



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**SUCCESSION CAUSE NO. 84 OF 2014**

***(Formerly Ogembo CM Succession Cause No. 10 of 2013)***

**IN THE MATTER OF THE ESTATE OF**

**J O O (DECEASED)**

**BETWEEN**

**J A O..... APPLICANT/PETITIONER**

**AND**

**E A O..... RESPONDENT/OBJECTOR**

**RULING**

1. J A O (“the deceased”) from [particulars withheld] , Gembe West Location, Mbita District of Homa Bay County died on 20<sup>th</sup> January 2013. J A O (“J”), claiming to be his widow, applied for grant of letters of administration intestate at ***Ogembo CM Succession Cause No. 10 of 2013*** which were issued to her on 30<sup>th</sup> September 2013.
2. In the meantime, E A O (“E”), claiming to be the widow of the deceased and co-wife to J , commenced citation proceedings against J in this cause. J, as citee, filed a replying denying that E was the deceased’s wife and that she was solely entitled to administer the estate of the deceased.
3. It is during the hearing of the citation proceedings that it transpired that J had filed the proceedings at Ogembo. I called for the file and on 1<sup>st</sup> August 2014, revoked the grant issued in ***Ogembo Succession Cause No. 10 of 2013*** under **section 76** of the ***Law of Succession Act (Chapter 160 of the Laws of Kenya)*** on the ground that the court in Ogembo lacked jurisdiction as the deceased was not resident within the local jurisdiction of that court. As the dispute related to who was entitled to administer the deceased’s estate, I directed the parties to file affidavits in support of their respective positions. I also directed that the matter be heard by *viva voce* evidence.
4. Whereas E admits that J is the deceased’s first wife, J denies that E was the deceased’s wife at the time he died. As a result, the main issue for consideration is whether E was the deceased’s wife at the time of his death and if so, whether she is entitled to co-administer the estate of the deceased with J. Both parties testified and called a witness each in addition to relying on their depositions. The material testimony was as follows.

5. E testified that she married the deceased on 26<sup>th</sup> December 1996 after the deceased paid dowry. During their time together they had three children: L A born in 1997, E O born in 1998 and C A born in 2003. She recalled that after the marriage she lived with the deceased at their matrimonial home at [particulars withheld] where the deceased had built a house. She stated that she lived with her husband until 2006 when she left him as a result of a disagreement and went to live with her sister at Kisumu. She maintained that she did not marry any other man but that she had a fourth child with the deceased named C who was born in 2013. She testified that at the time she was at Kisumu, the deceased used to visit her and that she remained his wife.
6. She recalled that the disagreements between her and the deceased arose while they were living in Kakamega. She finally left with the children for Kisumu when J came and beat her up. She testified that the deceased came to Kisumu and took away the children forcing her to file a case at the Children's Court in Kisumu. She further recalled that the deceased informed her of his illness before he died and when she went home, J chased her away so she went to live with her brother-in-law. She attended his funeral as the wife and she was recognized with her children.
7. E further testified that she now resides with her children in the house the deceased built for her in [particulars withheld] . She accused J of wanting to exclude her from the deceased's estate by filing succession proceeding in Ogembo.
8. The objector's witness and village elder, J O O, testified that he knew the deceased as his cousin. He confirmed that he married E as his younger wife and that the dowry paid had never been returned. He recalled that although both wives had houses, E was staying with the deceased where he was working while J stayed in the rural home. He recalled that at the funeral both wives spoke and that the problem J had with E was about the division of the deceased's property which J refused. He maintained that E was capable of taking care of the children although she had not been given the opportunity and that the deceased's property should be shared equally so that the co-wives could live in peace.
9. J testified that she married the deceased in 1981 under Luo customs and were blessed with the following four children: A A O born in 1983, M A O born in 1984, V O O born in 1989 and S A O born in 1999. She explained that E deserted the deceased in November 2003 while the deceased was working in Kakamega. At the time, the two were residing in Kakamega with her two children and E's children. The deceased had just been transferred to Nairobi in the month of July but could not leave immediately as the children were still going to school in Kakamega. She stated that E abandoned the children including one who was due to sit his Class 8 exams.
10. J further testified that after she deserted the matrimonial home, E sued the deceased for maintenance at the Children's Court for maintenance and his salary was attached by Court. She later wrote a letter indicating that they had divorced and she informed him to pick the children. In 2005, the deceased took E's children and brought them to Nairobi to start school while E remained with C who was still breastfeeding. J claimed that E had married someone in Kisumu and had given birth to a child and that she came for the deceased's funeral with her new husband.
11. J stated that a week after the deceased's death, E went to the deceased's workplace and demanded her share of the money before burial. J further stated that the deceased's employers wrote to her after burial and informed her of the death gratuity and that the deceased had named her and all the seven children as beneficiaries. She stated that all the children have been in her custody since 2005.
12. A longtime friend of the deceased, Pius Okoth Mungusa, testified on behalf of J. He stated that he knew the deceased in 1981 when they started working in the Police Service and that they came from the same locality in Homa Bay County. In 1989 they were employed together by the National Intelligence Service where the deceased worked until his death. He knew J as the deceased's first wife. The deceased also told him he had married E as his second wife. He testified that in 2003, the deceased was transferred from Nairobi to Kakamega. In November 2003, the

deceased told him E had left his home and had left his first born son, who was a KCPE candidate, alone with her children. He knew confirmed that the deceased told him that he had been summoned by the Children's Department and he was ordered to pay maintenance. He recalled that the he had tried to persuade the deceased to reconcile with E but he was very embittered and did not do so. He however continued to send her money. In 2012 when the deceased was diagnosed with a terminal illness, he confided about how he planned to subdivide his benefits by giving the children and J shares.

13. Mungusa confirmed that because of his close relationship with the deceased, he was involved in his funeral arrangements. A week after the deceased's death he was informed that E had come to the office to claim her money. He subsequently met her and took her to see the deceased's body as she did not know where the deceased and the children were staying. She was also informed that the office does not pay out benefits. He testified that when the deceased was alive, J was staying upcountry and was assisting the deceased build a shop in the village where his wife was farming. He testified that E was at the funeral as the second wife and mother of the children. When E approached him after the funeral to discuss the issue of succession, he informed her that the deceased had already divided his benefits and did not include her. He recalled that E's children were taken by the father in 2006.

14. The issue of who is entitled to administer the deceased's estate is governed by **Section 66 of the Law of Succession Act** which provides;

*When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and (d) creditors: Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.*

15. It is common ground that the petitioner and objector were the deceased's wives and would ordinarily be entitled to administer the estate of the deceased. In this case though, after considering all the evidence I have outlined above, I am satisfied that E had deserted the deceased before his death. In my view, three facts are decisive in reaching my conclusion. First, E accused the deceased of child neglect and indeed lodged a complaint with the Children's Department in Kisumu. The fact that she sued the deceased at the Children's Court was admitted by E in cross-examination. Second, E admitted that she had given birth to another child who was born after the deceased died. Although she claimed that that the child was sired by the deceased, she did not name the child a beneficiary of the deceased. The inference I draw from this is that after she separated from the deceased, she "moved on." Third, in a letter dated 13<sup>th</sup> February 2013, from the NIS Staff Superannuation Scheme addressed to J, the deceased had notified his employer that his death benefits were to be paid to his wife J and his seven children. Though the deceased named E's children in the letter, he did not name E which means that he did not consider her his wife. This aspect of the evidence is corroborated by the testimony of Mungusa who was his close friend.

16. I therefore find that although E was married to the deceased, she had deserted the deceased prior to his death and the deceased did not consider E his wife or indeed capable of administering his benefits. I therefore find that it is in the best interests of the estate that J administers the deceased's estate. In the circumstances, I dismiss the objection.

17.As a matter of law, where the property of the deceased is for the benefit of a child or children, there must be a continuing trust under **section 58** of the ***Law of Succession Act (Chapter 160 of the Laws of Kenya)***. The deceased's estate must therefore be administered by more than one administrator. I therefore adjourn the matter to enable the petitioner nominate a suitable co-administrator who shall file an affidavit attesting to his or her suitability.

18.There shall be no order as to costs.

**DATED and DELIVERED at HOMA BAY this 4<sup>th</sup> day of April 2016.**

**D.S. MAJANJA**

**JUDGE**

Ms Foza instructed by Nyauke and Company Advocates for the applicant/objector.

Mr Okoth instructed by G. S. Okoth and Company Advocates for the petitioner.