



REPUBLIC OF KENYA



KENYA LAW
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**Wabule & 3 others v Elegwa (Civil Appeal 20 of 2022)
[2025] KEHC 1177 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 20 OF 2022
RPV WENDOH, J
FEBRUARY 27, 2025**

BETWEEN

**BEATRICE SIMULI WABULE 1ST APPELLANT
EUNICE NYARIARA NG'ANGA 2ND APPELLANT
ISABELLAH ASHIKHUNYU SHIRESI 3RD APPELLANT
BRIGIT NAFUNA JUMA 4TH APPELLANT**

AND

BEATRICE NAMALWA ELEGWA RESPONDENT

JUDGMENT

1. The Appellants Beatrice Simuli Wabule, Eunice Nyariara Nganga, Isabella Ashikhunyu Shiresi and Brigit Nafuna Juma filed this appeal challenging the ruling of SRM Kitale rendered on 6/6/2022. In the Memorandum of Appeal, the appellants raised nine grounds of appeal which were supported by their written submissions dated, 9/6/2024. The appellants were represented by Teti & Co., Advocate.
2. The appeal was opposed and the Respondent's filed their written submissions dated 19/8/2024.
3. The background of this matter is that the appellants filed summons for revocation of grant dated 31/8/2020 seeking inter alia, revocation of grant issued to the Respondent on 1/8/2020. The court dismissed the application and the said ruling provoked the instant appeal. The grounds of appeal were condensed into five grounds. This being a first appeal the court is required to examine and analyse, the evidence tendered in the lower court and come up with its own findings.
4. The first issue is argued in ground 1 and 2; that the trial magistrate misdirected himself by finding that the children's birth certificates tendered in court were not conclusive evidence of the deceased's paternity; that they were sufficient proof as the deceased was named therein as the children's father hence they were the deceased's dependents; that the matter having been ordered by the magistrate



- to proceed by way of written submissions on 17/1/2022, that the Respondents did not insist on production of original or certified copies of birth certificates and the court did not raise any issue with the annexures. Lastly, that the children had been named in the Chief's letter dated 25/7/2029 Counsel relied on section 3(2) of the Law of Succession Act which defines a child for purposes of succession.
5. The second issue was canvassed in grounds 3 and 6; that the trial court erred by finding that the appellants were not the deceased's dependant's; Counsel submitted that the appellants annexed affidavits of marriage which were not contested by the Respondent. In addition, Counsel relied on the birth certificates of the children that bore both the appellants names and deceased as the father; that the court erred in finding that the deceased had no capacity to marry the appellants because he was legally married to one wife, the respondent, in 1989 and solemnized the marriage on 30/8/1996 at the DC's office Kitale.
 6. The third issue is found in ground 6 in which the appellants urged that by holding that the birth certificates were not conclusive evidence and that the deceased was the father of the named children, the trial magistrate disinherited the said children who were the deceased's dependants under section 29 of the Laws of Succession Act. Counsel argued that the court failed to uphold the best interest of the child as envisaged under Article 53(2) of the Constitution and the section 4 (2) of the Children's Act; that the court had a duty under section 47 and Rule 73 of the Laws of Succession Act to call for the production of the original or certified copies of the birth certificates. In the same vein, Counsel argued that the court also contravened section 29 of the Laws of Succession Act in holding that the appellants were not wives of the deceased.
 7. In ground 4, the appellants content that the court erred in finding that the Chief's letter dated 25/7/2029 was overridden by the Deputy Commissioner Kiminini's sub-county's letter of even date. In the letter of the Deputy Commissioner, to the Respondent, it was indicated that the Respondent and her children were the bona fide dependent of the deceased's estate. It is Counsel's contention that succession cases begin with introductory letter from the Chief of the area where the petitioner resides; that it is the Chief and not Deputy Commissioner who is in close proximity of the deceased's family and able to know the beneficiaries; that the practice of the court is that only the Chief's letter is recognized as the introductory letter. They relied on the decision in *Re Estate of Ambutu Mbogori (2018) eKLR* cited in *Re Estate of Magangi Obuki (deceased (2020) e KLR*.
 8. Grounds 5, 7 and 9 were argued as the fifth issue, that the trial court erred by finding that the appellants had not proved any of the grounds for revocation of grant. Counsel considered the various grounds for revocation of grant provided under section 76 of the LSA.
 9. As to whether the proceedings were defective in substance, it was urged that the appellants proved that the proceedings were filed in secret and contrary to Rule 26 of Probate and Administration Rules that requires the applicant for grant of letters to notify every person entitled to apply for administration; that the appellants had equal right to apply for grant of representation and should have been notified. As to whether the grant was obtained fraudulently by making a false statement or concealing from court material facts, it was urged that the Respondent informed the court that only her and the children were dependant's when she knew the contrary.
 10. On whether the grant was obtained by untrue allegation of fact in point of law, Counsel relied on Section 51(2) of the Laws of Succession Act which requires the Respondent to disclose all the surviving spouses and children and reliance was made on the case of *RE Estate of Moses Wachira Kimotho Succession Cause 122 of 2002 (2009) eKLR* and *Re Estate of Julius Ndubi Javan (deceased) (2018) eKLR* where the courts underscored the need to make full disclosure of all material facts. Counsel urged that the Respondent failed to disclose all material facts.



11. The Respondent responded to all the issues raised. On grounds 1 and 2, Counsel submitted that section 79 as read with Section 51 of the Evidence Act provides that copies of public documents such as birth certificate must be certified to prove the contents, and relied on the decision of Kenneth Nyaga Mwige & 2 others -V- Austin Kigula & 2 others (2015) eKLR which detailed how documents should be admitted in evidence; that the said birth certificates were not certified hence could not be conclusive evidence of the weighty issues of paternity and that the court was right in its finding.
12. As regards the issue raised in ground 3 and 6 it was argued that the issue is whether the appellants are wives of the deceased within the meaning of section 3 of Law of Succession Act and the marriage Act; that the deceased and Respondent had celebrated a civil marriage in 1996 and the marriage certificate was annexed; that the appellants produced affidavit's as proof of marriage but that cannot be conclusive proof of a marriage in terms of section 59 of the Marriage Act and relied on the decision of RE estate of Joshua Apiyo Ongany (2023) eKLR where the court held that an affidavit was not proof of a marriage. Counsel also submitted that the affidavits were filed long after the deceased died and that veracity was therefore put to question it was also submitted that a civil marriage is monogamous in nature and that section 6(1) and 11 of the Marriage Act precludes a party already in a civil marriage from conducting any other marriages; That the deceased lacked capacity to enter into another marriage; that for the appellants to rely on a presumption of marriage, they had to fulfil the criteria enunciated by the Supreme Court in Kangara -V- Mayaka; Initiative for Strategic Litigation in Africa (Amicus curiae) (2022) eKLR. Counsel urged the court to dismiss that ground. The third issue was raised as ground 6, that failure to accept the birth certificates as evidence disinherited their children and infringed on their rights as children and contravened section 29 of the LSA. As submitted earlier, without proof of paternity, the children could not be recognized as dependants. Counsel urged that there is a compromise available if the appellants are able to satisfy this court to their paternity, it can be rectified by amendment to the list of beneficiaries by adding the children's names.
13. The fourth issue relates to ground No. 4 which is a challenge to the discounting of the Chief's letter in favour of the Deputy County Commissioner's letter issued to Respondent. Counsel argued that a Chief's letter of introduction is merely persuasive for the court to identify the deceased's next of kin and cannot be above challenge. Counsel relied on the decision of Estate of Mukhobi Namonya (deceased) (2020) eKLR where the court discussed the role of the Chief's letter in succession proceedings; that in any case, the Chief had refused /ignored to issue the letter to the respondent and that's when she approached the Deputy County Commissioner for issuance of introductory letter.
14. For the last issue grounds 5, 7 and 9 on whether any ground for revocation under section 76 Law of Succession Act was proved; As to whether the grant was defective Counsel urged that Rule 26 & A Rules must be read with Section 7 of LSA; that Section 7 outlines the procedure for petitioning the court for grant; Counsel relied on the case Nanzala Mulunda (2023) eKLR where the court considered Rule 26 P & A Rules and Section 7(7) of Laws of Succession Act; that rule 26 became operative where the petitioner has an equal or less right than others not petitioning for grant; that to the contrary, the appellants were not proved to be the deceased's wives hence they could not have been sent consents for signature without legal basis being shown; that the appellants have not explained why they did not file objections to the petition when first filed, after gazettement.
15. As regard section 76(b) of the Act, on concealment of material facts, Counsel argued that Form 38 could not have been sent to person not proven to be a spouse of the deceased. Similarly, the children were also strangers to the Respondent.
16. As regards non-disclosure under section 76 (C), it was argued that the appellants must show deliberate non-disclosure; that section 51 Laws of Succession Act was complied with as all the known beneficiaries



were included in the supporting affidavit of the petition. Counsel relied on the case of *Serah Nduta Ndungu -V- Peter Kinyanjui Ndungu & another* (2017) e KLR where the court declined to revoke the grant just because some children had been left out of the list of beneficiaries.

17. Counsel urged the court to find that there is no basis to disturb the trial court's finding and dismiss the appeal.
18. I have duly considered the grounds of appeal, the Record of Appeal and the rival submissions on record. It is not in dispute that the birth certificates which were annexed to the appellant's affidavits (BSW3) were not original documents nor were they certified as true copies of the original.
19. Admissibility of documents is provided for in section 64 of the *Evidence Act* which states that the contents of documents may be proved either by primary or secondary evidence. Section 65 defines what constitutes primary evidence Section 67 of the *Evidence Act* provides that documents must be proved by primary evidence, except as provided for under section 68 (1) of the Act and the relevant part states; "Section 68 (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases; -
 - (e) where the original is a public document within the meaning of section 79 of this Act.
 - (f) when the original is a document of which is a certified copy is permitted by the *Evidence Act* or by any written law to be given in evidence."
20. Section 68 (2) (k) of the *Evidence Act* further provides that in the case of public documents, the only secondary evidence admissible are certified copies. The subsection reads;

"Section 68(2) (c) in the cases mentioned in paragraph (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible."
21. Public documents are defined in section 79 of the *Evidence Act* as follows (1)(b)(2):

"All documents other than public documents are private"
22. In this case, birth certificates fall under paragraph 79 1 (b):

The manner of certification of public documents is provided for under section 80 of the *Evidence Act* as follows; -
 80. Certified copies of public documents (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. (2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section
23. Section 68 (2) (C) as read with section 81 of the *Evidence Act* provides that secondary evidence of public documents can only be through certified copies. The Court of Appeal while dealing with Section 68 (2) of the *Evidence Act* stated thus "Also, in our opinion, a copy of a document which is not certified



is inadmissible and the court may not look at it because of the provisions of section 67 and 68(1) (e) and (f) and 2 (a) of the *Evidence Act*”

24. This court appreciates the fact that the summons for revocation, the subject of this appeal proceeded by way of written submissions and so admission of documents would not have been as per the detailed procedure set out in the case of Kenneth Nyaga Mwige (Supra) but it was expected that the appellants annex to their affidavit, certified copies of the birth certificates which they failed to do and hence the same could not be deemed to be conclusive evidence of the paternity of the said children.
25. Section 3(2) of the *Law of Succession Act* defines children for purposes of succession, as follows; -

“References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born of 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”
26. The appellants had the onus of proving that the children belonged to the deceased by production of certified birth certificates or proof that the deceased had accepted the children as his and had assumed responsibility for them, that was not done
27. Having given this matter due consideration, I am of the view that the issue of paternity of the subject children should not have been determined by way of submissions because even if a birth certificate is certified, its authenticity can still be challenged unless it’s produced by consent. As held in the Kenneth Nyaga case (Supra) the mere admission of a document in evidence as an exhibit should not be confused with proof of the document. Although the appellant’s counsel did not object to the court proceeding with the matter and determining it on the basis of written submissions, this court is of the view that by proceeding in that manner, the trial court denied the appellants an opportunity to present their case hence violated their right to fair hearing. As can clearly be seen on the court record, the parties had preferred to proceed with the matter by way of viva voce evidence but for some reason, the magistrate unilaterally made the order to determine the matter on submissions. I think that the appellants were prejudiced by the said order and the right to fair hearing denied them. So even though this court may have found that the appellants failed to prove paternity on the basis of the uncertified birth certificates, I find that they should be given an opportunity to be heard on that issue. Section 47 of the Laws of Succession Act gives this court inherent jurisdiction to grant orders that may be expedient or for the ends of justice to be met. It would be an injustice if the court locked out genuine dependants of the deceased. It is on that basis that this court will order that the matter be remitted back to the Magistrates court to be heard by way of viva voce evidence on the issue of paternity only so that injustice is not visited on the subject children. In their submissions, the Respondent’s Counsel indicated that they were ready for a compromise if the appellants proved paternity.
28. Ground 6 is closely related to the first and 2nd grounds., Where the appellants contend that the trial court disinherited the Respondent’s children since the court held that the birth certificates were not conclusive evidence that the deceased was the father of the children. It is true that Article 53(2) of *the Constitution* provides that in matters concerning children, the best interests of the child shall be a primary consideration. However, I think that Article 53 of *the Constitution* deals with children who are minors under the age of eighteen (18) years of age. In this case, the applicant’s children are all adults as can be deduced from the attached birth certificates. Article 53 of *the Constitution* would not apply to them. Children of a deceased person are covered under section 3(2) of the LSA.



30. In ground 3 and 6, the lower court is alleged to have erred by finding that the appellants were not the deceased's wives. The affidavits that the appellants purported to rely on as proof of marriage were sworn by each of the appellants on 24/7/2019 whereas the deceased died on 22/04/2019. The affidavits were not jointly sworn with the deceased. The said affidavits could not be a basis for the court to find that there existed marriages between the deceased and the appellants. Section 3 of LSA defines 'spouse to mean a husband or a wife or wives recognized under the *marriage Act*'. See page 11 section 59.

Section 3 of the *marriage Act* defines marriage to be“the voluntary union between a man and a woman. It also states that both parties to a marriage have equal rights.

Section 6(1) of the *Marriage Act* recognizes the following kinds of marriages

6.

- (1) A marriage may be registered under this Act if it is celebrated—
 - (a) in accordance with the rites of a Christian denomination;
 - (b) as a civil marriage;
 - (c) in accordance with the customary rites relating to any of the communities in Kenya;
 - (d) in accordance with the Hindu rites and ceremonies; and 39 2014 Marriage No, .4
 - (e) in accordance with Islamic law.

Section 11 *Marriage Act* provides as follows;

11. Void marriages

- (1) A union is not a marriage if at the time of the making of the union—
 - (a) either party is below the minimum age for marriage;
 - (b) the parties are within the prohibited marriage relationship;
 - (c) either party is incompetent to marry by reason of a subsisting marriage;
 - (d) by order made under section 25, the court has directed that the intended marriage is not to be contracted;
 - (e) the consent of either party has not been freely given;
 - (f) either party is absent from the ceremony;
 - (g) both parties knowingly and willfully permit a person who is not authorised to do so to celebrate the union;



- (h) either party is mistaken about the identity of the other party; or
 - (i) either party knowingly or willfully enters into the marriage for fraudulent purposes.
 - (2) Consent is not freely given where the party who purports to give it—
 - (a) is influenced by coercion or fraud;
 - (b) is mistaken as to the nature or purport of the ceremony; or
 - (c) is suffering from any mental condition whether permanent or temporary, or is intoxicated, or is under the influence of drugs, so as not to appreciate the nature or purport of the ceremony.
31. Section 6(2) of the *marriage Act* stipulates that a Christian, Hindu or civil marriage is monogamous. Section 6 and 11(C) of the *marriage Act* therefore preclude a party who has already undergone a civil marriage from entering into any other marriage. In the instant case, the deceased and the Respondent had celebrated a civil marriage on 30/8/1996 and therefore the deceased had no capacity to contract any other marriage unless he dissolved the said civil marriage
32. Section 59 (1) of the *Marriage Act* provides on how a marriage may be proved in Kenya
- 59.
- (1) A marriage may be proven in Kenya by— Evidences of marriage.
 - (a) a certificate of marriage issued under this Act or any other written law;
 - (b) a certified copy of a certificate of marriage issued under this Act or any other written law;
 - (c) an entry in a register of marriages maintained under this Act or any other written law;
 - (d) a certified copy of an entry in a register of marriages, maintained under this Act or any other written law; or
 - (e) an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra' communities, or a certified copy of such an entry.
33. In the end, I do agree with the trial magistrate that the appellants did not prove that they were married to the deceased and grounds 3 and 6 must fail.
34. The trial court's decision was also faulted for finding that the appellants had not proved grounds for revocation of grant under section 76 of the LSA.



35. Under Section 76(a) LSA a grant will be revoked if the proceedings were defective. In this case, the Respondent was alleged to have applied for the grant secretly, contrary to rule 26 of the P & A Rules, Rule 7 of the P & A provides for the manner for petitioning for grant. Rule 26 of P & A rules provides
- “Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
2. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent, in form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”.
36. When considering the above Rule, Judge Musyoka had this to say in HSCAP. 1/2021 Mary Nanzala -V- Joseck Kitui Mulunda; Rule 26, like 7(7) applies to cases where the petitioner is a person who has a lesser or equal right with other persons who are not applying for the grant. Rule 26(1) states the position that no grant is to be made to any person without notice to any other person entitled in the same degree as or in priority to the petitioner. What this means is that a petitioner for representation must notify all the persons who are entitled to representation at a degree of priority higher or equal to his. Rule 26(1) boosts Rule7(7) and goes beyond it.”
37. None of the appellants were proved to be spouses of the deceased hence the Respondent had no duty to notify the appellants of her intention to file these proceedings or send them consents to sign.
38. As to whether the grant was obtained through misrepresentation and concealing of material facts (section 76 (b), Again the Respondent could not have concealed the filing of this cause to strangers.
39. As respects the allegation of non-disclosure section 5 (1) (2) (g) of LSA requires the Respondent to disclose all the surviving spouses and children of the deceased. The said section provides “51 (2) (g) every application shall include information as to in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers, and sisters of the deceased, and if children of any child or his or hers the deceased”.
40. I do agree with the findings of the court in Re Estate of Moses Wachira (Supra) and Re Estate of Julius Ndubi (Supra). In the letter, Judge Gikonyo expressed himself thus
-in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case including succession cases.
- non-disclosure of material facts undermines justices and introduces festering waters into pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law.
41. In the instant case, the appellants have not proved that they were the deceased’s spouses nor have they proved that their children were deceased’s children or dependants. There was no basis for the Respondent to include them as beneficiaries of the estate.
42. In the end, I find that the appellants did not satisfactory prove the grounds for revocation under section 76 of the Laws of Succession Act and the Magistrates Judgment cannot be disturbed.
43. The last issue is found in ground 4 where the appellants fault the trial court for discounting the Chief’s letter of introduction in favour of that of the Deputy County Commissioner (DCC) Both letters were issued on 25/7/2029. The Respondent contends that she went to the DCC for the Letter of



introduction after the Chief failed to accede to her request for the letter. The question here is really what weight does the introduction letter by the Chief carry. J. Gikonyo in RE Estate of Magangi Obuku observed,

the petitioner committed other sins; he initiated these proceedings without a letter of introduction from the chief. This letter serves an important purpose in the ascertainment of the deceased, the dependants as well as the properties of the deceased”.

44. In Mukhobi Namonya (supra) Judge Musyokas said “the Chief has no role in succession proceedings beyond what I have stated in paragraph 2. There is no role for the Chief to play in the distribution of the assets. He should simply give the court the names of the survivors, he has no duty of suggesting how the estate should be distributed. Distribution of an estate is the responsibility of the court, guided by the provisions of the *Law of Succession Act* and customary law, where the latter is applicable. A letter from the Chief, which does not identify the survivors of the deceased and just throws in names without identifying who those individuals were to the deceased, is of no utility to the probate court. The same case should apply to a letter that tells the court how to distribute the estate without identifying how the person to whom it purports to distribute the property to were related to the deceased”.
45. There is no requirement in law for issuance of the Chief’s letter but it has become a practice of the courts because the Chiefs reside in the villages and are likely to know their subjects. It is not however uncommon that Chiefs tend to be partisan and may deny one party a letter of introduction. Though the Chief’s letter may include the names of the survivors, he has no role in distribution. In many cases, the Chief’s letter may only be a guide and may not be conclusive as to who the actual beneficiaries are. The exact beneficiaries have to be identified and agreed upon by the parties or it has to be proved during the hearing of the matter. In the instant case, even with the Chiefs letter, the appellants could not have proved paternity or that they are the deceased’s wives and whether or not the Chief’s letter was not recognized by the court, it did not make a difference in the determination of the case.
46. In the end, I find that all the grounds of appeal are devoid of merit save for the first and 2nd ground on the issue of paternity as considered earlier in the judgment.
47. I allow the appeal to that extent and direct that the file be remitted back to the lower court at Kitale to hear and determine the issue of paternity only and directions on confirmation of grant can be given after the issue of paternity is determined.

Each party to bear its own costs.

DATED, SIGNED AND DELIVERED ON 27TH DAY OF FEBRUARY, 2025

HON. R.P.V. WENDOH

JUDGE

Judgment delivered in open court virtually in the presence of
Appellant Ms. Akwabi holding brief for Mr. Teti for appellants.

Respondent Mr. Okumu

Juma/Hellen- Court Assistants

