



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 1916 OF 2006

IN THE MATTER OF THE ESTATE OF BENSON KAMOLO KINYUMU MANDIU (DECEASED)

FAITH MUNYIVA KAMOLO

WAMBUA BENSON KAMOLO.....ADMINISTRATORS

VERSUS

ELIZABETH KANINI MUSILIRESPONDENT

JUDGMENT

1. The deceased Benson Kamolo Mandiu Kinyumu died on the 8th of February 2005 and this court moved for grant of representation on the 15th of February 2005 by a son Wambua Benson Kamolo and daughter Faith Munyiva Kamolo. 9 survivors including a granddaughter were listed. The Applicant was not. The assets of the estate were listed as Kajiado/Kaputiei Central/455, cattle and money in the bank. A grant was issued on 29th May 2008.

2. On her part the Applicant Elizabeth Kanini Musili moved the court on 21st of December 2011 seeking to revoke the grant issued herein on grounds that the same was fraudulently obtained by making of false statement and concealment of material facts, not all assets were listed and she had not been informed of the petition.

3. In her affidavit in support of the application the applicant stated that she was the deceased second wife and known to the petitioners yet she and her 3 children were excluded as survivors. Further that before his demise the deceased had shared his properties through a will.

4. The application was objected to in a replying affidavit of Faith Munyiva Kamolo who deposed that the applicant was not a wife to the deceased but had been employed as a helper in 2000 to assist their late father and therefore the claim that she was a wife is false as no marriage between the applicant and the deceased was formalized. Further she accused the applicant of having withdrawn Kshs.400,000/= from the deceased account which amount the applicant had failed to account.

5. In an affidavit dubbed affidavit of distribution; the second respondent proposes distribution and proposes that the applicant gets 3 acres of land where she currently resides and cultivates.

6. The evidence of the applicant and that of two other witnesses, the applicant's uncle David Nthiwa Muia and Piliانا Koki a sister to the deceased is that the applicant got married to the deceased in 2002 under customary marriage. The deceased died in 2005 which means the two lived for about 3 years. Further evidence is that the applicant brought to the marriage her three children. The applicant further contended that the deceased died 11 days after signing a will in the presence of relatives.

7. Though without an admission of the union between of the deceased and the applicant there seems to be a change of heart by the deceased children and they now propose to give 3 acres of land to the applicant.

8. Having considered the evidence before court I am convinced that the applicant has placed before this court evidence on a balance of probabilities that she was a wife to the deceased having been married under Kamba customary law and the two cohabited as such for 3 years before his demise.

9. I must also state that I found David Nthiwa Muia and Piliانا Koki to be truthful witnesses and I believe their evidence that a marriage under Kamba customary Law was conducted. I found the 2nd respondent evasive in his evidence.

10. Having established that the applicant was not a helper as alleged but that she lived with the deceased as a wife I will then turn to consider whether the deceased left a will or not. For starters no original document was placed before court, secondly the said document cannot qualify as a will as the same does not meet the prerequisite of a will and I therefore find that the deceased died intestate.

11. The evidence before court is that the deceased was ailing as he married the applicant. There is no evidence either that in the three years the deceased and the applicant lived together they acquired any properties. The applicable law in this instance is Section 40 of the Law of Succession, the applicant should not expect to share the deceased properties in equal portion with the first house. The Court is also minded that the Applicant's 3 children as she admitted were not sired by the deceased. Further the law requires that each wife and child be considered as a unit in distribution.

12. Having stated as above I see no value in revoking and/or annulling the grant but do declare that the applicant was indeed the 2nd wife of the deceased and ought to be considered bearing the above point in mind at the time of distribution.

13. And in order to bring this matter to a closure I direct the administrators do file forthwith for the confirmation of the grant wherein they will list all assets of the deceased and not later than 30 days of the date hereof.

14. Costs in the cause.

Dated and Delivered in Nairobi on this 26TH day of FEBRUARY, 2020.

ALI-ARONI

JUDGE