



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

P&A CASE NO. 369 OF 2013

IN THE MATTER OF THE ESTATE OF THE LATE DAVID ROTICH (DECEASED)

JOAN JEPKOSGEI ROTICH AND BETTY JEPKORIR.....PETITIONERS

VERSUS

JENNIFFER JEPKOSGEI BOINETT.....OBJECTOR/APPLICANT

RULING

The applicants filed an application dated 14th August 2014 seeking orders for the revocation of the grant of letters of administration issued to the petitioners on the grounds that the grant was obtained fraudulently by the making of a false statement and by the concealment of something material to the case. Further, that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

APPLICANT'S CASE

The applicant relied on the affidavit sworn by the objector on 14th August 2014. The objector averred that she received information from the Public Trustee's office in Eldoret that the respondents, her deceased co-wife's daughters had received money from the Public Trustee's Office at Eldoret in the sum of Kshs. 688,872/- belonging to the estate of the deceased.

She sought information from the court and established that there had been a succession cause filed and a grant issued. The respondents filed an affidavit in support of the petition where they had omitted to state that she was a widow to the deceased and had 2 children with the deceased.

She deponed that she was a widow to the deceased and produced an affidavit of marriage marked as JJB2. They were married under customary law. The deceased then constructed a house for her upon marriage within his ancestral home in that parcel of land known as Title No. Irong/Segoit/127 in 2010.

Upon the death of her co-wife, she took all the children of the deceased and they stayed together in Kileleshwa. She took them to various schools.

Upon the death of the deceased she was informed of his death by the Kenya Police who recognized her as his wife. She annexed the communication as JJB4. The burial permit was issued to her and in the obituary she was recognized as the wife. The brothers and uncles of the deceased recognize her as a wife to the deceased. Upon his demise, she applied for a grant of letters of administration of the estate in Nairobi in NAIROBI HCCC SUCCESSION CAUSE No. 2886 of 2013 and obtained a limited grant.

The petitioners failed to disclose the other properties the deceased owned. She sought that the Grant of Letters of Administration issued be revoked.

The applicant filed a further affidavit in response to the replying affidavit by the respondents. She stated that she did not attend the meeting as the agenda was for her to return the assets of the deceased. She also feared for her safety. She attempted to serve them with the application for grant of letters of administration in Nairobi HCCC Succession cause no. 2886 of 2013 but was chased away upon the instructions of *Joan Jepkosgei* which she reported to the police station under OB No. 28/16/9/2013. The applicant contends that she was issued with a burial permit for the deceased and the report of the loss of the permit as reported by the respondent was fraudulent as she was aware that the applicant had the permit.

She further deponed that the annexure marked JJB2 was erroneously dated 3rd June 2011 instead of 13th June 2013 by the advocate commissioning the document. In reply to paragraphs 57 and 59 of the affidavit the applicant deponed that the deceased is entitled to a portion of the land known as Irong/Sergoit/ 127 as a beneficiary of his father. The deceased having purchased 3 acres and the interest should have

appeared in the petition of a grant. In the absence of a will the property can only be devolved through a grant. Further, she spoke to *Thomas Koitaba* who denied swearing the affidavit dated 17th November 2014.

RESPONDENT'S CASE

The respondents filed affidavits in response to the application. *Joan Jepkosgei Rotich* deponed that she applied for the letters of administration with her sisters upon the death of their father. The letters of administration were issued to her and her sister on 20th March 2014 and annexed the letters as J&BR 8.

She deponed that the objector was not known to her. That she tried to block the burial of the deceased claiming she was the wife and insisted that she be included in the burial arrangements. Her uncles decided to include her after a meeting and hence she was allowed to participate in the funeral arrangements. She prepared the funeral programme herself without the knowledge of the family and included herself and two other people as her children.

She denied that the objector was ever a wife to the deceased under customary law. She deponed that she was informed by Vihiga Police that the objector rushed to be given a note indicating that she was a wife to the deceased so that she could arrange for the funeral. She was however allowed to make clearance. She also cleared for the deceased with KRA and annexed the clearances as J&BR 10.

When they wanted to acquire the burial permit they were informed that the objector had taken the body and filed a report with the police annexed as J&BR11. After the burial the family held a meeting and the objector was supposed to attend so she could state who she was but she did not attend. The minutes of the meeting are annexed as J&BR12.

After the funeral, the chief of Sergoit location wrote to the Kenya Police Sacco Nairobi and the Kenya Police Pensions Department asking them to process the benefits due to them. The letters are annexed as J&BR 13 and J&BR14. The Chief, Sergoit location wrote another letter on 10th July 2013 at the instance and prompting of the applicant stating the applicant was a second wife of the deceased, contradicting his earlier letter. He then wrote another letter on 15th August 2013 for purposes of the respondents' succession and in an attempt to correct earlier mistakes.

She maintained that they disclosed all information necessary for processing letters of administration and there was no concealment of information. That they had not sold any asset that is subject or belongs to the estate of the deceased.

The respondents deponed that the affidavit of marriage was a forgery because in the affidavit of marriage the applicant's passport that was used during the swearing of the affidavit had not been issued since the affidavit was sworn on 3rd June 2011 yet the passport was issued on 21st October 2011.

The customary marriage under Keiyo customs requires that a ceremony called koito be conducted, where the families meet and dowry negotiations are conducted. The same did not take place. She annexed an affidavit of one Thomas Koitaba. Further, upon the death of her mother, the funeral programme did not contain the details of the applicant thereby negating her claims that she was married to the deceased as a second wife in 2002. She annexed the funeral programme as J&BR19. She further refuted the claims that the house in Iten was built for the applicant and maintained that it was built for her mother instead. She believes that the applicant arranged with the cameraman for the pictures of her at the funeral to be taken in advance.

She submitted that the deceased was indicated as her guardian in the college documents and the letters marked as JJB3 do not indicate who were the parents of her siblings therefore there is no proof that she secured various schools for any of her siblings and herself. She has been paying fees together with the 2nd administratrix and called upon her relatives to help her pay fees for their siblings.

She deponed that it is a fallacy that they failed to disclose land ref. No. Irong/Sergoit/ 127 as belonging to the deceased as it is registered in the name of their grandfather, *Rotich Chepter*. During the processing of the pension a declaration was required from a grandparent declaring her as a guardian of the children of the deceased and the same was given by her uncle, she annexed it as J&BR 22. Further, that Karuna/Karuna Block 4 Cheplaskei/71 was not disclosed as belonging to the deceased as it doesn't belong to the deceased as evidenced by annexure J&BR 23, an affidavit sworn by the actual owner *Teresa Jepleting*.

She deponed that the brothers of the deceased do not recognize the applicant as per annexure J&BR 24. The applicant had tried to obtain letters of administration without informing them. She had failed to disclose that there were minors involved and later amended her application to include her daughter. Further, she had also blocked the payments of monthly dependents pension from the Kenya Police.

The applicant never lived with them and she doesn't even know the proper names of the 2nd administratrix. She wants to unjustly benefit from the estate and nothing more. The respondents deny that there was any concealment or fraud involved.

ISSUES FOR DETERMINATION

- a) Whether there was concealment of material facts
- b) Whether the grant should be revoked

WHETHER THERE WAS CONCEALMENT OF MATERIAL FACTS

Section 51 of the *Law of Succession Act* is couched in mandatory terms in stating what information an application for grant requires. These are regarded as material facts.

Section 51 states;

- (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.**
- (2) Every application shall include information as to—**
 - (a) the full names of the deceased;**
 - (b) the date and place of his death;**
 - (c) his last known place of residence;**
 - (d) the relationship (if any) of the applicant to the deceased;**
 - (e) whether or not the deceased left a valid will;**
 - (f) the present addresses of any executors appointed by any such valid will;**
 - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;**
 - (h) a full inventory of all the assets and liabilities of the deceased; and**
 - (i) such other matters as may be prescribed.**

The applicant contends that the administrators failed to disclose that she was a wife to the deceased and that they failed to disclose that there were other properties belonging to the deceased.

In order to establish that she was married to the deceased she produced an affidavit of marriage. Upon perusing the annexures it is evident that the affidavit was sworn on 3rd June 2011 but the passport belonging to the applicant was issued in October 2011. The applicant explained it as an error on the part of her advocate but the said advocate has not sworn an affidavit to support this. It therefore brings into question the validity of the affidavit.

The court also considers whether there was any other proof of marriage given that it was allegedly a customary marriage. In *Hortensiah Wanjiku Yawe v The Public Trustee Court of Appeal Civil Appeal 13 of 1976*, the former Court of Appeal for East Africa laid down the principles that should guide the courts with regard to proof of a custom. These are -

- (a) that the onus of proving customary law marriage is generally on the party who claims it;**
- (b) that the standard of proof is the usual one for a civil action, namely, ‘on the balance of probabilities;**
- (c) that the evidence as to the formalities required for a customary law marriage must be proved to that standard;**
- (d) that long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;**
- (e) that only cogent evidence to the contrary can rebut the presumption; and**
- (f) that if specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.**

In *re Estate of Wallace Nderu Kamau [2017] eKLR* the court was of the view that -

‘In the absence of oral evidence by any family member on either side of the family, I find that the evidence does not disclose a customary marriage between the deceased and the objector.’

In *Hellen Tum vs. Jepkoech Tapkili Metto & another [2018] eKLR* the Court of Appeal stated that -

‘One of the most crucial evidence in proof of a customary marriage is the evidence of the customary rites required to establish a customary marriage and proof that these rites were indeed fulfilled ... It was clear that one of the crucial ceremonies, in a Nandi Customary marriage is the “Koito” ceremony that signifies a formal engagement ceremony, and also signifies that the couple is now a married couple.’

I find that the applicant failed to prove, on a balance of probabilities, that there was a customary marriage in existence between her and the deceased. A letter from the police recognising the applicant as the wife is not proof of marriage. An obituary on its own is not proof of marriage, neither is the presence of the applicant in the funeral programme or pictures of her at the funeral.

The applicant has not provided any proof of the allegedly undisclosed properties that she claimed belonged to the deceased, in form of titles, searches or any documents of registration.

WHETHER THE GRANT SHOULD BE REVOKED

Section 76 (b) of the Law of Succession Act provides as follows:

“A grant of representation whether or not confirmed may at any time be revoked or annulled at any time if the court decides either on Application by any interested party or of its own motion 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.”

The presented evidence by the applicant shows that there was a kind of relationship between her and the deceased, one *David Rotich*. The applicant must have been aware of the relationship given that she was recognised in the obituary. She did not disclose of that fact while applying for the letters of administration. Though customary marriage was not established, long cohabitation as a man and a wife gives rise to a presumption of marriage. If the application is not allowed, a rightful beneficiary may be disinherited. The issues can be well considered if the grant is revoked and fresh one instituted. I therefore find the application merited and is granted as prayed.

Cost be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 25th day of April 2019.

In the absence of:-

Mr. Macharia for petitioner

And in the presence of Ms Chesaro holding brief for Mr. Miyienda for objector

Mr. Etyang - Court clerk