



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.35 OF 2017

IN THE MATTER OF THE ESTATE OF MAXWELL MWANGI MWANIKI (DECEASED)

A N D –

REBECCA MUMBI MWANGI.....PETITIONER

V E R S U S

JOSEPH MURIITHI MWANIKI.....PROTESTOR

JUDGMENT

This matter relates to the estate of Maxwell Mwangi Mwaniki (deceased) who died intestate on 19/6/2012.

Rebecca Mumbi Mwangi, the widow of the deceased petitioned this court for grant of letters of administration. The grant of representation was issued to the petitioner on 5/5/2015.

By a summons dated 7/12/2015, the petitioner applied for confirmation of the said grant.

However, an affidavit of protest was filed by Joseph Muriithi Mwaniki, a brother to the deceased on 12/5/2016. In the affidavit of protest, he deponed that the deceased had been married to one Alice Wanjiru Karanja who died on 16/1/2008; that the deceased and the said Alice were blessed with a child by name Miriam Wangechi as per copy of birth certificate (JUN.2) and that the deceased acknowledged the child Miriam Wangechi as his child and the child was well known to his family; that the said child lives with her maternal grandmother who is elderly and unable to pursue the child's rights in this matter; that he filed this protest to protect the interests of the child who is also a beneficiary. He further urges the court to appoint him as a co-administrator of the deceased's estate in order to protect the interests of the child.

Directions were taken to the effect that the matter proceeds by way of viva voce evidence. The firm of Rubua Ngure filed submissions on behalf of the petitioner while the firm of Gakuhi Chege appeared for and filed submissions on behalf of the protestor.

The evidence of the protestor Joseph Muriithi Mwaniki (PW1) was taken first. He testified that the deceased was his elder brother; that he inherited land from his father, Nyandarua/Kiriita/Mairo Inya Block 2 (Ngai Ndethia 2124) measuring 0.6205 HA. He deponed that the brother had 2 wives, the first being the petitioner, Rebecca Mumbi, and Alice Wanjiru who died on 16/11/2008 as per the death certificate P.Ex.No.1; that Alice and Maxwell got a child who lives with the aunt in Ndaragwa and that she was born on 18/2/2003 as per birth certificate P.Exh.3.

The protestor contends that since the deceased's land was inherited from their father, it must be shared between the petitioner and the child; that the child is named after his mother, Wangeci, according to Kikuyu customs. According to the protestor, the petitioner knew Alice and the child. He agreed that he procured the birth certificate after the death of the deceased.

The petitioner in her testimony told the court that she got married to the deceased in 1975. She denied that he had any other wife. She also denied that the deceased acknowledged the child. She denied that there is a house in the subject land nor does anybody live on it. The petitioner suggested that a DNA be done and if it is found that the child is the deceased's, the child should be given to her and she has no objection to sharing the land with the child. She suggested that the costs of the DNA be borne by the protestor who filed the protest. The petitioner also testified that the deceased already purchased the land from his father and it was not inherited from the father as alleged. She could however not produced the sale agreement.

The protestor declined to have a DNA test done to determine whether the child was the deceased's.

I have dully considered the evidence adduced in this protest and the submissions of both counsel. The issues that arise are:

- (1) Whether the deceased was married to a second wife Alice Wanjiru;**
- (2) Whether the deceased and Alice Wanjiru sired a child, Miriam Wangeci;**
- (3) Whether the protestor should be appointed a co-administrator of the deceased's estate.**

In this case, we have the word of the protestor against the word of the petitioner.

Alice Wanjiru, who is alleged to have been married to the deceased is also deceased. The protestor did not tell the court when the said Alice got married to the deceased. The protestor testified that he has 4 surviving brothers, a mother to Alice and a sister to the said Alice. He did not call any of these people to confirm whether or not the deceased was ever married to Alice Wanjiru. Besides the family members, the Chief, Assistant Chief or elders in the area should have been in a position to know whether such a marriage existed.

This being a Civil case, the standard of proof is on a balance of probabilities. The protestor having made the allegation, the burden lies upon him to prove on a balance of probability that the deceased was married to Alice Waithera. In the protestor's submissions, the case of **John Kanyungu Njogu v Daniel Kimani Mwangi (2000) eKLR** was cited. The court of Appeal held that the plaintiff had the burden of proving her case on a balance of probabilities. When the court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other.

In **DT Dobbie & Co Ltd (K) v Wanyonyi Chebukati (2014) eKLR** the court cited the decision of Lord Denning in **Miller v Master of Pensions (1947)**.

Where the court held, ***“the degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say: We think it is more probable than not, the burden is discharged but if the probabilities are equal, it is not. Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

In the instant case, the protestor did not make any attempt to prove that Alice Wanjiru was married to the deceased and it is more probable that the deceased was not married to a second wife.

It is the protestor's case that Alice Wanjiru and the deceased had a child, Miriam Wangeci who is named after his mother. He produced a birth certificate in evidence. P.Ex.no.3, registered on 29/1/2015, about 7 years after the mother of the child had died and 3 years after the deceased died. The protestor said he is the one who procured the registration. The certificate indicates that the child was born on 18/2/2003. Section 8 of the Births and Deaths Registration Cap.149 Laws of Kenya bars a late registration save with a written authority of the Principal Registrar. It reads: ***“A Registrar shall not register a birth or death after the expiration of six months from the date of such birth or death except upon receiving a written authority of the Principal Registrar issued in accordance with the Rules and upon payment of the prescribed fee.”***

The protestor did not disclose to the court how he came by the birth certificate now that the parents were deceased. Counsel cannot argue that it was not a late registration yet it clearly shows on the birth certificate that the date of registration is 29/1/2015. The protestor did not have copies of the documents issued at birth, that is, birth notification which are used in processing a birth certificate.

The fact that the birth certificate was produced without an objection does not mean that the contents thereof cannot be questioned. It is the protestor who produced the birth certificate and it is his duty to prove his case on a balance of probabilities and that having not produced any other evidence on how he obtained the certificate, it was his duty to call the Registrar of Births and Deaths.

The protestor relied on the Section 11 and 12 of the Births and Deaths Registration Act which provides as follows:

Section 11:

“Upon the birth of any child, the registration of whose birth is compulsory, it shall be the duty of the father and mother of a child, and, in default of the father and mother, of the occupier of the house in which to his knowledge the child is born and of every person present at the birth, and of the person having charge of the child, to give notice of the birth, within such time prescribed, to by the registrar of the registration area in which the birth occurs.”

Section 12:

“No persons shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or in accordance with some recognized custom.”

In this case, the protestor does not live with the child nor has he ever. In his affidavit of protest, he alleged that the child lives with his elderly maternal grandmother who was not able to approach the court to protect her rights and that is why he is doing it. However, in his testimony and in cross examination, the protestor told the court that the child lives with the aunt whose name he does not even know but that

they had agreed that the aunt looks after the child. The protestor was not consistent.

Although the protestor said that his sister who was present in court had the child's hospital cards, they did not deem it necessary to call her to confirm his averments or produce the documents. The protestor contended that the deceased had recognized the child as his but after the mother of the child died, in 2008, it is not understandable how the deceased did not have the child registered during his life time. In my view, the production of the birth certificate alone is not proof that that child is the deceased's. The production of the birth certificate does not satisfy requirements of section 11 and 12 of the Births and Deaths Registration Act.

The further allegations that the child is named after the protestor's mother is not *per se* evidence that she is the deceased's child. None of the protestor's relatives or the child's aunt or grandmother have come up to confirm that fact. There is no evidence that the child ever lived with the deceased after the demise of the mother.

The petitioner offered a solution to this issue by proposing that the child be subjected to a DNA test using the deceased's elder brother who was ready and willing to avail himself for it. The protestor declined that offer. As held by J. Mativo in the matter of the ***Estate of Patrick Mwangi Wathiga Succ.342/2005***, that the objector who had showed up after the deceased's death bore the burden of prove that he was a child of the deceased hence a beneficiary of the deceased's estate. The judge observed: ***"I am clear in my mind that the burden of proof lies on the objector to prove paternity or his claim to be a beneficiary of the deceased's estate..... The case becomes even more difficult where no medical evidence is adduced to prove paternity...."***

Whereas I agree with the protestor's submissions that DNA is not the only way to prove paternity, yet where there is no other evidence, to prove that the parents of the child were ever married or had a relationship, or that the deceased ever lived with or acknowledged the child, the best evidence that would have settled the question of paternity is DNA. However, the protestor has declined to have it done for reasons best known to himself. For that reason, I find that the protestor has not proved on a balance of probabilities that Miriam Wangeci is a child of the deceased or that the deceased ever acknowledged the child.

It is not uncommon in Kenya today for people to come up after a deceased's death to claim that they are either son to deceased or a father to deceased purely for purposes of laying claim to the deceased's estate. The protestor should have discharged the burden placed on him which he did not.

Having found that the protestor has not proved that Alice Wanjiru was the wife of the deceased or that Miriam Wangeci is the child of the deceased, he cannot be enjoined to this cause as a co-administrator. The petitioner is the proper person to be appointed as administrator. The protest is hereby dismissed. Instead, I allow the prayer in the summons dated 7/12/2015 and hereby confirm the grant of letters of administration issued to Rebecca Mumbi Mwangi on 5/5/2015.

Each party to bear its own costs.

Dated, Signed and Delivered at NYAHURURU this 30th day of April, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Ng'ethe holding brief for G. Chege for protestor

and holding brief for Rubua Ngure for petitioner

Soi- Court Assistant