



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION APPEAL NO. E012 OF 2024

IN THE MATTER OF THE ESTATE OF NJOROGE KIMANI
(DECEASED)

HANNAH WANJIRU MWANGI.....

APPELLANT

VERSUS

LEAH NYAMBURA WAMBUI.....

RESPONDENT

(Being an appeal arising from the ruling and orders issued on 18/7/2024 by the Hon. Aloyce Peter Ndege (Senior Principal Magistrate) in Succession Cause Number E947 OF 2021 - Chief Magistrates Court at Nakuru)

JUDGEMENT

1. The Respondent was the Petitioner in Nakuru Chief Magistrate's Court's Succession Cause No. E947 of 2021. She was issued with Grant of Letters of Administration Intestate on 2nd of March 2022 that was subsequently confirmed on 28th October, 2022.
2. The Appellant approached the Trial Court seeking revocation of the Grant *vide* Application dated 30th January, 2023 contending that it had been obtained through concealment of material facts and by misrepresenting to the Court that the Respondent was the lawful wife of the deceased.
3. In its Ruling delivered on 18th July, 2024, the Trial Court dismissed the Appellant's Application for want of merit.
4. Being dissatisfied with the Ruling and the order of the Court, the Appellant lodged this Appeal through Memorandum of Appeal dated 18th August, 2024 predicated on 16 grounds. The Grounds of Appeal are condensed into 7 broad as follows:-

- i) The Learned Trial Magistrate erred in law and in fact by importing responses from a different application already concluded and dismissing the Summons for revocation of the Grant notwithstanding that a Replying Affidavit and/or Grounds of Opposition had not been filed.**
- ii) The Learned Trial Magistrate erred in law and in fact by failing to recognize the Appellant as a wife and dependant of the deceased, contrary to the concerned chief's letter and other evidence demonstrating her marital relationship to and dependency on the deceased.**
- iii) The Learned Trial Magistrate erred in law and in fact by failing to recognize the minor sired by the deceased with the Appellant as a surviving child under Section 29 of the Law of Succession Act, despite the filing of a birth certificate and chief's letter thus disinheriting a child of the deceased.**
- iv) The Learned Trial Magistrate erred in law and in fact by expunging from the record annexures to the Appellant's affidavits on technical grounds thereby disregarding evidence supporting the Summons for revocation of the Grant and effectively disinheriting rightful heirs.**

- v) **The Learned Trial Magistrate erred in law and in fact by failing to hold that the Respondent acquired the Grant fraudulently through concealment of material facts, a valid ground for revocation of a Grant under Section 76 of the Law of Succession Act.**
- vi) **The Learned Trial Magistrate erred in law and in fact by failing to hold that the Succession Cause was improperly filed in Nakuru Court, despite evidence showing the deceased resided in Limuru, the properties were located there, and the introductory letter originated from a Limuru chief.**
- vii) **The Learned Trial Magistrate erred in law and in fact by prioritizing technicalities over substantive justice, thereby disinheriting rightful dependants or heirs of the deceased.**

5. The Appellant thus seeks these reliefs;

- a) **That the Trial Court's Ruling and consequential orders issued on 18th July, 2024 be set aside**
- b) **That the Summons for Revocation of Grant dated 30th January, 2023 be allowed to the effect that;**
 - i) **The Grant issued on 28th October, 2022 in favour of the Respondent be revoked**

ii) The Appellant and her daughter BN be included as beneficiaries of the estate of the deceased and

iii) The Appellant and the Respondent be appointed as joint Administrators of the estate of the deceased for purposes of finalizing the succession to the deceased's Estate.

c) Costs of the Appeal be provided for.

d) Any other relief the Court deems fair and just to grant.

6. The Appeal was heard by way of written submissions duly filed by learned Counsel for the Parties.

Appellant's Submissions

7. The Appellant Submits *inter alia* that the Trial Court wrongly relied on a Replying Affidavit sworn in a different Application dated 28th January, 2023 to oppose the Summons for revocation of Grant dated 30th January, 2023. Counsel opine that since no reply was filed in opposition to the Summons, the same was thus unopposed and should have been allowed.

8. It is further argued that by the Trial Court demanding that the Appellant prove she was a wife through oral evidence

but accept the Respondent's claim of being a wife based only on a Chief's letter was unfair and inconsistent.

9. The Appellant submits that the Respondent hid important facts by failing to disclose that the deceased had another wife and a minor child and therefore by dint of **Section 76** of the **Law of Succession Act** such concealment is enough to revoke a Grant. The Appellant's Advocates also cite **Re Estate of Moses Wachira Kimotho (Deceased), [2009] KEHC 3958 (KLR)** to submit that failure to disclose true heirs of a deceased person's Estate is concealment warranting revocation of a Grant.
10. Reference is made to the Respondent's prior litigation in 2015 where she allegedly admitted that the deceased was cohabiting with another woman, which fact is said to debunk any claim of ignorance of the Appellant's association with the deceased. Further reliance is placed on the case of **Hottensiah Wanjiku Yahweh vs Public Trustee [1976] KECA 1 (KLR)** where the Court of Appeal established that cohabitation, reputation and other

attendant circumstances may give rise to a presumption of marriage between a couple.

11. The Appellant in the circumstances contends that her Application was wrongly dismissed as she not only relied on her Chief's letter but also on her child's birth certificate naming the deceased as the father; sworn affidavits, proof of cohabitation and M-Pesa statements showing remittances the deceased made towards her maintenance. Taken cumulatively, she submits that the evidence meets the balance of probabilities test for establishing a customary-law marriage, dependency, and the child's entitlement under **Section 29** of the **Law of Succession Act**.
12. The Appellant argues that the Trial Court's reliance on **Rule 9** of the **Oaths and Statutory Declaration Act** to expunge annexures from her affidavit owing to technical issues to do with stamping was erroneous. She thinks that the measure infringes **Article 159(2)(d)** of the **Constitution** which requires courts to focus on substantive justice over undue regard to technicalities.

13. The Appellant's Counsel further cite the Court of Appeal case in **Sarah Hersi Ali vs Kenya Commercial Bank Ltd [2000] KECA 189 (KLR)** which restates that procedural rules should not defeat substantive rights. The expunged documents included the Chief's letter, the Appellant's child's birth certificate and proof of cohabitation which were said to be crucial to the Appellant's case. The Trial Court is also faulted for ignoring the Appellant's Further Affidavit dated 8th February, 2024 and annexures thereto which were properly marked.
14. The Appellant also pitches tent on **Re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR** where the Court emphasized that a Succession Court must identify and distribute Estate property to rightful beneficiaries, and that valid claims must be resolved before confirmation of a Grant.

Respondent's Submissions

15. The Respondent retorts that the Appellant's Supporting Affidavit was incomplete because the annexures were not marked or sealed by the Commissioner for Oaths as

provided under **Rule 9** of the **Oaths and Statutory Declarations Rules**.

16. Authorities relied upon include **Fredrick Mwangi Nyaga vs Garam Investments & another [2013] KEHC 1638** where it was observed that a litigant could not invoke **Article 159** of the **Constitution** where there is a clear an express provision of the law. In **Abraham Mwangi vs S.O. Omboo & Others HCCC No. 1511 of 2002** and **Solomon Omwega Omache vs Zachary O Ayieko & Others [2016] eKLR** also cited in reliance by the Respondent's Counsel, it was held that unmarked exhibits ought to be rejected. It is the Respondent's view that the Appellant's affidavits in issue were incomplete and so the Summons for revocation of the Grant was unsupported.
17. The Respondent argues that the Appellant is a stranger to the estate and failed to prove she was a wife of the deceased as was required **In re Estate of the Waithaka Kubi (Deceased) [2019] eKLR**.
18. Contrary to the **Section 3** of the **Law of Succession Act** providing that a spouse must be recognized under the

Marriage Act, the Appellant is said to have failed to produce a marriage certificate or prove a customary marriage. The Respondent's Advocates submit relying on **Njoki vs Mathara & Others Civil Appeal No. 71 of 1989** that the burden of proving a customary marriage lies on the party alleging it.

19. The Respondent further cites case law in **Re James Mberi Muigai Kenyatta [2001] eKLR, NEO vs HWK [2018] eKLR**, and **Prisilla Waruguru Gathogo vs Virginia Kanugu Kathigo [2004] eKLR**, which held the position that birth certificates cannot conclusively prove paternity.
20. The Respondent insists that the Appellant failed to prove that the deceased maintained her or her said child during his lifetime and they were not therefore dependants of the deceased within the meaning of **Section 29** of the **Law of Succession Act**.
21. The Respondent therefore takes the position that the Appellant failed to discharge her burden of proof under **Section 107 of the Evidence Act** thereby failing to establish fraud or concealment of material facts warranting

revocation of the Grant. The court is referred to judicial determinations in re Estate of Waithaka Kubi
(Deceased) [2019] eKLR and Albert Imbuga Kisigwa vs
Recho Kawai Kisigwa Succession Cause No. 158 of
2000, which emphasized that revocation of a Grant is discretionary and the discretion must be exercised judiciously.

Analysis and determination

22. The court as a first appellate court is enjoined to interrogate the lower court's record with a view to reaching its own conclusions on both matters of fact and law (see case law in Selle vs Associated Motor Boat Company).

The court is accordingly guided.

Whether the Trial Court misdirected himself in expunging and/or ignoring Annexures to the Appellant's Affidavits.

23. Is non-compliance with **Rule 9** of the **Oaths and Statutory Declarations Rules** so fundamental as to have invalidate annexures to affidavits?

24. **Rule 9** provides that:

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”

25. I have looked at the annexures which have been attached to the affidavit in support of the Appellant’s Summons. It is not in doubt that the impugned annexures do not strictly comply with the above provision.

26. The Court of Appeal in the case of **Oginga vs Moko [2024] KECA 1830 (KLR)** stated as hereunder:

“.....Similarly, it is true, as the Solomon Omwega Omache Case held, that the proper procedure in which annexures become part of an affidavit is for them to be identified in the affidavit..... and have each annexure separately stamped by a Commissioner for Oaths. However, it is not true that the venial failure to studiously follow each of this formalistic failures would automatically render the annexures inadmissible in evidence. The test is substantive: can it be said that the failure in process was prejudicial to the other side? Was it otherwise so bad that it would make a mockery of procedural due process? And, finally, does the failure betray a lack of good faith or an

animus to steal a match on the other side? We think on consideration of each of these factors, the technical deficiencies of the supporting affidavit are to be forgiven under Article 159(1)(d) of the Constitution”

27. It follows then that the mere failure to comply with **Rule 9** is not of itself fatal. This being a succession Cause the Court is cognizant of the fact that succession proceedings are *sui generis* in nature. This is not to excuse noncompliance with procedure but the Court is usually required to interrogate the circumstances on a case to case basis.
28. The Court retains discretion and the guiding principle is whether the defect causes prejudice to the adverse party. **Article 159(2)(d)** commands Courts to administer justice without undue regard to technicalities.
29. The Trial Court’s decision to expunge all annexures relied upon by the Appellant elevated form over substance. Such an approach carried the risk of locking out rightful beneficiaries of the Estate and undermining the very purpose of succession proceedings. The proper course in

the circumstances was to determine the matter on its merits.

30. In the premise I hold and find in the affirmative, that the lower court wrongly expunged the Appellant's exhibits in question and ignored contents of her Further Affidavit. The annexures to the Appellant's Further Affidavit sworn on 8th February, 2024 were not considered yet they contained crucial evidence *to wit*; birth records of the Appellant's child and personal records of the deceased which go to the heart of the dispute. The omission to consider properly marked annexures was therefore a misdirection.

Whether the Appellant proved that her child was a dependant of the deceased and/or beneficiary of the deceased's Estate.

31. **Section 3(2) of the Law of Succession Act states**

“(2) references in this Act to ‘child’ or ‘children’ shall include a child conceived but not yet born (as long as the child is born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

32. The Respondent questioned paternity of the Appellant's child arguing that her birth certificate was obtained late after the deceased's death; that the name on the birth certificate is different from the names of the deceased in the death certificate and that inclusion in the birth certificate does not proof paternity but only DNA testing would settle the issue.
33. It is settled that DNA testing is not mandatory as proof of paternity in succession cases. See **In re Estate of Benard Njeru Kamau (Deceased) [2025] KEHC 7457 (KLR)**, the Court was of the view that the deceased DNA profile was unavailable and it would be unconscionable to profile one set of children. The Court further observed that inheritance may still arise even where DNA testing is not undertaken.
34. The Trial Court misdirected himself in finding that there was conclusive proof that the Respondent and her children were the sole beneficiaries of the estate of the deceased. The Appellant's Child's birth certificate on record indicates that the minor was born on 9th May, 2021; that the date of

registration of birth is 15th June, 2021 and it was issued on 28th July, 2021 approximately one week after the death of the deceased who died on 22nd July, 2021. The deceased passed on when the minor was only two months. The birth was registered before the death of the deceased. The Appellant explained that the delay in obtaining a birth certificate was because she had given birth via caesarian section.

35. The other challenge to the birth certificate was that the name of the father in the birth certificate is shown as George Njoroge Kimani whereas the name in the death certificate is Njoroge Kimani. The Appellant has annexed several documents including employment records, NSSF statement, educational and achievement records where the deceased is either referred to as “Kimani Njoroge” or “George Kimani Njoroge” or “Njoroge Kimani” or “Njoroge K. George” .

36. The Appellant explained that she had initially filled the child’s father’s name as Njoroge Kimani but she was advised to amend for the reason that the deceased had

given the name George in Hospital at the time of birth of the child. The Respondent did not discredit these documents and only sought to have them expunged based on technicalities.

37. On the material placed before the Trial Court I accordingly find that the subject child was a dependant of the deceased within the meaning of the **Law of Succession Act**.

Who between the Respondent and the Appellant was the widow and/or dependant of the deceased.

38. **Section 3** of the **Law of Succession Act** provides;

"spouse" means a husband or a wife or wives recognized under the Marriage Act

39. Further, **Section 29(a)** of the Law of Succession Act provides -

29 "For purposes of this part, "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."

40. The Court is faced with two competing claims; that of the Appellant who alleged marriage to the deceased and that of

the Respondent who Petitioned for the Grant as widow of the deceased. The Respondent's chief's letter 23rd September, 2021 only listed her and her children as beneficiaries whereas the Appellant exhibited her area Chief's letter dated 21st April 2022 purporting to confirm that she was the deceased's second wife. The Letter also listed the Respondent, her children and the Appellant's daughter as beneficiaries.

41. The Appellant has also exhibited records from Limuru Children's Court No. 16 of 2015 wherein the Respondent purportedly admitted that she had lived with the deceased as man and wife from 2003 to the year 2013 when they parted ways. It follows that the two had not lived together as husband and wife for over seven years prior to the deceased's demise. This admission casts doubt on the Respondent's claim to be the deceased's wife, suggesting instead that she was a former wife rather than a surviving spouse at the time of death.

42. The Appellant claim, on the other hand, is pegged on the argument that she had cohabited with the deceased giving rise to presumption of marriage.
43. The Supreme Court in Mary Nyambura Kangara alias Mary Nyambura Paul vs Paul Ogari Mayaka [2023] KESC 15 (KLR) addressed presumption of marriage;

“[64] We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:

- 1. The parties must have lived together for a long period of time.**
- 2. The parties must have the legal right or capacity to marry.**
- 3. The parties must have intended to marry.**
- 4. There must be consent by both parties.**
- 5. The parties must have held themselves out to the outside world as being a married couple.**
- 6. The onus of proving the presumption is on the party who alleges it.**
- 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.**

8. The standard of proof is on a balance of probabilities.

44. The Court clarified that long term cohabitation does not automatically constitute a marriage. That status must be proven through evidence proving all the elements of a marriage.
45. The onus of proving the marriage remained with the Appellant. A chief's letter and the deceased's name being included in a child's birth certificate or a single photograph with an alleged sibling of the deceased does not create presumption of marriage. Even if there was cohabitation, the same cannot be deemed to have given rise to marriage. There therefore no sufficient on which to presume a marriage between the Appellant and the deceased.
46. **Section 29** of the **law of Succession Act** envisages a dependant as someone who was being maintained by the deceased immediately prior to his/ her death.
47. The Appellant produced M-Pesa Statements dating from 2018 where she had been receiving some amounts from the deceased up to his demise in 2021.

48. Although the amounts were not substantial, the transactions were consistent and stretched over several years. This pattern of support cannot be dismissed outright and may in the circumstances point to a form of dependency within the meaning of the law.

49. I find in the premises that the Appellant proved dependency on a balance of probabilities.

Whether the conduct of the Respondent amounts to concealment of fact warranting revocation of the Grant.

50. **Section 76** of the **Law of Succession Act** provides thus;-

“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 ...”

51. The scope and application of **Section 76** was expounded by the court **In re Estate of Prisca Ong'ayo Nande (Deceased)** [2020] KEHC 6553 (KLR) the High Court emphasized that revocation is not automatic but must be justified by clear evidence of misrepresentation, concealment, or maladministration.
52. I am not persuaded that the Respondent deliberately withheld the existence of the Appellant and her daughter in relation to the deceased. The Trial Court cannot be faulted for not making a finding on concealment of facts since the Appellant did not place material before Court to substantiate that allegation.
53. It is, however not lost to the Court that the Respondent admitted in the Children’s Court that she was no longer married to the deceased even though she argued that no such evidence was produced. She was aware that the deceased was cohabiting with another woman. That fact ,

however, may not be of much consequence as the woman did not necessarily have to be the Appellant.

54. The Respondent's misconduct was demonstrated when she intentionally misled the Court by representing herself as the widow of the deceased when there is no evidence of a valid marriage between them.

55. The inevitable consequence is the Grant issued solely in favour of the Respondent cannot stand.

56. For the foregoing reasons this Appeal succeeds and the lower court's order is set aside and substituted with this Court's orders as follows:

i) The Grant of Letters of Administration Intestate and Certificate of Confirmation of Grant dated 2nd March, 2022 and 18th October, 2022 respectively are hereby revoked.

ii) Grant of Letters of Administration Intestate is hereby issued jointly to the Appellant and the Respondent.

iii) The Appellant and her daughter BN are included as beneficiaries of the Estate of the deceased .

iv) This being a family issue, each party shall bear their own costs of the Appeal.

Delivered, Signed and Dated at Nakuru on this 16th day of March, 2026.

J. M. NANG'EA - JUDGE

In the presence of:-

Mr. Kihoro Advocate for the Appellant

Ms Njigina Advocate for the Respondent

Court Assistant (Jeniffer)

J.M. NANG'EA - JUDGE