



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 562 OF 2019
IN THE MATTER OF THE ESTATE OF MATHEWS LEMMY
ADEMA (DECEASED)

JUDGMENT

BAKGROUND

1. This matter relates to the Estate of **Mathews Lemmy Adema** who died intestate on **12th October 2018**. Following citation filed by **Mary Mbuva, Margaret Mwenje** and **Lilian Kavochi Adema** in their capacity as wife and child. The matter was gazetted on 22nd November 2019. Mary Mbuva has then filed the Objection that is the Subject of this Judgment

2. In the Petition, the Petitioners aver that the deceased is survived by the following persons;

- i. Margaret Mwenje Mathews..... Wife
- ii. Aggrey Ambane Adema..... Son.
- iii. Lilian Kavochi Adema Daughter.
- iv. Mike Adema Son.
- v. Humphrey Adema Son.

3. Further it is submitted that the deceased had the following assets;

- a) Money in Kenya Commercial Bank Account Number 1104039370.
- b) Money in Kenya Commercial Bank Account Number 110854440.
- c) Money in Barclays Bank Account Number 0824480540.
- d) Money in Standard Bank Account Number 010032531900.
- e) 0.3 acre plot in Chavakali.
- f) Donholm house A923 Harambee Sacco Estate
- g) Tassia Plot 30 *70 feet.

4. In her Objection, Mary Mbuva contends that she too is a wife of the deceased and she had a child with the deceased. Their omission is therefore in contravention of their rights to the deceased estate. Further she alleges that the Petitioners, have omitted some of the deceased's properties. She states that the deceased had vehicles but they have been left out.

5. She cohabited with the deceased from 1990 till his demise. She lived with the deceased and they were blessed with a daughter Sharon who is school going. She avers that she and her daughter have been left out of the list of beneficiaries. The deceased paid her daughter's school fees and their house rent. Since the deceased died, their daughter has been unable

to continue with her education. The house they live in is in arrears and they have since then been locked out. The deceased's family has not given them any financial help yet they collect rent from Tassia Estate and a house on Donholm.

6. She argued that she and her daughter were not given the deceased's shares in Spinners & Spinners Ruiru where he used to work. The deceased's brother gave her daughter Kshs. thirty three thousand shillings only. According to her, she has met the deceased's brothers, son and his daughter. That the issue of shares owned in Spinners & Spinners was resolved; the Chief, Ruiru Location wrote a letter to the Human Resource Director, Spinners & Spinners.
7. The application was canvassed by way of *viva voce* evidence.

EVIDENCE

8. **OW1, Mary Mbuva** her evidence was that she cohabited with the deceased from 1990 until he died in October 2017. They were blessed with a daughter named Sharon born in 1994. Their relationship was known by both their families. The deceased used to pay her daughter's school fees and rent. At one point, she reported the deceased to NALEP. He continued

supporting them after he received a demand letter. When he was unwell, he told his daughter to talk to his brother in case she needed financial support. When he died, they attended funeral arrangement meetings in Donholm. She was assured that her daughter would attend viewing at his former employer's company in Ruiru. However, they denied her to go to the company. They were not aware that they would exclude them from the funeral programme.

9. She attended the deceased's funeral with her daughter and some of her relatives. She saw the programme and she noticed that she had been excluded. After the burial, she inquired from the deceased's son, Aggrey what plans they had for her daughter and her. She informed him that she was in rent arrears and needed tuition fees for her daughter. He told her the issue would be sorted after "makumbusho". He saw them off to Nairobi. She then went to the chief's office. The chief wrote a letter to the deceased's former employer asking that his benefits should not be shared until the family solves their issues.

10. They returned to Western one day before the memorial day. Her daughter spotted the deceased's sons at a car wash. He went to inform his mother about their presence. She told him that they should not go to their home. The local sub- chief tried to intervene. John, who was a nephew got them a place to sleep. She and her daughter attended the memorial service the next day. They introduced themselves. The petitioner and her children were hostile to her. They returned to Nairobi. Later, the deceased's step brother Alfred Adema called her to the Chief's Office. He was in the company of his son, the petitioner and her son Mike. They went to the company and got his terminal benefits. The money was divided equally. Her daughter also got a share. They signed an acknowledgement for it. She went to NALEP. Alfred refused to attend mediation in the absence of the petitioner. When the petitioner was summoned, she stated that she would attend the meeting in the presence of her children. At this point, she decided to file citation proceedings against the petitioner. When she came back from Western, her house had been locked. According to her, the constitution recognises cohabitation and presumption

of marriage after six months. The caretaker harassed her and she left the house, her daughter stopped going to school because she lacked school fees. The petitioner collects rental income from the deceased's estate in Donholm and Tassia. She needs to account for the rent she collects. She argued that she is the deceased's wife and has a right to the estate. Her daughter is 31 years old and is equally entitled to a share. The petition was lodged without their consent or approval. She has no objection to her daughter being a co-administrator. The petition was gazetted on 22nd November 2019.

11. During cross -examination, she stated that the paternity of her child has not been denied. She did not take her daughter for DNA testing because she is sure of her paternity. The letter from NALEP shows that Sharon is the deceased's daughter. She does not have Sharon's birth certificate. Sharon was an adult when the deceased died. She has not filed any papers. Sharon does not have the deceased's name on her ID. She is named after her great grandmother. She met the deceased while they were working together at

Spinners in Ruiru. She worked there from 1989 until she resigned in 2000. She wants a portion in Spinners. She is not familiar with the deceased's handwriting.

12. When she joined the company, she provided her details. She did not update her records. The deceased completed the form after she had resigned. She is seeing for the first time the form that shows the deceased's next of kin. She received some money from Alfred, the deceased's brother after signing. It was returned to the company. Alfred called them to his house and gave her daughter money. Margaret's signature is not on the document. It does not have her ID Number. They were informed the money was from spinners. She does not know who was recognized as the deceased's wife. The petitioner was paid his benefits. She confirmed that the next of kin form completed by the deceased enumerated 5 family members. Her daughter is not included. The deceased was her husband according to Kamba culture.

13. She is not aware that he had formalised his marriage with the petitioner. The deceased would send money to her through Mpesa and occasionally, he would give her cash. She

was introduced to the petitioner and her children at Donholm. The deceased had not built for her a house at the time of his death. The deceased had another child out of wedlock named Humphrey. It is not true that the deceased took up Sharon because she was living with him. The chief who wrote her letter is called Robert Aswani. He is already retired and won't be calling him as a witness. The Mpesa statements do not show her number. She has two numbers; 0724***** and 0727*****. She used to receive money through 0724*****. She does not have evidence showing that the deceased used to send money to her daughter. Her daughter refused to undergo DNA testing. She is not interested in this case. She is pursuing her right.

14. **PW1, Margaret Mathews** told the court that the deceased was her husband. They got married in 1978 and were still married at the time of his death. She asked the court to adopt her sworn affidavit dated 16th September 2019 and 14th August 2019 together with all attachments as her evidence in chief. It is not true that she gave Alfred Kshs. 33,000 to pay Sharon. She was the only wife of the deceased and they had

four children. The deceased had a child out of wedlock named Humphrey. She raised him with her children. he is included in the list of beneficiaries. She does not recognize the objector as the deceased's wife. Her daughter is not a child of the deceased.

15. During **cross examination**, she stated that she did not discuss anything with the objector at the funeral.

16. The court gave orders that parties do file written submissions. At the time of writing this judgment, only the petitioner had filed written submissions. Her submissions are dated **24th July 2025**.

PETITIONER'S SUBMISSIONS.

17. It was her submission that she is a dependant under Section 29 of the Law of Succession Act and by virtue of Section 66 (a) and (b), she and her children are entitled to be administrators of the estate of the deceased.

18. She argues that she was legally married to the deceased and the deceased did not have the legal capacity to marry another wife. Relying on the decision of **Mombasa Civil Appeal No. E030 & E032 of 2023 (consolidated)- Waita**

& another v Waita & another and **Succession Cause No. 2108 of 2015 at Nairobi Milimani Law Courts in the Estate of Paul Kariuki Njuguna - deceased**, it was her argument that the objector had not proved her marriage and dependency on the deceased and therefore, she and her child are not beneficiaries of the estate of the deceased.

19. Lastly, she argued that the objector's child had not proved that she was a biological child or a dependant of the deceased. Reference was made on the decision of Nairobi **Civil Appeal No. 114 of 2012- EMM v IGM & RMM.**

ANALYSIS AND DETERMINATION

20. The issues for determination are;

- i. Whether the objector is a wife of the deceased and therefore a dependant of the deceased?**
- ii. Whether the Objector's child is a dependant of the deceased entitled to share in his estate?**
- iii. Who is entitled to the grant of letters of administration intestate?**

Whether the objector is a wife of the deceased and therefore a dependant of the deceased?

21. A ground raised by the objector is that the petitioner failed to disclose to the court that the Objector was a wife and dependant of the deceased. The Petitioner on the other hand alleged that the objector is not a beneficiary of the estate of

the deceased as provided under the Law. The question is therefore whether the objector was a wife to the deceased and dependant within the meaning of Section 29 of the Succession Act. Under **Section 29** the meaning of dependant for the purposes of that part is given as follows:

“Dependant” means-

"a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters; as were being maintained by the deceased immediately prior to his death; and c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

22. Was the objector a wife to the deceased? At the hearing, the objector testified that she was married to the deceased under Kamba customary law. However, she did not tender evidence on whether the traditional rights of a Kamba Customary marriage were fulfilled, nor did she indicate the formalities that accompany the specific type of marriage that she alleges to have contracted with the deceased. She also did not provide any independent witnesses who witnessed the

ceremony attendant to their marriage if there was any. In the case of GITUANJA -V- GITUANJA [1983]KLR 573, the **Court of Appeal** held that:-

“The existence of a customary marriage is a matter of fact which is proved by evidence.”

23. I therefore find no basis to hold that the objector was a wife to the deceased by dint of Customary Law.

24. In the alternative, did the deceased cohabit with the Objector and was there a presumption of marriage? The Objector testified that she cohabited with the deceased from the year 2003 to 2011. The Court of Appeal in the case of *Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another [2009] eKLR* in holding that the presumption of marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute, stated as follows-

Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage.

25. The Objector has not tendered evidence to demonstrate that she cohabited with the deceased and for how long that went on. She has not tendered evidence by calling witnesses to prove how they presented themselves to society or whether the community held them as man and wife to enable this court presume marriage by cohabitation existed. There is no evidence to lead the court to find that a presumption of marriage existed. I am therefore unable to find that the objector was a wife to the Deceased.

Whether the Objector's child is a dependant of the deceased entitled to share in his estate?

26. The Objector in her evidence told the court that she had a daughter with the deceased. She stated that the deceased paid school fees for their daughter. During cross examination, she stated that she did not produce the birth certificate of their daughter. On 23rd July 2024, the objector indicated to the court that she would ask her daughter whether she will for DNA testing. During cross examination, she told the court that her daughter refused to go for a DNA testing. She stated that she did not want anything to do with the deceased.

27. The burden of proof on paternity lay on the objector. He who alleges proves. **Sections 107 to 109** of the **Evidence Act** provide as follows:

“107 (1) Whoever desires any court to give judgment as to the legal right and liability dependant on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies with that person.

108. The burden of proof in suit or proceeding lies on that person who would fail if no evidence at all were given on the other side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact lie on any particular person.”

28. I quote with approval the decision in **Wilfred Koinange Gathiomi V. Joyce Wambui Mutura & Another, [2016] eKLR** where paternity was central to the dispute and it was held that DNA testing was the only way to resolve the paternity issue.

29. In the absence of a birth certificate or DNA findings, the court is unable to hold that the objector’s daughter is a daughter and or beneficiary of the estate of the deceased.

Who is entitled to the grant of letters of administration intestate.

30. According to Section 66 of the Law of Succession Act, the court has final discretion as to the person or persons to whom a grant should be made, but the guiding principle is the order of reference provided in the said section and top on the list is the surviving spouse or spouses with or without association of other beneficiaries.
31. Since the Petitioner has proved that she is the only spouse. It is also not contested that **Lilian Kavochi Adema** is a daughter to the deceased. There being no reason for the court to depart from the general guide I find that they are both proper persons to be issued with the grant.
32. For the forgoing reasons this court makes the following findings and determinations:
- i. This court finds that the Objector was not the deceased's wife and therefore not a dependant of the deceased
 - ii. This court finds that the objector's daughter Sharon is not the deceased's child and therefore not a dependant of the deceased.

- iii. Grant of Letters of Administration Intestate will issue to the s Petitioners, Margaret Mwenje and Lilian Kavochi Adema the grant of letters of administration.
- iv. The Administrators so appointed will file summons of confirmation of Grant within 30 days
- v. Mention before the Deputy registrar on 3rd February 2026 to confirm summons for confirmation filed and to take directions on its hearing
- vi. Parties at Liberty to file appeal, party exercising their right of appeal to do so within 30 days
- vii. This being a family matter each party to bear their own costs.

It is so ordered

DATED and DELIVERED VIRTUALLY at NAIROBI this 28th Day of NOVEMBER 2025.

**P.M. NYAUNDI
JUDGE**

In the presence of:

Fardosa Court Assistant
Ojwok holding brief for Modi for Petitioners
Mary Mbuva in person