family members returned her to her parents. She further stated that was in union with the deceased while she was at her parents’ home and that her husband never divorced her. There was no divorce ceremony as per the Kamba customary law.

45. In case of Anna Munini and Another –vs- Margaret Nzambi Civil Case No. 751 of 1977, the court held thus:-

***“It has been proved that the deceased and the defendant were man and wife under customary law and though some ceremonies and rituals sfor such marriage had not been fulfilled before the deceased’s death they did not affect the presumption or validity of marriage.”***

**B) Whether she is entitled to inherit the property from the deceased.**

46. Under Section 40(1) of the Law of Succession Act:

***“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net 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 unto to the number of children.”***

47. The protestor remained a wife and even if they physically lived separately due to certain differences, that relationship subsisted. Moreover for purposes of Law of Succession, then even if she were to be considered as having separated from the deceased, then she would be considered a former wife and therefore a dependent within the meaning of **Section 29 of the Law of Succession Act.**

48. Section 3(2) of the Law of Succession Act states the meaning of children. The children belonging to the protestor are children for the deceased herein and are entitled to inherit from the deceased. The grant issued to Petitioners was improper as it gave them sole administration and an unfair distribution, and we pray that the same be revoked. We pray that a grant of letters to issue to Petitioners and Objector as joint administrators.

**ADMINISTRATORS SUBMISSIONS**

49. It was the contention of the Administrators that the deceased was very young 16 years old so he was unable to pay the price of Dowry bearing in mind that he was not working.

50. The protestor has not discharged the burden of proving the existence of a Kamba customary marriage between herself and the deceased bearing that in any customary law in relation to marriage, the families of both the husband and the wife comes together for mutual undertaking and agreement to the aspect of dowry price. Witnesses are engaged to witness. The protestor has failed to call any of her witnesses to confirm the matters of her dowry payment. So the evidence of the above was not discounted at all.

51. The 2<sup>nd</sup> Administrator during her testimony made it clear that the protestor has inherited her share of land from her maternal father’s estate as one of their beneficiaries due to the fact that the protestor has cut shot her future relationship with in the family of the deceased by returning a He goat (Mbui ya ulee) to the said family of the deceased.

52. The 2<sup>nd</sup> Administrator points out that during the burial of the deceased neither the protestor nor her children feature as being part of the family of the deceased and even in the time of eulogies reading. If the protestor considered herself as a wife to the deceased, she could have protested her exclusion from this important undertaking.

53. The protestor has not even produced any documentary evidence to confirm whether they had sired any children with the deceased no witness had testified to this fact, putting to consideration that the protestor has testified that her fifth child was sired by another man apart from the deceased. But she named the said child as J M M. It is a very clear proof that the protestor sired her children with men known to herself but named the deceased as their father for security purpose.

54. It is not clearly proved that the deceased was taking care of the protestor and her children before he died. It is noted that the protestor has failed to call any of her children to confirm whether indeed they were taken care of by the deceased purposely to ascertain the point of being dependants.

55. The deceased had written a structured will which is translated as a Kamba English language and marked as exhibit “PKM1” in the witness statement. The said will has declared the sub division of parcel No. **MAKUENI/KIKUUMINI 260 and 547** among the deceased two wives and the said will was not disputed by the protestor.

56. It is at the interest of justice the said recorded will be upheld with accordance to part II section 11 of the Law of Succession Act.

57. The following questions are worthy answering so as to shed light on the truthfulness of the protestor’s testimony.

**i) If the investigation was done to confirm that the protestor was a wife to the deceased why did the protestor not produce the award and/or the decreed order from the commissioned officers who arbitrated her claim at the DC’s office.**

**ii) The protestor testified that she was allocated a house by the deceased why did she not decide to go back and occupy the said house together with her children if at all the said house exist?**

**iii) If the children of the protestor were sired by the deceased and in the real sense are dependants, why did they not go back to the land of the deceased to build their home together with their wives? Instead they choose to live with their mother at her maternal home.**

**iv) The protestor has relatives and clan members who had an idea behind her claim and status of her marital affair with the deceased. If at all this was true why did she not call the said people to witness in her claim.**

58. It can be deduced that the protestor was not a wife to the deceased neither her children be dependants to the Estate of the deceased.

59. The protestor is not truthful in her testimony and she is only using assumption evidence to pave in as a beneficiary to the estate of the deceased.

60. The letter written by C. M. Mbuvi for District Commission dated 16<sup>th</sup> February 2012 since no arbitration proceeding and the finding of the award and the decree order was not enclosed to verify the kind of investigation done by the commissioned officers.

61. The protestor misrepresented herself as a wife to the deceased and has not given a sufficient proof to sustain her claim.

#### **ISSUES, ANALYSIS AND DETERMINATION**

62. The issues for determination in this matter are:-

**a) Whether the protestor was married by the deceased.**

**b) Whether she and her children are entitled to inherit the property from the deceased.**

*On whether the protestor was married by the deceased.*

63. In Re Estate of **Stephen Kimuyu Ngeki (1998) eKLR**

**J.W Mwera, J.** (as he then was) stated that Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of 3 traditional goats called Mbui Sya Ntheo.

64. In his book; **Marriage and Divorce, 1<sup>st</sup> edn, (1968) 28 Dr. Cotran** summarizes the essentials of a valid Kamba customary marriage as follows:-

**(a) Capacity.**

**(b) Consent.**

**(c) Slaughter of a billy goat.**

**(d) Marriage consideration.**

**(e) Cohabitation.**

65. In the case of **Njoki –vs- Mathara and Others Civil Appeal No. 71 of 1989 (UR), Kneller J. A** reading the judgement of the court held that:-

**a) The onus of proving a customary marriage is on the party who claims it.**

**b) The standard of proof is the usual one for civil action, balance of probabilities.**

**c) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.**

66. Further in the case of **Hortensiah Wanjiku Yawe –vs- The Public Trustee, Civil Appeal No. 13 of 1976**, the court held:-**The onus of proving customary law marriage is generally on the party who claims it. The standard of proof is the one usually for a civil action namely “on the balance of probabilities.” Evidence as to the formalities required for a customary law marriage must be proved to that standard. Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.**

67. From the foregoing, I am satisfied that the most important element of a Kamba customary marriage is the payment of 3 goats (mbui sya ntho) by the groom. From the evidence on record, the above aspect aspects about the ceremony on alleged marriage of protester and deceased are lacking.

68. The protestor has not discharged the burden of proving the existence of a Kamba customary marriage between herself and the deceased bearing that in any customary law in relation to marriage, the families of both the husband and the wife comes together for mutual undertaking and agreement to the aspect of dowry price. Witnesses are engaged to witness. The protestor has failed to call any of her witnesses to confirm the matters of her dowry payment.

69. During the burial of the deceased neither the protestor nor her children feature as being part of the family of the deceased and even in the time of eulogies reading. If the protestor considered herself as a wife to the deceased, she could have protested her exclusion from this important undertaking.

70. The protestor has not even produced any documentary evidence to confirm whether they had sired any children with the deceased no witness had testified to this fact, putting to consideration that the protestor has testified that her fifth child was sired by another man apart from the deceased.

71. It is not proved that the deceased was taking care of the protestor and her children before he died .They separated long before she sired the children she has now and never thereafter cohabited with the deceased. It is noted that the protestor has failed to call any of her children to confirm whether indeed they were taken care of by the deceased purposely to ascertain the point of being dependents.

72. The court therefore holds that the protestor has failed to prove that she was married by the deceased and that her children were sired by the deceased thus her and her children are not entitled to any portion of the deceased estate. The deceased demonstrated wish was for sharing of the lands parcel No. MAKUENI/KIKUUMINI 260 and 547 among the deceased two wives.

73. Thus the court makes the following orders;

- i. The first wife house gets MAKUENI/KIKUUMINI 260 and the 2<sup>nd</sup> wife house gets MAKUENI/KIKUUMINI /547.**
- ii. As for the cash, same shall be shared equally between all beneficiaries including the surviving wife/wives(2).**
- iii. No orders as to costs.**

**SIGNED, DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF MAY 2018, IN OPEN COURT.**

**C. KARIUKI**

**JUDGE**

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