

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT SUCCESSION CAUSE NO. 76 OF 2013**

**IN THE MATTER OF THE ESTATE OF MOHAMED MWOTE**

**(DECEASED)**

**SCOLA                      WAIRIMU                      MOTE.....**

**.....APPLICANT**

**VERSUS**

**ZAINABU                      NAITORE                      MBOGO.....**

**RESPONDENT**

**JUDGEMENT**

1. Before this Court for determination is the Summons for Revocation, Annulment and/or suspension of Grant dated **4<sup>th</sup> April 2025** by which the Applicant **SCOLA WAIRIMU MOTE** seeks the following orders:-

**“1. SPENT**

**2. SPENT**

**3. SPENT**

**4. THAT the Grant of letters of Administration Intestate made to ZAINABU NAITORE MBOGO on the 27<sup>th</sup> day of November 2014 be revoked and/or annulled.**

**5. THAT the respondent herein be condemned to pay the costs of the application.”**

2. The summons was premised upon **Section 76 A (B) (i) (iii) and Sections 82 of the Law of Succession Act, Cap 160, Laws of Kenya and Rule 44 and 49 of the Probate and Administration Rules** and was supported by the affidavit of even date sworn by the Applicant.
3. The Respondent **ZAINABU NAITORE MBOGO** did not file any reply to the summon and did not appear in Court on the hearing day despite having been properly served with a hearing notice. The summons was heard by way of oral evidence in open court.

### **BACKGROUND**

4. This succession cause relates to the estate of the late **MOHAMED MWOTE** (hereinafter 'the Deceased') who died intestate on **8<sup>th</sup> November 2013** at Tumu Tumu Hospital. A copy of the Death Certificate Serial Number **164363** is annexed to the Supporting Affidavit dated **18<sup>th</sup> September 2023**.
5. Following the demise of the Deceased the Respondent **Zainabu Naitore Mbogo** applied for and obtained Grant of letters of Administration Intestate which grant was issued to her on **9<sup>th</sup> May 2013**. Thereafter the Grant was confirmed in favour of the Respondent on **27<sup>th</sup> November 2014**. This confirmed Grant was later rectified on **22<sup>nd</sup> November 2018**.
6. According to the rectified certificate of confirmed grant the estate which consisted of only one property being **EX LEWA SETTLEMENT SCHEME/685** was to devolve to the Respondent absolutely.
7. The Applicant has now filed this Summons seeking revocation of the confirmed grant which was issued to the Respondent.

## **THE EVIDENCE**

8. The applicant testified on her own behalf. She told the court that she was also a widow and a dependant of the Deceased, having gotten married to the Deceased under customary law. The Applicant asserts that she bore five (5) children with Deceased. Therefore according to the Applicant the Deceased was survived by two (2) widows and ten (10) children.
9. The Applicant faults the Respondent who was the senior wife for proceeding to obtain letters of administration without informing and/or involving her. The applicant stated that she only became aware of the existence of the succession cause in the year **2023**. The Applicant further opposes the manner in which the estate was distributed. She states that she is the one who lives in **Lewa Plot 685** yet the entire property was allocated to the Respondent.
10. The Applicant contends that she and her five (5) children are all beneficiaries of the estate of the deceased and are entitled to a share therefrom. That the grant issued to the Respondent was obtained fraudulently by non-disclosure of a

material fact to wit that the Deceased had a second family. The Applicant therefore prays that the Grant which was issued to the Respondent be revoked and that the estate property revert back into the name of the Deceased to allow for a fair and equitable distribution of said estate.

11. As stated earlier despite having been properly served with notices the Respondent did not file any reply to the summons nor did she appear in court on the hearing date. The hearing therefore proceeded by way of formal proof.

#### **ANALYSIS AND DETERMINATION**

12. I have carefully considered the summons before this court, the evidence adduced by the Applicant as well as the written submissions dated **16<sup>th</sup> December 2025**.
13. This court is sitting as a Probate Court whose primary mandate is to oversee the distribution of the estate of the Deceased to the genuine beneficiaries. In the case of **PRISCILLA NDUBI and ZIPPORAH MUTIGA -VS- GERISHON GATOBU MBUI [2013] eKLR** it was held that:-

**“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity the estate property must be identified.”**

14. The Applicant seeks to have the confirmed grant issued to the Respondent revoked.
15. The grounds upon which a Grant may be revoked are set out in **Section 76, Law of Succession Act Cap 160 Laws of Kenya** as follows:-

**“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 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;**

**(d) that the person to whom the grant was made has**

**failed, after due notice without reasonable cause**

**either -**

**(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or**

**(ii) to proceed diligently with the administration of the estate; or**

- (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or**
- (iv) that the grant has become useless and inoperative through subsequent circumstances.”**

16. This provision of the law was expounded upon in the case of **RE ESTATE OF PRISCA ONG'AYA MANDE (Deceased) 2020 eKLR** where it was held as follows:-

**“A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not**

**competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving**

**behind no administrator, loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and therefore becomes unqualified to hold any office of trust.”**

17. The Applicant claims that the Respondent initiated and concluded this succession cause without informing and or involving her yet she (the Applicant) was also a wife to the Deceased. I have carefully perused the Petition for letters of Administration intestate made by the Respondent '**Zainab Naitore Mbogo**'. In that petition the Respondent named herself and her five (5) children as the only beneficiaries to the estate.
18. The Applicant asserts that she is also a widow to the Deceased and that she and the Deceased bore five (5) children together. The Applicant insists that she and her children are also dependants of the deceased under the terms of **Section 29 Law of Succession Act** and are also entitled to a share of said estate.

19. It is trite law that he who alleges must prove. It is a general proposition of the law that the legal burden of proof lies upon the party who invokes the aid of the law. **Section 107 (1)** of the **Evidence Act Chapter 80 Laws of Kenya** provides:

**“107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

20. **Sections 109 and 112** of the same Act provide as follows:-

**“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 the proof of that fact shall lie on any particular person.**

**“112. In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

21. The two provisions were considered in the case of **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court held as follows:-

***“As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Section 109 and 112 of the Act.”***

22. The Applicant claimed that she was a wife to the Deceased. She therefore had an obligation to prove to the satisfaction of this Court that she got married to the Deceased under a system of marriage recognised by law in Kenya. In the case of **RAHAB WANJIRU NDERITU -VS- DANIEL MUTETI & 4 others [2016] eKLR** the Court held that

**“The Plaintiff must prove dependency. If a wife she must prove marriage to the deceased either**

**by customary marriage or by production of a marriage certificate or by any other acceptable manner by a letter from the chief confirming that the plaintiff is a wife of the deceased.....”**

23. In her evidence the Applicant alleged that she got married to the Deceased under customary law in the year **1977**. The Applicant did not specify under which communities customs she was married.
24. Nevertheless in most (if not all) of the Kenyan communities payment of dowry is a critical aspect of a customary marriage. The applicant did not elaborate on how, when or in whose presence dowry was paid. She did not call any witness to confirm that a customary marriage was conducted between herself and the deceased.
25. In the case of **KIMANI -VS- GIKANGA [1965] E.A 735** it was observed that:-

**“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the**

customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”

26. In **Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976** the Court laid down three principles regarding proof of customary marriages in Court.

They are:

- a) **The onus of proving customary law marriage is generally on the party who claims it;**

- b) The Standard of proof is the usual one for a civil action, namely, one the balance of probabilities;**
- c) Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.”**

27. The Applicant herein has not adduced any evidence to prove that the formalities for a customary marriage of any community were conducted between herself and the Deceased. Likewise the Applicant has not called any evidence to prove a “**presumption of marriage**” between herself and the deceased.

28. The Applicant contended that she had five (5) children with the deceased. This fact would not in itself give a presumption of marriage between the Applicant and the deceased.

In **Re Estate of Kihara Thatu (Deceased) (2019) eKLR**, the Court observed as follows;

**“.....Evidence of children between a man and a woman is not necessarily evidence of long**

**cohabitation. The petitioner needed to call evidence to show that she had a long cohabitation with the deceased and that they held each other out as man and wife. As stated in the case of MWK vs AMW (supra), there has to be evidence that the long cohabitation is not a close friendship between a man and a woman, that she is not a concubine but that the cohabitation has crystalized into a marriage and that it is safe to presume that there is a marriage. The Judge in the MWK VS AMW case went ahead to state, 'Since then, our case law has been consistent in following the English Common Law in requiring that a presumption of marriage arises only when a person proves two factual predicates:**

**a. Quantitative element - namely the length of time the two people have cohabited with each other; and**

**b. Qualitative element - namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative elements include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account - and so forth.”..... These factors in my view must be applied conjunctively and not disjunctively. I am fortified in this holding by the realization that for example a man and a woman may have children over a long period of time yet they continue living separate lives hence no presumption of marriage can be made. At other times a man and woman may be engaged in business together for long yet that alone does not lead to a presumption of marriage. It**

is the sum total of the factors that leads to the presumption must of necessity put in evidence which, or a balance of probabilities, demonstrates the quantitative and qualitative elements alluded to above (see MWK vs AMW case). 46. In our instant case, other than stating that she cohabited with the deceased from 1988 and they bore two (2) children, the petitioner provided no evidence of such cohabitation and repute that the two (2) held out as husband and wife. She did not call any member of the community in which they lived or even a family member to prove the cohabitation and general repute of a husband and wife.”

29. The Applicant sought to rely on a letter from the chief dated **7<sup>th</sup> August 2023** (Annexure **SWM '2'**) to the Supporting Affidavit dated **18<sup>th</sup> September 2023**) in which letter it is indicated that the Applicant was the second wife to the Deceased. A letter from the chief is not proof of the

existence of a marriage. Secondly the author of the letter i.e the chief was not called to testify. Thirdly in that same letter the chief went on to allege the commission of fraud by the Respondent without tendering any evidence of said fraud. Fraud is a Criminal offence and mere allegations of fraud will not suffice. There is no evidence that the chief (who is a government official) or the Applicant made a report to any authority regarding this alleged fraud. Finally this letter was not addressed to the court but was addressed to the **land Registrar Meru**. I find that the letter on its own is not proof of the existence of a marriage between the Applicant and the Deceased and I find no evidence that a marriage existed between the two.

30. The Applicant further claimed that she had five (5) children with the Deceased all of whom were dependants of the Deceased and therefore entitled to a share of his estate. Firstly the fact that the applicant bore children with the Deceased (which has not been proved) is not evidence of the existence of a marital union. No proof has been tendered that these five (5) children were sired by the deceased. The

Applicant did not produce the birth certificates of any of the said children. Likewise the Applicant did not tender any evidence to prove that the five (5) children were being cared for and maintained by the Deceased immediately prior to his death - in other words there is no evidence of dependency.

31. Finally I find no merit at all in this summons for revocation of Grant. The same consists of bare allegations with no evidence to support said allegations. Having failed to prove that she was a wife to the Deceased the Applicant cannot accuse the Respondent of failing to disclose her existence to the court. Accordingly I dismiss in its entirety the summons for revocation of Grant dated **4<sup>th</sup> April 2025**. No orders on costs.

**Dated in Nyeri this 24<sup>th</sup> day of April, 2026**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL