REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1329 OF 2019

IN THE MATTER OF THE ESTATE OF STEPHEN MWAURA KUNGU (DECEASED)

PETER KIMANI KUNGU.....APPLICANT

-V-

ELIZABETH GICUGU NGARI.....RESPONDENT

RULING

1. The deceased Stephen Mwaura Kungu died intestate on 26th April 2019 in Nairobi. He left a widow Elizabeth Gicugu Ngari (the respondent) whom he had married in 2008 under Kikuyu customary law. They did not have a biological child.

2. His estate comprised bank accounts in Equity Bank and Cooperative Bank; motor vehicle KCG 650B; and parcels plot No. B-431 – New Kamulu Self Help Group, LR No. Ngobit Supuko Block 2/4463 (Wiumirire), LR No. Ruiru Kiu Block 2/12297 and LR No. Limuru/Bibirioni/T.1067.

3. The deceased left his father Peter Kimani Kungu (the applicant), mother Jane Nyambura Peter and siblings who included Duncan Kimani and James Njoroge Kimani. When the deceased was alive he was staying with P.K. a minor child in primary school. He was educating the child. The child's father is James Njoroge Kimani. The deceased had requested him to hand over the child to him for upkeep.

4. In the Eulogy of the deceased it was written that:

> **"He got married in 2008 to his lovely wife Elizabeth Ngari. However out of God's will they were never blessed with a biological child. After 5 years they took into custody young P.K. as a foster child who they love and adore. Stephen was very proud and fond of young P."**

In his tribute to the deceased, P.K. stated as follows:-

> **"Daddy, I will always remember your love, tender care and unlimited protection you had for me. I never imagined you will one day go and leave me alone. I will always remember how you used to surprise me with gifts, take me out and create time to spend and play with me. You taught me how to make wise decisions and be a good boy always. I will live to love and cherish your good memories and for your compassion for the needy and the community.**
>
> **Dad may your soul rest in peace."**

5. It is common ground that after the deceased's demise, the respondent abandoned the child who is now living with Duncan Kimani.

6. On 14th October 2019 the respondent petitioned this court, and on 19th May 2020 was issued with a grant of letters of administration intestate. The grant has not been confirmed.

7. The applicant filed summons under **section 26** of the **Law of Succession Act** seeking to be found to be a dependant of the deceased. He stated in the supporting affidavit that the deceased catered for him, for his mother and for the child while he was alive; that they all depended on him. He stated that he and his wife were peasant farmers, in subsistence farming as a source of livelihood. When the deceased was alive, he stated, he took care of their daily upkeep. The deceased ensured that they were well taken care of, and would send them money for

upkeep. He was also paying their NHIF contribution. In addition to sending them money, he would buy them foodstuffs.

8. The deceased was working at Ms. Nivas Limited. He had taken out a life insurance cover and had indicated the applicant as the next of kin. When he died the applicant received Kshs.7,598,800/= which he equally shared with the applicant. In addition, M/s Naivas Limited released to him Kshs.328,000/= from its staff welfare kitty. He gave Kshs.300,000/= to the applicant to build a house. Subsequently, he got the respondent to be employed by the company. The applicant is 73 and said he was diabetic with medical bills. His wife is 68.

9. The respondent denied that the applicant, his wife and the child were the deceased's dependants. She stated that the deceased's relationship with the child was that of uncle and nephew, and it was on that basis that he was assisting the child. As for the applicant and his wife, she stated that these were the deceased's parents who essentially lived off their farming, but he would assist them but not that they were wholly dependent on him. In any case, she said, the parents had other children and who would contribute to their support.

10. It is notable that both the applicant and Duncan Kimani kept saying that the deceased had adopted the child. They also talked of the deceased being the foster father to the child. What is material is that there was no formal adoption or foster arrangement between the deceased and the child.

11. The respondent has a relationship with one Stephen Githu, and the two have a child. The applicant and his family consider her to be remarried, and therefore should no longer inherit the estate of the deceased. Stephen died that the two are married. The respondent denied that she is remarried. Stephen denied that the two are married. There was no application for the respondent to be considered remarried. There was also no evidence of such marriage. It is possible for a man and a woman to be in a relationship and to get a child, without necessarily them being married or even intending to get married. The applicant did not say that Stephen Githu has, for instance, agreed to pay dowry or has paid dowry to the parents of the respondent. He did not say that there has been some civil or church ceremony between the man and the respondent. Under **sections 107(1), 109** and **112** of the **Evidence Act (Cap. 80),** whoever alleges must prove. There was no proof of marriage. The **sections** provide 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.**
>
> **108……..**
>
> **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.**
>
> **110…….**
>
> **111…….**
>
> **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."**

12. In any case, the application by the applicant was not whether or not the respondent was remarried. He acknowledged that the respondent has a grant in respect of the estate of the deceased. All that he wanted was that, before the confirmation of the grant, he, his wife and grandchild be determined to have been dependants of the deceased.

13. Under **section 29(b)** of the **Act**, the applicant, his wife and grandchild have to show, that they were being maintained by the deceased immediately prior to his death. **(In Re of the Estate of Joshua Orwa Ojodeh (Deceased) [2014]eKLR).** I do not want to say that, ideally, the only person who applied to be declared as a dependant was the applicant. His wife and child were only mentioned in the supporting affidavit. But since the respondent took it that all the three had applied, and the response and the written submissions by her counsel proceeded on that basis, I will not be technical.

14. M/s Maina for the applicant and Mr Okach for the respondent filed written submissions which I have read and considered.

15. There will be occasions when a parent can establish through evidence that he/she was wholly dependent on his/her deceased child, and therefore that reasonable provision should be made for him/her from the estate of the deceased. When there is proof, the court will under **sections 27** and **28** of the **Act** determine whether the provision be periodically or be a lump sum, and it will upon whatever conditions that may be appropriate to the case. In making such determination, there has to be evidence regarding how much assistance the parent was getting. There has to be evidence regarding his/her needs so that a sensible order has to be made.

16. In the instant case, the applicant and his wife said that the deceased was taking care of them by giving them money and by buying them foodstuffs. They had other children. They were silent on whether the children made any contribution towards the support. When the applicant produced evidence from Safaricaom ("PKKU"), it was clear that in the years 2017/2018 the deceased sent Mpesa money to him 9 times. 6 times, the money came from the respondent. The highest was Kshs.7,100/= and the lowest was 527/=. It was not indicated how many times the deceased visited the parents, and how often they were bought food. It was not indicated what support, if at all, came from the other children of the applicant. I also take note that in the supporting affidavit and supplementary affidavit by the applicant, he swore that he was residing in Nairobi and "working for gain."

17. It is usual for a child to give his mother or father a stipend monthly, or even take out a medical cover for them. In the instant case, the deceased went further and indicated the applicant as the next of kin in a life insurance cover. The deceased was doing what a responsible child would do for his parents. He may have been a little generous with his parents, but that should not be held against him or his estate.

This was a moral and social responsibility. It was not a legal responsibility. The evidence available was not such that the applicant and his wife were wholly dependant on the deceased. The evidence does not prove that the two were dependant on the deceased immediately prior to the deceased's demise. The evidence shows that the applicant and his wife have their own means of livelihood.

18. In any case, the applicant has, since the deceased's death, benefitted to the tune of about Kshs.4 million from the insurance cover and from the employee welfare kitty. This is courtesy of the deceased's generosity. It would be stretching his luck too far to want more from the estate.

19. As for the child, I consider that there was no formal arrangement between him and the deceased. But the deceased took him to school. The child considered him as a father. He considered the child as his son. Nonetheless, the child had parents, they did not swear any affidavit to say that they had given their child to the deceased in any permanent way. But given all the facts of the case, I find that the child was dependent on the deceased immediately prior to his death. That being the case, and considering that the estate was not substantial, I order that the respondent, when confirming the grant, will set aside Kshs.750,000/= (seven hundred and fifty thousand Kenya shillings) to be put into an interest generating account to be operated jointly by the respondent and the Deputy Registrar of this court and to be released to the child upon attaining the age of majority.

20. To that limited extent, the application is allowed. I make no order as to costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2022.

A.O. MUCHELULE

JUDGE