



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 863 OF 2016

IN THE MATTER OF THE ESTATE OF SHEM MARCAAD NYAMAI alias

SHEM M. OWITI NYAMAI alias SHEM M. O. NYAMAI (DECEASED)

RULING

1. The deceased herein Shem Marcaad Nyamai alias Shem M. Owiti Nyamai alias Shem M. O. Nyamai died intestate on 5th March 2016. On 19th May 2016 one Zaina Rashid Mbonika (hereinafter the Respondent) filed a Citation in her capacity as a widow (wife) to the deceased citing Jennifer Mary Jagire as the Deceased's wife and Patrick Nyamai, Julius Nyamai and Jackline Nyamai as children to the deceased seeking them to show cause why they could not take out a grant of representation in respect of the deceased's estate.
2. In her affidavit in support of the Citation sworn on 13th May 2016, the Citor (Respondent) claimed that she was a co-wife to Jennifer whom she had approached together with her children to take out a Grant of Letters of Administration but had refused.
3. After failing to serve the Citees with the application, the Citor moved the Court through a Notice of Motion dated 15th November 2017 seeking to effect service by way of advertisement in two local daily newspapers with wide circulation. Subsequently, the Court granted the application on 9th March 2018. Service was effected upon the Citees (Applicants) through advertisement on the Standard and Nation newspapers of 27th March 2018.
4. The Citees having failed to respond within 15 days by entering appearance, the Court on 30th May 2018 granted leave to the Citor to petition for a grant of representation. Consequently, the Citor (Respondent) petitioned for a grant of representation on 28th June 2018.
5. In Form P & A 5, she listed the following as survivors to the deceased;
 - (1) Jennifer Mary Jagire 59 years, widow
 - (2) Zaina Rashid Mbonika 58 years (widow)
 - (3) Patrick Nyamai 32 years (son)
 - (4) Julius Nyamai 26 years (son)
 - (5) Nyandega Nyamai 26 years (son)
 - (6) Jackline Nyamai 24 years (daughter)
6. The estate was gazetted on 2nd November 2018 and the grant issued on 7th December 2018. Subsequently, Jennifer Jagire a widow to the deceased and her children moved to this Court vide Summons dated 19th September 2018 seeking orders as follows;

(1) Spent

(2) That the Court be pleased to set aside the Ruling dated 30th May 2018

(3) That the Court be pleased to allow the Applicants to petition and or file for Letters of Administration.

(4) That costs of the application be provided for.

7. The application is premised upon grounds set out on the face of it and an affidavit sworn by Jenniffer Jagire Nyamai on 13th August 2018. According to the 1st Applicant, they were not served with the Citation as alleged since she is a resident in Canada. That it was not reasonably possible to read the Citation in the daily Nation and Standard newspapers while in Canada.

8. She averred that she was the only wife to the Deceased having been married under the Marriage Act at the Registrar of Marriages Nairobi. She averred that her marriage to the deceased was never dissolved.

9. She claimed that she did not have any knowledge of the Respondent's intentions in petitioning for a grant of representation without her knowledge nor that of her children. She further averred that the claim by the Respondent that she was a second wife to the deceased was a misrepresentation of facts hence a stranger to these proceedings.

10. In response, the Respondent filed Grounds of Opposition dated 15th November 2018 stating that;

(i) Zaina Rashid Mbonika is a wife for the purposes of Section 3(5) of the Law of Succession Act Cap 160 Laws of Kenya and is entitled to apply for Letters of Administration of the estate of Shem Marcaad Nyamai (Deceased).

(ii) Both Zaina Rashid Mbonika (Zaina) and Nyandega Wamunda Nyamai (Nyandega) are dependants and beneficiaries of the estate of Shem Marcaad Nyamai (Deceased) by virtue of being a wife and son respectively and any of them is hence entitled to apply for Letters of Administration.

(iii) By virtue of the prima facie evidence contained in the Insurance Policy taken out by the Deceased during his life time in which Zaina is named as the next of kin and described as "spouse" by the deceased her right to apply for Letters of Administration ranks pari passu to that of any other beneficiary.

(iv) That Zaina did not conceal any material information as she had disclosed all beneficiaries including the Applicant and her children.

(v) That the Applicants are all residents of Canada hence not suitable to take out a grant of representation.

11. The Respondent also filed a replying affidavit sworn on 15th November 2018 opposing the application. She averred that she lived with the Deceased with the full knowledge of Jenniffer and she got a son with the Deceased named Nyandega. That the Deceased had listed her as a wife in the Insurance Policy which serves as proof of her marital status to the deceased.

12. When the application was first placed before the duty judge on 25th September 2018, it was not certified urgent. The Judge directed for service to be effected and hearing date to be taken at the Registry.

13. On 27th May, 2019, a mention date was taken at the Registry. Mention was fixed for 14th October 2019. On that day, the matter was mentioned before the Deputy Registrar. Mr. Mokaya for the Applicant indicated that the mention was for fixing a hearing date. M/s Njoki for the Respondent confirmed.

14. Hearing was then fixed for 28th January 2020. On 28th January 2020, the matter was placed before the Deputy Registrar. Mr. Akelo holding brief for Matemu for the Respondent indicated that parties had agreed to have the matter disposed by way of written submissions. M/s Luvai holding brief for Mr. Kabue for the Applicants also confirmed the same. The Deputy Registrar however did not endorse that prayer. Instead, the learned Deputy Registrar fixed the matter for directions before the Judge on 18th February 2020.

15. On that day, again the matter was mentioned before Hon. Mbulika the Deputy Registrar. Mr. Chalo holding brief for Kabue for the Applicant indicated that they had filed submissions. The Deputy Registrar then indicated that mention on 18th March 2020 before the Judge to take a Ruling date. Upto this stage no directions had been given by a Judge on how the application dated 19th September 2018 was to be disposed. It would appear that the Advocates assumed that their proposal to dispose of the matter by way of written submissions had been endorsed by the Deputy Registrar.

16. For some reason which is not clear from the record, the matter remained unattended till 28th September 2020 when Mokaya for the Applicant and M/s Grace Katasi for the Respondent appeared for directions. Mr. Mokaya indicated that he had filed submissions on 17th February 2020. The Court then directed Mr. Mokaya to serve his submissions and the Respondent to file theirs within 7 days. Hearing was fixed for 12th October 2020. On that date, Mr. Mokaya indicated that they intended to rely on the submissions filed.

17. M/s Katasi also relied on their submissions dated 1st October 2020 and made a brief submission that the Respondent was a wife to the Deceased under customary law. The Court went ahead to fix a ruling date.

Submissions

Applicant's Submissions

18. Through the firm of Kabue Thumi and Co. Advocates, the Applicants filed their submissions on 17th February 2020 basically submitting that the Respondent was not a wife to the Deceased and that Jenniffer was the only and legally recognized wife having married under the Marriage Act. Counsel contended that the widow was not served properly with the citation application as service through daily newspaper was not sufficient given that the Applicants are residents of Canada. Several authorities were filed to buttress the point that Jenniffer was the only wife to the Deceased and that the Respondent was a stranger to the estate.

19. Mr. Kabue contended that the Citor/Respondent misrepresented herself as a widow to the Deceased and that she has no beneficial interest in the estate. Counsel argued that no grant can issue without notifying every person interested in the estate. To support that proposition, Counsel relied on the holding in the case of **In Re Estate of Kariri Ndirangu alias Kariri S/o of Ndriangu (Deceased) (2018)** where the Court held that it was incumbent upon the Citor to ensure that every Citee is served. Further reference was made in respect to the holding in the case of **In Re Estate of the Late Fredrick M'Mutea M'Kiara alias Fredrick M'Kiara (Deceased) (2019)eKLR** in which the Court held that a Citor has an obligation to prove that she served the Citation accordingly.

Respondent's Submissions

20. Through her submissions dated 1st October 2020 filed by the firm of Matem, the Respondent contended that she was a widow to the Deceased and therefore entitled to take out a grant of representation after the Applicants who were entitled in priority failed to do so. It was contended that the Citation was properly served through advertisement. Counsel submitted that even in the absence of proof of a statutory marriage, the presumption of marriage is relevant considering that the respondent got married to the Deceased in 1989 under Luo/Swahili Customary Law.

21. That by virtue of Section 3(5) of the Law of Succession, she is entitled to a share of the estate. To fortify this submission on presumption of marriage, Counsel made reference to the holding in the case of **Estate of Morris Kilonzo Musyimi (Deceased) (2018)eKLR** where the Court held that, in the absence of any proof of formal statutory marriage, the Court must refer itself to the question of presumption of marriage. Further reliance was placed in the holding in the case of **Hortensiah Wanjiku Yawe Vs. Public Trustee (C.A. No. 13 of 1976)** and **Mary Wanjiru Githatu Vs. Esther Wanjiru Kiarie Civil Appeal No. 6 of 2019 (2010)eKLR** where both courts presumed marriage due to long time cohabitation notwithstanding the existence of a statutory first marriage.

22. Concerning the issue of Citation, Counsel submitted that the same was procedurally issued. He contended that the Respondent who is the second wife to the Deceased was cognizant of the fact that the Applicants had priority under the Law of Succession to apply for Letters of Administration. Counsel further submitted that the Respondent having petitioned for a grant of representation, the Applicants should have filed an objection pursuant to Rule 17 of the Probate and Administration Rules. That as it stands now, the petition is not opposed as there is no formal objection.

23. Lastly, Counsel submitted that the Applicants are not suitable administrators as they are residents of Canada hence not competent to administer the estate. To buttress this argument, Counsel referred to the decision in the case of **In the Matter of Kombo Mulinge (2015)Eklr** where the Court observed that it was difficult for a proposed co-administrator to administer the estate from abroad.

Determination

24. I have considered the application herein, response thereto and submissions by both Counsel. The application before me is seeking orders setting aside orders made on 30th May 2018 in which the Court authorized the Respondent to petition for a full grant after the Applicants/Citees failed to petition for the same. Secondly, the Applicant seeks to be allowed to petition or file for a grant of Letters of Administration.

25. Issues that arise for determination are;

(i) Whether there is sufficient ground advanced to set aside the orders of 30th May 2018.

(ii) Whether the Court has properly been moved to direct that the Applicants do petition for a grant of Letters of Administration.

26. The Respondent herein moved the Court by citing the Applicants to show cause why they could not petition for a grant of representation. Considering that the Applicants were not residing in Kenya, the Respondent sought substituted service by way of advertisement in two daily newspapers with wide circulation. The application was granted. However, pursuant to Rule 21(5) of the Probate and Administration Rules, there was no appearance nor objection entered or filed within 15 days in response to the citation.

27. Consequently, the Court was moved to allow the Respondent petition for a full grant which she did and eventually gazetted the estate and a grant issued on 7th December 2018. Basically, the Applicants lost two opportunities. Firstly, failure to enter appearance and objection to Citation pursuant to Rule 21 of the Probate and Administration Rules. Secondly, after the estate was gazetted, the Applicants ought to have filed objection by way of an answer to petition and cross petition pursuant to Rule 7 & 17(6) of the Probate and Administration Rules. See **Nyawira Githanga Vs. Margaret Wangare Mwaura (2006)eKLR**.

28. A grant having been issued, the issue of issuance of Citation and entry of appearance and filing of objection is overtaken by events. The Court cannot reverse the clock to the stage of issuance of a Citation. A grant is already in place. In any event, service by way of advertisement is deemed to be good service hence failure by the Applicants in not reading the same by virtue of the place of their residence is not material. I am satisfied that the Citation was properly served through advertisement.

29. Has the Court been moved properly to direct that the Applicants do petition for a Grant of Letters of Administration? As stated, there is already a grant issued on the strength of a Petition by the Applicant that she is a wife. According to the Applicants, the Respondent was not a

wife to the Deceased and that she is a stranger. The only legal recourse the Applicants have is to seek for revocation of the Grant if they think the respondent is not a widow to the deceased and therefore not a beneficiary to the estate.

30. Under Section 66 of the Law of Succession Act, a spouse or spouses are ranked first in equal footing in order of preference in petitioning for a grant of representation in an intestacy estate. If the Applicants believe that the Respondent was a wife to the Deceased as they seem to suggest through whatever form of legally recognized marriage, then they should pray that Jennifer (1st Applicant) be made a co-administrator to the Respondent in compliance with Section 66 of the Law of Succession.

31. On the other hand, if the Applicants are convinced that the Respondent has no interest in the estate either as a wife or dependant, then, they can move the Court appropriately seeking revocation for the grant citing relevant grounds and if the Court is satisfied, it will revoke the same and issue a fresh grant to the right person.

32. From the pleadings, the Applicants are not seeking revocation of the grant although there seems to be some semblance of the intention to indirectly seek for annulment of the Grant by seeking orders setting aside the orders of 30th May 2018.

33. The issues surrounding the dispute over the existence of marriage between the Respondent and the Deceased are matters of fact requiring evidence to be adduced and witnesses subjected to cross examination. If the Court in the final analysis finds that Jennifer (1st Applicant) and the Respondent were wives to the Deceased, it will make appropriate directions as to whether there should issue joint Letters of Administration to the two to administer the estate or not.

34. Having held as above, it is my finding that I do not wish to delve into the issues regarding the existence and or legality of a marriage between the Respondent and the Deceased. To do so will prejudice any possible proceedings where evidence on the disputed marriage will be adduced and a determination made. For the sake of justice, I will not make a determination on the issue of marriage at this stage as that will be addressed in a properly filed application if any.

35. For the above stated reasons, it is my finding that the application dated 19th September 2018 is not merited and the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF JANUARY, 2021.

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J. N. ONYIEGO

JUDGE