



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 20 OF 2012**

**IN THE MATTER OF THE ESTATE OF JAMES MAKAU NGINGA (DECEASED)**

**1. BEATRICE MUKUI MAKAU**

**2. JOSEPH WAMBUA MAKAU**

**3. PHILP KIOKO MAKAU.....PETITIONERS**

**VERSUS**

**ANN KOKI MULANDI.....APPLICANT**

**RULING**

A grant of letters of administration intestate was issued on 14<sup>th</sup> June 2012 to the Petitioners herein with respect to the estate of James Makau Nginga (hereinafter referred to as “the Deceased”). The said grant was confirmed on 22<sup>nd</sup> February 2013. The 1<sup>st</sup> Petitioner is the wife of the Deceased, while the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners are sons of the Deceased. The Applicant herein who alleges to be the wife of a son of the Deceased, subsequently filed a summons dated 23<sup>rd</sup> April 2014 seeking revocation of the grant issued to the Petitioners.

The grounds for the application are that the grant was obtained fraudulently by the concealment from the Court of a material fact, as the Petitioners failed and refused to disclose that the late John Muthuka Makau, who was a son of the Deceased was married to the Applicant, which union was blessed with four issues. Further, that the Petitioners have refused and failed to provide the share of the Applicant who is a daughter-in-law of the Deceased.

The Applicant explained in a supporting affidavit and Further Affidavit sworn on 23<sup>rd</sup> April 2014 and 6<sup>th</sup> October 2014 respectively that she got married to the late John Muthuka Makau in 1989 under Kamba customary Law and that their union was blessed with four issues being:

- a) Mutisya Muthuka, a son aged 24 years
- b) Musembi Muthuka, a son aged 23 years
- c) Mukui Muthuka, a daughter aged 21 years
- d) Mutindi Muthuka, a daughter aged 14 years

Further, that John Muthuka Makau died on 11<sup>th</sup> August 1997, and that by the said date they were not

divorced or separated. Therefore, that she and her children are entitled to his share of the Deceased's Estate. The Applicant averred that the Deceased James Makau Nginga organised and performed a Kamba customary rite known as *Ntheo* at her home, to confirm that she was wife to his son. According to the Applicant, she continued living in her matrimonial home after the death of her husband, until 2004 when the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners demolished her house and chased her away from her matrimonial home.

The Petitioners filed a replying affidavit and Further Affidavit sworn by the 2<sup>nd</sup> Petitioner on 4<sup>th</sup> September 2014 and 17<sup>th</sup> March 2015 respectively in response to the Applicant's application. The Petitioners denied that Applicant was a wife of the late John Muthuka Makau or that she was living with him at the time of his death. Further, that no dowry was paid either by the Deceased or the late John Muthuka Makau, and that the late John Muthuka Makau died out of injuries inflicted by the Applicant herein thus by law she cannot benefit from her criminal conduct. The Petitioners attached a letter written by the late John Muthuka Makau to this effect.

It was also averred that the late John Muthuka Makau died in 1997, yet the Applicant alleges that Mutindi Muthuka aged 14 years is an issue of her marriage with John Muthuka Makau, when the said child was born 3 years after the demise of John Muthuka Makau. Further, that it was not true that the late John Muthuka Makau had a son called Mutisya Muthuka as alleged, and that on the contrary the official name of the alleged son is Danson Mutisya Mutua clearly showing that he has a different father. The Petitioners attached a copy of the school leaving certificate of Danson Mutisya Mutua as proof.

Lastly, the Petitioners denied that they demolished the Applicant's house, and stated that the Applicant withdrew the complaint she had made against the Deceased in this respect.

### **The Evidence**

The Court on 12<sup>th</sup> May 2015 directed that the Applicant's application would proceed to hearing by way of viva voce evidence, and the Applicant gave evidence as PW1 at a hearing held on 3<sup>rd</sup> February 2016 and called two additional witnesses in support of her case. The Applicant adopted the contents of her supporting affidavit and Further Affidavit sworn on 23<sup>rd</sup> April 2014 and 6<sup>th</sup> October 2014 respectively as her evidence in chief.

Upon cross-examination she stated that John Muthoka paid dowry of ten (10) goats, and that John took the first five (5) goats to her family and the rest were taken in 2001. Further, that when John Muthoka died in 1997 she was pregnant and there was a mistake made in the clinic card of her child Mutindi Muthuka who was born in April 1998 instead of 1999. She however admitted that Mutindi was born after John Muthuka had died.

She also stated that she had already given birth to Mutisya Muthoka in April 1989, before she got married to John Muthoka in September 1989, and that before John died he educated Mutisya from nursery school to standard eight, and that Mutisya used the name Muthoka in primary and secondary school. She also denied that she had beaten John Muthoka before he died.

Mutua Kivondo, PW2 testified that he is the father to the Applicant and that late John Muthoka Makau was married to the Applicant and 11 goats were paid as dowry of which 3 goats were paid by John Muthoka together with 400 Kenya Shillings and some foodstuffs before he died. Further, that he was present when the goats were paid and one goat was slaughtered and alcohol poured on the ground, and a record was written of the dowry paid.

The same facts were reiterated by John Nzau Mutuku, (PW3) testified that he knew the Applicant and the late John Muthuka Makau. He stated that the two married in the year 1989 and he was present when the first five goats were taken to the Applicant's home by John Muthuka in 2001 and that a goat was slaughtered during the occasion and alcohol was poured on the ground.

The Petitioners called 4 witnesses to testify during a further hearing held 12<sup>th</sup> October 2016. Beatrice

Mukui (DW1) who stated that she is the wife to the Deceased and the mother to the late John Muthuka Makau. She testified that she knew the Applicant as a friend of the late John Muthuka Makau, and not as a wife, as the Applicant had previously been married by another man and no dowry had been paid by John, and that she had never gone to the Applicant's home to pay dowry.

She further stated that the Applicant left her son when he became sick and was not present when John Muthuka died, and that the Applicant was never built a house and was only living in DW1's kitchen which was later demolished by rain. She also testified that she was aware that the Applicant reported the Deceased to the police and of a dispute between the Applicant and the Deceased's over allocation of land to her.

DW2 was Joseph Wambua Makau who stated that he is a son of the Deceased and a brother to John Muthuka Makau. He stated to the Applicant was a friend to his brother and that he did not understand if there was any marriage according to custom between them. He produced a letter dated 26/7/1997 together with its translation as the Petitioner's Exhibit 1 a written by John Muthuka in which he stated that he had refused Ann Mulola as his wife. He also produced a school leaving certificate from Ivumbuni Primary School dated 8th July 2008 as the Petitioners' Exhibit Number 2 that showed that the child indicated therein was 'Danson Mutisya Mutua' and did not bear the name of John Muthoka Makau.

DW2 informed the court that the Applicant sued his father claiming rights for her children, and he produced clan meeting minutes as well as their translation as Petitioner's Exhibits Number 3 (a) and (b), where the clan resolved that the Applicant should not be given a place to live because she had disobeyed her father in law but that she should sit down with parents both sides and try to resolve the issue. He stated to court that he never demolished the Applicant's house.

According to DW2, dowry was never paid for the Applicant by John Muthuka, and that after John died the Applicant left their home and went away. Further, that DW2 and the Deceased then went to the Applicant's home in 2001 to look for the children so has to keep the John's name alive, but found that the Applicant had been married elsewhere.

The third witness to testify for the Petitioners (DW3) was Philip Kioko Makau who was also a son of the Deceased and brother of the late by John Muthuka. He stated to this court the Applicant and the late John were living together but not married. He reiterated the evidence given by DW2. He informed court that the Applicant caused him and the Deceased to be arrested for malicious damage having complained that her mud house had been demolished but the police found it was a family dispute.

DW3 had no objection to the Applicant being given land so long as she did as she was advised by the clan to cleanse the curse of reporting the Deceased to the police. He also alleged that the Applicant had since remarried to a person called Mutua.

The Petitioners' last witness (DW4) was David Muthike, the secretary to the Atwii clan, which was the Deceased's clan. He confirmed that he was aware of the dispute the clan handled involving the Applicant and the Deceased wherein the Applicant was seeking a portion of the Deceased's land, and that there was also a case involving her children which was still pending. DW4 testified that the clan gave the Applicant some rules to comply with before she could be given any land, but that she did not comply with the said rules.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Applicant and Petitioners. The issues to be decided are firstly, whether the Applicant was wife to John Muthuka, a son of the deceased, and secondly, if so, whether and her children are beneficiaries of the Deceased's estate, and lastly whether the grant issued to the Petitioners should be revoked.

The Applicant's Advocates, J.M. Mutua Advocates filed written submissions dated 1st December 2016 wherein they relied on the decision in **Anna Munini & Another vs Margaret Nzambi [1984] eKLR**,

and **Gituanja vs Gituanja, (1983) KLR 575**, to argue that the Applicant had by evidence adduced proved the fact of and existence of a customary law marriage with John Muthuka Makau to the required standard.

Reliance was also placed on Section 3 of the Law of Succession Act which provides that a "'wife" includes a wife who is separated from her husband, and there was no doubt that the Applicant was the wife of the late John Muthuka Makau having cohabited with him since the year 1989 and having had children together namely Musembi Muthuka and Mukui Muthuka and that the late John Muthoka Makau had taken Mutisya Muthuka as his own and assumed parental responsibility over him.

The Applicant further submitted that a grant can also be revoked on account of false statements and concealment of vital matters. Reliance was placed in this regard on section 76 of the Law of Succession Act. Further, that it is clear from the documents filed in Court by the Petitioners in the succession proceedings that they did not disclose that the Applicant or her children had a share of the deceased's estate.

B.M Mungata & Company Advocates for the Petitioners filed written submissions dated 31st January 2017, wherein they relied on the definition of a marriage under section 3 (i) of the Marriage Act Number 4 of 2014 as the voluntary union of a man and a woman whether in a or polygamous union or not, and on section 9 (a) of the said Act which provides that a married person shall not while in a monogamous marriage contract another marriage.

It was submitted in this regard that the Applicant herein had already contracted a marriage even before she had any alleged relationship with John Muthuka, and had no capacity to enter into any subsequent marriage. Therefore, that any relationship between the Applicant and the late John Muthuka which could have been presumed to be a marriage would be a void marriage pursuant to Section 9 a) of the Marriage Act.

Reliance was also placed on the decision in **Anna Manini and Another vs Margret Nzambi (1984) eKLR** where the court held that the essentials of a valid marriage in Kamba customary law are capacity, consent, slaughter of a billy goat, marriage consideration and cohabitation. It was contended that these essentials of a valid marriage under the Kamba customary law have not been met by the Applicant for reasons that firstly, though the Applicant and the late John had the capacity to contract a marriage, the late John Muthuka in the letter produced as Petitioner's Exhibit 1, did not give consent to the marriage and denounced the Applicant as his wife.

Secondly, that the witnesses testified that at no time were they informed of any arrangements as to payment of dowry and discuss matters of marriage consideration, and the Applicant's evidence on this issue was contradictory. Lastly, that no evidence was produced as to the period of cohabitation by the Applicant and John Muthuka, and the witnesses testified that they only saw them together and some even regarded them as friends. Consequently, that there was no marriage which could be presumed between Applicant and the late John Muthuka Makau.

The applicable law to determine whether the Applicant was validly married to the late John Muthuka is Kamba customary law, as the witnesses for the Applicant alleged and gave evidence on the existence of a marriage according to Kamba customs, which evidence is disputed by the Petitioners. In addition the provisions of the Marriage Act relied upon by the Petitioners are inapplicable as they cannot have retrospective application, the said Act having been enacted in 2014 after the death of John Muthuka.

The essentials of a marriage under Kamba customary law are discussed in **Restatement of African Law Volume 1: The Law of Marriage and Divorce (1968) by Eugene Cotran** at pages 23 to 28. On the requirement that the parties must have capacity to marry, no evidence was brought by the Petitioners to prove their allegation that the Applicant had been previously married to another man. In addition the time of consent to a marriage by the parties and their families to a marriage under Kamba Customary law is given at the time of marriage negotiations when the father of the girl accepts the two goats (*mbui sya ntheo*) sent to him by the boy's family. (See **Cotran (supra)** at page 24) The letter by the deceased John

Muthuka produced by the Petitioners as their Exhibit 1 was written after he had cohabited with the Applicant, and therefore is not evidence as to his state of mind at the commencement of his relationship with the Applicant.

From the evidence adduced, there was evidence of visits by the Deceased and his family to the Applicants family. The Applicant's evidence was that during these visits dowry was paid, and the evidence by PW2 who is the Applicant's father and who testified that he was present during the visits and that he received dowry of which 3 goats were paid by John Muthuka together with 400 Kenya Shillings and some foodstuffs before he died. Further, that he was present when the goats were paid and one goat was slaughtered and alcohol poured on the ground.

DW2 and DW3 confirmed that the visits to the Applicant's home were made after John Muthuka died, and the reason was that they wanted to keep his children so as to keep his name alive. The fact of meetings and negotiations between the Applicant's family and that of the late John Muthoka was therefore established by the evidence, and coupled with the fact that DW1, DW2 and DW3 all testified to the fact of cohabitation of the Applicant and the late John Muthuka, it is my finding that the existence of a customary law marriage between the Applicant and the late John Muthuka has been proved on a balance of probabilities.

It is also instructive that DW2, DW3 and DW4 in their evidence and exhibits 3A and B testified as to the Applicant being disciplined by their Atwii clan, and the clan meeting minutes produced as exhibits refer to the Applicant as a wife of the late John Muthoka before they separated. She was therefore considered a member of the said clan, which was the Deceased's clan, by virtue of her marriage to the late John Muthuka Makau.

As regards the rights of the Applicant's children to the estate of the deceased, the Petitioners testified that the first and last born children of the children namely Mutisya Muthoka and Mutindi Muthoka have no right to inherit from the deceased, as they were not the children of the late John Muthoka. This was for the reason that the Applicant came to stay with the late John Muthoka when she had already given birth to Mutisya Muthuka, and that Mutindi Muthoka was born after the death of John Muthoka.

These facts were admitted by the Applicant, who however testified that the late John Muthuka had accepted Mutisya Muthuka as his own, lived with him and educated him. The evidence by the Petitioners of a school leaving certificate (their exhibit 2) showing different names of Danson Mutisya Mutua in my view does not disprove the averment that the late John Muthuka did take care of Mutisya, and is only evidence as to his paternity which is not contested.

Section 3 of the Law of Succession Act is instructive in this respect and provides that where there is evidence that a deceased person took a child and accepted him as his own, the said child will be his beneficiary for purposes of succession. However, Mutindi Muthoka cannot be regarded a beneficiary on this ground, having been born after the death of John Muthoka, and the Applicant not having brought any evidence as to her date of birth.

I therefore find from the foregoing that that the Applicant was a wife of the late John Muthuka Makau, and that Mutisya Muthuka, Musembi Muthuka and Mukui Muthuka were the children of the late John Muthuka Makau and are therefore entitled to the late John Muthoka's share of the Deceased's estate.

On the second issue, the grounds for revocation of a grant is provided in section 76 of the Law of Succession as follows:

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, 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 longer 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**

**(e) that the grant has become useless and inoperative through subsequent circumstances.”**

I have perused the Petition for Letters of Administration Intestate, and affidavit in support of the said Petition filed herein by the Petitioners on 23<sup>rd</sup> January 2012. The late John Muthoka Makau is indicated as one of the survivors although he was also deceased at the time. The Applicant was not listed therein as the beneficiaries of the estate of the deceased despite her relationship with the late John Muthoka Makau and the deceased. Likewise, the attached consent by the beneficiaries does not have the consent of the Applicant.

The summons for confirmation of grant dated 30<sup>th</sup> January 2013 and filed in court on 31<sup>st</sup> January 2013 and affidavit in support thereof also do not include the Applicant or her children as beneficiaries. There is no consent by the Applicant to the said summons for confirmation on record. The said confirmation sought to distribute the property of the deceased namely Machakos/Mua Hills/416 to the Petitioners.

I therefore find from the foregoing that there was concealment of material facts and/or untrue allegations made by the Petitioners, and that any and all of the distribution of the deceased's estate so far has been illegal. This finding notwithstanding, the Court also notes that in addition, the Applicant cannot rank in priority to the Petitioners as an administrator of the deceased's estate under section 66 of the Law of Succession Act, as the said Petitioners are the wife and sons, and the Applicant a daughter-in-law of the Deceased. In the premises, it is only the confirmation proceedings that will require to start afresh.

I accordingly order as follows:

1. The Certificate of Confirmation of a grant issued to Beatrice Mukui Makau, Joseph Wambua and Philip Kioko Makau on 22<sup>nd</sup> February 2013 with respect to the estate of the late James Makau Nginga be and is hereby revoked.
2. Any distribution, transfers and dispositions of any kind to and/or by Beatrice Mukui Makau, Joseph Wambua and Philip Kioko Makau of the deceased's property known as Machakos/Mua Hills/416, and any other subsequent dealings with the said properties be and are hereby declared unlawful and null and void and shall be cancelled forthwith.
3. The joint administrators shall file and serve the Applicant with a fresh summons for confirmation of grant within 60 days.
4. The Applicant shall be at liberty to file and serve an affidavit of Protest to the said Summons for

Confirmation of Grant within 60 days of service.

**5. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of James Makau Nginga (Deceased) pending the confirmation of grant of administration shall be that the Petitioners and Applicant shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Petitioners and Applicant shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by any party.**

6. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 13<sup>th</sup> day of June 2017.

**P. NYAMWEYA**

**JUDGE**