

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

FAMILY APPEAL NO. E004 OF 2024

ANN NJERI NDEGWA.....APPELLANT

-VERSUS-

ANN NJOKI KANURI.....RESPONDENT

JUDGMENT

- 1. Ann Njoki Kanuri**, the Respondent, approached the court through a citation to accept or refuse Letters of Administration Intestate directed to the Appellant, **Ann Njeri Ndegwa**, in respect of the ***Estate of Joel Njuguna Kareri (Deceased)***. The Citor urged that just like the Citee she was the deceased's widow.
- 2.** The Appellant contested the citation. Her argument being that the Citor conspired with some of her in-laws to disinherit her and she was not a wife of the deceased but his colleague who claimed his life; and, that the deceased did not leave behind any estate. She disputed the allegation that the deceased sired children with the Citor. Further, that the deceased's pension or benefits are not subject to succession proceedings as they are funds of a nomination that cannot vest in his personal representative subject to **Section 36A of the Retirement Benefits Act as read with Regulation 23 of the Retirement**

Benefits (Occupation Retirement Benefits, Scheme) Regulation 2000.

3. Upon consideration of the Citation, by a Ruling dated 15th October, 2024, the Appellant was ordered to take out Letters of Administration within 30 days Intestate, and, in default, the Chief, Maina Location would be at liberty to issue an introduction letter to the Respondent to facilitate filing of a substantive petition for the grant.
4. Aggrieved, the Appellant proffered an appeal on grounds as follows;

1) That the learned trial Magistrate erred in law and fact by ordering the Appellant to take out letters of administration without first and foremost satisfying himself that the deceased left an estate capable of administration and on the basis of which the Citation could be entertained.

2) That the learned trial Magistrate erred in law and fact by failing to determine the issue whether or not the deceased left an estate capable of administration despite the issue having been framed for his determination and being an issue that was central to the determination of the citation.

3) That the learned trial Magistrate erred in law and fact by failing to appreciate that the provisions of the Law of Succession Act (CAP 160) only come into play where a deceased person left an estate (testate or intestate) and therefore the Citation was incompetent to the extent that the deceased did not leave an estate capable of administration.

4) That the learned trial Magistrate erred in law and fact by failing to find that the orders sought by the Respondent were in vain since there was no estate to be administered and courts do not issue orders in vain.

5) That the learned trial Magistrate erred in law and fact by finding that the Respondent had shown that she had shown bonafide in the estate whereas;

- i) The existence of the alleged estate was not proved.**
- ii) Her alleged marriage to the deceased was not proved.**
- iii) Paternity of her alleged children was not proved.**

6) That the decision of the learned trial Magistrate is against the law and weight of evidence on record.

- 5.** The appeal was canvassed through written submissions. It is urged by the Appellant that the deceased did not leave behind any estate that is capable of Administration. That contrary to the Respondent's averment that the deceased left some two (2) plots at Mairo Inya and ½ plot at Kagwe, Kiambu, she failed to tender evidence of existence of the plots; and, the allegation that he was registered as the owner of the plots as an agreement of 22nd April, 2009 is not proof of ownership.
- 6.** That it is not disclosed that the deceased left behind pension/gratuity benefits which are subject to succession.
- 7.** Further that the Respondent has no bonafide interest in the estate of the deceased, she is a stranger as there was no evidence whatsoever that she was married to the deceased.
- 8.** On her part the Respondent submits that as stated in the supplementary affidavit, the Respondent attached an agreement dated 22nd April, 2009 which shows that he bought 1/2 an acre of land to be excised from L.R. No. Gatamaiyu/Kagwe/1646 for which he paid Kshs.100,000/- before the deceased and Respondent started cohabiting. That the Appellant confiscated documents for 2 plots at Miaro Inya, issues to be addressed substantively in the

petition. That Citation proceedings are to trigger a substantive succession cause. That the agreement forms prima facie evidence that indeed the deceased has property either in form of the money paid or the property itself and liabilities connote to the estate.

9. On the question of gratuity, it is urged that there is no indication of who was nominated hence the personal representative should be given the gratuities. That per **Rule 22 of the Probate Administration Rules**, the Respondent was qualified in the first priority by dint of being the deceased's wife.

10. This is a first appeal. The court has a primary duty to re-evaluate and analyze the entire record of the trial court hence coming up with independent conclusions. In **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** it was stated that;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212

wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

- 11.** The Respondent herein sought to have the court compel the Appellant take on the role of administration of the Estate of the deceased. She acknowledged the Appellant as the spouse of the deceased hence a person interested in the Estate who could institute the petition for letters of administration to speed up the legal process. She further argued that she would take up the action to ensure that the estate is managed if the Appellant was not interested as she was in a position to do so.
- 12.** In using the test of Citation to trigger the Appellant to petition for letters of Administration, the Respondent

describes herself as a widow of the deceased, with some entitlement to the estate.

13. Section 66 of the Law of Succession Act provides as follows;

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be

granted to any executor or executors who prove the will.

14. Ordinarily, a spouse would have a priority to petition for letters of Administration, and, the Respondent described herself as a widow. The law recognizes a spouse to be one in a valid marriage. **Section 3 of the Law of Succession Act** defines “spouse” as;

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

A woman married under customary law would qualify to be a spouse.

15. It is averred that the Respondent got married to the deceased in 2017 under the Kikuyu Customary Law. The Respondent supports the argument by a statement of the deceased’s sisters, a copy of eulogy and birth certificates of children, documents dismissed by the Appellant as no proof of marriage.

16. The Appellant herein did not allude to having married the deceased in any other marriage other than customary marriage which is potentially polygamous. However, she has been acknowledged by the Respondent as the first wife of the deceased, despite lack of a marriage certificate.

17. For the Respondent, similarly there was no registration of the alleged marriage between the Respondent and deceased hence what was required was proof of payment

of dowry or performance of specific cultural ceremonies that were not alluded to. There is a document authored by Ruth Nyambura and Serah Njoki stated to be authored on behalf of the family of the deceased with an intention of withdrawal of the traffic case which was however concluded. They did recognize the Respondent as a wife of the deceased, which would have been subject to proof on a balance of probabilities.

18. In **MNM v DNMK & 13 Others [2017] eKLR** it was held that;

“To prove a valid Kikuyu customary marriage, E was obliged to adduce evidence showing on a balance of probabilities the essential rites and ceremonies, without which a Kikuyu customary marriage is not valid, were performed. On the essentials of a valid Kikuyu customary marriage, Dr. Eugen Cotran, in his seminal work Restatement of African Law: Kenya Volume 1 The Law on Marriage and Divorce (supra) explains that no marriage is valid under Kikuyu law unless the ngurario ram is slaughtered and that there can be no valid marriage under Kikuyu law unless part of the ruracio has been paid. (See also Zipporah Wairimu v. Paul Muchemi, HCSCNO 1880 of 1970). These are the rites that E readily admitted were not performed on account of her

father's Christian background, and yet she was insisting that she was married under Kikuyu customs.

Although she later on changed track and insisted that dowry was paid and ngurario performed, there is no credible evidence on record to prove that. It is inconceivable that the ngurario ceremony could be performed by a few people in a hurry, as she testified, on a day when the family was also involved in a funeral, and also in the absence of the deceased, who with E would have been the stars of the ceremony and responsible for cutting the lamb's shoulder. It is also far fetched to claim, as she did, that a different person represented the deceased in such an important ceremony. As this Court observed in Eliud Maina Mwangi v. M Wanjiru Gachangi."

- 19.** The two signatories did recognize that children were involved in the relationship. Apparently, children can be born out of wedlock and such children should be recognized as dependents for purposes of inheritance. (See **Section 29 of the Act**).
- 20.** In the supplementary affidavit the Respondent deposed that their marriage was based on a presumption of marriage, the basis being the eulogy.

21. In the matter of the **Estate of Morris Kilonzo Musyimi (Deceased) Succession Cause No. 261 of 2007** Odunga J (as he then was) had this to state;

“46. That the concept of presumption of marriage exists in our jurisdiction is no longer in doubt. In fact that concept has a statutory underpinning and this was recognized by the Court of Appeal in Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie Civil Appeal No. 20 of 2009 [2010] 1 KLR 159 where it was held that:

“There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the Evidence Act, Cap 80, Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and

private business, in their relation to the facts of the particular case.”

- 22.** Although no evidence was called by the community to prove that the Respondent and deceased cohabited for the duration, a period within which two (2) children were sired, the birth certificates of the children have the name of the deceased as the father of the children, though this is not in itself sufficient proof of presumption of marriage. Having children perse does not create a legal marriage.
- 23.** A funeral program was drawn. In the eulogy, both the Appellant and Respondent are stated to be wives of the deceased. The conclusion reads *“He has left behind two (2) wives and four children”*. This requires some other evidence to confirm existence of marriage. Two of the sisters of the deceased consider the Respondent a wife of the deceased. Since no other family member confirmed long cohabitation, it would be a matter subject to proof.
- 24.** It is also argued that the Respondent did claim the deceased’s life who is not entitled to administer his estate. **Section 96 of the Law of Succession Act** provides that;

1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons

beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer had died immediately before the murdered person.

2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.

25. The Respondent was convicted and sentenced for a traffic offence where the deceased was a victim who lost his life. Being a traffic case, which resulted following the negligence of the Respondent, there was no intent to kill. The only question that would arise is if the estate of the deceased were to institute a claim against her under the **Fatal Accidents Act and Law Reform Act**. It may not be in the interest of justice to have her administer the estate.

26. Notably, this court takes judicial notice of a suit **Nyahururu CM's Succ. Ad-Litem E037 of 2024** where the Appellant did institute a matter seeking grant of letters of Administration Ad-Litem. Upon being granted she instituted a civil claim and she pleaded that;

"..by reason of his death his estate has suffered loss and damage and hereby claims damages."

- 27.** A person being appointed as an Administrator is expected to act in good faith. Such a person would be expected to be of integrity since there will be need to account for acts performed. Making such denials not only means that she has approached the court without utmost good faith, but, makes the court wonder if indeed she can secure assets and settle liabilities that have to be paid from the estate. The Appellant has proved to be unfaithful by concealing material facts.
- 28.** The Appellant was granted the opportunity to take up administration of the estate but declined and appealed. Her only concern is the gratuity of the deceased which indeed is determined under another law regime per the statutory provision.
- 29.** All in all, it is clear, that in this particular matter the Appellant has no interest in petitioning for Letters of Administration Intestate in respect of the estate of the deceased. This being the case, the appeal succeeds to the extent that this court sets aside the decision/order of the trial court directing the Appellant to take out Letters of Administration Intestate within a specified period, which is substituted with an order for any beneficiary(ies) with a beneficial interest to take out the same within 30 days. In default, the Public Trustee may act.
- 30.** Each party to bear their own costs of the appeal.
- 31.** It is so ordered.

**Dated, signed and delivered virtually this 13th day of
May, 2026.**

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L.N. MUTENDE
JUDGE