



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI
HC P&A NO. 18 OF 2017
FORMERLY MACHAKOS HC P&A NO. 725 OF 2008
IN THE MATTER OF THE ESTATE OF MULU KATIKU MUASYA (DECEASED)
PHILIP MUTUKU MULI..... PETITIONER
VERSUS
BETH MBENYA MULI.....OBJECTOR
RULING

1. By Summons dated 27/06/2012, the Applicant/Objector sought orders:-

1. Spent.

2. **THAT** the Grant of Letters of Administration Intestate issued to PHILIP MUTUKU MULI on 20/04/2009 and confirmed on 23/08/2010 be revoked.

3. **THAT** land parcel No. MBOONI/KALAWANI/89, which is the only asset of the deceased's estate, and which has already been transmitted to the Petitioner (Philip Mutuku Muli), be reverted back to the deceased's estate.

4. **THAT** the deceased's estate comprised of land parcel No. MBOONI/KALAWANI/89, be preserved pending hearing and determination of this application.

5. **THAT** cost of this application be paid by the Petitioner.

2. Same is supported by Affidavit of Beth Mbenya Muli sworn on 27/06/2012 where she deponed:-

1. **That** she is a widow of the deceased, being his first wife.

2. **That** the deceased had two wives, herself being the first wife and Mwikya Muli (now deceased) being the second wife.

3. **That** the said Mwikya Muli (who has since died) is the mother of Philip Mutuku Muli the Petitioner herein.

4. **That** Philip Mutuku Muli (the Petitioner), is the deceased's step-son, whom the deceased took in as his son on marrying his mother, and is, therefore a beneficiary of the deceased's estate.

5. **That** in the year 2007, the Petitioner *secretly* petitioned for grant of letters of administration of the deceased's estate vide this court's Succession Cause No. 541 of 2007, which this Honourable court struck off on 08/07/2008 with costs to me, and further ordered that the Petitioner (PHILIP MUTUKU MULI) be arrested and taken to Machakos Police Station for investigation into matters raised in the said matter on 07/07/2008 and 08/07/2008. (Hereto annexed and marked "BMM1" are copies of this court's proceedings and Ruling dated 08/07/2008).

6. **That** in its said Ruling (dated 08/07/2008), this Honourable Court also ordered that the conduct of an officer at this Court's Registry be investigated to find out whether the officer had committed an offence, and appropriate action be taken (see an annexure "BMM1" – supra).

7. **That** objector has not been advised on whether any action was taken pursuant to this court's said orders, and the outcome of any

such action.

8. **That** after this Court's Succession Cause No. 541 of 2007 was struck off as afore stated, the objector filed in Court's Succession Cause No. 549 of 2008, seeking to be granted letters of administration of the deceased's estate.

9. **That** objector was issued with Letters of Administration Intestate on 25/02/2009, and the same was confirmed on 05/12/2011, and was given to her on or about 28/03/2012. The only asset of the deceased's estate (land parcel No. MBOONI/KALAWANI/89) was, on his application, ordered to be registered in the joint names of himself and Philip Mutuku Muli (the Petitioner herein), and to be shared equally between the deceased's two (2) houses. (Hereto annexed and marked "BMM2" are copies of the said Letters of Administration Intestate, the Certificate of Confirmation, and this Court's Proceedings and Orders dated 05/12/2011).

10. **That** upon presenting the aforesaid confirmed grant at Makueni Lands Registry where the deceased's aforesaid parcel of land is registered, objector was shocked to learn that:-

a) The Petitioner herein (Philip Mutuku Muli, once again came to this Honourable court and secretly and filed the present succession proceedings after (his) Succession Cause No. 541 of 2007 was struck out as aforesaid; and failed to disclose yet again that the deceased had two houses/wives.

b) Philip Mutuku Muli (the Petitioner herein) obtained letters of administration intestate on 20/04/2009, which was then confirmed on 23/08/2010.

c) The only asset of the deceased's estate, land parcel No. MBOONI/KALAWANI/89, was ordered to be registered in the name of the Petitioner, Philip Mutuku Muli. (Hereto annexed and marked "BMM3" are copies of the grant of letters of administration intestate and certificate of confirmation of grant issued to the Petitioner in these proceedings as aforesaid).

11. **That** the objector further learnt at Makueni Lands Registry that:-

a) In a bid to keep the present proceedings secret from her, the Petitioner informed the said Lands Registry that the deceased's title deed regarding the aforesaid parcel of land was lost, and swore affidavits in that regard, yet he knew that the said title deed was in the custody of the deceased's brother, Daniel Wambua, who was keeping it until the succession proceedings and dispute over distribution of the estate was over. (Hereto annexed and marked "BMM4" is a copy of the title deed).

b) The said parcel of land was on 18/07/2001 registered in the name of the Petitioner herein, Philip Mutuku Muli, to hold for himself and his siblings (the deceased's second house).

12. **That** on 24/05/2012, she registered a caution on the said title, and objector has now come to court seeking revocation of the confirmed grant issued to Philip Mutuku Muli (the Petitioner herein), and reversion of the deceased's estate, comprised in land parcel no. MBOONI/KALAWANI/89, to the deceased's name, to pave way for distribution of the said land between the deceased's two (2) houses as already ordered by this Honourable court in Succession cause No. 249 of 2008. (Hereto and marked "BMM4" is a copy of a certificate of Official Search).

13. **That** the deceased's first house (which is his house), has been deliberately disinherited by the Petitioner herein (Philip Mutuku Muli), and she verily believes that investigations may have to be ordered against him once again.

14. **That** objector has the following children with the deceased, all of whom have been deliberately disinherited.

a) Syombua Muli.

b) Mutua Muli.

c) Musengy'a Muli.

d) Kasiva Muli.

15. **That** there is a real danger that the Petitioner and his siblings may dispose off the deceased's said parcel of land, and the Petitioner has severally made such threats.

3. The same is opposed and a Replying Affidavit was filed and sworn by Philip Mutuku Muli on 18/09/2012 in which he depones:-

1. **THAT** the Objector never informed him of High Court Succession Case No. 549 of 2008 as alleged and he never signed any consent to issuance of letters of administration hence objector was not aware of Succession Case No. 549 of 2008 when I filed the matter herein.

2. **THAT** by the time grant was confirmed in High Court Succession Case No. 549 of 2008 on 05/12/2011, he had already obtained a confirmed grant on 23/08/2011, (Annexed and marked '**PMM1**' are copies of both certificates).

3. **THAT** the Principal Registrar, High Court of Kenya, Nairobi, duly issued Form 30 on 17/02/2009 certifying that no grant of

representation had been made, nor was any application pending at the said registry at the time (annexed and marked 'PMM2' is a copy of Form D').

4. **THAT** the Objector was never married to the deceased and no evidence has been tendered to show that there was marriage by repute.

5. **THAT** the Objector never even attended the deceased's funeral nor supported him when he was sick, as a wife would do. She only got interested in his estate upon his demise.

6. **THAT the** objector has never seen Title Deed No./Mbooni/Kalawani/89 since his father's demise hence he presumed it was lost.

7. **THAT** the said Daniel Wambua never informed him that the said Title Deed was in his custody.

8. **THAT** Gazette Notice No. 5422 was duly issued giving notice to all persons that h had duly applied for a new Title Deed hence the Objector cannot allege that he did so secretly.

9. **THAT** no one opposed to issuance of the new Title Deed when the gazette notice was published.

10. **THAT the petitioner has** not deliberately disinherited the Petitioner as alleged. The Objector herein, on the other hand, deliberately left out his mother's house, particularly Joyce Ndungwa Muli and Reginal Mwangeli Muli, who are his sisters from the proceedings.

11. **THAT** the Objector has never informed him or his family members of the date for confirmation of grant in High Court Succession Case No. 549 of 2008 as alleged in the proceedings before Justice Dulu dated 05/12/2011.

4. On 19/11/2014 the court gave directions that the matter to be heard via viva voce evidence. Parties filed witness statements and exchanged the same.

5. The Objector/Applicant testified to the effect that she relied on the content of her affidavit on cross examination. She stated that: -

"She married the deceased in 1988. It was a customary law marriage. Dowry was paid to her family. We had two children Mary Muli was married to the deceased. She married the deceased in 1997. she left the matrimonial home in 1994. She is aware that Mary had been married before she married the deceased and that the deceased reimbursed the dowry which had been paid by the previous husband. At the time of marriage, Mary had three sons but she heard that she also had daughters who were married. P&A 549 of 2008 – she petitioned for letters of Administration. The Grant was confirmed on 05/12/2011. She indicated only 3 children of Mary. She did not know the daughters. She only indicated those that she knew. When she brought the Petition P&A 549 of 2008, she did not know that Philip Mutuku had petitioned in this cause. Dowry has not been reflected in her case. Her husband died on a date in the 1990 that she could not recall. She did not attend the funeral as she was unwell. He was buried in the family homestead. Mary is deceased. She was married in the same compound where her husband was buried."

6. She was also re-examined and stated:-

"Mary was married to the deceased in accordance with Kamba customary law. objector was also married under Kamba customary law. They were both customary law wives. Dowry reimbursement in the case of Mary to Mary's former husband is in accordance with the Kamba customary law. Mary came with (3) children and these young men who lived with deceased on the land. None of the daughters came to the homestead."

7. PW2 Daniel Wambua Katiku testified;

*"Muli Katiku Muasya deceased was his elder brother. The deceased had (2) wives the first was Beth Mbenya Muli and the 2nd was Mary Mwikya Muli. Beth Mbenya had (2) children with deceased. The names of her children are Gloria Kasiva Muli and Musenya Muli. Beth Mbenya had been married under Kamba Customary law. They conducted all rites. They paid (3) goats for dowry as **mbui cia ntheyo**. The goats were taken to the parents for the girl to be married. One of the goats is slaughtered and eaten at the ceremony together between the two families. The other two are left at the home of bride.*

That is the Kamba marriage agreement by dowry subsequently. objector was involved in the dowry arrangements and the Ntheyo. The dowry is paid at continuous basis as the family lives together not at one go. The deceased was a drunkard and there were occasions of disputes at the home with Beth. On one occasion Beth went back to her family. There was however no divorce. The two remained married.

Beth had other children before the marriage – Syombua Muli and Mutia Muli. They were small children when the mother married the deceased. The deceased was with them when the Ntheyo and dowry was being concluded. The deceased and Geth built a house on his land on marriage. Deceased married a lady who had been previously married to another person who had died.

Kamba customary law allows polygahis. The lady had children. The deceased paid the family of previous husband – 3 goats, Kshs. 120/= . He did not recall anything else. Ntheyo was not done. they first refunded the dowry upon marriage of a woman who had been previously married, the dowry paid for the woman is refunded to the parents of the girl who repays the person who had paid it.

Mary came with (3) children:- Philip Mutuku who was in class 6, John Kioko Muli and Moses Musau Muli. Mary had surname from the previous marriage – Musyoki – who was the father of her children. After marriage Mary took the name of Muli. The deceased accepted them to his home and we also accepted them.

They were not conversant with the daughters of Mary. They were never brought to the homestead of the deceased. They had been married. The deceased had a shamba Mbooni/Kalawani/89. According to me the shamba should be divided into (2) because his brother had (2) wives. Under Kamba customary law, the land is divided into the number of wives. Mary died in 1999. The deceased herein died previously.

Beth lives at her mother's home at Tawa. Her house at the deceased home was demolished by the children of Mary – Philip, John and Moses. They used the roofing tiles to construct their own house. When this happened he called the clan of Ithanga and the clan resolved that the children buy the roofing tiles and that Beth to come and construct her house. Objector has been aware that the parcel of land has been transferred into the names of children of the 2nd wife, Mary.

He is aware of the litigations on the estate;

- (1) Objection by Beth in Petition for Letters of Administration, P&A 541 of 2007 – Annexure BMM1.
- (2) The Judge struck out the petition and ordered that Beth gets Letters of Administration.
- (3) On order of the court Philip and the other children were to be investigated by Criminal Investigations Department, and punished.
- (4) Beth filed Petition for letters of Administration of the estate and included the names of the children including house of her co-wife Mary. P&A 549 of 2008. It went all the way to confirmation of Grant. The court ordered the distribution into (2) parts.
- (5) The land was changed/transferred and registered in the names of Philip Mutuku, John Kioko, Moses and the daughters even before they were married.
- (6) Beth had applied to court to have the title revoked.

The case was filed after the court had revoked the previous Grant. The case is P&A 725 of 2008 after determination of objection in P&A/541 of 2007. The copy of the title deed marked as BMM4 (original produced and returned with no objection by counsel for the petitioner). Title deed dated 05/12/1990 in the names of Muli Katiku Muasya.

The Petitioners had in seeking a new title indicated to the Land Registry at Makueni that the original was lost which was not true. Beth seeks revocation of Grant of Letters of Administration because it was obtained fraudulently after the determination of the P&A 541 of 2007. He agrees that the parcel of land shall be restored to the name of the deceased so that it is properly distributed to the lawful beneficiaries..”

8. PW2 was cross examined and stated that:-

“Beth was married by the deceased in 1988. She left to her family's home after dispute with the deceased in 1994. She lived at her mother's home. The deceased died in 1996. Beth was still at her mother's home. It was two years after she went away. She came after the burial. She was unwell. She came when she became well. Her family members came. He does not recall whether Beth's children came for the funeral. Mary and her children attended the funeral. Beth had gone to work leaving her husband farming in and went to work elsewhere. From 1994 to 1996, Beth was still married. objector was present when the dowry was paid to Beth's family. He was not aware of any refund of dowry. There was no refund of dowry of Beth. The children of Mary became after marriage children of the deceased. Mary was married in July 1994. She lived in house of Beth. In 1996, Mary's family entered in the house constructed for Beth. The deceased died and left them in that house. Joyce Kasiva Muli, Regina Mwangeli –objector has heard of them but he does not know them. Original title deed –objector was given by the deceased and he told me to hold on to it. He also has his identify card. Whenever they needed the identity card they would come for it and they would return. They never asked for the title. I never told them about it. Philip was in class 6. He was 18 years. I am not sure of his age. P&A 541 of 2007 – order for investigations by the court. He did not know whether anyone was found to have committed an offence.”

9. Upon re-examination PW2 stated that;

“Beth was still married under Kamba customary law even with the separation or return to her home to her family. The marriage under customary law is broken upon refund of dowry. Beth remains a wife of the deceased. Under customary law, a goat – **mbui ya ulee**- goat of refusal – when a spouse rejects the other. If the other spouse accepts the goat, the dowry is refunded. If it is wife rejecting the husband, the wife will give the goat. Beth never gave the “mbui ya ulee.” Death does not terminate marriage under Kamba customary law. If the woman remarries dowry is refunded. Mary was searched by Muli's elder sister. It was not Muli who got the women for himself because he was a drunkard and he got woman to marry.”

10. PW2 upon cross-examination with leave of court on question of Mary, he stated that the women were sought by Muli's sister. They paid dowry. They took her as the wife of Muli.

11. PW3 also testified as follows:-

That he was a clan chairman. The clan is Ezangambadi. He knew one Muli Katiku Muasya. He was from his clan. He adjudicated over an issue involving his family while he was already dead. The disputants were the children of the deceased's wives. He had 2 wives. The first is Beth Mbenya Muli (Applicant) and the second one is Mwikya Muli. The second wife is not alive now. When he arbitrated, the second wife and the husband had died. The issue was land dispute. He could not remember the date of the dispute. He listened to brothers of Muli and He confirmed that he had two wives under Kamba customary law. His testimony is that the deceased had two wives. The first wife had 4 children while the second had 5 children. All the five children of the 2nd wife were born outside marriage."

12. Upon cross examination PW3 stated that:-

"He did not know when Muli died. He knew the deceased. He did not know much about his life. The second wife was not in that meeting.

But he also did not see the first wife. He could not remember if there were people representing the 2nd wife, but I think there were. He could not remember when the deceased married the 2nd wife. His statement was that the 5 children of the 2nd wife did not belong to the deceased and he was informed that by brothers of the deceased. It was not from his personal knowledge.

From the meeting, it came out that the first wife was not living in the family. Even todate she is not staying in the family land because her house was demolished by the children of the 2nd wife. He could not tell whether by the time of the death of Muli the 1st wife was staying with him. He did not know much about the life of Muli."

13. During re-examination PW3 stated;

"He was a clan chairman in charge of the Division. He came from the same location with Muli. That is why he did not have the knity gritty of Muli's life details. What he said about the objector was information he got from Muli's family and brothers. Brothers of Muli at the meeting were; Daniel Katiku, Jackson Munyao and Mutua Kithome. His testimony is that Muli had two wives and his property should be divided between the 2 houses and that is what we agreed at the meeting."

PETITIONER'S CASE

14. Petitioner DW1 relied on his reply of affidavit wholly on cross examined and stated as follows;

"He lived at Kalawani location and was a farmer and the Petitioner herein. He filed a replying affidavit herein dated 18th September 2012. He adopted as part of his testimony. There was a clan meeting which he attended. His mother was already dead by that time. His mother married his father in 1994. There were no other people living with them. It was only his father, mother and siblings.

15. Upon cross-examination DW1 stated;

"His mother was the late Mwikya Muli, the 2nd wife. He was born in 1976. When his mother married his father, they were already born. He has 2 sisters. By 1994 his 2 sisters had already married. They were only him and his two brothers namely; John Kioko Muli, Moses Musau Muli and himself. His mother married his father with 3 of us. Before his mother was married to his father, she was married somewhere where all of us were married. He did not know when his mother left her first marriage. Muli died in 1996, two years after he married his mother. His mother died in 2000. At Muli's home they found a house and a kitchen. He was not told who owned them. The house is no longer there. It was there when Muli was still there.

The wind blew away the roof. His brother Moses then used the bricks from that house to build his house. He did not know Beth Mbenya Muli – the 2nd wife. He did not know even her children. But he saw her before these matter began in 2008. The deceased property is now registered in his name. He did not know where the 1st wife lives now. The clan had resolved that the deceased property be divided into 2 and each house to have one half. He did not know if the deceased's asset should be divided into 2 for both families."

16. When DW1 was re-examined he stated as follows;

"He came to the home of the deceased in 1994. The deceased died living in that homestead. They were the only people living there. The deceased did not introduce them to any relatives. When Muli died the first wife and children did not attend his funeral."

17. DW2 Mutua Kithome testified that they belonged to the same clan with the deceased. He adopted his statement filed on 02/01/2016. He said he knew Petitioner whose mother was Mwikya who was married by the deceased.

18. He said the deceased did not marry any other person. He knew deceased land at Kalawani. He knew Mwikya's dowry was paid. During deceased funeral only, the wife present was Mwikya. He said he did not know Beth, the Objector. The suit land should then go to Mwikya family.

19. On cross examination, he said he belonged to the same clan with deceased. He knew deceased brother testified. He is from Kalawani location but different sub-location with deceased. He knew deceased was married under Kamba customary law.
20. He did not know when deceased got married. He married Mwikya while she had children:- Philip Muli, Kioko, Musau, Mwangeli and Ndunge.
21. She had divorced another man Musila Kilei, but he did not know their father. Mwikya's father was Lula. When Mwikya was married, deceased had a home. He did not see the wife who was with deceased then when he married Mwikya. He attended clan meeting of 14/11/2007 at deceased home and he did not know why he was called.
22. This was not the time Mwikya children had demolished Beth's home. Mwikya was deceased by then. The house was demolished by rains and Mwikya's children used iron sheet to build their structure.
23. They were called by deceased brother he did not know what was dissolved. He was there for measurement of land. He knew High court at Machakos ordered Petitioner to be arrested in P&A 541/2007. He was Petitioner's witness.
24. Petitioner was arrested and put in custody. DW2 was also questioned by the CID. He was not charged. The court file disappeared. He is a surety of Petitioner. He did not know of deceased family. He is of same clan with Mwikya Muli. His wife is step sister of Mwikya Muli. He had never seen Beth. He never attended clan meeting.
25. Mwikya dowry was paid by deceased. He could not remember whether Beth dowry was paid. He did not know deceased had any other wife. He did not know whether there was divorce between deceased and Beth.
26. Children remains with father on divorce. A wife leaves husband either if she dies or she remains wife.
27. In re-examination DW2 said that every year clan had a come together and he would see deceased and his children. He did not see Beth. Mwikya sired children at her parent's place. He attended clan meeting when deceased died. The house had been demolished by rains.
28. The land was sub-divided. He was never arrested on High Court Machakos orders but only Petitioner but he was not charged. He never bribed for file to be hidden.
29. DW3 Nguyo Mulwa stated that he was a watchman before but now at home since he was suffering from disability. He knew the deceased Muli Katiku Musya. He was his brother's son. He was his nephew.
30. He relied on his statement filed on 02/01/2015 as evidence. He stated that the deceased was younger than him. He knew him up to his demise. When he was alive he married only Mwikya. His home and the deceased were close.
31. DW3 said that he did not know Beth Mbenya. He said that during burial of deceased, no other persons claiming to be wife appeared. The wife of the deceased had five children as per his statement. He knew the deceased land as it was residing near his land but didn't know the number of the land. The deceased paid dowry for his wife Mwikya.
32. He was among the elders who delivered the dowry. He stated that they never paid dowry elsewhere for another deceased wife. The deceased children lived in their land and that he had only one wife.
33. DW3 was cross examined and stated as follows;

"The deceased is Muli and his father is Katiku and Katiku's father was Muasya. His name is Muio Mulwa. The signature was his and his name is Nguyo Mulwa not Muio. His father is Mulwa. His father's father is Muli. The deceased is his brother's son. His brothers are Makau, Musay Nguruchi, Nzive and 3 ladies namely; Kalondu, Beatrice, Ndululu.

The deceased Muli Kitiku Muasya brothers are Daniel Wambua Katiku, Jacson Munyao Katiku and Phoeb Kamene. One deceased person is Mbithi Kituku. He didn't know the above Daniel and Jackson deceased brothers testified in this matter. He knew deceased family. He talked of only one Mwikya. She is the one who was the family of deceased. He didn't know when deceased married Mwikya. He went to school up to standard 2 in 1941 and left school after 2 terms. He had worked several places including 1965. He was working in Uganda, with Mawlom and several other places but never worked with government. He worked in East African Community as a soldier in Uganda. He worked with Indians in Kenya. By the time deceased married, he had a house. He didn't know when the said house was built by then he had no wife. He was working in Nairobi when the house was built. When he married Mwikya, he had no other wife. He used to visit home. He did not see any other wife. When Mwikya was married by the deceased she had 5 children. They were young children. The children of Mwikya were Mutuku, Kioko, Musau. There were 2 ladies and were small girls. Deceased married Mwikya with her 5 children of out of marriage. He didn't know Mwikya's father.

He did not know she was married by Masila Kilii. He could not remember the year they paid dowry of Mwikya. They never took dowry of Mwikya while this case was in court. They took dowry when Mwikya was being married. They paid dowry (Ntheo) during time of deceased and Mwikya. Muli was present. They took tea to Mwikya former husband after Mwikya and deceased death. They confirmed wife was married by a specific person. They gave "Ngasya" (dowry). During the pendency of this case, Mwasya and deceased had passed on. The significance of that is to let people know a girl was married off to another home. They called deceased brothers but they refused to accompany us. He took dowry to deceased as his son. Philip Muluku petitioner never paid Him. He had no records of dowry payment. The family of Mwikya demanded from deceased children dowry of Mwikya. For his dowry he did pay. He was taken to pay with other people. He never attended clan's meeting at deceased home. His names are

Moses Nguyo. He never attended such meeting in 2007. He couldn't be able to read the documents he claimed to have his name. He didn't know Beth Mbenga Muli. He didn't know her children with deceased."

34. During re-examination DW3 stated as follows;

"The statement ought to read "Moses Nguyo Mulwa". He stated Muli's brothers present during payment for Ntheo. They were present even Muli and deceased the time of INGASYA. They refused to attend payment as the case was in court. He never noted the year but he said in statement that it was 1990 or thereabout. (Deceased) built house for Mwikya. He never saw any other wife of deceased when Mwikya was married. Children were between 3 – 5 years. She had father of the children. Mulu talked with parents and was given children. He could ccouldn't be able to read the ID shown to Him. They took as Ngasya while case in court, and they took to parents of Mwikya. Evern Ntheo (dowry) they did the same. "Ngasya" chai was taken while case was in court. This was after Muli death. Mwikya;s son convened for the occasion. Children took 'Ngasya; after Muli died. Much could have been done if he was alive. He couldn't remember year of payment of Ntheo. He had no records. If he was to pay dowry, he would call people to take him to pay. If he is not alive his children would pay. He never attended any clan meeting at deceased home. He was at home 2007 but he didn't know of that meeting. He didn't know Beth Mbenya. He didn't know whether she had children with deceased."

SUBMISSIONS

35. The objector /applicant submit that she was wife of deceased married customarily and evidence on record proved so. She had 4 issues with deceased namely Syomua, Mutua, Musengya and Kasiva. Mwikya mother of petitioner was married by deceased with adult children which deceased recognized as his. Thus there were 2houses of the deceased thus provisions of section 40 LSA comes into operation.

36. The aforesaid fact was concealed by the petitioner in the instant matter thus breaching provisions of section 76 of LSA.Thus letters of administration and certificate and all consequential orders are null and void.

37. The totality of petitioner's submissions is that the objector was not wife of the deceased and herself and her children not beneficiaries of the deceased estate.

ISSUES, ANALYSIS AND DETERMINATION

38. After going through the evidence and the submissions on record, I find the issues are:-

i. Whether Objector was the wife of the deceased?

ii. If above is in affirmative, whether herself and her children they get share of the deceased estate?

iii. What is the order as to costs?

39. The essence of Kamba customary law of which deceased and Objector belonged to are that; in customary marriage, there are certain ceremonies which were to be conducted and goat given "***Mbui sya ntheo.***"

40. In the case of Andrew Manunzyu Musyoka (deceased) [2005] eKLR, ;court observed that;

"Steven Mututu Mutisya (DW2) testified as an expert on Kamba customary law. He said that a marriage is contracted when goats of "Ntheo" are paid to the girl's parents and that even if dowry is not paid "Ntheo" has to be paid and concludes a marriage. He said that if a woman leaves the husbands home with children and one dies the body has to be taken back to the man's home for burial. Similarly, if the woman dies when at her parents' home, the body has to be taken back to the husbands home if "Ntheo" had been paid. A lady can only inherit from her father's estate if she divorces her spouse by returning "Mbui sya ulee" – where goats are returned to the husband by the woman."

41. In **Re estate of James Simu Nthiwa** [2005] eKLR the court observed that;

"There was a contestation as to whether the deceased was married. The objector was the deceased's mother, She averred that he was not married as he had never informed her of it nor had any dowry been paid in accordance with kamba customary law where goats called "Mbui sya ntheo" are taken to the girl's parents and one is slaughtered"

42. PW1 Objector affirmed that same customary requirements were performed and she was married customarily and they got issues with deceased. However they separated with deceased due to disagreements and she relocated to her parents.

43. This was corroborated by PW2 the deceased brother who was one of the people who did pay for dowry. He confirmed Objector was married under customary law and never divorced the deceased.

44. PW3 clan chairman learned of the same fact and supported Objector and her children getting share of the deceased estate.

45. On the Petitioner's side, he concedes that he was not sired by the deceased but came to deceased home after he married his mother.

46. He could not thus vouch as to the marriage of Objector and the deceased.
47. He found the deceased with a home but no wife. Of course Objector left before PW1 came to the home with his mother and siblings.
48. DW2 who is married to the step sister of Mwikya i.e. Petitioner's aunt denied knowing Objector nor ever meeting her. He did not know whether she was married.
49. The court noted his spirited move to assist Petitioner get the estate to the exclusion of the Objector. He cannot vouch as to the marriage of Objector and the deceased.
50. DW3 who had worked outside the country for long and especially in Uganda, denied also that Objector was ever married by the deceased. He is a clan member but not deceased family member nor close to the same.
51. The evidence on record shows that, the objector was wife of deceased married customarily. She had 4 issues with deceased namely Syomua, Mutua, Musengya and Kasiva. Mwikya mother of petitioner was married by deceased with adult children which deceased recognized as his. Thus there were 2 houses of the deceased thus provisions of section 40 LSA comes into operation.
52. The aforesaid fact was concealed by the petitioner in the instant matter thus breaching provisions of section 76 of LSA. Thus letters of administration and certificate thereof and all consequential orders are null and void.
53. The totality of Petitioner's submissions is that the objector was not wife of the deceased and herself and her children not beneficiaries of the deceased estate.
54. The court thus finds a balance of probabilities that the Objector and the deceased had married under Kamba customary law no divorce was executed thus by the time of the deceased death, he was still her husband and she is still his wife and her children deceased children.
55. Herself and her children are thus deceased beneficiaries and entitled to the share of the estate. The clan shared same land equally between the 2 homes of the deceased.
56. The objector filed in Court's Succession Cause No. 549 of 2008, and Letters of Administration Intestate were issued on 25/02/2009, and the same was confirmed on 05/12/2011, and was given to Objector on or about 28/03/2012. The only asset of the deceased's estate (land parcel No. MBOONI/KALAWANI/89) was, ordered to be shared equally between the deceased's two (2) houses. That order remains unchallenged thus this court has to go by it.
57. The court thus makes the following orders:-

1. The grant herein plus certificate confirming grants herein are cancelled and to be issued fresh jointly to petitioner and the objector.

2. The Land No. MBOONI/KALAWANI/89 title is hereby cancelled and ordered to be registered in the deceased name MULU KATIKU MUASYA.

3. The same to be shared equally to the two houses of deceased.

4. Parties to bear their costs.

SIGNED, DELIVERED THIS 11TH DAY JUNE OF 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE