



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION NO. 114 of 2016**

**IN THE MATTER OF THE ESTATE OF HUMPHREY LIVUMBATSI MAHONGA**

**VERONICA KASIVWA LUMALA.....APPLICANT**

**VERSUS**

**JAPHETH. S. ASIGE**

**MARGARET MWAIZI ASIGE.....RESPONDENTS**

**RULING**

1. Humphrey Livumbatsi Mahonga, the deceased herein died on 7.8.14 at Mulundu Sub-Location, Vihiga. Following his death, a grant of letters of administration (the Grant) was on 17.2.17 issued to (the Respondents) in their capacity as cousin and sister respectively. The deceased was survived by his mother and 4 children all minors. The estate of the deceased consists of dues from his employer Teachers Service Commission and shares in Mwalimu Sacco.
2. By an application dated 13.6.17 and filed on even date, Veronica Kasivwa Lumala seeks the revocation of the Grant. She claims that she was married to the deceased under Baluhya Customary law and they were blessed with 4 children. As the widow of the deceased, she had priority over the Respondents who are cousin and sister respectively of the deceased, to obtain the Grant. The Respondents obtained the Grant fraudulently without her knowledge or consent. She only became aware of the Grant in the process of following up the deceased's shares with Mwalimu Sacco and gratuity with the Teachers Service Commission. To her, the Respondents' failure to include her herein is intended to deny her, her share in the estate of the deceased.
3. The Respondents in a replying affidavit sworn on 2.10.17 by the 2<sup>nd</sup> Respondent deny that they obtained the Grant fraudulently and further deny that the Applicant was ever married to the deceased. According to the Respondents, though the Applicant and the deceased had children, they were not married. They were friends and cohabited intermittently. Around 2008 to 2009 the Applicant went to the Middle East in search of domestic employment. The deceased remained with the children and provided for them until the time of his demise. The Applicant did not attend the burial of the deceased who was buried as an unmarried single father. The Respondents further deny that LA is not the Applicant's child and has a different mother. The other 3 children were born to the Applicant and the deceased out of wedlock but the Applicant abandoned them to their grandparents. According to the Respondents, the Applicant has no interest in the welfare of the children and intends to convert the estate of the deceased for her own use while they intend to place the proceeds thereof in a trust for the benefit of the minor children.
4. In response, the Applicant in her affidavit sworn on 18.12.17 denied abandoning the children. She and the deceased had agreed that she goes to the Middle East to work in order to better their lives. Her interaction with the Deceased was not merely a brief friendship. During their marriage they had 3 children, the first being born on 21.1.15. The Applicant admits that she is not the mother of LA but claims to have assumed parental responsibility over her. It is only after the demise of the deceased that LA's maternal grandmother took him away her home. She stated that she lives with the children and provides for all their needs. The purpose of filing the application herein as the only remaining parent is to ensure that the best interests of her children are taken care.
5. In her testimony, the Applicant reiterated the averments in her affidavits and further stated that she got married to the deceased on 13.2.10 and they lived together for 12 years but did not perform any customary marriage. No cows or goats were taken to her parents' home. The Applicant claimed that they had married under Baluhya Customary law on 13.2.02 in a small ceremony at the deceased's mother's home. Those present were the Applicant, her sister, the deceased and his friends whose names she could not remember. The deceased made arrangements for the Applicant to travel to Saudi Arabia in 2012 to work as a house help. Upon his demise she did not have money for airfare. She has taken care of the children from when they were young with the little she had and denied that she is unable to take care of the estate of the deceased. The deceased was a drunkard and they would have disagreements when he came home drunk. The 1<sup>st</sup> Respondent has never assisted her in taking care of the children who are often sent away from school due to lack of fees. One child stays with her sister in Nairobi while she lives with the last 2 children in her mother's home in Vihiga. She does not live in the deceased's home any more as every time she went out to do business she would find the house had been broken into. She left the deceased's home for her own safety. She acknowledged that LA is not her biological child. Upon her marriage to the deceased, LA came to stay with them. LA started staying with

the 2<sup>nd</sup> Respondent when she went to secondary school. The Applicant went to the Middle East in 2012 and when the deceased died, she did not attend his funeral. She was recognized as his wife but the 1<sup>st</sup> Respondent refused to have her in the funeral program. Her desire is that the children's rights be protected.

6. The 2<sup>nd</sup> Respondent reiterated her averments in her affidavit. She told the Court that the Applicant is the mother of the deceased's children. She was however not a wife of the deceased and no marriage took place between them. The deceased and the Applicant had separated before she left for Saudi Arabia. The Applicant did not live in Kenya and did not stay with the children. As such the Respondents did not involve her in the process of obtaining the Grant. The 2<sup>nd</sup> Respondent has been like a father to the deceased since their own father died and paid for his school fees up to university. The deceased had indicated his late father as beneficiary. The 2<sup>nd</sup> Respondent did not however have any document to support this claim.

7. The issues for determination in this matter are:

- i) whether the Applicant was a wife of the deceased
- ii) whether the grant was obtained fraudulently

#### **Whether the Applicant was a wife of the deceased**

8. In her Application, the Applicant claimed that she was the widow of the deceased a fact denied by the Respondents. The Applicant claimed that they had married under **Baluhya Customary law on 13.2.02 in a small ceremony at the deceased's mother's home. Those present were the Applicant, her sister, the deceased and his friends whose names she could not remember. No cows or goats were taken to her parents' home. With this kind of testimony, the only conclusion one can draw is that there was no marriage under Baluhya customary law.** In this regard I follow Njagi, J who in **Vincent Aliero Ayumba v Livingstone Eshikuri Liakayi & 2 others [2017] eKLR** stated:

*In his book Restatement of African Customary Law, The Law of marriage and Divorce Vol.1 Eugene Cotran at page 53 mentions the essentials of a valid Luhya marriage as:-*

- Capacity to marry
- Consent by parties to the marriage and their respective families
- Payment of dowry
- Cohabitation

*Mr Cotran states that there can be no valid Luhya marriage unless bukhwī (dowry) has been paid. The dowry has to be negotiated between the families and can be paid by cattle or by money and can be paid by installments commencing before the marriage and continue afterwards.*

#### **Whether the grant was obtained fraudulently**

9. The law relating to revocation of grants is found in Section 76 of the Law of Succession Act (the Act) which provides:

**“ 76 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) that the proceedings to obtain the grant were defective in substance;**
- (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) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either –**
  - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or**
  - (ii) to proceed diligently with the administration of the estate; or**
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or**

*(e) that the grant has become useless and inoperative through subsequent circumstances.*

10. The Applicant's case is that the Respondents obtained the grant fraudulently by failing to involve the Applicant as the widow of the deceased. That under Section 66 of the Act, the Applicant being the widow of the deceased ranked in priority to the Respondents. Section 66 of the Act provides:

*When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

*(a) surviving spouse or spouses, with or without association of other*

*beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) ...*

11. The Court has found that the Applicant was not a wife of the deceased. As such Section 66 of the Act which gives a surviving spouse priority over other beneficiaries does not apply to the Applicant. Further Rule 7(7) of the Probate and Administration Rules requires that a person applying for a grant must obtain the written consent of every person having a prior preference to a grant as follows:

*(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—*

*(a) renounced his right generally to apply for a grant; or*

*(b) consented in writing to the making of the grant to the applicant; or*

*(c) ...*

12. In the instant case, the Applicant states that as widow of the deceased, she was not involved in the process of obtaining the Grant nor was her consent obtained. As such the Grant was obtained fraudulently. For the reason that the Applicant was not a wife of the deceased, her involvement and consent was not necessary for the purposes of obtaining the Grant. This being the case, this Court finds no evidence of fraud on the part of the Respondents. The Application dated 13.6.17 is found to be without merit and the same is dismissed. For the reason that the Applicant is the mother to the children of the deceased, I direct that each party bears own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 26<sup>th</sup> day of April 2019**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**