In re Estate of Anyika David Lengou (Dceased) (Succession Cause 23 of 2019) [2022] KEHC 10931 (KLR) (30 March 2022) (Judgment)

Neutral citation: [2022] KEHC 10931 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

SUCCESSION CAUSE 23 OF 2019

SN MUTUKU, J

MARCH 30, 2022

IN THE MATTER OF ESTATE OF ANYIKA DAVID LENGO (DECEASED)

SUSAN NJERI ANYIKA.....APPLICANT

VERSUS

JULIUS MARK APALE.....1ST RESPONDENT

SOLOMON PAIYIA ANYIKA.....2ND RESPONDENT

RAPHAEL ORUMOI ANYIKA.....3RD RESPONDENT

JOSEPH LENGETE ANYIKA.....4TH RESPONDENT

JUDGMENT

1. Susan Njeri Anyika, the Applicant, seeks to have the Grant of Administration intestate issued in Nairobi on 7th December 2004 in Succession Cause No. 2644 of 2004 revoked. She has filed this Summons for Revocation of Grant under section 76(a), (b) and (c) of the *Law of Succession Act*. She also seeks costs.

2. She has sworn an affidavit on 7th February, 2013 in support of the Summons. It is her case that she married the deceased as his fifth wife under Masaai customary law and changed her last name to Anyika; that their union was blessed with two issues namely J. R and S. S; that the Grant of Letters of Administration intestate was issued to the Respondents herein excluding her; that the Grant was obtained by false statements and/or concealment of material facts; that the Respondents failed to inform court that the deceased had left a valid Will dated 26th September, 2002 in which he had made provisions for all his dependents and that it is in the interest of justice that the Grant be revoked and the Will and Testament of the deceased be followed.

3. The Respondents have opposed this application. In a Replying Affidavit dated 10th May, 2013 and sworn by Julius Mark Apale (1st Respondent), it is stated that he is one of the administrators of the estate together with the other three Respondents; that the deceased was his brother; that the deceased had only 4 wives namely Mary Masilayo Anyika (deceased), Margaret Wanjiku Anyika (deceased),

Mary Wangui Anyika and Salome Njoki Anyika. He stated that the Applicant was not deceased's wife. He stated that the Applicant was married to one James Lomboni Ole Nankuru. He stated that the signature in the Affidavit sworn by the deceased as contained in the Applicant's annexure SNA- 1 does not belong to the deceased.

4. The 1st Respondent further averred that the two issues namely J. R and S. S are not the deceased's children, the former being the biological son of one James Lomboni Ole Nankuru; that the Applicant and her children are strangers to the family of the deceased and cannot be included as beneficiaries. He stated that the purported Will of the deceased dated 26th September, 2002 is an act of forgery by the Applicant; that though the Applicant alleges to have been married to the deceased in 1994 she only changed her name in the National Identity Card on 21st January, 2003, 4 months before the deceased's death and that the Applicant brought this Application 13 years after the death of the deceased. He deposed that the Application is fatally defective, frivolous and an abuse of court process.

5. On 27th March, 2019 the Applicant filed an affidavit in response to the Replying affidavit where she stated that Julius Mark Apale was not a brother to the deceased but was being taken care of by the deceased before his death. She stated that the allegations that the signatures of the deceased were forged are not true and that the Affidavit was signed in the presence of the magistrate.

6. It is her statement that her son though not a biological child of the deceased was accepted by the deceased and he treated him as his own child and he even used the deceased name as evidenced by his school certificates. She denied that she was married to James Lomboni Ole Nankuru who she knew as Benson Loibon Nanguru. She stated that she lived with the aforementioned but that he never paid any dowry for her and that he deserted her and never returned.

7. On 30th October, 2019 the Applicant filed a supplementary affidavit in which she deposed that dowry was paid to her mother in the form of land and that the same was registered in her name; that the deceased bought Plot No. 41 from John Inder Singh; that after the deceased death she was given the responsibility of collecting rent and depositing it in the account of Apale and that the deceased had 5 wives as confirmed in the funeral programme.

The evidence

8. The matter was canvassed through viva voce evidence. The Applicant called Elijah Koipitat (PW1) as her first witness. He testified that he knew both the Applicant and the deceased. And that he knew the Applicant as the deceased's widow. He testified that he witnessed the deceased sign a Will on 4th January, 2003. He stated that he knew the 4th Respondent as the son of the deceased and that he is married to his daughter. He stated that he knew the deceased very well as he went to school with him and was his neighbor and that the Applicant lives at Loitokitok town in the deceased's house on Plot No.41. On cross- examination he stated that he knew the Applicant since she was married in 1984 but did not know whether customary marriage took place. He also stated that he did not attend any wedding ceremony between the two of them. It was his evidence that the Will was made on 20th September, 2002 and that he signed it on 4th January, 2003.

9. Rikani Mugure Mwaura (PW2) was the second witness for the Applicant. She testified that she is the mother to the Applicant and that she wished to rely on her statement dated 17th July, 2013. On cross examination she stated that the deceased paid dowry for her daughter in the form of a cow and calf, blankets and sheets. She stated that the deceased had build a house for the Applicant and that the Applicant lived with the deceased.

10. Lucy Mumbi Shahenza (PW3), a document examiner, testified as the Applicant's third witness. She stated that she is a document examiner and a retired police officer; that she trained at Eastleigh Private Training School; that she was given instructions to examine certain documents; that the instructions were to examine a bundle of documents with known signatures of the deceased including banking slip and original Will (disputed); that her findings were that the signature in the banking slip and the Will were by the same person and that she made a report dated 25th February, 2020 which she produced as PEX 1.

11. The Applicant, Susan Njeri Anyika (PW4) adopted her affidavit dated 27th March, 2019 together with the annexures as evidence. She also relied on her supplementary affidavit dated 30th October, 2019 and its annexures. She reiterated the contents of her affidavits.

12. The case for the Respondents was supported by the evidence of Joseph Lengete Anyika (DW1). He testified that he is the deceased's son and relied on the Replying Affidavit of Julius Mark Apale whom they had given authority to swear the Affidavit. He also relied on his own affidavit sworn on 5th November, 2019 as well as annexures. It is his evidence that the deceased had 4 wives and 19 children and that 2 of the widows are deceased; that the Applicant surfaced after 10 years claiming to be the deceased's widow; that the Applicant was a tenant in the plot belonging to the deceased and that he used to collect rent from her; that he doesn't know of any Will and that they petitioned for the deceased estate intestate.

13. James Lomboni Ole Nanguru (DW2) testified that he signed a statement dated 10th May, 2013 and an affidavit sworn on the same day and wished to adopt them as his evidence. He stated that the Applicant was his wife; that they got married in 1984 and got a child in 1988; that he did not pay dowry for her; that they lived together from 1984 to 1993 when they had a misunderstanding and the Applicant left.

14. Emmanuel Karisa Kenga (DW3) testified that he is a forensic document examiner and retired commissioner of police; that he trained as a document examiner at the CID Nairobi, then proceeded for further training in Israel, France and Moshi in Tanzania; that he has been in the field for 15 years and testified in various courts in East Africa. He stated that on 4th November, 2019 he received documents from the firm of Solonka & Co. Advocates for verification. The documents are marked Q1 -Q3 and known signature are marked B1-B8; that he compared the disputed signatures indicated in red arrows as Q1 to Q3 with known signatures in B1 -B8 indicated in blue arrows; that he could not find any agreement between the questioned signatures and the known signatures.

15. He testified that he compared signatures on Q2 with known signatures indicated by blue arrows on document B1, B2, B3, B5, B7 and B8; that there were some similarities indicating they were from the same author. He testified that when he examined disputed signatures indicated in red arrows on Q3 with known signatures in blue arrows on document B1-B3, B5, B7 and B8, he could not find any agreement between the signatures indicating they were made by different author. He testified that he used were microscopic and magnifying methodology. He prepared a report dated 5th November, 2019 which was produced as exhibit in court.

16. On cross examination this witness told the court that the document marked Q1 is the questioned Will and that he was not given the original because he was told it was not available. He stated that his opinion would not have changed even if he had examined the original.

Submissions

17. Parties filed written submissions. The Applicant through her submissions dated 28th June, 2021 submitted on four issues. The first issue was whether the Applicant was married to the deceased under

Maasai customary law. On this issue she submitted that she was married to the deceased under Maasai customary law. She submitted that dowry was paid and that during marriage negotiations, 20kgs of sugar, tea leaves and Kshs. 20,000 were given to prepare for the traditional wedding ceremony; that on the day of the traditional ceremony, sheets and blankets, 2 goats, one cow and its calf, Kshs. 30,000 and other things like soda were brought. She argued that she dropped her maiden name and took the name of the deceased Anyika as her surname. She relied on the Court of Appeal case MWK -vs- AMW (2017) eKLR Civil Case No. 5 of 2016, to support her case

18. On the second issue on whether the deceased left behind a valid Will dated 26th September, 2002 where he made provisions for all dependents, she submitted that the deceased intentions had always been clear as per a copy of a letter dated 20th May, 2002 signed by the deceased setting the schedule for the distribution of the estate. In her argument, she relied on the witness statement produced in court by Elijah K. Koipitat. She submitted that Joseph Lenget Anyika, one of the petitioners, was married to his daughter and would have no reason to be deceitful. that the allegations of forgery of the Will had no basis, as the same was examined by a handwriting examiner who concluded that there was a high likelihood that the signature on the Will was authored by the deceased. She cited the *Law of Succession Act* Section 11 on the validity of written Wills.

19. On the third issue on whether the Grant was obtained by fraudulent means through false and/ or concealment, she argued that from the documentary evidence and witness statements there was clear indication that she was married under Maasai customary law and that the deceased left behind a valid Will. That further her daughter S. S was not included as a beneficiary despite the fact that the petitioners knew she was a dependent and therefore the Grant was obtained fraudulently through false and/or concealment of facts.

20. On the fourth issue on whether the Grant issued on 7th December, 2004 should be revoked, she argued that the Grant be recoked as it was clear that material facts were excluded and/or concealed as per the evidence adduced in court. She cited sections 3(2) and 29 of the *Law of succession Act* to support her arguments and urged the court to revoke the Grant.

21. The Respondents through their submissions dated 29th October 2021 argued on 3 issues. The first issue raised is whether the Applicant was married to the deceased under Maasai customary laws. They argue that there was no proof that dowry and the ceremony took place; that the testimonies given in court by the Applicant's witnesses are mere allegations without proof; that the Applicant confirmed that she was cohabiting with Loibon Nanguru and that she did not state the exact period she separated with him. It was their argument that the Applicant did not call any expert witness in Maasai customary law to clarify what constitutes a valid marriage and whether such requirements were met.

22. It was their submission that a question of customary marriage is a question of fact which ought to be proved by evidence; that the issue of the Applicant changing her maiden name was suspect as she alleged she was married in 1994 and only changed her name 4 months before the deceased's death.

23. On whether the deceased left behind a valid will it was their argument that the Will exhibited in court was a forgery; that this fact was confirmed by the handwriting expert Emmanuel Karisa Kenga who produced a report dated 5th November, 2019 to the effect that the signature on the purported Will was not made by the deceased. They submitted that the Will failed to meet the criteria required under section 11 of the *Law of Succession Act* and that none of the witnesses actually saw the deceased signing the Will. They relied on the case of the Estate of GKK Succession Cause No. 1298 of 2011 where court stated that the witnesses to a Will must be capable of seeing the testator sign the Will and thereafter attest to the fact.

24. On whether the Grant was obtained fraudulently they submitted that due process was followed and all beneficiaries of the deceased as indicated in the chief's letter dated 23rd July, 2004 participated in the process. They further argue that the Applicant was lawfully married to Loibon Nanguru with whom she admitted to have cohabited and had a child. They submitted that no objections were raised by the Applicant upon filing of the Petition and that she has not explained why it has taken her 13 years to bring this Application.

25. In their argument on the issue of whether a customary marriage was performed the Respondents relied on the case of *Eva Naima Kaaka -vs- Tabitha Waithera Mararo* Civil Appeal No. 130 of 2017 where the court set out the essentials of a kikuyu marriage, which included Capacity, Consent, Ngurario, Ruracio and commencement of cohabitation. They also relied on the case of *Monica Nyawira Wahome -vs Veronica Wambui* ELC No. 39 of 2018. Where the learned judge referred to the case of *Prisilla Waruguru Gathigo -vs- Virginia Kanugu Kathigo* (2004)eKLR where the evidence adduced fell short of proving that the marriage occurred. That there was no evidence of Ngurario or participation of any elders from the deceased's family.

26. It was their argument that the summons for revocation of Grant should be dismissed with costs as the same lacks merit and has no basis in law.

Determination

27. I have summarized the issues in this matter to three, namely:

    a. Whether the Applicant was married to the deceased.

    b. Whether the deceased left behind a valid written Will.

    c. Whether the Grant obtained on 7th December 2004 should be revoked.

28. I have considered the evidence of the Applicant who maintains that she was married to the deceased under Maasai customary law as shown in her evidence and submissions. She has attempted to show that certain items were paid to her mother as dowry. I have considered the evidence of her mother who testified that she received dowry from the deceased in the form of bed sheets and blankets, 2 goats, one cow and its calf, Kshs. 30,000 and other items like soda and that of Elijah Koipitat, who testified that he knew the deceased and that they grew up together as neighbor and that that the deceased married the Applicant in 1994 and built her a home in his plot at Loitoktok town where they lived together. Does this evidence meet the threshold of a Maasai Customary Law marriage?

29. As far as the evidence on that issue goes, it is only the evidence of the Applicant's mother that the deceased was accompanied by his friend Richard Nkumama, Mary Nyaruai among other several people; that the deceased would visit her on several occasions and would bring goats to slaughter and that during negotiations she received 20kgs of sugar, tea leaves and Kshs. 20,000 to prepare for the traditional ceremony. I find lacking in evidence the ingredients that form a Maasai Customary marriage. This evidence would have been vital in proving that a Maasai Customary marriage did take place between the Applicant and the deceased.

30. I have not been able to get an authority on this issue and none was submitted to me. However looking at *Kimani v Gikanga*, (1965) EA 735, at page 739, I may be able to determine whether there is proof of a Maasai Customary marriage. In this case, the court stated that:

> " To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law

must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."

31. In *Mary Wanjiru Githatu vs Esther Wanjiru Kiarie* (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009) it is stated in the dissenting judgment that:

> " It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the 'come we stay' marriages which are neither customary nor statutory".

32. In the case of *Hortensia Wanjiku Yawe v The Public Trustees*, Civil Appeal 13 of August 6, 1976 the court laid down three principles regarding proof of customary marriages in court as follows:

(i) The onus of proving customary law marriage is generally on the party who claims it;

(ii) The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;

(iii) Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.

33. From the above cases it is clear that the onus of proving that a Maasai Customary marriage existed between the Applicant and the deceased is solely on the Applicant. As far as this court can tell from the evidence presented there is nothing tabled in court to prove that this marriage took place. This court was not presented with evidence to show that the items said to have been presented to the Applicant's mother are what entails a Maasai Customary Marriage. African culture is rich. I doubt that Maasai Culture involves giving sugar, blankets, sheets, one cow and calf and Kshs 20,000 or 30,000 as dowry. There must be elaborate cultural rites and performances to seal the marriage. I dare say that it is common knowledge that the Maasai is a rich cultural society that has admirably held onto their rich cultural practices to the present even when the other communities seem to let go in the name of modernity.

34. From my careful analysis of the evidence presented to this it is my considered view that the Applicant has failed to prove that there was a valid Maasai customary marriage between her and the deceased or at all.

35. Did the deceased leaved a valid written Will? I have considered the evidence tendered touching on this issue. The Applicant claims that the deceased left a valid written Will dated 26th September 2002. She called Elijah Koipitat who told the court that he saw the deceased sign the Will on 4th January, 2003 and that he also attested to the will on the same day.

36. The Respondents have opposed this and stated that they no knowledge of the Will. They called the document a forgery. The Applicant called Lucy Mumbi Shaheza, a document examiner who told

court that the signature on the Will is that of the deceased. On the other hand the Respondents called Emanuel Karisa Kenga who examined the signature on the Will and compared this with writings on other known signatures of the deceased. He arrived at a different findings than that of Lucy Mumbi that the signatures were made by different authors, meaning that the signature on the Will is not that of the deceased. It is obvious that the two expert witnesses did not agree on the issue of who signed the purported written Will.

37. The law under Section 11 of the *law of Succession Act* provides that:

No written will shall be valid unless—

(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

38. I have read the purported Will. It is a copy and is dated 26 the September 2002. It is in Kiswahili and it identifies five wives including the Applicant as the wives of the deceased. It's contents speak of division deceased's properties to the people named in it including the Applicant. Of importance, the will is purported to have been signed by the deceased on 4th January 2003, over three months from date it was drawn. It bears the name of M.A Maalimu as the first witness but there is no signature by this witness. It bears the name of Isaya Samana who signed it on 5th January 2003; Elija K. Koipitat who is shown to have signed it on 4th January 2003; Josephat K. Munyamala who singed on 4th January 2003 and Rokat Lekoko Anyika who singed on 4th January 2004.

39. It is clear from the record that out of the 4 witnesses that signed the Will, only one witness, Elijah Koipitat (PW 1) came to Court to testify. He told court that he witnessed the deceased affix his mark on the Will. The other witnesses did not testify. The requirements of Section 11 (c) of the *Law of Succession Act* are that each of the witnesses to the signing of the Will by the testator must have seen him so sign. It was crucial for the Applicant to call all the people that witnessed the signing of the Will to testify to that fact. But even for the witness that said he saw the testator sign the Will, he denied knowledge that there was a customary marriage between the deceased and the Applicant.

40. It is also clear that one of the witnesses, Isaya Samana, signed the purported Will on the 5th January 2003! That is not all. The document bear other dates when the deceased is shown to have signed. The document starts on page 2. After page 4, the pagination stops. On one of the unpaginated pages there is a date, 2nd October 2002. This date appears as the date the deceased appended his signature on the document on that page; the following page (unpaginated) shows a similar date, 2nd October 2002 and a signature purported to be that of deceased; on the following page (unpaginated) the document bears a signature purported to be that of the deceased. The date indicated is 23rd May 2001 and another signature purported to be that of Elijah Koipitat bearing 24th May 2001 as the date the signature was appended. There is yet another page (unpaginated) showing signatures purported to be those of the

deceased on 20th May 2002, Elija Koipitat of 24th June 2002, Josephat Munyamala of 17th June 2002 and Susan Njeri Anyika of 19th June 2002.

41. It is obvious to me that the Applicant had a duty to bring witnesses to court to shed light on this mixed evidence on dates and signatures. On the face of it this document, the purported Will, appears to be a parchment of pages taken from different places hence the difference dates. This court is unable to tell what nature of the document this is. The original was not presented to the court. There is no telling if there is an original of this document and what format it takes.

42. In the Supreme Court of Queensland in the case of *Estate of Grant Patrick Carrigan* [2018] QSC 206, the Court stated the conditions necessary for a document to form part of a will as the existence of the document; the document purports to embody the testamentary intentions of the deceased; and that the deceased by some words demonstrated that it was his intention that the document operate as the last will.

43. In this instant case, the wording of the Will in question does not appear to demonstrate that it was the intention of the deceased that the document operate as the last will and testament. It is incredible to say the least.

44. It is trite that he who alleges must prove. *In Re: Estate of Julius Mimano (deceased* [2019] eKLR the court held that he who alleges forgery of a Will must prove this by calling a document examiner to give expert opinion on the signatures. In respect to this case, the case of *Apex Security Services Ltd v Joel Atuti Nyaruri* [2018] eKLR which followed the decision of *Stephen Kinini Wangondu v the Ark Ltd* [2016] eKLR was cited. In this case, the court held that expert evidence must be judged against the background of the other evidence available but should not be elevated above the other evidence.

45. Both the Applicant and the Respondents brought their own expert witness PW 3 and DW3. They gave contradictory opinions and therefore it is up to the court to determine whether the Will is valid or not. To determine whether the Will is valid or not, I have to consider the circumstances surrounding its making. I have shown above the contradiction dates this documents, which I have stated seems to be a parchment of several documents, bears. I have mentioned the lack of the evidence of the witnesses who purportedly signed it and the failure to have all these witnesses witness the testate signing the document. In addition to this it is clear that this will is being mentioned more than 10 years after the deceased death in an application to revoke the grant. All these factors raise more questions than answers. The delay in bringing up the issue of the Will after 10 years when she must have been aware that the family of the deceased went to petition for letters of administration intestate is to me suspect.

46. In conclusion of the issue of the validity of the Will, I am persuaded that the evidence purported to support this issue is insufficient. It falls short of proving the validity of the purported Will on a balance of probabilities.

47. On the third issue of whether the Grant obtained on 7th December 2004 should be revoked I have considered the provisions of Section 76 (b) of the *Law of Succession Act* which provides that:

> A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any 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 the 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 an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs(e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

48. The grounds advanced by the Applicant to support her Summons for revocation of the grant are that the fact of her marriage to the deceased and the fact that the deceased died testate were not revealed to the court.

49. I have agonized over the issues raised in this matter, especially the issue that the deceased had sired two children with the Applicant or at least one chile. The issue of the Applicant being a wife of the deceased has been adequately addressed elsewhere in this Judgment with the conclusion that the Applicant has failed to prove, on a balance of probabilities, that she was married to the deceased under Maasai customary law. I have also resolved the issue as to whether the deceased left a valid written Will by concluding that the Applicant has failed to prove the same. This means that the Summons to revoke the grant cannot stand based on the two issues of failure to disclose that the Applicant was a wife of the deceased and that the deceased left a valid Will.

50. I note that the Applicant did not claim that the grant should be revoked because her children were also left out of the sharing of the properties. This comes out in her Affidavit. But curiously enough, the Applicant deposed in paragraph 3 of her supporting Affidavit that: "That we resided together relatively peacefully during the deceased's life our union being blessed with two issues namely J. R and S. S."

51. The image emerging from this statement is that the children were sired by the deceased which is not true given the evidence on record including the Applicant's own evidence. It has come out through her evidence that the boy was not sired by the deceased. She claims that the daughter was sired by the deceased but the Respondents have denied this. She has not presented any evidence save from stating that she was married to the deceased and had two children with him. What would have been easier than to attach a birth certificate to support her claim?

52. I have read the Court of Appeal decision in *E.M.M vs. I.G.M & another*, Civil Appeal No.114 of 2012. In this case, the Court of Appeal at Nairobi while dealing with a similar issue, observed as follows:

> "The next issue is whether the appellant proved on a balance of probabilities that he was a child of the deceased whom the deceased had taken into his family as his own and was being maintained by the deceased immediately prior to his death...

> We would have expected some form of evidence to show support from the deceased towards the appellant while he was a pupil in Nairobi Primary and when he was a student at Nairobi School...
>
> Additionally the definition of a 'child' in section 3(2) of the *Law of Succession Act* includes a child whom the deceased has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility. We agree with the respondent that the appellant has to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the appellant"

53. following the above decision, it is my considered view that although the Applicant has attached various school certificates to show that the boy bore the surname of the deceased, there is no evidence to show a reasonable degree of permanency in the responsibility that the deceased is alleged to have voluntarily assumed over the boy. As for the girl, even a birth certificate is missing. There is nothing provided as evidence to show that the child was the daughter of the deceased or that the deceased had voluntarily assumed some degree of permanency in parental responsibility over her.

54. Having carefully considered this matter, I come to the conclusion that the Applicant has failed to prove her case. She has failed to prove that she was a wife of the deceased. She has failed to prove that the deceased died testate leaving a valid written Will and she has failed to satisfy this court why the Grant issued to the Respondents herein should be revoked. For this reason the Summons dated 7th February 2013 cannot stand and is hereby dismissed. I order that each party bears own costs in this matter. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED ON 30TH DAY OF MARCH 2022.

S. N. MUTUKU

JUDGE