



**In re Estate of NWM (Deceased) (Succession Cause 14 of 2019)
[2022] KEHC 16898 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 14 OF 2019
RB NGETICH, J
DECEMBER 20, 2022**

BETWEEN

MWM 1ST ADMINISTRATOR

MWM 2ND ADMINISTRATOR

AND

MWM 1ST APPLICANT

ITM 2ND APPLICANT

IKM 3RD APPLICANT

JUDGMENT

1. This matter relates to the Estate of NWM who died on December 4, 2017. The petitioners filed petition for Grant of letters of Administration on April 2, 2019 after citing the administrators who failed to file petition. A temporary grant was issued on June 10, 2019 to the petitioners.
2. On November 26, 2019, the petitioners filed a summons for confirmation of the grant. In response to the application, the objector MW filed an affidavit of protest on February 5, 2020.
3. The objector contends that she is the 2nd wife of the deceased and the petitioners herein are not children of the deceased and the petitioners have not involved her and her co-wife as beneficiaries of the estate of the deceased; that the petitioners failed to seek her consent and that of her co-wife. That petitioner had previously cited her and her co-wife to take out letters of administration in citation Cause No 12 of 2018 and through the orders of the court, she and her co-wife MW took out letters of administration in Nakuru CMCC Succ No 77 of 2019, and a temporary grant was issued on August 19, 2019. She averred that she complied with the orders of the court and was surprised to be served with the summons for confirmation of the grant. She urged the court to dismiss the Succ. Cause No 14 of 2019.



4. On February 6, 2020, the court directed file Nakuru CMCC No 77 of 2019 to be transferred to the High Court and consolidated with Succ No 14 of 2019.
5. In response to the affidavit of protest, I and M filed their replying affidavit on May 28, 2020 in which they averred that the protest lacks merits. They averred that the deceased had 3 wives and in the instant petition, the petitioners have cited all the beneficiaries from the 3 houses and further stated that the second wife MW has difficulty and had refused to cooperate in filing the succession cause.
6. On the other hand, MWM in her replying affidavit filed on May 2, 2020, contends she is not aware of any succession cause filed by the protestor and on being explained about the petition, her name and that of her co-wife have been omitted but all other beneficiaries have been named.
7. Directions were taken that the protest does proceed by *viva voce* evidence.

Protestor's Case

8. PW1 MWN testified that NW was her husband having gotten married in 1969. She stated that they went to live in the Njoro Kikabu area with the co-wife and they lived together before a house was built for her. She stated that she relocated to Kilgoris with the deceased in 1973 where they engaged in business. She later went to live on the farm. She stated that the 1st wife also has her farm. She said the deceased while in Kilgoris lived in the shop and went home over the weekend.
9. She denied ever knowing that the deceased had married a 3rd wife. She said she learned of the issue of a child born outside wedlock and confirmed that the deceased buried the child. She further stated that the deceased divided his property between her and the 1st wife; that she was to have the land in Kilgoris while the 1st wife was to utilize the land in Njoro.
10. In cross-examination, she confirmed that the child of K was buried in her land by the deceased but she denied that K was married to the deceased.
11. PW2 Daniel Leuru testified that he was the chief of the Poroko Location from 1993 to 2003. He said he knew the deceased since 1980 when he purchased land in the Poroko area. He testified that he was not informed by the deceased about a third wife. He further stated that there was a meeting at the chief's office but the parties did not agree as they were shouting and there was a lot of noise. He said the deceased was forced to bury the body of the child as parties did not agree.
12. PW3 Joseph Ole Mugie testified that he was a friend of the deceased and a neighbour in Poroko. He confirmed that the deceased had told him he had 2 wives. He said he could not tell who was buried at the home of the deceased. He said he would visit the deceased at his shop but he had never found any other wife.

Petitioner's /defendants case

13. DW1 IKM testified that the deceased was his father, and the deceased had 3 wives. He said the 1st house has 8 children, 2nd house has 7 children, and 3rd house has 13 children. He belongs to the 1st house. He stated that the 1st house lives in Njoro, the 2nd house in Kilgoris Poroko while the 3rd house live in Kilgoris town and the deceased's wives are MW, MW and JK.
14. He further stated that the 3 families maintained a good relationship when the deceased was alive.
15. In cross-examination, he stated that the children of the 1st and 2nd wife have the names of their maternal and paternal grandparents but he does not know the naming of children of the 3rd house. He said he



- does not know when dowry was paid or how the 3 wives were married and he came to know of the 3rd house in 2016. He said the deceased did not introduce the 3rd wife to the family.
16. DW2 Samson Ndalai testified that he retired as chief of the Poroko Location in 2014 and said he knew the deceased from the year 1972.
 17. In cross-examination, he said the deceased had 3 wives in Kilgoris in 1997 and in the year 2003, he assisted the children of 3rd family to apply for an identification card when the deceased brought them into his office. He said the deceased informed him that the 3rd wife was buried in Kilgoris. He said the 3rd wife has 10 children but he only knows about 6 children and he is not aware if the deceased paid dowry of the wives.
 18. DW2 said he did not know whether K was married to PN. He said the 2nd and 3rd families of the deceased lived in Kilgoris and all the children of the deceased were well acquainted with each other.
 19. DW3 Michael Nahashon Ole Nyaboke testified that he lives in Poroko and adopted his witness statement dated August 2, 2021 as evidence. He testified that before the deceased purchased land in Poroko, he lived together with the 2nd and 3rd wife in Poroko. He confirmed he has interacted with M and K as his brother married M's daughter and during the payment of the dowry both M and K were present at the ceremony. He however could not tell how the deceased married K.
 20. DW4 ITM adopted his witness statement dated November 18, 2021 as evidence. He testified that the deceased M was his father and that his father had 3 wives. He said his mother is K the 3rd wife. He further stated that the children of the 3 wives were peaceful; that before the demise of their father, the children cooperated and worked together; that they had a family account where his wife and DW were signatories.
 21. He further stated that he lived with DK in his house before the demise of their father. He stated that his mother had 2 children before she was married to the deceased and that he was issued with identity card in the year 1997; that he did not change his name and he denied that PN was his father.
 22. He testified that his mother was not buried by the deceased in Poroko. He added that when he was young, he lived in Kilgoris at the shop with his mother and the deceased and when his brother died, there was a commotion as they were being told to bury him on the Nyahururu farm but the deceased agreed to bury him in Kilgoris. He said the 3rd house was not involved in filing the succession cause.
 23. He further stated that the children of the 3rd house did not live in the Poroko land where the family of the 2nd house lived. He further denied threatening the man who had indicated the children of his mother K belonged to his brother.
 24. DW5 John Pukuri Ngairi adopted his witness statement dated August 2, 2021. He testified that he is the chief of Poroko Location and he knew M as he hailed from his location. He further stated that he knew the deceased had 3 wives and he asked the deceased M to bury his son. He said during the burial of the deceased M, all the children of the deceased together with the wives were involved.
 25. Directions were taken on December 1, 2021 for parties to file written submissions. Both parties complied.

Protestor's Submissions

26. Counsel for the protestor filed submissions on 27 January 2022 and submitted that issues for determination are as follows: -
 - a. How many wives the deceased had



- b. The number of children of the deceased and
 - c. Who should benefit from the estate of the deceased.
27. Counsel for the protestor submitted that the deceased had 2 wives namely MWM and MWM and was blessed with 7 children and 13 children respectively. He further submitted that the two wives were each settled in their respective parcels of land.
28. Counsel submitted that the late J K was not a wife to the deceased M; that the deceased did not at any time recognize her as a wife. He added that the evidence of Daniel Leuku who testified that the deceased had 2 wives was not challenged.
29. Counsel for the protestor further submitted that the 2nd Petitioner could not tell when the deceased K was married to the deceased nor why the M (deceased) did not bury the said K (deceased).
30. Counsel further submitted that the 3rd house did not adopt the naming of children as required by the Kikuyu Custom Law as evidenced in the 1st and 2nd house.
31. In conclusion, counsel for the protestor submitted that the petitioners have failed to prove their relationship with the deceased as well as prove dependency as per Section 29 of the Succession Act and urged this court to distribute the estate of the deceased according to two houses.

Applicant's /Petitioner's Submissions

32. Counsel for the petitioner filed submissions on 23rd December 2021 and submitted that the instant Succession Cause 14 of 2019 was procedurally filed and is proper before this court; that it was filed after the 60 days period given to the 2nd house by the court. The 1st and 2nd petitioners filed the petition in their capacity of daughter and son of the deceased from the 3rd house, while the 3rd Petitioner represents the 1st house.
33. Counsel submitted that the application dated February 6, 2020 and the petition filed in CMCC Succ Cause No.77 of 2019 is a mere abuse of the court process; that the objector filed the Succ No.77 of 2019 after the 60 days period, citing the 1st wife as the co-petitioner but she failed to obtain the consent of the 1st wife and other beneficiaries thus the same was obtained fraudulently and the application dated February 6, 2019 seeking to strike out Succession Cause No 14 of 2019 fails to meet the required threshold as Succession Cause Number 14 of 2019 was filed before Succ 77 of 2019.
34. Counsel further submitted that the issue of a 3rd wife has not been controverted by the objector and the objector has failed to adduce any evidence to the assertion that petitioners are not children of the deceased; and submitted that in the current Succ Cause, all beneficiaries have been involved in the process.
35. In conclusion counsel for the petitioners submitted that the petitioners have no dispute in having a representative of the 2nd house enjoined as an administrator of the estate of the deceased.

Analysis and determination

36. I have considered the pleadings, the evidence on record, and the submissions filed by the parties. I consider the following as issues for determination: -
- a. Whether the petitioners concealed material facts
 - b. Whether the late K was wife to the deceased and whether her children are the beneficiaries of the deceased herein.



c. The mode of distribution

(i) Whether the petitioners concealed material facts

37. The protestor argued that the petitioner in filing the petition, concealed material facts; that her and her co-wife who is the first wife have been omitted. I have perused the petition filed herein and note that it lists all the beneficiaries including the protestor and her children.
38. I have also perused the chief's letter dated March 26, 2019 from the Poroko area attached to the petition and note that it is the same letter the protestor used to file the petition in the lower court. It states the deceased had 32 children and 3 wives. 1st wife has 7 children, 2nd wife has 13 children and 3rd wife has 10 children. The same letter was used by both applicant and objector in filing the petition. I also note in the petition filed by the protestor, only a few beneficiaries from the 2nd house signed. The protestor did not involve all beneficiaries listed by the area chief when applying for the grant of letters of administration.
39. From the foregoing, I do not find any issue of concealment of facts by the petitioners in filing the current grant.

(ii) Whether the late K was wife to the deceased and whether her children are the beneficiaries of the deceased herein.

40. From the evidence adduced, I note that it is only the protestor the deceased's second wife herein, who is challenging the 3rd wife as deceased's wife. She stated that she lived with the deceased and the deceased did not disclose the existence of a 3rd wife but on being asked why the deceased buried alleged 3rd wife's son on the deceased's piece of land in Poroko, she could not explain. The protestor's evidence is that the deceased had 2 wives, the protestor and MW (the 1st wife) and K was not a wife to the deceased. Her argument is that failure by the deceased to bury K who is the alleged 3rd wife, is a clear indication she was not a wife of the deceased.
41. No evidence of marriage between the deceased and K has been tabled before this court. The fact that the deceased did not bury her in his land raises more questions than answers. If indeed there was formal marriage between the deceased and the late K, he would have buried her in his land. From the foregoing, there is no proof of marriage between the deceased and the said K.
42. However, the fact that the deceased buried one of K's children in his land confirms that he sired children with K. PW1 said K had two children at the time she started living with the deceased in Kilgoris. Therefore, of the 10 children, there is no doubt that the first two were not sired by the deceased.
43. In respect to the 8 remaining children, evidence has been adduced to the effect that they were not named as per the deceased's Kikuyu Culture. Apart from the son buried by the deceased in his land, there is no certainty as to who among the remaining 7 children were sired by the deceased.
44. In my view, there is need for DNA tests to confirm who of K's children were sired by the deceased.
45. The results of DNA will determine who among K's children are entitled to benefit from the deceased's estate.
46. Final order:-
1. DNA tests to be done to establish whether the deceased was the father of 7 of the late K's children.



2. The modalities on who should avail samples for matches to be as per guidance of Government Health Official
3. The estate to cater for the cost of DNA.
4. Further mention to confirm results of DNA and further directions.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2022.

.....

RACHEL NGETICH

JUDGE

In the presence of:-

Martin - Court Assistant

No appearances by parties

