



In re Estate of Geoffrey Nyaga Kamau (Deceased) (Miscellaneous Succession Cause 11 of 2007) [2024] KEHC 4041 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 4041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS SUCCESSION CAUSE 11 OF 2007**

SM MOHOCHI, J

MARCH 19, 2024

IN THE MATTER OF THE ESTATE OF GEOFFREY NYAGA KAMAU (DECEASED)

BETWEEN

FLORENCE ALVIZA APPLICANT

AND

LEAH MUTHONI NYAGA RESPONDENT

RULING

1. Before Court for determination is the Summons for Revocation of Grant filed on November 15, 2007 on the grounds that the Grant confirmed on August 17, 2005 that the Grant was obtained fraudulently by concealment of material fact, that the proceedings obtaining the Grant were defective. She also sought that the Respondent be restrained from administering the estate of the deceased as well as an order that the Grant was obtained by means of untrue allegations of facts.
2. The application was supported by the sworn affidavit of the Applicant dated August 23, 2007. She stated that she was the 2nd wife of the deceased having been married in 1992. The deceased paid Kshs. 10,000 to the applicant's father as dowry on April 15, 1997. That the ceremony had witnesses and annexed "Exb FA-1". She stated that she came to learn of the succession when the Respondent evicted her and her daughter from Kiosk at site & service 11 No. K9A the property belonging to the deceased.
3. That she proceeded to the chief of Gathanji Location who informed her that he wrote a letter on November 2, 2004 to the Respondent. That she went to the District Commissioner's office who wrote a letter to the chief advising him to include the Applicant and her daughter. That the Respondent failed to disclose this fact and proceeded to obtain both grants secretly. That her consent was never sought nor informed to attend court during confirmation of Grant. That together with her child she was disinherited and seeks annulment.



4. The Summons were opposed by the Replying Affidavit sworn and filed by the Respondent on January 21, 2008. She stated that she was the sole wife of the deceased having been married in 1958 and subsequently solemnized on January 1, 2002.
5. She stated that prior to the deceased's death, the deceased instituted Nyahururu PMCC No. 91 of 2004 which he sought and order of eviction as against the Applicant. The case was heard and judgement delivered in favour of the deceased. An order of eviction was issued. That during the proceedings of the case, the Applicant was aware that the Respondent had filed a succession cause vide Nyahururu PMCC Succession Cause No. 180 of 2005 and never filed an objection.
6. She added that the Applicant's claim the she got married to the deceased was dealt with in Nyahururu PMCC No. 91 of 2004 and was dismissed. That the issue of marriage having been dealt with cannot be adjudicated upon for a second time. That the Applicant being a stranger to the deceased's estate could not have been involved in filing and prosecution of succession proceedings and her presence was not required or necessary. That the Applicant and her purported child are not entitled to a share of the estate of the deceased estate.
7. The Applicant filed a further affidavit she stated that out of her marriage to the deceased the Applicant and the deceased were blessed with one child born on June 15, 1993. That she used to pay rates to Nyahururu Municipal council under her name and that of the deceased and continued doing so even after the deceased passed on. That she used to collect rent from parcel Plot Kiosk Number 9A Site Phase 2 while the deceased was alive and eve after the demise of the deceased.

Applicant's Case

8. PW1, Florence Aliviza stated that the Respondent is her co-wife band both of them were married to the deceased. That she was the 2nd wife married under Luhya Customary Law and the deceased paid her father dowry of Kshs 10,000 on April 15, 1997 as dowry at their home Nyahururu and that there were witnesses. That a document was written to support and their union was blessed with one child. That the deceased had 4 other children with the Respondent. That the Respondent knew her as a co wife and her children knew her as their step mother and they knew her daughter. That she lived with the deceased as husband and wife and that she did not pay rent to the deceased. She stated that she used to pay Municipal Council rates and produced the payments receipts as "P Exh-3 (a) (b) and (c)". That together they build two rooms and she build 3 rooms alone. That they rented them and she was collecting rent although the deceased collected rent at times. She produced the rent receipt book "P Exh-4".
9. She also stated that her child was baptized at the salvation Army and produced the baptism certificate dated August 28, 1993 as "P Exh-5". That she attended the deceased funeral and photos were taken, that when she asked for the photos, Solomon Kamau became violent. That she did not know about the succession case and found out later. That she went to the chief in Gathanji who chased her away and told her the issue of succession was complete. She went to the DC Nyahururu who summoned the chief vide latter dated February 19, 2007 produced as "P Exh-6" the chief never appeared.
10. On cross examination, she stated that her ID does not bear the names of the deceased. That the deceased sued her in Nyahururu PMCC No. 91 of 2004 seeking eviction and that he stated that she was not his wife. She stated that in her affidavit in support of her application she stated that she was married under the Kikuyu customs but she was married under Luhya Customs. She stated that she wanted the Court to note that she was married under Kenyan Customary Law though she did not know if such laws existed.



11. That the birth certificate shows the name of the deceased and she got it after giving the registrar the dedication certificate and clinic card. That during the funeral her name and that of her daughter were not in the Eulogy and that the family did not recognize her and her child. That when the deceased and the Respondent got married on January 1, 2002, she was present but she did not oppose as she was a second wife,
12. PW2, Susan Livombolo Nyaga the Applicant's daughter, was 14 years old appeared in Court and was taken through *viva voce* examination and the court was satisfied she understood the import of taking oath. She gave sworn testimony that the deceased was her father and lived together with her mother in the same house. That the Applicant knows her mother and that the deceased used to pay for her upkeep and school fees, though she did not have any of them. That she attended the funeral together with her mother, photos were taken but has not seen them. She added that she loved her father and he loved her.
13. On cross-examination she stated that the receipts of school fees are with her mother, that he used to pay her school fees at Ewaso Effort a school owed by the deceased's son Solomon Kamau. She later went to Starehe Primary but has no documents.
14. PW3, Andrew Mgohi Njunganyi, the Applicant's father, stated that he was paid dowry on April 15, 1997 by the deceased. He produced the document annexure FA1 as "P Exh-7". He was paid dowry in Estate No. 2 where the deceased used to live with the applicant. He attended the burial of the deceased; no photo was taken.
15. On cross examination, he stated that the deceased called him on phone to go to Nyahururu to be paid dowry. That at that time he was residing in Ol Moran in Laikipia East. He did not invite any witnesses and all the witnesses that were present were invited by the deceased and were kikuyus. He admitted that he testified in another case where he stated that he asked the deceased for assistance to take his child to school. He admitted that "P Exh 7" was not signed by him or the deceased though denies it was prepared for this case. He added that he was not aware if the Applicant lived anywhere with the deceased. He further added that the Applicant attended the funeral and photos were taken but she was not in any of the photos that he was shown and did not have photos of the funeral as well.
16. PW4 Stephen Gichuki Mathenge, Registrar of Births in Nyandarua. He stated that on June 25, 2008 an application for late registration was presented by the Applicant. That it met the requirements and he proceeded to register it. He produced receipt as "P Exh-8" and the Birth Certificate as "P Exh-2".
17. On cross examination he stated that from the records, the child was born 15 years before registration and according to the application the child was born in Ol Joro orok. That one can still apply for late registration but it is illegal for one to state the child was born in hospital. That he would be surprised that the child was born in hospital.
18. He added that at times they may issue two death certificates. He stated that the second death certificate dated February 19, 2007 was for school bursary and it would be a surprise if the same was being issued to claim from the deceased estate. That the reason for late registration was that the Applicant thought the clinic card was enough.

Respondent's Case

19. RW1, Leah Muthoni Nyaga adopted her statement and her replying affidavit as evidence.



Submissions

20. Parties were directed to file as serve written submissions. The Applicant's submissions are not on record.
21. The Respondent in her submissions dated and filed on January 11, 2024 submitted that the Applicants claim that she was married to the deceased is *res judicata* having been dealt with in Nyahururu PMCC No. 91 of 2004. She relied on in the case of [Kenya Commercial Bank Limited vs Benjob Amalgamated Limited](#) (2017) eKLR.
22. The Respondent also submitted that the certificate of birth of the existence of a child between the applicant and the deceased was a late registration and according to the Respondent is aimed at bolstering the Applicant's claim. That a birth certificate is not conclusive evidence of paternity or proof of kinship and reliance was place on in the case of [re Estate of Fredrick Marangu Ragwa \(Deceased\)](#) (2020) eKLR as well as [re Estate of Phyllis Wairuri Maina \(Deceased\)](#) (2021) eKLR.
23. Further the respondent submitted that the Applicant has not met the parameters required in such an application under the law and as was highlighted [in re Estate of Benjamin Kiregenyi Muiri \(Deceased\)](#) (2022) eKLR. She prayed that the Summons be dismissed with costs.

Analysis and Determination

24. The first issue is whether the issue of the Applicant's marriage to the deceased was *res judicata* as argued by the Respondent. Section 7 of the [Civil Procedure Act](#) on *res judicata*, reads as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
25. The Court of Appeal held in [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), [2017] eKLR, that:

“[F] or the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

 - a) The suit or issue was directly and substantially in issue in the former suit.
 - b) That former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
26. The proceedings before the Nyahururu PMCC No. 91 of 2004 were proceedings seeking eviction orders instituted by the deceased as to the occupancy of the Applicant in Kiosk at Site & Service 11 No. K9A which property belonged to the deceased. The Respondent was not a party to the suit and only



came in to substitute the deceased upon his death. In this case the issue is regarding a Grant and the Applicant filing a claim against the Respondent as administrator of the estate and claiming a share of the estate for herself and her daughter. There is a clear distinction between the Applicant as a Defendant before the subordinate Court and her position before this court as an Applicant claiming hers and her daughters stake in the estate.

27. Although the Applicant was a party before the Subordinate Court, the issues and orders sought are not the same. The issue before this Court is whether the Applicant is entitled to claim in the estate together with her daughter. The parties are different, the cause of action is different and the Court jurisdictions are different. In the circumstances, the issue does not fit the criteria for holding it *res judicata*. The Court has to determine whether she is a wife of the deceased under the provisions of the *Law of Succession Act* and whether together with her daughter they fall within the definition of beneficiaries.
28. The second issue is whether the Applicant and her daughter are entitled to claim from the estate. The Applicant states that she is the wife of the deceased while the Respondent states that she does not know the Applicant as a wife as she is the sole wife. The Petitioners evidence is that she married the deceased and produced the marriage certificate and lived with him till he died. The Applicant produced a written agreement where the deceased indicate that she was married under the Kikuyu Customary Laws and dowry of Kshs. 10,000 was paid by the deceased to the Applicant's father. The ceremony was witnessed by Maina Karungi, Kamau Chege, Awesi Malongo and James Rwenji.
29. Now therefore was the Applicant married to the deceased? The Applicant averred in her affidavit that she was married under the Kikuyu Customary laws. In considering whether the marriage met the threshold of being considered a marriage under the Kikuyu customs, the Court in *MNM vs. DNM K & 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 *uracio* 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 farfetched 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*:

‘Even if we allow room for evolution and development of customary law, it does not appear to us that *ngurario* under Kikuyu customary law has today transformed into a casual ceremony performed by a delegation of just two people.’



30. There was contradiction as to whether the Applicant was married under the Kikuyu customs since in her sworn statement she stated that she was married under the Luhya customs.
31. Be that as it may, if the Court was to consider that the marriage was formalized under the Luhya Customs the Court has to also consider whether the required customary rights were followed. In *AK M & another v AKA* [2015] eKLR the Court stated that:-

“... Eugene Cotran’s *Restatement of African Customary Law Vol. 1* (The Law of Marriage and Divorce) at Page 50 (Chapter 5 on the Luhya Marriages) has this to say: -

“1. Definition of marriage considerations (Bukhwi):

Bukhwi is a payment or payments of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father (or other guardian) of the bride, which is necessary for the validity of the marriage and to establish the affiliation or legal control of the issue of the union, and which may be repayable in whole or in part on the dissolution of the marriage.

Bukhwi must be distinguished from other collateral payments and gifts made at the time of marriage.”

At Page 52 thereof it is stated: -

“

“7. Effect of non-payment of marriage consideration:

No valid marriage can arise in Luhya law if no Bukhwi is paid. However, a marriage will arise if Bukhwi is partly paid. The family of the wife may sue the husband for the payment of unpaid Bukhwi. The balance of unpaid Bukhwi at the death of a husband becomes the responsibility of the Omulindi”.

32. The take from the above is that for the marriage to stand the test of time, there are traditional rituals that had to be undertaken. Sure, times have changed and in a fast-moving world culture keeps on evolving. However, a son in law does not call his soon to be father-in-law to his home, calls his own delegation and proceeds to pay dowry and the only witnesses to that union are the witnesses of the groom’s choosing. That was so casual.
33. There were also glaring inconsistencies as to how the ceremony took place or was undertaken. There was confusion as to which custom between the Kikuyu and the Luhya that the deceased and the Applicant married under. PW3 also stated that when he travelled to Nyahururu he did not know that it was a dowry negotiation. Doubt was also cast on whether the Kshs. 10,000 paid was for dowry or school fees.
34. Section 107 of the *Evidence Act*, states as follows: -

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



35. It was incumbent on the Applicant to establish the custom she was married under and also establish that even if the dowry process had not been concluded the process had commenced under the required customary threshold. The Court of Appeal in expressed itself in the case of *Njoki -vs- Muteru* (1985) KLR 874 in the following manner: -

“The existence of a custom must be established by the party who intends to rely on it...”

36. There being no evidence of payment of dowry bukwi or *ngurario* no marriage can arise under the Luhya customs or under the Kikuyu customs. This Court therefore finds that the Applicant has not proved her case on a balance of probabilities that there was a valid marriage between the deceased and the Applicant

37. In the same breath, can PW2, the Applicant’s daughter be considered a child of the deceased and a beneficiary of the estate within the law? It is the Applicant’s case that the birth certificate dated June 25, 2008, immunization/clinic card and the dedication certificate dated August 28, 1993 with the name of the deceased included is conclusive proof of her daughter being the child of the deceased. The Respondent, on the other hand argues that a birth certificate is not conclusive proof of paternity. That more so the birth certificate was obtained late after the Applicant had already filed the case.

38. Section 3 (2) of *Law of Succession Act* provides 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, any 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”.

39. It is not in dispute that the deceased knew the Applicant. The Applicant produced the dedication certificate dated August 28, 1993 and the immunization card include the name of the deceased. Both of these documents were obtained during the lifetime of the deceased. There is no evidence that the deceased complained of his name having been included.

40. As to the birth certificate dated June 26, 2007. The respondent also questioned the authenticity of the birth certificate. The birth certificate was acquired during the pendency of this suit and almost 15 years after the birth of PW2. PW4 testified that there was no illegality on late registration and it was issued based on the fact that the applicant stated that she delivered at home. He added that it would have been an illegality of the Applicant had delivered in a hospital and the same was not reported. The immunization card did not specify where PW2 was born. PW4 did not indicate that the certificate was a forgery or fraudulently acquired and he confirmed that indeed the certificate originated from his office. He also confirmed that late registration was not an illegality. This Court makes a finding that the Certificates of birth of Applicant’s daughter PW1 which indicates that deceased is her father was lawfully issued.

41. The Applicant called PW2 who according to the Court, being a child of tender age understood the import of taking oath and as a church going child understood that if one lied they would go to hell. She testified that the deceased was her father and even went to a school owned by the deceased son. That she loved her father and he loved her too. That she even went to her father’s funeral. She named her step brother as an owner of the school she went to. She was able to identify where she lived together with her mother and the deceased. She added that the deceased took care of her needs. She stated that the documents that were used to show where she went to school were with her mother. The evidence tendered by the Respondent did not controvert the testimony of PW2. As a matter of



fact, the Respondent did not address the sentiments of PW2. The Respondent delved on insisting that the deceased was not married to the Applicant.

42. Although a birth certificate is not conclusive proof of paternity, the Applicant has produced other documents as well as witness to prove her daughter is the child of the deceased and that there was no mischief or fraud in the issuance of the birth certificate. For all intents and purposes this Court finds that the Applicant's daughter is the child of the deceased.

43. The third issue is whether the Applicant has met the threshold for annulment or cancellation of a Grant. The grounds upon which a grant may be revoked or annulled are provided for under Section 76 of the Law of Succession Act 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 an 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 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;”

44. The grounds are therefore statutory and it is incumbent upon the Applicant to demonstrate the existence of any, some or all the above grounds.

45. The question then is whether a revocation of the grant would be in the best interests of everyone beneficially entitled to the estate. It is the Courts view that that would not be. Upon the demise of the deceased, the Respondent became the person with the highest ranking with respect to the estate of the deceased. This Court nevertheless has the power to determine what would be the best interests of the estate and the beneficiaries. In the circumstances and with the findings it would be in order to allow the application to a certain extent.

46. Taking the above into consideration I make the findings;

- a. That the Applicant has not established that she was wife of the deceased married under the Kikuyu or Luhya Customary Law.
- b. That the applicant has not met the requirements for revocation of Grant.
- c. The Applicant has established that her child is the child and a beneficiary entitled to intent from the father's estate.

Therefore, the following orders issue:

- a. That the Certificate of Confirmation of Grant dated August 17, 2007 be and is hereby cancelled.
- b. That the Petitioner/Respondent to file fresh Summons for Confirmation of Grant within sixty (60) days herein including the Applicant's child as a beneficiary and the proposed mode of distribution of the estate
- c. That each party to bears its own costs.

It is so ordered.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF MARCH, 2024.

MOHOCHI S.M.

JUDGE OF THE HIGH COURT

