



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION 7 OF 2017

IN THE MATTER OF THE ESTATE OF K M (DECEASED)

AND

IN THE MATTER OF MPM (MINOR)

A B A

(Suing as mother and next friend) PLAINTIFF/APPLICANT

-VERSUS-

JANE KERUBO DEFENDANT/RESPONDENT

1. The Application before the Court is brought by a Notice of Motion. It is brought on behalf of a Child M P M who was born on 14th May 2016 and therefore is a Minor. The Application is brought by his Mother and Next Friend, ABA. The Application is brought under *Article 53 of the Constitution of Kenya ("CoK")*. And *Sections 4, 6, 24, 82, 90, 97 and 101 of the Children's Act 2001, Order 40 Rule 1(a) and (b), 2 and 3, Order 51 Rule 1 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act, and all the enabling provisions of the Law.*

2. The Application was brought under a Certificate of Urgency but due to various extraneous factors including illness and the non-availability of witnesses it could not be heard for several months.

3. The Application seeks the following orders:

1. THAT this application be certified as urgent and be heard ex parte in the 1st instance. (Spent)

2. THAT pending hearing and determination of this application; an order of injunction be and is hereby issued restraining the defendant/respondent whether by herself, her servants and/or agents or otherwise assigns and for any person whatsoever acting on her behalf and/or under the mandate and/or instructions from transferring, processing, dealing and in any manner whatsoever interfering with the disbursements of proceeds and gratuity, Bank, insurance and any other benefits of the deceased without the inclusion of the applicant and the minor herein until this application is heard and determined.

3. THAT pending the hearing and determination of the application the Human Resource, Ministry of Interior, The Manager Equity Bank, The Manager Pioneer Insurance (Policy NO. (particulars withheld) FOSA, Manager Pension Scheme Police Sacco be restrained from releasing any funds from the respective institutions to the defendant, his agents or any other person whatsoever acting on her behalf without the participation of the applicant and the minor until the application is heard and determined.

4. THAT the Chief Richard Muturi and his assistant, at Mwamosioma Sub-location Township Location Kisii Central be compelled by the order of this court to include the minor herein and the applicant in the succession letter during the succession proceeding to the estate of the deceased as beneficiaries.

5. THAT costs of this application be in the cause.

4. The Application relies on the Grounds that are set out on its face. In summary the Grounds are that :

(i) The Applicant and Respondent were both wives of a P M K who is now sadly deceased;

(ii) The Applicant co-habited with the Deceased in Nairobi and they were married under Gusii/Kisii Customary Law in April 2012 and they continued to co-habit until his demise on 28th September 2016

(iii) The Applicant and the Deceased were blessed with one Child Master M P M born on 14th May 2016

(iv) The Applicant and the Child attended the funeral and burial ceremonies;

(v) The Applicant contributed towards the funeral of the Deceased alongside the Respondent.

(vi) Since the burial the Respondent has sidelined the Applicant and the Child

(vii) The Applicant has sought the intervention of the Area Chief but that has not produced any results

(viii) The Respondent has claimed and obtained around January 2017 payments from the Deceased's employers for compensation and funeral expenses without making allowance for the Child. The Applicant alleges she has done that through deceit.

(ix) The Child and the Applicant were maintained by the Deceased and were totally dependent on him

(x) As a consequence of the passing of the Deceased the Applicant and the Child have lost their home and have become destitute which has caused the Child to be adversely affected both financially and psychologically

(xi) It is in the interest of justice for the Court to issue the restraining orders sought so both Parties can benefit from the Estate of the Deceased.

5. The Application is supported by the Affidavit of A B A . She makes several points in Support of her Application. In it she says that she is competent to swear the Affidavit because she is the Applicant. It should also be noted that she brings the Application on behalf of the Child and to that extent she is his Guardian ad Litem/Litigation Friend and/or Next Friend. Although she has made no formal application to proceed as such, the Respondent has not objected to her so acting and the Court deems she did so act.

6. The Supporting Affidavit states that the Applicant knew from her relationship with the deceased that he owned land, bank deposits, insurance dividends, NSSF contributions, Sacco contributions and other property. The Applicant states that she knows that the Respondent has claimed certain property as a consequence of her representing herself and her children as the only dependants of the Deceased. The sum set out in the Affidavit is KShs.150,000/ (One hundred and fifty thousand shillings only). The Deponent says that she has attempted to resolve the matter amicably but her approaches were rebuffed and she was ostracised by the family. The Respondent is also alleged to have descended to harassment and intimidation. She also complains that her attempts to seek the assistance of the Area Chief to act as neutral arbiter were unsuccessful as the "chief has become partisan". She complains that as a result she is homeless and destitute. She also believes that the Respondent is in the process of liquidating the estate and that will be to the detriment of the minor.

7. In Support of her allegation that the Deceased was the father of the Child she exhibits Form B1 – Acknowledgement of Birth Notification (for Parents) Serial No [particulars withheld] stating that a M P M was born in Nairobi on 14th May 2016 and his father was P M and Mother A B. The Father's ID No is recorded as [particulars withheld]. Thereafter the birth was registered and Exhibit ABA 1a is a birth certificate [particulars withheld] names the father as M K, P.

8. The Application was filed under a Certificate of Urgency on 13th January 2017. It came before this Court differently constituted. Hon **LADY JUSTICE M. MUIGAI** ordered that:

IT IS HEREBY ORDERED:

1. **THAT** the application is certified as urgent.
2. **THAT** the application shall be served to the Respondent.
3. **THAT** the Respondent shall file the Replying Affidavit and serve.
4. **THAT** the Estate of the deceased shall be preserved Under Section 45 Law of Succession Act Cap 160 until hearing and determination of the application.
5. **THAT** no funds, payments or pension shall be released to any of the parties until and unless a grant is obtained under Section 67 of Law Succession Act Cap 150.
6. **THAT** parties to obtain a hearing date from the Registry for hearing interpartes.

The date fixed for the inter partes hearing was 6th February 2017.

9. The Applicant engaged a process server to effect service on the Respondent. The process server travelled all the way to Malaba to effect service. It seems on the very day that the Process Server arrived in Malaba, the Respondent found it necessary to rush to Nairobi and would

not answer her phone so service was not effected. On 1st February 2017, the Process Served (Joseph Akuno) received a phone call from a Mr Ogeto, an Advocate asking for the documents to be served upon him because he had been instructed by the Defendant. In fact he did not file a Notice of Acting until 3rd February 2017. That notice was never served on the Applicant but was given to her in Court on 6th February 2017. Counsel with conduct took it upon herself to enforce the Notice with the words that it was served in Court, thereby casting herself in the role of a witness producing a self serving document which document may not be factually correct. The same Counsel (Ms Nyabati) informed the Court that the Respondent lived in Kisii. That contradicted the information contained in the Affidavit of Service stating that the Respondent herself had said she lives in Malaba.

10. The Hearing was adjourned to allow the Respondent time to respond. The Respondent filed her replying Affidavit on 7th February 2017. It was not served on the Applicant. The Hearing was adjourned to 8th February 2017. On that day the Respondent was represented by a Ms Shitubi, who informed the Court that she had on the same day filed a Skeleton argument and wished to argue the point that Court does not have jurisdiction to grant the injunction granted by Hon Lady Justice M. Muigai on 13th January 2017. Neither the Skeleton Argument nor the Replying Affidavit had been served on the Applicant who was a litigant in person to allow her an appropriate opportunity to consider the issues and deal with them. It may be that the animosity displayed by Ms Shitubi in Court was borne of the fact that the Order of 13th January 2017 had been served on the Kenya Police Headquarters. In any event the conduct demonstrated by Ms Shitubi fell so far below what was considered professionally appropriate that the Court had to seek the assistance of the Professional Conduct Committee of the LSK to act as amicus to ensure a fair trial.

11. As stated the Respondent did file a Replying Affidavit. It challenges the version of events put forward by the Applicant. It states;

1. **THAT** though the Applicant claims that the Deceased lived with her in Nairobi, the Deceased at his time of death lived and worked in Machakos having moved there on transfer at the end of 2014. I frequently visited him in Machakos and he too frequently visited the family home in Teso where he eventually passed on on 24th September 2016. I annex the Death Certificate Number [particulars withheld] marked as Exhibit **JK-4**. I also annex a letter dated 11th October 2016 from the Chief Kisii Township Location where the deceased was buried marked as **JK-5**.

2. **THAT** I have not applied for letters of administration to the Deceased's Estate and to the best of my knowledge no succession suit is currently pending in any court of competent jurisdiction over the Estate of the Deceased.

3. **THAT** I expressly deny the presence or participation of the Applicant in the Deceased's funeral. I did not see her or talk to her. That my evidence is also that it is quite telling that the Applicant's Affidavit is bare of details that a wife or dependant would ordinarily know and some of which the Law of Succession anticipates including the exact place and duration of cohabitation, the exact date, time and place of death and the dates, time and place of the funeral ceremony the Applicant claims to have attended.

4. **THAT** my advocates on record have advised me, which advise I take to be true, that the Applicant's only claim to the Deceased's Estate would be through proof of the claimed Kisii Customary marriage or failing that proof of presumption of marriage through cohabitation; both requiring the calling, examination and cross of examination of witnesses and adduction of viva voce evidence. That the Applicant's claim is therefore unfit for determination through affidavit evidence.

5. **THAT** there is no lawful basis for the current application, which is not a citation, as the Grant of Probate once issued will be publicly Gazetted and the Applicant can then make a protest and seek reasonable provision under section of the Law of Succession Act, Cap 150 subsequent to proving her marriage to the Deceased.

6. **THAT** my advocates on record inform me which information I verily believe to be true that the funds subject to a nomination do not from part of the Deceased's estate, and therefore cannot pass under the will of the deceased or vest in his personal representative. I am further informed that such funds are not subject to succession processes, and should therefore be dealt with in accordance with the law governing that nomination since nominations are statutory, in the sense of them being specifically provided for by a particular statute.

Best interest of the Child

7. **THAT** my advocates on record inform me that since the claim involves a child, **NPM** claimed to be a dependant to the deceased's estate, the best interest of that child lies in that interest being speedily litigated within a succession cause properly filed. Be that as it may, the present application as filed has no merit because the only link between that child and the deceased's estate is if dependence is proved under the Law of Succession Act, Cap 150. Until that is done, the applicants remain strangers with no moral or legal claim to the deceased's estate.

12. When the matter came before the Court on 15th March 2017, the Court made the following Order:

IT IS HEREBY ORDERED:

1. **THAT** stay is denied.

2. The Professional Conduct Committee of the Law Society of Kenya/is invited to act as amicus in this case to ensure a fair trial for the Applicant and to report to this Court on the conduct of the Respondent's Advocates.

3. File to remain in safekeeping.

4. *Copies of Proceedings to be made available to the parties on request and payment of the appropriate fees.*

13. The Applicant responded to the Replying Affidavit with a Supplemental Affidavit and Exhibits. The points raised can be easily listed as follows:

1. Skeleton argument and replying affidavit misleading and untrue.
2. States they are co-wives and are all dependants.
3. Customary marriage Kisii customs complied with Luhya customs outstanding but “on schedule”.
4. Co-habitation since 2012 between Nairobi and Machakos.
5. Chief’s letter is a forgery.
6. Travelled with Deceased to Kisii.
7. Defendant was not there, she lived in Teso (Malaba).
8. She shared family responsibility for the children that were not hers
9. The Defendant always knew of the marriage and is no misleading the Court.
10. The Applicant attended the funeral of the Deceased with the Child – photographs. AB & V.
11. Nomination on the SACCO forms etc were superseded by 2nd marriage and birth of child.

14. With a view to allowing the Parties to place as much evidence before the Court to allow a fair resolution the Court permitted the Parties to file such evidence as they wished. The Respondent in reply to the Supplemental Affidavit made the following points that:

1. She denies the 2nd marriage.
2. She denies she ever had knowledge of 2nd marriage.
3. States the Applicant never visited Deceased’s rural home.
4. Deceased’s relatives do not know her.
5. Error in year of birth because ID card had error.
6. Urgency so Chief wrote letter using ID card.
7. She was called by Vigilance House to collect the death benefit she did not contact them. (In fact exhibits show that her Advocates did do so).
8. She was called by Police Sacco and did not contact them.
9. Kshs.220,000/-.
10. “Blind fishing expedition”.
11. Affidavit to change date of birth.
12. Exhibits – She visited offices.
13. Sacco – nominated next of kin.

15. The Court heard oral evidence and the Parties were directed to file written submissions which were highlighted. Although the Respondent sought to use the opportunity to introduce more evidence the Court has considered the submissions both oral and written made by and on behalf of the parties.

Litigation Conduct of Respondent

15. Notwithstanding the Certification of Urgency, this matter has been marked by repeated delay caused by the Respondent. The unco-

operative conduct of the Respondent and her Advisers had got to the extent that the Court appointed the LSK amicus curae to oversee the proceedings to ensure that both parties and in particular the litigant in person received a fair trial. The outcome of that intervention is not before the Court but it is sufficient to note that it became possible to complete the hearing including oral evidence of those witnesses that troubled themselves to attend.

The Issues

16. The Issues that arise for determination in this Application are:

- a. What are the needs of the Child?
- b. What are the rights of the Child?
- c. Was the Deceased his Father?
- d. If not did the Deceased adopt/acquire/willingly take on parental responsibility for the Child?
- e. Is it in the best interests of the Child for the Court to preserve the Estate to prevent dissipation until there is a succession cause filed?
- f. Does the Court have jurisdiction to make those Orders under its inherent Jurisdiction (Article 162) and Section 63 of the Law of Succession Act

17. The Evidence before the Court although not strictly going to to the immediate and urgent issues to be tried raises the following issues that are best determined within a succession cause and not this application.

- a. Who are the Dependants of the Deceased
- b. What is the evidence before the Court and on whom does the evidential burden lie
- c. Is the Applicant a Wife of otherwise a dependant of the Deceased.
- d. Notwithstanding her right to petition, has the Respondent, through her conduct in these proceedings shown herself to be a fit and proper person to be granted letters of administration
- e. Should the Court make any other others in relation to the Estate.

Reasoning and Decision

18. The Application is principally for interim maintenance of a child. The allegation is that the Child was the Child of the Deceased and the Applicant is seeking an order of advancement against the Estate of the Deceased. There is no Petition for Letters of Administration for the Estate of the Deceased.

19. The Parties have filed written submissions and numerous authorities that have been taken into account. In the main they focus on the issue of the marriage of the two adult parties. That is for any future succession cause. In the meantime there are the interests of a child of tender years at stake.

20. The Respondent raises a number of points in her Replying Affidavit. In the main she is saying that the Applicant and the Child are strangers to her and therefore the Deceased. The Applicant claims she was married to the Deceased too.

21. This is in fact an application that deals with the needs of a Child. Under **Article 53 of the CoK**, the best interests of the Child are paramount. In addition the Children Act, in particular Section 4 requires the Court to give the interests of the Child overriding importance. In the circumstances, the starting point must be the locus of this Child to seek and maintenance from the Estate of the Deceased. The evidence placed before the Court by the Applicant are various photographs together with the birth certificate and acknowledgment of birth of the Child. The Deceased is named as the father of the Child in both documents. That creates a presumption that he is the father. According to the law, that is a prima facie case that the Deceased was the Father of the Child. The Respondent challenges that but has not produced any cogent evidence to challenge that. She produces a letter from an area chief which confirms her and her children are the only dependants of the deceased. It is common ground that the Respondent lived in Malaba and not Kisii. The Area Chief is from Kisii. The Chief was required to attend Court to introduced his Letter into evidence. He refused to do so. In the circumstances, the Letter is not introduced into evidence and therefore is mere heresay and therefor of no evidential value. The Mother of the Deceased came to Court to say she does not know the Applicant nor the Child. She did not present as a credible witness because throughout her evidence she repeatedly glanced towards the Respondent and her Counsel as if seeking guidance as to how she should answer. The Respondent says "the contents of paragraph 4 of the Affidavit of Ms A are not true or correct for the reason that I am a stranger to the allegation by Ms A that she was the wife of the Deceased. It must be patently obvious that ignorance of a matter does not prevent it from existing. Thus the Respondent has failed to rebut the presumption created by the two official documents.

22. In addition, parental responsibility can be acquired by word and deed. The Applicant's case is that the Deceased was maintaining her and the Child. She produced evidence of school fees paid by the Deceased for herself. The Respondent disputes this too but her challenge is a

bare denial of the fact of the receipts. In relation to school fees paid for her own daughter, all she can say is she is “suspicious” as to how the Applicant obtained those receipts.

23. From the foregoing it is abundantly clear to this Court that the Deceased recognised and recorded himself as the Father of the Child. Further, he took parental responsibility of the Child. It is clear from the photographs that the Child attended the funeral and burial of the Deceased. He was not prevented from attending. Again, the Respondent’s evidence is a bare denial of the attendance and the reason for that attendance. The Respondent says the Applicant never visited the Deceased’s rural home. However, she herself did not live there.

24. The Respondent of her own admission has received monies forming part of the Estate of the Deceased namely a payment from the SACCO and payment of an employment insurance policy. The Respondent and her lawyers are of the view that those payments do not form part of the Estate because the Deceased nominated the Respondent and her Children. The fact is that they were nominated. They received certain payments. Those payments refer to and are consequent to the death of the Deceased. The documents show that the Deceased did nominate the Respondent. The Respondent states that she received a telephone call from the Kenya Police Staff Sacco at Ngara informing her that she had been nominated as a beneficiary of the Funeral Benevolent Fund. The tone of the correspondence exhibited suggests that this was not a communication out of the blue. There must have been prior communication between the Respondent/her Representatives and the Police Staff Sacco. The Respondent asserts that she was nominated as “beneficiary”. That interpretation turns on what were the terms of the Sacco and the Fund. The Respondent was nominated. That nomination was done before the alleged second marriage. The Applicant states the Deceased intended to change that to include her. Whether a nominee is a recipient and/or a beneficiary and whether or not a nomination is subject to challenge on the formation of subsequent relationships are matters of law to be determined within a succession cause. At present this Court is not seized of that Cause (if one exists) and there is insufficient evidence before the Court to determine them.

25. At **Exhibit JK-4** the Respondent provides the Court with a copy of her Advocates letter to Pioneer Assurance Limited and a copy of what is purported to be the Nomination. It is dated 13th January 2015. It is not certified. There is no explanation for the date given that it does not seem to coincide with the date the Deceased commenced service. The terms of the policy are not exhibited. The forms says “I hereby declare that in the event of the death of any of the following dependants funeral benefit... will become payable...” That has no relation to the death of the Deceased. On the following page, the Deceased certified the following statement; “I hereby nominate the following person(s) to be considered for receipt of all benefits payable upon my death.”. That does not call them beneficiaries and it does not exclude other possibilities. Further, the benefits are not to be paid to the Respondent but to her Children as well. The Daughter was to receive 20% and the sons 30% each. That suggests that the Deceased was mindful of the maintenance of his children, in particular in providing a greater share of the younger members of the family. The same applies to the benefits from the Sacco. The Respondent is named nominee not beneficiary.

26. The Applicant claims the Respondent received Kshs. 150,000/= The Respondent admits that she received KShs.220,000/-. There is nothing before the Court to explain how that was broken down. There is also nothing to say that was in addition to what the Children nominated received. Although it is not a definitive figure, it is a good starting point for the purpose of these proceedings.

27. It is clear from the above that the Deceased intended to provide for his Children. From the evidence before the Court, the Child M P M was his Child or at the very least he had taken on parental responsibility for the Child. The Children Act provides that Children should be treated equally and that the needs of the Child are paramount.

28. This is a Child of tender years. The Child has a basic need for maintenance under the Children Act is to be provided by the Parents and/or the State. In this case the Deceased is deemed a parent. In the circumstances, the Child is entitled to maintenance from the Estate. The Application before the Court is for interim maintenance pending filing and determination of a succession cause.

29. By reason of the above, the Court is satisfied that the Deceased was the Father of the Child. The Court is satisfied that the Child is in need of maintenance. The Court takes the view that this Child must be treated in parity with the other Children of the Deceased. It is therefore ordered and directed that:

(1) The Respondent shall pay or cause to be paid to the Applicant the sum of KShs. 70,000/= for the maintenance of the Child. That sum is less than but consistent with a 30% share of receipts thus far. In the first instance the monies shall be paid into Court within 30 days.

(2) Penal Notice attached to (1) above;

(3) The Applicant shall hold that money in trust for the Child in a Bank account. Withdrawals from the Account shall only be with leave of the DR of the Division on the production of sufficient evidence the justify the payment.

(4) The interim orders made by Hon Lady Justice Muigai made on 13th January 2017 to continue until a succession cause is commenced by either party when the Court seized of the matter will re-consider the issue.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered, Dated and Signed at Nairobi this 14th day of February 2018

In the Presence of:

Clerk: Patrick Mwangi

Applicant: Mr Akato holding Brief for Mr Abenga

Respondent: Mr Amoke