REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 203 OF 2015

IN THE MATTER OF THE ESTATE OF JACOB COSMAS AURAH, DECEASED

JUDGMENT

1. The deceased herein died on 20th February 2015. A letter from the Chief of Butsotso South Location, dated 7th April 2015, indicates that the deceased was survived by a widow, Catherine Muhonja Aurah, and four children, being Vincent Etemesi Zablon, Billy Ajanga Aurah, Jerome Justus Opwanda and Teddy Tom Ashibende.

2. Representation to his estate was sought vide a petition lodged herein on 20th April 2015. The petition was filed by Catherine Muhonja Aurah and Vincent Etemesi Zablon, in their capacities as widow and son, respectively, of the deceased. He was expressed to have been survived by the individuals listed in the Chief's letter mentioned here above. He was also said to have died possessed of money held in four banks accounts operated in undisclosed banks or financial institutions. Letters of administration intestate were made to the petitioners on 3rd July 2015 and a grant was duly issued on 29th July 2015. I shall hereafter refer to the two as administrators.

3. An application was lodged herein on 21st August 2015, dated 20th August 2015, by Mary Molly Hajih, to be hereafter known as the applicant, seeking revocation of the grant made on 3rd July 2015, and inclusion of Jerry Aurah Eshitika as a beneficiary of the estate of the deceased. She claimed to be the second widow of the deceased, and accused the administrators of obtaining representation to the estate without consulting her, and excluding her and her son as beneficiaries. She asserted that her son was entitled to a share in the estate. She amended the application on 18th January 2016, to claim that the grant be made to her and Catherine Muhonja Aurah as joint administrators.

4. The first administrator, Catherine Muhonja Aurah, swore a replying affidavit on 8th February 2015, which was filed in court on 15th February 2016. She asserted to be the only widow of the deceased. She averred that Jerry Aurah Eshitika was not a son of the deceased but of a person she identified as Jack Cosmas Aurah, saying that Jack Cosmas Aurah and Jacob Cosmus Aurah were two different individuals. She argued that under custom if the said child was indeed of the deceased he would have been brought home and introduced. She attached several documents to her affidavit to support her case. There is a beneficiary nomination form signed by Jacob Cosmus Aurah, national identity card for Jacob Cosmus Aurah, a bank card under the same name, a driving license and an assortment of certificates all in the name of Jacob Cosmus Aurah.

5. The applicant swore a further affidavit on an unknown date in 2016, which she filed herein on 14th April 2016. She averred that she and her son attended the burial of the deceased, and attached a photograph of the child standing next to a coffin. She asserted that paternity of her son could only be resolved through a deoxynucleic acid (DNA) test. She said that the deceased had supervised the initiation of her son. She also said that the child was taken to the home of the deceased for the shaving of his first hair as per custom. She also averred that it was the deceased who had obtained the birth certificate for her son. She attached to her affidavit two photographs of a funeral event. She swore a further affidavit on 25th May 2016, to attach an MPesa statement as evidence that the deceased used to send her money.

6. Directions were given on 1st December 2016, that the said application be disposed of by way of oral evidence.

7. The oral hearing happened on 24th April 2019. The applicant was the first on the stand. Stated that she was married to the deceased since 1998 and that they had lived together since then as man and wife in rented quarters at Amalemba. She stated that they did not go through any formal ceremony of marriage. She said that the MPesa statement was intended to show that the deceased was sending her money for the upkeep of her son. She said that she played no role at the funeral of the deceased, although she took the child to the *matanga* . She did not contribute to the burial expenses. She did not make a speech at the burial and was not listed as a spouse in the funeral programme. She said she had no documents to show that she was married to the deceased, saying that a DNA test could be carried out to prove paternity.

8. She called one witness, Ramadhan Juma Mbwana, who claimed to be a village elder at Amalemba. He said that he knew the deceased to be the husband of the applicant since the two had a child together. He said that their living together made them a couple. He said that he was the one who followed up on the issuance of the birth certificate for the child. He escorted the applicant to the deceased's *matanga*, adding that he did not see the applicant's house at the home. He stated that the applicant's house at Amalemba had been rented for her by the deceased, and that the applicant had showed him the rent receipts.

9. The first administrator took the witness stand next. She said that she did not know the applicant, and that she only got to know of her when she filed her motion for revocation of grant. She stated that she was married to the deceased since 24th November 1987, initially through cohabitation and later the marriage was solemnized on 13th December 1997 in church. She added that she was not aware that the deceased had married another wife. She also said that she was unaware about Jerry Aura Ashitika. She stated that the birth certificate for that child read Jack Cosmas, and not Jacob Cosmus, which was the name of her husband. She asserted that Jack was not part of her husband's name. She said that she did not know Jack Cosmas Aura. She stated that the MPesa statement did not show whether the Jacob Aura who sent the money was her husband, adding that the same was not evidence of paternity. She stated that the name of the applicant did not appear in the nomination done by the deceased. She also stated that she was not aware that the applicant attended the burial, nor that she was stopped from addressing mourners at the funeral. She also said that the applicant never approached her for the purpose of a DNA test. She stated that there was no will, and what she had was a nomination form from the deceased's employer. She stated she attended funeral meetings within Kakamega town, and not at the rural home of the deceased at Matioli, and that she was not aware that the applicant attended family meetings at Matioli.

10. The second administrator testified next. His testimony largely mirrored that of the first administrator.

11. At the conclusion of the formal hearing, I directed the parties to file written submissions. That has been done by both sides. I have read through their respective written submissions and noted the arguments made therein.

12. These proceedings relate to revocation of grants and appointment of administrators.

13. The law on revocation of grants is section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. A grant will be revoked where the process of obtaining the same was defective or was attended by fraud or misrepresentation or concealment of matter from the court. The second ground is where the administrators, upon being properly appointed, face challenges with administration. Such as where they fail to seek confirmation of their grant within the period allowed in law or fail to proceed diligently with administration of the estate or fail to render accounts as and when required. The last ground is where the grant has become useless or inoperative, such as where a sole administrator dies or is adjudged bankrupt.

14. In the instant case, the applicant appears to anchor her application on the first general ground, that the process of obtaining the grant was either defective or fraudulent. She claims to be a widow of the deceased and argues that she and her son were omitted from the process. The process of obtaining grants is governed by section 51 of the Law of Succession Act, which requires disclosure in the petition of all the surviving spouses and all the surviving children of the deceased. If the applicant was a spouse of the deceased and her son a child of the deceased, then it would follow that their omission caused the process to be defective for there would be no compliance with section 51. It would also suggest that their omission or exclusion or nondisclosure was for a fraudulent purpose or amounted to concealment of matter from the court or was meant to misrepresent the facts. Whichever the case, that would be fertile ground for revocation of the grant.

15. In addition, the applicant seeks to be appointed co-administrator with the first administrator, on grounds that she is co-surviving spouse with the first administrator. She, no doubt, must be having in mind the provisions of section 66 of the Law of Succession Act, which provides guidelines on who may be appointed administrator upon intestacy. That provision gives widows priority over all other survivors of the deceased. That would mean, if the applicant is indeed a surviving spouse of the deceased, she would have priority over the second administrator, who is a surviving son of the deceased.

16. To be able to determine whether to revoke the grant and appoint the applicant as one of the administrators, I will have to determine her status as a widow and that of her son as a child of the deceased. I will need to look at the evidence placed before me to determine those two questions. If I find that indeed she was a widow and her child was a son of the deceased, it would mean that the administrators prosecuted a flawed petition to obtain representation or had excluded legitimate survivors of the deceased from the process with an intent to defraud them or to mislead the court.

17. From what is before me, it is quite clear that the applicant did not go through any form of ceremony of marriage with the deceased. So she was not formally married to him. Her claim to marriage appears to be grounded on alleged cohabitation and the fact that the two had a child between them. On cohabitation, no evidence was adduced beyond the claim that they cohabited at Amalemba. Her witness claimed that the deceased used to pay the rent for the house. Yet that witness did not claim to have had known or interacted with the deceased, whether at Amalemba or elsewhere. Indeed, it was clear that his evidence was hearsay for he stated that it was the applicant who told him so and showed her rent receipts. Yet no rent receipts were produced showing that the deceased used to pay rent for the house. The landlord would, perhaps, have been a more credible witness. Marriage founded on prolonged cohabitation is said to be constrained on the basis of repute. The person raising the presumption ought to demonstrate to the court that the community around the parties knew about the cohabitation and regarded the cohabitees as a married couple. No evidence to establish that was led.

18. What the applicant relied on was a birth certificate of her son, yet the name appearing in that document as of the father of the child did not match that of the deceased. The deceased herein is Jacob Cosmus Aurah, the name in the certificate is Jack Cosmas Aurah. It has not been demonstrated that the deceased person was known by both names. I, therefore, do not find any connection between the two sets of names. She also put in photographs of her son at a funeral. Firstly, apart from the portrait of the deceased, there is nothing else to show that that was the event of the burial of the deceased. Secondly, the boy appears all alone in the two photographs. There is nothing to show that he was party to or participated officially in the process. It is true that pictures often speak louder than words, but then again pictures alone without more are of no help. There must be a context and background. The pictures must be able to tell a story. The two placed on record herein tell no story at all. There is no photograph of the deceased together with the child or with the applicant or both at their home at Amalemba or elsewhere to demonstrate that they were a family would have gone some way. Again, marriage and family is a communal matter. It would have been expected that the applicant would have called family members, from either side, to attest to her claim that the deceased was her husband. Calling a village elder alone does not assist her case.

19. The conclusion that I ought to draw from the above, is that I have not been persuaded that there is material demonstrating that the applicant and the deceased were in a marriage and that the child in question was their son. The issue of DNA was mentioned. No formal

application was made. In any event, I can only consider ordering a DNA test where concrete evidence is led to put the deceased and the applicant in such close proximity to each other as to leave no doubt that there was sexual connection between them which would have produced a child.

20. I am not persuaded that the orders sought in the said application are available for granting and I hereby dismiss the said application, dated 20th August 2015 and amended on 18th January 2016, with costs. Any party aggrieved by the judgment herein shall be at liberty to move the Court of Appeal appropriately.

DATED, SIGNED AND DELIVERED at KAKAMEGA THIS 20TH DAY OF DECEMBER, 2019

W. MUSYOKA

JUDGE