



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 207 OF 2006**

**IN THE MATTER OF THE ESTATE OF THE LATE JBM(DECEASED)**

**CAM.....1<sup>ST</sup> PETITIONER**

**AKM.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JAA.....1<sup>ST</sup> OBJECTOR**

**MBM.....2<sup>ND</sup> OBJECTOR**

**JUDGMENT**

1. This judgment relates to the application dated 1<sup>st</sup> April 2014 by the 1<sup>st</sup> petitioner CAM to confirm the grant of letters of administration intestate that was jointly issued to her and her son AKM(2<sup>nd</sup> petitioner) on 24<sup>th</sup> November 2008, and the summons dated 26<sup>th</sup> May 2014 by the 1<sup>st</sup> objector JAO who sought to be acknowledged as one of the dependants of the deceased. The 1<sup>st</sup> objector further sought that the petitioners be compelled to render accounts of all the assets collected and disposed since the death of the deceased.

2. The facts of this case are that the deceased JBM died intestate on 18<sup>th</sup> November 2005 in India but was a Kenyan from Kuria. On 24<sup>th</sup> February 1984 he married the 1<sup>st</sup> petitioner under the **Marriage Act** and they got three children: the 2<sup>nd</sup> petitioner, TMM and PRM. In the course of time, he was involved with CMM and the result was a daughter MBM (2<sup>nd</sup> objector). Subsequently, he got involved with the 1<sup>st</sup> objector JAO and the result was a daughter KGM. CMM was the 2<sup>nd</sup> objector but died on 9<sup>th</sup> February 2019 and that is how her daughter became a party to the proceedings.

3. Following an application dated 22<sup>nd</sup> June 2006 by the 1<sup>st</sup> objector against the petitioners, the court (Justice B.P. Kubo) discussed the question whether or not she was the deceased's widow, whether, after the deceased was monogamously married to the 1<sup>st</sup> petitioner, he could still marry her under Luo/Kuria customary law as she had claimed. Her evidence was that the deceased had married her customarily, had paid dowry to her parents, had settled her in his Hazina Estate South B, House NoXXX, and had made her next of kin in respect of the property. In the ruling delivered on 31<sup>st</sup> October 2006, the court found that, despite **section 3(5) of the Law of Succession Act (Cap 160)**, the deceased had no capacity to marry the 1<sup>st</sup> objector, that the purported customary law marriage was null and void, and that the only way she would benefit from the estate was if, on application, she could show that she was the deceased's dependant.

4. CMM filed her application dated 2<sup>nd</sup> November 2007 seeking, among other things, to be recognised as a widow of the deceased. Her case was that she had got married to the deceased in 1997 under Kuria customary law, and that the marriage had been blessed with one child (the 2<sup>nd</sup> objector). Her evidence was that dowry had been paid to her parents, and that the deceased had settled her on one of the parcels of land and given her another to cultivate. In dismissing her application, Justice G.B.M. Kariuki (as he then was) delivered a ruling on 24<sup>th</sup> May 2012 in which he stated as follows: -

**“As the court has already determined the deceased was monogamously married under statute law and that he would not contract a customary law marriage to another woman or other women, it follows that the basis of the application by C, like**

**that of Jessica is misplaced. An order of revocation cannot be made on a ground that has already been found to lack merit in law.”**

5. In the 1<sup>st</sup> objector’s application for dependency, she reiterated her marriage to the deceased. Of course, this is a decided issue. But the fact that she lived with the deceased since 2005, and that when he died he had settled her in the Hazina House, were not disputed. Infact, in the proposed sharing in the summons for confirmation, the 1<sup>st</sup> petitioner has offered this house and several other properties to her to hold in trust for her daughter KGM. I find that the 1<sup>st</sup> objector was dependent on the deceased immediately prior to his death, and the court will therefore make provision for her in accordance with **sections 26, 27, 28 and 29** of the **Act**.

6. The 1<sup>st</sup> petitioner proposed to give some of the estate of the deceased’s mother MBK. M made no application to be declared the deceased’s dependant, and the 1<sup>st</sup> petitioner did not in her affidavit give a basis for sharing the deceased’s estate to her. Dependency by a parent has to be proved.

7. The result is that, the deceased left the following beneficiaries: -

- (a) CAM (widow);
- (b) AKM (son);
- (c) TMM (son);
- (d) PBM (daughter);
- (e) MBM (daughter); and
- (f) KGM (daughter).

The only dependant left was JAA (1<sup>st</sup> objector).

8. According to the 1<sup>st</sup> petitioner, the deceased’s estate comprised the following property:-

- a) Kajiado/Ololoitokoshi/Kitengela/XXXX;
- b) Ngong/Ngong/XXXX;
- c) Bugumbe/Isebania/XXX;
- d) Bugembe/Mabera/XXX;
- e) LR No. Nyabohanse;
- f) Central Kitutu/Daraja Mbili/XXXX;
- g) Bukira/Bwisaboka/XXX;
- h) Kisii Mun. Council/Block 2/XXXX;
- i) [particulars withheld] Hotel Ltd that stands on land parcels Bukira/Buhirimono I/XXXX,
- j) Kisii Mun. Council/Block 4/XXXX,
- k) House No. 1335/F8 situate in Hazina Estate South B on LR No. XXXX contained in Sectional Title No. XXXX
- l) Nyabasi/Bomerani/XXXX
- m) West Kitutu/Bomatara/XXXX
- n) LR No. XXXX Nyabohanse; and
- o) motor vehicles KAL XXXX, KAJ XXXX, KWJ XXX, KZQ XXXX, XXXX, KXS XXXX, KAG XXXX and KAQ XXXX.

9. The 1<sup>st</sup> petitioner proposal on the distribution of the estate was as follows:-

- (a) she gets Kajiado/Ololoitokoshi/Kitengela/XXXX and Ngong/Ngong/XXXX absolutely;

- (b) she and the deceased's mother Maria Boke Karoso are given LR No. Nyabohanse and LR No. XXXX Nyabohanse in equal shares;
- (c) the 2<sup>nd</sup> objector Maria Boke Marwah gets Central Kitutu/Daraja Mbili/XXXX Bukira/Bwisaboke/XXXX, Kisii Municipal Council Block 2/XXXX and vehicle KAL XXXX;
- (d) he deceased's mother Maria Boke Koroso gets Bugumbe/Isebania/XXXX and Bugembe/Mabera/XXXX absolutely;
- (e) Andrew Koroso Marwah, Thomas Mwita Marwah and Pauline Bosensera Marwah to equally share [particulars withheld] Hotel Limited with all parcels Bukira/Buhiri Monono/XXXX, XXXX,
- (f) The vehicles KAJ XXXX, KWG XXXX, KZQ XXXX, KAC XXXX, KXS XXXX, KAG XXXX and KAQ XXXX are sold and the proceeds used to meet family needs and to settle the deceased's outstand debts.

10. Jessica Atieno Onyony in the replying affidavit sworn on 26<sup>th</sup> May 2014 stated that she was the deceased's widow and beneficiary and the Hazina House has always been in her possession. She named motor vehicles KAG XXXX, KZU XXXX and KAQ XXXX which the said should be deemed to be part of the deceased's estate. The court had earlier ordered that Kshs.10,000/= be paid monthly towards the upkeep of her daughter and she acknowledged that the petitioners were also paying the daughter's fees. Her case was that the petitioners had sold [particulars withheld] Hotel in Isebania and also sold off various motor vehicles without accounting for them, and they had made various attempts to sell the Hazina House but that she had obtained an injunction to stop them. The 1<sup>st</sup> objector further swore that the petitioners had collected the deceased's terminal benefits from Kisii Bottlers and also withdrawn funds from the deceased's accounts No s. 011XXXX and 0166XXXX in Cooperative Bank at Kisii Town branch and had failed to account for them. The deponent did not materially challenge the proposed distribution.

11. The 2<sup>nd</sup> objector MBM swore a response on 27<sup>th</sup> September 2019. She made reference to a proposed consent that had been discussed. She sought to be given Bugembe/Mabera/XXXX where she said her late mother's house stood and where she was buried, Bugembe/Isebania/XXXX which she said her mother used to till, Central Kitutu/Daraja Mbili/XXXX, Kisii Municipal Council/Block XXXX and Bukira/Bwisaboke/XXXX. Lastly, she asked that because Mark Hotel Ltd was a commercial property she wanted to share equally in it.

12. I have stated that the deceased left a widow (1<sup>st</sup> petitioner), five children (AKM, TMM, PBM, MBM and KGM) and a dependant 1<sup>st</sup> objector (JAO). It has been found that the deceased was not polygamous.

13. Under **section 35** of the **Act**, the 1<sup>st</sup> petitioner is entitled to the deceased's personal and household effects and to a life interest in the immovable properties, but I consider that she must have contributed to the acquisition of the estate. She should be separately settled. The children should ideally equally share the deceased's net estate. However, I consider that the immovable estate of the deceased consists of various parcels of land of different sizes, and in various areas. The parcels were not valued. It is therefore not possible to attain equality. The court will seek to be as equitable as is possible.

14. It was stated, without demur, that the 1<sup>st</sup> petitioner had alone benefitted from the deceased's terminal benefits and the proceeds of the two Cooperative Bank accounts. She had also sold some property of the estate. I will consider that.

15. Doing the best that I can, the estate of the deceased shall be shared as follows:-

- (a) vehicles KALXXXX, KAJ XXXX, KWJ XXXX, KZQ XXXX, KXS XXXX, KAG XXXX and KAQ XXXX shall be sold and the proceeds shared equally by JOO, KGM and MBM;
- (b) the deceased's shares in the property known as Mark Hotel Ltd that comprises Bukira/Buhirimonono/XXXX shall equally be shared by AKM, TMM and PBM;
- (c) CAM shall absolutely get Kajiado/ Ololokitoshi/Kitengela/XXXX, Ngong/Ngong/XXXX and LR Nyabohanse;
- (d) JAO and KGM shall equally get House No. XXXX/FB situate in Hazina Estate South B on Land Parcel No. XXXX contained in sectional title No. XXXX;
- (e) KGM shall get Nyabasi/Bomerani/XXXX and West Kitutu/Bomatara/XXXX absolutely;
- (f) Maria Boke Marwah shall get Central Kitutu/Daraja Mbili/XXXX, Bukira/Bwisaboke/XXXX, Bugembe/Mabera/XXX and Kisii Municipal Council/Block XXXX absolutely;
- (g) Bugumbe/Isebania XXXX shall equally be shared between KGM and MBM;
- (h) JAO shall get LR Nyabohanse;
- (i) Kisii Municipal council/Block XXXX shall be shared equally by AKM, TMM and PBM; and
- (j) any property not indicated above shall be sold and the proceeds shared equally among all the children of the deceased.

10. In those terms, the grant issued to the petitioners shall be confirmed. I will not allow the request for accounts.

11. This was a family dispute. Each side shall bear own costs.

**DATED and DELIVERED electronically at NAIROBI this 17<sup>TH</sup> day of JANUARY 2022.**

**A.O. MUCHELULE**

**JUDGE**