REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 119 OF 2015

(AS CONSOLIDATED WITH SUCCESSION CAUSE 112 OF 2016)

ISB.....APPLICANT

VERSUS

MS.....1ST RESPONDENT

ZSS.....2ND RESPONDENT

ZSM.....1ST INTERESTED PARTY

NSB.....2ND INTERESTED PARTY

ASB.....3RD INTERESTED PARTY

MBSA.....4TH INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Obat Wasonga Advocate for the Applicant

Kadima & Co. Advocates for the Respondents

RULING

The Applicant herein filed a Chamber Summons Application dated 16.09.2020 under certificate of urgency supported by an Affidavit sworn by the Applicant on the same day. Their application moved the Court for orders:

(i). Spent

(ii). That pending the interparties hearing and determination of this Application, there be temporary injunction stopping the 2nd Interested Party or any other party to this suit from interfering with the matrimonial homes.

(iii). That pending the hearing and determination of the succession cause, this Honourable Court be pleased to order that the widows and their children continue living in their respective matrimonial homes without any interference.

(1v). Any other or further orders of the Court geared towards protecting the matrimonial homes.

(v). That costs of this Application be in the cause.

The second Application sought the following prayers;

(i). Spent

(ii). That the Honourable Court declares that the 2nd Respondent has since remarried and her interest in the Estate has been extinguished.

(iii). That the Honourable Court declare the 1st Respondent is a divorcee and therefore cannot be an Administrator of the Estate.

(iv). That the Honourable Court be pleased to order the matter to start denovo.

(v). That the costs of this Application be in the cause.

The Application was grounded upon the grounds espoused therein by the sworn affidavit of **ISB** *dated 16.09.2020. The Respondents' response was by way of affidavits both dated 15.10.2020.*

Background

The deceased to whose estate these proceedings relate is **SB** who died on 22nd July, 2014 while domiciled in Kenya. The deceased had three widows namely; **ZSM, MS** *and* ***ZSS****. The Applicant contends that with regard to the 1st Interested Party,* ***ZSM****, there were no formal divorce/ separation proceedings that had been filed though they were separated. That further, at the time of his demise, the deceased was still married to* **ZSS** but she got remarried to a man called S and as such her interest in the Estate of the deceased have been extinguished by operation. The Applicant further argues that he had obtained court documents showing that the 1st Respondent, **MS** *had applied for divorce twice in Divorce Petition No. 4 of 2006 which was later withdrawn and Divorce Petition No. 2 of 2014 which the deceased died before final orders were issued. He also contends that it would be a failure of justice to allow the 1st Respondent and the 1st Interested Party to administer the estate of the deceased based on the above reasons.*

The Respondents on the other hand contend that the Applicant has used this Application for raise issues prematurely and that the only results in keeping the succession cause pending offends the rules of natural justice of determining matters expeditiously and justly.

This Application has been brought by the Applicant despite Directions by consent of the parties having been taken twice in this matter, being 20.03.2017 and 08.07.2019. Parties having consented to abandon all applications and proceed with the hearing and determination of this matter, which consents are yet to be set aside.

This court also notes that PW1 **AS*B*** *who resides in the United Kingdom has already given evidence.*

Analysis.

The framework for applications for grants of representation is section 51 of the Law of Succession Act. The most relevant provisions are in section 51(2)(g)(h), which state as follows:

"*Application for Grant*

51. (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) ...

(b) …

(c) …

(d) …

(e) …

(f) …

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased..."

Under section 51(2) (g) the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The Administrator in this present case disclosed all the three widows survived by the deceased, brother of the deceased and all the four children of the deceased. This court notes that failure to disclose all the above petitioners would be non-compliance with the provisions of Section 51 (2) (g).

The law makes very clear provisions that an administratrix is obliged to disclose the children of the deceased and the children of any of them who had died. This is required because, as a surviving widow, one is not entitled absolutely and exclusively to the intestate estate of her departed husband. If anything, she is entitled only to a life interest over the property, for the ultimate destination of the property of the deceased is not to her but to the children of the deceased. Her entitlement to absolute access to the estate is limited to personal and household goods, but not to capital assets, which are destined to the children. It is about a parent passing property on to his or her descendants but not to his or her contemporaries or ascendants.

This to the mind of this court therefore rules out the issue of whether one of the widows has since remarried or is a divorcee as has been alleged by the Applicant.

To clear the air on the dependants in this matter, I shall stick to the definition in **Section 29** of the Act as follows:

> **"29. For the purposes of this Part, "dependant" means-**
>
> > **(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;"**

Therefore, the dependants in this matter remain the ones indicated in the letter by the chief stating all the dependants to the deceased Estate, in addition to any other dependants that falls under the auspices of **Section 29** of the **Law of Succession Act.**

Apart from section 29 of the law of succession I have in mind Article 27 (i) of the Constitution which states that every person is equal before the law and has a right to equal protection and equal benefit of the law. It would be worthwhile to mention that in all this contestation by the applicant over the estate of the deceased no cogent evidence or material to persuade any court in the land that the respondents were spouses to the deceased. The law of succession more specifically section 40 provides as follows:

> **"where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, distribute among the houses according to any wife surviving him as an additional unit to the number of children. The distribution of the personal and household effects and the residue of the net intestate estate which earn more shall then be in accordance with rules set out under section 35 and 38."**

In this case the rights of the widows and children are protected under the constitution Article 27 on equality and freedom from discrimination and the law of succession as stipulated under section 35 ,38 and 40 of the Act. The argument being advanced by the applicant that some of the widows are now divorcees or have since been remarried remains an issue that the court will look into at the final determination of this Petition. Based on the evidence adduced by the Respondents it is clear that they were indeed married to the deceased and sired children out of the unions. The widows and children taken into the family of the deceased upon his death is supported by the chiefs letter dated presented before this court. Under section 3(2) of **the Act it defines the** child or children as follows; Reference in this Act to child or children shall include a child conceived but not yet born as long as that child is subsequently born alive and in relation to a female a child born to her out of wedlock an in relation to a male a child whom he has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

The concept of succession, whether under statute or common law or customary law, is about generational transfer of family wealth from parents to children. That is why the property passes absolutely to the children but not to the surviving spouse, who would only be entitled to a life interest over that property. I am alive to the argument that the surviving spouse should have priority over the children and the property ought to pass to him or her exclusively and absolutely first, and subsequently to the children following the demise of the surviving spouse. That contention has no backing in law, and is utterly contrary to the concept of succession. Such argument distorts the concept. It should be emphasized that succession is not meant to be within a generation, where property passes from one spouse to the other, but outside, of the generation, where family wealth passes from one generation to the next.

It is also important to note that dwelling on such applications will only delay the final determination of this petition. This court notes that Directions by consent had been taken twice in this matter, on the 20th of March, 2017 and 8th July, 2019, parties had agreed to abandon all applications and proceed with the Hearing and determination of this matter viva voce and in fact, PW1 ASB had already given his evidence. It is important that court orders must be obeyed by everyone for the dignity and authority of the court to be maintained. This court notes that the application elicits nothing new and is but a futile attempt by the Applicant to delay the expedient determination of the matter and a ploy to disinherit some dependants of the estate.

In the upshot the court makes the following orders:

Orders:

1. **That status quo be maintained.**

2. **That all beneficiaries to the Estate of the Deceased continue living in their respective matrimonial homes without interference from each other.**

3. **That all assets of the deceased Estate remain intact without interference from any of the beneficiaries.**

4. **That the matter proceeds from where it has reached.**

5. **That this being a family matter there shall be no order as to costs.**

It is so ordered.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 22ND DAY OF MARCH, 2021

.....

R. NYAKUNDI

JUDGE

NB: This Ruling has been dispatched to the advocates respective emails

kadimaadvocates.legal@gmail.com

obatwasonga@gmail.com