



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION

SUCCESSION CAUSE NO. 1598 OF 2010

IN THE MATTER OF THE ESTATE OF

GEDION OLORKINYOKI NAREIYO ALIAS GIDEON

OLORKINYOKI OLOLE NAREIYO (DECEASED)

KARTAKIA ENE LOORKINYOIN NAREIYO.....1ST APPLICANT

NGOTO NAKUDEL.....2ND APPLICANT

VERSUS

JWM alias JNMEN.....RESPONDENT

RULING

1. The deceased Gedion Olorkinyoki Nareiyio alias Gideon Olorkinyoki Olole Nareiyio died intestate on 2nd March 1993. The respondent JWM alias JNMEN filed a petition on 11th August 2010 seeking the grant of letters of administration intestate. She stated that the deceased had died leaving three houses: the house of the 1st applicant Kartakia Ene Lookinyoin Nareiyio, the house of the 2nd applicant Ngoto Nakudel and her house. She stated that each house had children. She took out citations to accept or refuse letters of administration against the applicants. The record has an affidavit of service filed on 7th April 2011 showing that the applicants were served on 15th September 2010. No action was taken by the applicants. On 3rd November 2011 a grant was issued to the respondent.

2. The applicants filed the present summons dated 1st November 2012 seeking the revocation and/or annulment of the grant. The grounds were that the proceedings leading to the grant were defective; the grant was obtained fraudulently by making of false statement and concealment of material fact; and that the grant was obtained by untrue allegation of facts. The supporting affidavit was sworn by the 1st applicant. She stated that she and the 2nd applicant were the only widows of the deceased as the respondent was never married by the deceased, and was therefore a stranger to the estate of the deceased; they denied having been served with any papers in the petition; that not all the children of the applicants had been indicated in the petition; that upon the death of the deceased the 1st applicant obtained a certificate of death ("KON – 2") issued on 12th October 1993 and was surprised that the respondent had obtained another certificate of death on 11th June 2004 that she had used to petition for the grant; and that the children of the respondent were not the children for the deceased, and that both her and her children were not entitled to benefit from his estate and therefore she could not petition for the grant.

3. The respondent opposed the application and swore a replying affidavit dated 8th April 2019. Her case was that she was married off to the deceased when she was 14 years old and dowry paid to her home. She began to live in the deceased's home. She found that the deceased had been married twice before but the wives had each separated from him, leaving children. In the home were five daughters and two sons of the deceased. The two sons were of the first wife. The girls were from the second house. She lived with these children. On her part, she got five sons with the deceased. In 1987 she got employed at [Particulars withheld] where she went to live with her children. The deceased would visit them. In all, she lived with the deceased for ten years before he died. At no time did the first and second wives (the applicants) return to the deceased. In 1993, while on duty, she learnt of the sickness of the deceased. She went to Kajiado District Hospital where he was ailing. She looked after him for two weeks before he died. She buried him at his home. The applicants did not attend the burial.

4. Daniel Toimasi Lookinyoki is son of the 1st applicant with the deceased. He swore an affidavit to deny that the respondent was married to the deceased. The 1st applicant swore a supplementary affidavit to deny the contents of the respondent's replying affidavit. She produced

proceedings in High Court at Nairobi **Succession Cause No. 2725 of 2013** (“KPON-3”) in which the respondent had petitioned for, and on 23rd January 2014 successfully obtained a grant of letters of administration, in respect of the deceased Joseph Kitole Solai who had died intestate on 17th April 2013. In the proceedings, the respondent had deponed that she was the widow of the deceased Joseph Kitole Solai and sought to inherit his estate. In those proceedings, there was a statement by one Gideon Ntaisi Zakayo dated 6th August 2014 (“KON – 2”) saying that between 2005 and 2010 he married the respondent following the death of her husband Regania Ole Murata in 2004.

5. Makudel Enole Mareiyo swore that she was the daughter of the deceased by the 2nd applicant. She stated that her mother separated from the deceased when she was young, and that it was the respondent (whom the deceased had married) who took care of her.

6. Geoffrey Njoroge Kariuki swore that he was the elder brother of the respondent and that he witnessed the respondent being married off to the deceased in Maasai ceremony in 1977. Margaret Wanjiku Kilele swore that she was married in the same area where the respondent subsequently came to be married to the deceased. The deceased had two previous marriages which had ended. The marriages had children. The respondent got four children with the deceased.

7. The application for revocation was heard orally by Justice A.N. Ongeri who gave directions for either side to file written submissions. She has since been transferred to the High Court at Kericho. When counsel (Mr. Rono for the applicants and Mr Githuka for the respondent) appeared before me on 8th June 2020, they asked that I take over the matter and prepare and deliver a ruling. This is how the matter came to me.

8. The record shows that during oral hearing, Retired Chief Stephen Muterian Taporu, the 1st applicant and Daniel Toimasi Lookinyoki testified in support of the application. The respondent, Margaret Wanjiku Kilele and Geoffrey Njoroge Kariuki testified in opposition. The evidence of the retired chief was that he knew that the respondent was married to the deceased when the later died. He knew both the deceased and the respondent. He knew the deceased had two other families when he married the respondent.

9. It is material to point out that the respondent has filed an application to confirm the grant that was issued to her. The application is pending. During confirmation, the court will determine the property making the estate of the deceased, identify who the beneficiaries of the estate of the deceased are, and distribute the estate to the beneficiaries (**section 71(2) of the Law of Succession Act (Cap. 160)**).

10. At this stage, the applicants are asking that the grant issued to the respondent be revoked because she was never married to the deceased, had no child with the deceased, and that both her and her children were not beneficiaries of the estate of the deceased.

11. Under **section 66 of the Act**, where the deceased has died intestate the court shall generally have discretion as to the person or persons to whom a grant of letters of administration shall be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

- (a) the surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy (subject to Part V of the Act);
- (c) the Public Trustee; and
- (d) creditors.

12. It does not appear to be in dispute that the 2nd applicant, after getting children with the deceased, left and went to remarry. That was the evidence of the 1st applicant, the evidence of the Chief, the evidence of her (the 2nd applicant’s) daughter Nakudel Enole Nareiyu, and the evidence of the respondent. I accept the evidence. In any case she did not testify or swear any affidavit. I find that she ceased to be a beneficiary of the estate of the deceased, and cannot obtain a grant in the estate.

13. As for the 1st applicant, she testified that she never left the deceased to remarry, or at all. However, the Chief was her witness and stated that she was not staying with the deceased when he died. The two were separated. Margaret Wanjiku Kilele stated that his mother (the 1st applicant) never separated from the deceased. The respondent, JWM alias JNMEN and Geoffrey Njoroge Kariuki had stated that the deceased had separated from his first two wives when he married the respondent. The evidence of Nakudel Enole Nareiyu related to her mother (the 2nd applicant) whom she said had left the deceased when he married the respondent. None of the witnesses stated that the 1st applicant had remarried. The fact only that she was separated from the deceased at the time he died did not take away the status of her being a widow of the deceased. They had not divorced.

14. The respondent’s case was that she was married to the deceased up to when he died. She was supported in this regard by the Chief (who was called by the applicants), Nakudel Enole Nareiyu (a daughter of the 2nd applicant and the deceased) and her witnesses Geoffrey Njoroge Kariuki and Margaret Wanjiku Kilele. The length of period the two stayed together, and which children were born during the stay, are issues that the evidence available did not clearly indicate. During the hearing of the application for the confirmation of the grant, the court, in dealing with the question of who the deceased’s beneficiaries are, will determine whether the children of the respondent were fathered by the deceased.

15. On the evidence, and on balance of probabilities, I find that the deceased was married to the respondent when he died, and that the two had lived together for a considerable time during which time he had separated from his first two wives. However, I find that after the deceased died the respondent moved on. She got remarried. One of the reasons why I make this finding is because in **High Court Succession Cause No. 2725 of 2013** at Nairobi she obtained a grant following the death of the deceased Joseph Kitole Solai on 17th April 2013, and the petition she filed to obtain the grant stated that she was the deceased’s widow. In her mind, she had been remarried. Had she

not been remarried, she would have been entitled to the personal and household effects of the deceased absolutely, and to a life interest in the whole residue of the net estate of the deceased. This is what **sections 35 and 40** of the **Act** provide. The High Court in **Tau Katungi –v- Margarethe Thorning Katungi & Another [2014]eKLR** observed as follows:-

“The effect (of section 35) is that the surviving spouse enjoys rights over the property and at his or her death the property passes to other persons. In the context of section 35, the widow is entitled to enjoy rights over the residue of the net estate that is after taking away the chattels and settlement of liabilities, during her lifetime with the property passing to the children upon her demise or remarriage.”

16. For these reasons, I find that respondent, having been remarried following the death of the deceased, cannot benefit from the estate of the deceased and therefore was precluded by the law from applying for, or being issued with, a grant of letters of administration intestate in respect of the estate of the deceased. I consequently revoke the grant of letters of administration intestate that was issued to the respondent on 3rd November 2011.

17. So that the matter can move forward, and in the wider interest of justice, I issue a joint grant in the names of Daniel Toimasi Lookinyoki and Nakudel Enole Nareiyio. The two, or either of them, shall be at liberty within 60 days to apply for the confirmation of the grant.

18. Costs of the application shall be borne by the respondent.

DATED and DELIVERED at NAIROBI this 27TH JULY 2020

A.O. MUCHELULE

JUDGE