



In re Estate of Boaz Harrison Ogola (Deceased) (Miscellaneous Civil Case 19 of 1976) [1978] KEHC 29 (KLR) (Family) (6 February 1978) (Judgment)

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Neutral citation: [1978] KEHC 29 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

MISCELLANEOUS CIVIL CASE 19 OF 1976

AH SIMPSON, J

FEBRUARY 6, 1978

IN RE ESTATE OF BOAZ HARRISON OGOLA (DECEASED)

JUDGMENT

1. This is an application by the Public Trustee under section 9 of the *Public Trustee Act* seeking the decision of the court as to the lawful heirs to the estate of a deceased person and their respective shares of inheritance.
2. The deceased, a Luo, died at Nairobi intestate on 8th April 1974, domiciled in the Republic of Kenya. It is not disputed that the law governing the succession to the estate (the net value of which is Shs 385,325/55) is Luo customary law. Nor is it disputed that, on 29th August 1964, the deceased married Gladys Anyango Ogola and that during the subsistence of this marriage she gave birth to four daughters, Pauline Edith Akinyi born 10th March 1965, Rose Suzan Achieng born 26th June 1967, Miriam Jacqueline Akoth born 17th May 1971 and Thereza Lilian Atieno born 4th March 1974. The deceased was survived also by his father, who has since died, his mother and a younger brother.
3. A claim to a share in the estate is also made by Bona Awino Ogola on the ground of customary marriage to the deceased on 1st March 1974. She also claims on behalf of her daughter, born on 20th October 1974, whose father, she says, was the deceased.
4. On the assumption that Bona was married to the deceased in accordance with Luo customary law, a preliminary point was argued; namely whether or not a wife married under customary law could inherit any part of her deceased's husband's intestate estate when a wife married to the deceased under the African Christian Marriage and Divorce Act prior to the customary law marriage was still alive.
5. Mr Hayanga, for Bona, contended that many Africans after a Christian marriage had taken another wife in accordance with their customary law and that, although the *Marriage Act* forbade such customary marriages, the women concerned should nevertheless inherit on intestacy in accordance with customary law.



6. Since this petition was filed the same question was considered by Sachdeva J in *Re Ruenji's Estate* [1977] Kenya LR 21. Two ladies claimed to have been married to the deceased under Kikuyu customary law subsequent to his marriage to another lady under the African Christian Marriage and Divorce Act. Sachdeva J held that any such marriage was null and void and that the ladies were not entitled to any inheritance from the estate of the deceased.
7. Mr Hayanga submitted that the matter was not fully argued before Sachdeva J and that the decision of Barth J in *Jembe v Nyondo* (1912) 4 KLR 160 was not considered. This was an appeal from the decision of a magistrate who held that, where there had been a Christian marriage, the law applicable to distribution of the estate on intestacy was English Law.
8. Barth J allowed this appeal holding that the fact that the deceased married a wife according to the rites of the Anglican Church did not affect the succession to property which must be regulated by native law and custom. Although, according to the facts set out in the judgment, the deceased reverted to paganism and married three pagan wives the judge did not consider the question for determination in this case which is a matter of interpretation of the law as it now stands. It is conceded by all parties that customary law applied to the succession.
9. The provisions of the *Marriage Act* apply (except as otherwise provided) to all marriages celebrated under the African Christian Marriage and Divorce Act. Section 37 of the *Marriage Act*, so far as relevant, provides:

Any person who is married under this Act ... shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom ...
10. Section 3(2) of the *Judicature Act*, which sets out circumstances in which Courts shall be guided by African customary law, contains the qualification "so far as it is not ... inconsistent with any written law".
11. The foregoing provision of the *Marriage Act* therefore overrides customary law. If a man who was married under the Act purports to marry another wife under customary law it is not a valid marriage under customary law, or otherwise. If it is not a valid marriage the woman does not become his wife and cannot therefore inherit in that capacity.
12. Mr Hayanga argued that such a decision would create a class of distitutes; but there is nothing to prevent a man from making a will containing provisions for a concubine and illegitimate children.
13. With respect, I entirely agree with the decision of Sachdeva J. To decide otherwise would be to condone the offence of bigamy. An African in Kenya is not obliged to marry under the *Marriage Act* or the African Christian Marriage and Divorce Act; but, if he chooses to do so, he is choosing the Christian way of life which recognised one wife only and, on his death, removes the widow and children from the ambit of tribal customs affecting cohabitation and guardianship.
14. In case my view of the law is wrong I have considered the evidence relating to the alleged customary marriage of the deceased to Bona. [His Lordship then reviewed the evidence and found it insufficiently convincing to satisfy him that a customary marriage had taken place or that the deceased was the father of the child born after his death. He continued]: Even were I able to make such a finding the child would be illegitimate and I am satisfied on the evidence of Mr Odinga Odero that, under Luo custom, an illegitimate child is entitled to inherit a share in his or her father's property.
15. Thus I hold that Bona was not lawfully married to the deceased and neither she nor her daughter is entitled to a share in the estate.



16. The lawful heirs are Gladys Anyango Ogola and her four daughters. It is I understand the practice of the Public Trustee to give the parents about 5 per cent of the estate of a deceased son. The deceased's brother does not seek a share. The share will include the deceased's house at Usenge in Yimbo location which has been valued by the Lands Department at Shs 15,000.

The estate will be divided as follows:

Deceased's wife 25 per cent Thereza Lilian 20 per cent Miriam Jacqueline 20 per cent Rose Suzan 15 per cent Pauline Edith 15 per cent Deceased's parents 5 per cent

17. Mr Kithyoma for the Public Trustee submitted that, should Bona be found not to have been married to the deceased, in order to discourage such litigation, she should be ordered to pay the costs of the deceased's wife and the Public Trustee. Having regard to all the circumstances of this case I think it reasonable and sufficiently discouraging to order Bona to pay her own costs and those of the Public Trustee. The costs of Gladys will come out of the estate.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 1978

A.H SIMPSON

JUDGE

