



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 31 OF 1988

IN THE MATTER OF THE ESTATE OF KISINGA KINOTHYA (DECEASED)

ANNA MBATHA KISINGA.....1ST PETITIONER

BONIFACE KINOTHYA KISINGA.....2ND PETITIONER

VERSUS

REGINA NDULEVE MUIA *alias* REGINA NDULEVE KISINGA.....OBJECTOR

RULING

1. On record are several chamber summons brought under Section 76 of the Law of Succession Act and dated 20.1.2003, 27.6.2003, 22.1.2004, 11.3.2005. The Applicant/objectors sought revocation of grant that was issued to the petitioners on 15.6.1989 on the ground that the said grant was obtained by concealing essential material facts. There are several applications on record seeking the same remedy and this court ought to determine the fate of the several applications and narrow down on the application that is the subject of the instant ruling.

2. The application was supported vide an affidavit deponed by Regina Nduleve Muia wherein she stated that the grant was obtained by concealment of some material facts being that some of the deceased's dependants were not listed in the petition. She averred that she was related to the deceased as she was the widow and that part of the estate being Iveti/Misakwani/389 had been omitted. She lamented that the grant was obtained and confirmed without including her and her children as beneficiaries of the estate of the deceased.

3. The application was opposed by the respondents vide affidavit deponed by Annah Mbatha Kisinga who is the 1st petitioner. The deponent averred that she was the sole wife of the deceased and had married him customarily in 1954. She averred that the applicant is not a wife to the deceased and that she and her son, the 2nd petitioner were lawfully granted letters of administration to the estate of the deceased. She pointed out that the estate of the deceased had already been distributed and that title Iveti/Misakwani/389 that was part of the estate of the deceased had since been registered in the joint names of the beneficiaries being Vincent Kungu Kisinga, Boniface Kinothy Kisinga and Annah Mbatha Kisinga as evidenced by a copy of the title marked AMK1. The court was urged to dismiss the application.

4. The court directed that the objection proceedings be heard via viva voce evidence. The hearing began in earnest on 24.4.2017 where Regina Nduleve Kisinga testified as OB Pw1. On record is her witness statement where she stated that during her marriage to the deceased she acquired properties being Iveti/Misakwani 389, Share No. 453 Misakwani Coffee Factory, Iveti/ Misakwani/89 and 762, Machakos Town Block 11/200, 201 and 212 and Post office savings account No. KMA 418169. She testified that she was the 2nd wife of the deceased having got married to the deceased in 1968 and had 6 children with him but however one child had since died. It was her testimony that the petitioner is her co-wife and that there were assets of the deceased that were left out. She lamented that her and her children's names were omitted in the petition by the petitioners and that she was not involved in the distribution of the estate of the deceased; she wanted the assets of the deceased to be shared equally so that she and her children get a share. On cross examination, she testified that she left the deceased and went to live with her parents but however maintained that she was entitled to benefit from the estate of the deceased. On cross examination, by the 2nd petitioner, she testified that the Kamba customs were fully complied with which involved the slaughtering of a goat, traditional brew and feasting. She told the court that her mother, brothers and father witnessed the ceremony. She testified that the clan gave her the land; that she was still residing on the land that was given to her by Maingi. On reexamination, she testified that Maingi was the deceased's older brother who gave her a place to reside.

5. The objector's second witness was Fredrick Wambua Kisinga who sought to adopt his written statement. He testified that the deceased was his father and that the 1st petitioner is his step mother whilst the 2nd petitioner is his step brother. He lamented that the petitioners did not

involve him in the proceedings and urged the court to revoke the grant. On cross examination he testified that he was born in 1972 and that when the deceased died he was living with his maternal grandparents. He was not aware as to why his parents separated as it happened when he was young. He testified that his uncle gave him temporary shelter. In reexamination he told the court that his uncle Maingi Kinothyia paid his school fees.

6. The objector's third witness was Florence Wanjiku Kisinga who testified that the 1st petitioner is her step mother whereas the 2nd petitioner is her step brother. She lamented that the petitioners left her out as beneficiaries of the estate of the deceased who was her father and she sought that she be included as a beneficiary. When recalled for cross examination she testified that her mother was chased away by the deceased and she went to stay with her parents. She told the court that her father used to provide for her and that her uncle gave them land in Kibwezi. She revealed to the court that the 2nd petitioner chased her away from the land in Misakwani. On reexamination she testified that she was born in Misakwani but however left when her mother was chased away.

7. The objector's fourth witness was Munyao Kiilu the objector's uncle who testified that the objector and the 1st petitioner are wives of the deceased. He testified that the objector had four children with the deceased and that she was duly married under Kamba customary law. He sought to adopt his statement where he stated that the deceased did the "ntheo" marriage ritual and paid dowry to the objector's parents. When recalled, he testified that the Kamba dowry customs were performed at the objector's parent's home and that the deceased and his brother (Maingi) took the "mbui sya ntheo". He testified that several villagers participated in the dowry negotiations and that the objector did not participate in the ceremony as she had already cohabited with the deceased but however in the absence of the woman being married, an in-law and the father in law could eat the traditional meat. He further revealed that dowry was being paid for the protestor who was already married. He told the court that the mother of the protestor would know about the ceremony; that minutes were taken of the ceremony but however he did not see the same. He testified that many of those who were present in the ceremony had died. It was his testimony that the 2nd protestor chased the objector and her family from the land. He emphasized during reexamination that the protestor and her family were entitled to the estate. That was the close of the protestor's case.

8. The petitioner's first witness was Boniface Kinothyia Kisinga. He testified that the 1st petitioner is his mother who died in 2019. He told the court that the deceased only married one wife who had seven children including him. He testified that the protestor invaded their family land and claimed to have been married to the deceased but however he never saw the protestor and the children all the time that he lived with the deceased. As far as he is concerned the protestor and her children are strangers and her claims ought to be dismissed. On cross examination, he testified that the protestor had never resided on the family compound. He admitted that Maingi Kinothyia, the deceased's elder brother gave land to the protestor and her children but refuted that the protestor and her children were related to his family.

9. The Petitioner's second witness was Francis Mackenzie Nthenge who sought to adopt his statement dated 4.7.2016 but which I have not seen on the court record. He testified that the deceased was his uncle and that the objector was not married to the deceased. He emphasized that the objector ought not to be given any property. On cross examination, he testified that the protestor was one of the deceased's workers and he could not tell if dowry was paid to the protestor's parents. He told the court that he had never seen the protestor and her children in his village. He admitted that the 2nd petitioner chased away the protestor. In reexamination, he told the court that the protestor had no valid claim.

10. The court directed that the parties file written submissions. The objector filed her submissions on 5.6.2019 while the 2nd petitioner filed his on 3.3.2020.

11. The objector's counsel in their submissions submitted that the objector discharged her duty of establishing that she was married to the deceased; she is a beneficiary of the deceased and that the petitioners concealed this fact and hence the grant so issued should be annulled and revoked.

12. The 2nd petitioner submitted that there was no evidence that the objector or her children lived with the deceased but instead they lived with the objector's mother. It was submitted that there was no proof of the Kamba rituals performed as evidence of marriage hence the court was urged to dismiss the objector's claim with costs.

13. Having carefully read the contents of the applications and the affidavits and addressed my mind to the oral evidence of all the parties, I find that the main issue for determination here is whether the objector has demonstrated that the petitioners excluded lawful dependents to the estate of the deceased so as to warrant the revocation of the subject grant.

14. The circumstances in which a grant may be revoked or annulled, material to the application as set out in section 76 of the Law of Succession Act is as follows:

Revocation or annulment of grant a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a.;

b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c.;

15. The objector's case is that she is a wife to the deceased and therefore she and her children are entitled to share his estate. It is the 2nd petitioner's case that the deceased married one wife who is the 1st petitioner and therefore the objector and her children are not entitled to share in the estate of the deceased as they are strangers. Because of these divergent views, the court will have to consider whether the parties

have met their standard of proof as per section 107, 109 and 112 of the Evidence Act.

16. In the case of **Hortensiah Wanjiku Yawe v The Public Trustee, Civil Appeal No. 13 of 1976**, the court held: -

- (i) The onus of proving customary law marriage is generally on the party who claims it.**
- (ii) The standard of proof is the one usually for a civil action namely “on the balance of probabilities.”**
- (iii) Evidence as to the formalities required for a customary law marriage must be proved to that standard.**
- (iv) Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it.**
- (v) Only cogent evidence to the contrary can rebut the presumption.**
- (vi) If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.**

17. In the case of In Re Estate of **Stephen Kimuyu Ngeki (1998) eKLR Mwera, J.** (as he then was) stated that Akamba customary marriage follows an elaborate course and emphasis seems to lie more with payment by the groom of three traditional goats called Mbui Sya Ntheo.

18. In his book; **Marriage and Divorce, 1st edn, (1968) 28 Dr. Cotran** summarizes the essentials of a valid Kamba customary marriage as follows:-

- (a) Capacity.**
- (b) Consent.**
- (c) Slaughter of a Billy goat.**
- (d) Marriage consideration.**
- (e) Cohabitation.**

19. According to the evidence on record, to wit the testimony of OBW1 and OBW2, as pitted against that of Pet Pw1 and Pw2 the aspect of the conduct of a traditional marriage appears to be the word of one side against the other. The element of cohabitation is not established; neither is there evidence of the slaughter of the Billy goat. I am not satisfied that a marriage was conducted and I do not find the evidence of OBW1 convincing; she seems to have been disowned by the petitioners for being a stranger to the family and that the persons who witnessed a ceremony being conducted have not given evidence. This being the case I find that the objector has failed to discharge her burden of proof of a customary marriage. I expected more evidence to show that indeed she was married to the deceased and possibly evidence from the persons who attended the ceremony that attest to the fact that she is recognized as a wife; that evidence is simply not there. Nobody from her family side was called to confirm that a traditional marriage took place between her and the deceased. The 2nd petitioner stated that the objector had been an employee of the deceased who was later kicked out and chased away and who had never showed up even at the time of the demise of the deceased to lay any relationship with him. The objector’s long stay with her parents did her no good as it showed that she had no relationship with the deceased. I am not satisfied that the objector had been married to the deceased as claimed by her. Nevertheless, I am satisfied that she is in occupation of the land in Kibwezi that was given to her by a brother to the deceased and her interest with regard to the portion of land that she occupies would if presented in the appropriate forum, deserve protection. I find that the objector has not satisfied the court that she meets the threshold for grant of a revocation or annulment of grant. This debacle must therefore lead to one conclusion namely that the plethora of applications lodged by the objector must fail as the evidence led by her has not managed to pass muster. If the objector intends to lay claim onto the land that had been given to her by a brother of the deceased, then she is at liberty to do so in the appropriate forum.

20. In the result I find no merit in the Objector’s objection and consequently proceed to dismiss the applications dated 20.1.2003, 27.6.2003, 22.1.2004 and 11.3.2005 with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 16th day of December, 2020.

D. K. Kemei

Judge