



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 6 OF 2020

IN THE MATTER OF THE ESTATE OF JMM(DECEASED)

SMM.....APPLICANT

VERSUS

PKM.....1ST PETITIONER

MM.....2ND PETITIONER

AND

JKM.....INTERESTED PARTY

J U D G M E N T

- 1. JMM (the deceased)** died on 5/1/2018. According to the introduction letter by the Area Chief Waso Location, the deceased was survived by **JKM (wife), PKM, KGK, EMM and JKM (Sons)**.
- On 14/2/2019, **PKM and EMM (the petitioners)** petitioned for letters of administration in **Isiolo Succession Cause No. 3 of 2018**. The grant was issued to them on 13/3/2018. The cause was subsequently transferred to this court.
- On 31/8/2018, **SMM (the applicant)** lodged a Summons for the revocation of that grant. **JKM (the interested party)** also filed an application dated 2/6/2020 seeking a determination on her provision and entitlement from the estate of the deceased as a former wife of the deceased.
- Subsequently, with the agreement of all the parties and for the total determination of all the matters in dispute, the petitioners lodged an application for confirmation on 5/8/2020 in respect of which, the applicant filed a protest on 11/8/2020.
- The matter proceeded by way of *viva voce* evidence whereby all the parties testified in respect to the applications. They relied on their affidavits on which they were cross-examined.
- Pw1 SM** testified that she was married to the deceased with whom she had a son, **BKM**. That the petitioners had failed to disclose that **PKM and KGK** were not children of the deceased but sons of the interested party from a previous marriage. That the immediate dependants of the deceased were; herself as widow, **EMM, JKM and BKM**.
- She testified that she had cohabited with the deceased from August, 2015 until his demise on 8/1/2018 during which period they were blessed with **BKM** on 31/2/2016. That the deceased partly paid her dowry in the sum of Kshs. 40,000/= witnessed by her grandmother and **JM**.
- According to her, the deceased had not accepted the two children of the interested party **PK and KGK**. She gave the court her preferred mode of distribution.
- Pw2 JMM** testified that he was 75 years old, familiar with Meru marriage customs and a brother to **NE**, the interested parties' grandmother. He told the court that sometimes in the month of August in a year he could not recall, the deceased brought Kshs. 50,000/= as dowry for the applicant.

10. **JKM**, the interested party, testified that she was married to the deceased on 17/9/1979. At the time, the deceased was a clinical officer whereas she was a teacher. She confirmed that they divorced on 5/11/2014. She did not know that after the divorce, the deceased cohabited with the applicant.

11. It was her testimony that she only came to know **BKM** during the funeral of the deceased. Since her suit for division of the matrimonial property had not been concluded by the time of the deceased's demise, her entitlement in the estate should be determined before distribution.

12. She confirmed that **PK and KGK** were not born of the deceased but he had taken care of them as his own during his lifetime. He had educated them and gave dowry for them to wed.

13. **Rw1 PK** testified that he was not born of the deceased but the latter had educated him to college and his brother **K** up to University. He had taken his identity using the deceased's Id card and that is how he acquired the deceased's name in his id card.

14. The evidence of **Rw2 EMM** resonated with that of **PK**. He testified that the estate should be distributed according to ones contribution in its development. He reiterated that during the time they were growing up, they lived with **PK and KK** and that the deceased had taken care of them. They went to the same school, [Particulars withheld] Primary School and later he went to the same campus with **K**.

15. By consent, the parties agreed that **Plot No. Light Density Zone A County Council** be distributed to **AHM**.

16. Valuation reports for **Kiirua/Naari/[...], Plot No. [...] Zone B [...] Isiolo and Plot No. [...]** were produced. I have considered the various modes of distribution presented by the parties. Both parties also filed their respective submissions in respect of the applications and modes of distribution which have been dully considered.

17. The issues for determination are; ***Who are the beneficiaries of the deceased's estate? How should the estate of the deceased be distributed?***

18. To answer the first issue, the following questions should be answered, to wit, **a) Whether JKM is entitled to any provision from the estate of the deceased and the share due to her, b) Whether SMM was a wife of the deceased and, if so, what is her share in the estate, c) Whether PKM and KGK are persons entitled as beneficiaries of the estate.**

19. **Section 26 of the Law of Succession Act ("the Act")** makes provision for dependants. It clothes the court with jurisdiction to make provision upon dependants from the estate on application.

20. **Section 29 of the Act** defines a dependant to mean *'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'*.

21. There was no dispute that the interested party was a former wife of the deceased. In this regard, she is a dependant of the deceased entitled to a provision in the estate of the deceased under **section 26 of the Act**.

22. It was the interested party's contention that she was involved in the acquisition of the properties of the estate and that for that reason she was entitled to a bigger share. That may be the case that she was involved in the acquisition of the estate properties but that, in my view is not a consideration in an application under **section 26 of the Act**.

23. Obviously, that would have been a consideration in the case for the division of Matrimonial property under the Matrimonial Properties Act. However, those proceedings abated. In the present proceedings, what the Court has to consider is what is set out in **section 28 of the Act**.

24. The Court has considered **section 28 of the Act** and the evidence on record. The interested party is already owner of **Isiolo Block [...]** where Little Angels Academy is said to stand. The estate of the deceased is not that expansive. Next to that property is **Isiolo Block [...]** whereon the said school extends to. It will be just and fair if that property is distributed to her.

25. It was contended that since **Plot no. [...]** was matrimonial property, the same be given to the interested party. From the evidence on record, although the said property had been matrimonial property where the interested party and the deceased had lived as a family, the same was no longer used as matrimonial property. It had been let out for rental. The Court declines that invitation.

26. Next to be considered is the position of **PKM and K GK**. The Court saw the witnesses testify. The interested party and **Rw2 EM** were categorical that the said two sons of the interested party lived together with the rest of the family consisting of the deceased, the interested party and their two sons in Isiolo.

27. The testimonies of the petitioners and the interested party, which the Court believed was that the deceased did not discriminate against the said children but rather maintained them. He educated them and even provided dowry for them to marry.

28. The Court was invited to consider the averments of the deceased in his Cross-Petition for divorce and the replying affidavit in the division of property proceedings. The applicant referred to some unreported cases of **Nyeri HCCA No.38 of 1995 and Meru Succession Cause No. 419 of 2006** on the proposition that the Court should consider the said statements of the deceased.

29. The applicant did not provide copies of the aforesaid authorities. The Court did a search on Kenya Law but did not find the **Nyeri HCCA**

No.38 of 1995. As regards **Meru Succession Cause No. 419 of 2006**, the same is reported as **John Gituma M'raiji & Another v. Elizabeth Kamwitu [2017] Eklr.** Having carefully perused the same, the Court never found anywhere Gikonyo J delivered himself to the binding nature of a deceased's deposition that is not tested.

30. In any event, the Cross-Petition and the replying affidavit were not tested in cross-examination. They were made by the deceased during a bitter struggle to free himself from the interested party. During such period, parties ordinarily make denials which can only be tested at the trial. The two documents were not tested. The averments of **PK, EM** and the interested party were tested under intense cross-examination and they remained firm. This Court prefers their evidence the depositions of the deceased that were never tested.

31. Accordingly, both **PK and KT** were dependants on the estate of the deceased. They are therefore beneficiaries of the estate.

32. The next to be considered is the position of **SM**, the applicant. It was her contention that she was the widow of the deceased, he having divorced the interested party. That she came to the life of the deceased in 2015, bore a child with him in February, 2016 and got married to him under the Meru customary law.

33. Marriage can either be proved through a certificate if registered under the **Marriage Act, 2014** or through acceptable evidence. According to the applicant, she was married by the deceased through customary law. That he visited her grandmother and paid dowry.

34. On customary marriage, it was her testimony that one morning, the deceased informed her that he wanted to go and introduce himself to her grandmother. That when they reached at her grandmother's home, the grandmother called her neighbours to come and witness payment of dowry. That the deceased then paid Kshs.40,000/- to her grandmother. He then promised to return and finalise the balance of the dowry but he never did.

35. The applicant called **Pw2 JM** in support of her case. His testimony materially contradicted that of the applicant. According to him, the deceased had given notice of his coming to negotiate dowry. That he paid Kshs.50,000/- as dowry while the applicant had stated Kshs.40,000/-. That the money was paid after the applicant's grandmother had passed on. That the deceased had come on that day with the Meru traditional *Mwati*. The applicant had not seen any *Mwati* on their visit to her grandmother.

36. Due to the inconsistencies, the Meru traditional marriage customs were not proved. The deceased never visited the applicant's relatives with his friends or relatives. No traditional *mwati* was given.

37. Further, the applicant cannot rely on short cohabitation with the deceased to raise the presumption of marriage. Firstly, she never pleaded the same. Secondly, the evidence on record is that she went to stay with the deceased in August, 2015 and the deceased died on 15/1/2018. They must have lived together for a period of only 29 months, a period for less than 3 years. Thirdly, there was no evidence to show that the parties had been in a long cohabitation wherein they had carried out themselves to the public as husband and wife. At least, no evidence of such was called.

38. Accordingly, on a balance of probability, the applicant had not proved that she was married to the deceased. A mere living together of parties which results in a child does not elevate a romantic relationship into a marriage.

39. Rather, the allegations on record were that the deceased had a liking of living with members of the opposite sex. It was alleged, and not denied, that the deceased had lived with five women between the time of his divorce and the time of his demise. The applicant came to the life of the deceased when he was living with one **J**. He dropped **J** 3 months later and called the applicant from Mombasa to come and live with him from August, 2015.

40. Accordingly, the Court holds that the applicant was never a wife of the deceased and she is therefore not a beneficiary of the estate.

41. In view of the foregoing, the beneficiaries of the estate of the deceased are **BKK, PKM, KK, EM and JK**. The interested party was a dependant whose provision the Court has already made under **section 26 of the Act**.

42. The principle behind distribution under the Act is equity. There are five beneficiaries. One of them is so young, 4 years and it would take him years to catch up with the rest of his brothers. The demise of his father should not be reason for his incapacitation.

43. The Court has considered the size, the developments undertaken in the properties and value of the estate. The petitioners propose that the young boy of 4 years be given **Plot No. Kiirua/[...]** only. The same is valued at Kshs.1 million. The remaining two properties, **Plot No. [...]** **Zone B (Formerly [...]) Isiolo** and **Plot No. [...]** **Kulamawe (Isiolo)** are valued in excess of Kshs.11 million. It will be a grave injustice to distribute properties valued as such to three people while leaving the little child with Kshs. 1 million property.

44. Some of the properties of the deceased were, admittedly, under litigation while another had been grabbed by 3rd parties. The property that is under dispute awaiting court decision is hereby set aside to await the final decision of the court in that suit.

45. In view of the foregoing, the estate will be distributed as follows: -

i. PLOT NO. [...] (Now [...])

BKM (EM to hold in trust until age 18)

PKM - Equally

ii. PLOT NO. [....]ZONE B (Formerly [....])

EMM

JKM

KGK - Equally

iii. KIIRUA/NAARI/[....] & KBJ [....]

BKM (To be held in trust by SMM)

iv. PLOT NO. [....] & KBN [....]

JKM

v. PLOT NO. LIGHT DENSITY ZONE A COUNTY COUNCIL

AHM

46. This being a family matter, each party shall bear own costs.

It is so decreed.

DATED and **DELIVERED** at Meru this 29th day of October, 2020.

A. MABEYA, FCI arb

JUDGE