

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**SUCCESSION APPEAL NO. E008 OF 2023**

**BETWEEN**

**CRIFTON            MUTISYA            MATHEKA.....1<sup>ST</sup>**  
**APPELLANT**

**RODAH            NDUMGE            MWANIA.....2<sup>ND</sup>**  
**APPELLANT**

**AND**

**KAREN            NYAMBURA            HEHO.....1<sup>ST</sup>**  
**RESPONDENT**

**FLORA            NYAMBURA            HEHO.....2<sup>ND</sup>**  
**RESPONDENT**

*(An appeal from the ruling and order of the Chief Magistrate's Court at Mavoko (B. Ojoo, SPM.) delivered on 21<sup>st</sup> June 2023 in CMSC No. E103 of 2021)*

**JUDGMENT**

1. In Mavoko CMSC No. E013 of 2021, the appellants lodged an objection to the making of a grant dated 25<sup>th</sup> November 2021. The objection was based on the grounds stated on its face and supported by the affidavit of the 1<sup>st</sup> appellant. The basis of the objection was that the respondents were strangers to the estate of the late Joshua Mwanja Mutisya. Accordingly, the appellants argued that the respondents lacked the authority of the deceased's family members to

petition for a grant of letters of administration on behalf of the estate.

2. The trial court considered the application, the replying affidavit sworn on 29<sup>th</sup> November 2022 and the parties' further affidavits. The matter was subsequently heard through viva voce evidence and written submissions from both parties. In its ruling dated 21<sup>st</sup> June 2023, the court dismissed the objection and ordered each party to bear its own costs.
3. Dissatisfied with the trial court's findings, the appellants filed a memorandum of appeal dated 12<sup>th</sup> July 2023. The appeal raised three grounds of appeal summarized as follows: the learned magistrate erred in finding that the 1<sup>st</sup> respondent was a wife of the deceased without sufficient evidence to support that finding; there was inadequate proof that the 1<sup>st</sup> respondent and her child were dependants of the deceased; and the objection filed on 1<sup>st</sup> December 2021 was merited. Based on these grounds, the appellants prayed that the appeal be allowed, the ruling dated 21<sup>st</sup> June 2023 be set aside and substituted with a proper finding. They also sought for costs of this appeal.
4. The appeal was heard on the basis of the parties' submissions. The appellants submissions and list of authorities are dated 25<sup>th</sup> October 2024. They argued that the evidence presented by the respondents was insufficient to establish that the 1<sup>st</sup> respondent was married to the

deceased, as required under section 55 of the Marriage Act and section 3 of the Law of Succession Act. Furthermore, they asserted that the 1<sup>st</sup> respondent failed to prove the existence of a marriage in accordance with section 59 (1) of the Marriage Act. To support their position, the appellants cited the case of **In re estate of Mbuti Mungushi Igiria** (deceased) (Succession Casue E875 of 2022) [2024] (*sic*) **Kimani vs. Gikanga** (1965) EA 735 and **JOK vs. SAO** [2018] eKLR.

5. Additionally, the appellants submitted that the respondents, being strangers to the deceased's family, lacked the legal capacity to petition for letters of administration. They relied on sections 39 and 66 of the Law of Succession Act and urged the court to adopt the reasoning in the decision **In re estate of Zachaeus Sumani Kadagale (deceased)** [2011] eKLR. For those reasons, the appellants prayed that their appeal be allowed.
6. The respondents opposed the appeal. They filed their submissions dated 4<sup>th</sup> November 2024. They maintained that the 1<sup>st</sup> respondent was married to the deceased under the Agikuyu customary law and that they cohabited and lived together as a husband and wife in Athi River. This they urged was credible demonstrated through evidence. They further submitted that, even if formal proof was lacking, a presumption of marriage arose from their conduct and circumstances.

7. In support of their argument, the respondent cited the following decisions: **Hortensiah Wanjiku Yawe vs. Public Trustees** EACA CA No. 13 of 1976 (UR), **Halsbury's Law of England 3<sup>rd</sup> edn. Vol. 19 para 1323, Halsbury's Law of England 'Matrimonial and civil partnership law) vol. 72 (2009) 5<sup>th</sup> edn. Para 6, Goodman vs. Goodman** (1859) 28 LJ CH 742, **MNM vs. DNMK & 13 others** [2017] eKLR, **Mbogoh vs. Muthoni & another** [2006] 1KLR 272, **Kimani vs. Kimani & 2 others** [2006] 2 KLR 272, **Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie** [2010] 1 KLR 159, **Njoki vs. Muthuru** [2008] 1KLR (G&F) 288 and section 118 of the Evidence Act.
8. It was contended that the 1<sup>st</sup> respondent had exclusive rights over the estate to the exclusion of others by virtue of her marital status to the deceased. Citing section 66 of the Law of Succession Act, **In re Estate of Gamaliel Otieno Onyiego** (deceased) [2018] eKLR and **In the matter of the Estate of Joshua Orwa Ojode (deceased)** Nairobi Succession Cause No. 2015 of 2012, the respondents argued that they ranked in priority as a surviving spouse and child of the deceased respectively over the appellants who were deceased's parents.
9. The respondents further submitted that the objection proceedings failed to meet the threshold under section 67 (1), 68 (1), 69 (1) and 76 of the Law of Succession Act. They acknowledged that the 1<sup>st</sup> respondent was not included in the

funeral program and obituary, they emphasized that the respondents were not strangers to the appellants having previously visited the 1<sup>st</sup> respondent's home. The respondents further stated that the appellants being elderly had never assisted the 1<sup>st</sup> respondent raising the 2<sup>nd</sup> respondent as a young mother. They urged that the ruling was a fair and devoid of any error. For these reasons, they prayed that the appeal be dismissed with costs.

10. I have considered the submissions, examined the record of appeal and analyzed the applicable law. This appeal challenges the exercise of discretion by the learned magistrate. The Court of Appeal in **Mark William Trevor Price & Caroline Elsa Anne Sturdy Vs John Greaves Hilder [1984] KECA 114 (KLR)** when invited to reconsider the exercise of discretion by a trial court:

***“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It would be wrong for this Court to interfere with the exercise of the trial Judge’s discretion merely because this Court’s decision has been different.”***

11. In this case, the appellants filed an objection to the making of a grant dated 25<sup>th</sup> November 2021. The governing provision is set out in section 68 (1) of the Law of Succession Act which provides as follows:

***“Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow”***

12. The interpretation of this provision was clarified by the court in ***In re estate of Agnes Ogolas Akoth (Deceased)*** [2016] KEHC 1810 (KLR) expounded the interpretation of that section in the following terms:

***“Section 68 of the Law of Succession Act makes it clear that objection may be lodged with the Court, in such form as may be prescribed within a period specified by the notice, or such longer period as the court may allow. The period in this case is the one that is specifically specified by the notice, thus the Kenya Gazette Notice.”***

13. In this instance, the trial court held as follows;

***9. It is clear from rule 17(6) of the P&A Rules that intervention of the court will only come in after an objector has filed in the Registry, the proper form, an answer to the petition for a grant (P& A Form 25), together with a petition by way of cross-application for a to grant to himself. In this***

*case there is no answer and cross-petition that accompany the objection to the making of a grant. Suffice it to say the effect of section 68(2) and 69(1) of the Act is that Objection proceeding in which no answer and cross-petition are filed are incomplete and the court may proceed and make a grant to the petitioner.*

- 10.** *The cause herein had not been advertised in the Kenya Gazette though payment has been made in favour of the Government Printer. In the absence of proof that this cause has been advertised in the Kenya Gazette, it is a finding of the court that the filing of the objection as contemplated in section 68 of the Act was premature. I am fortified in this finding by the decision of the High Court in the case of In Re estate of Quintus Ekessa- Deceased (2021)eKLR where the court held that ‘as the prerequisite Gazette Notice had not been issued the objector therein had no basis for filing an objection and that in doing so the same was premature, incomplete and improper before that court as the procedure prescribed in Sections 67, 68 and 69 of the Law of Succession Act was not complied with.*

11. It is apparent from the record that the succession cause is yet to be advertisement in the Kenya Gazette which is necessary for the objector to make the required application. At this stage of the proceedings, I agree with the trial court that the objection was inchoate and not ripe for determination. Consequently, the appeal is based on an objection that ought not to have been determined, as the trial court's jurisdiction was not yet triggered.
12. Accordingly, I find that since the application for grant of letters of administration was not advertised in the Kenya Gazette, there was nothing for the court to determine. The court ought not have heard the application. Accordingly, the present appeal must fail. The appellants are at liberty to lodge the necessary application before the trial court at the appropriate.
13. The upshot of the above is that the appeal lacks merit and the same is dismissed with costs. It is so ordered.  
It is so ordered.

Dated, signed and delivered at Machakos this 3<sup>rd</sup> day of  
November, 2025

**RHODA RUTTO**  
**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant

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