



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC APPLICATION NO. 4 OF 2018

IN THE MATETR OF THE ESTATE OF JOSHUA OUYA MUGANDA ..DECEASED

LINET WASHIALI OMUGANDA.....APPLICANT

VERSUS

MARY NAMBOKA RAPANDO.....RESPONDENT

R U L I N G.

1. The applicant herein **Linet Washiali Omuganda** has filed an application dated 12th march 2018 seeking for orders that:-

1. That the limited grant of letters of administration ad litem made to **MARY NAMBOKA RAPANDO** be revoked and/ or annulled.
2. Spent
3. That the cost of this summons be provided for.

The grounds in support of the application are , inter alia that :-

- (1) The limited grant ad litem is defective as it was obtained without fully disclosing all the material facts that the deceased has a lawfully wedded wife, the applicant herein.
- (2) There has been no marriage between the respondent herein and the deceased and thus the respondent is not a widow to the deceased.
- (3) The respondent has no locus to take out the grant.

2. The application was opposed by the respondent on the grounds that:

1. The respondent is a widow of the deceased having been married under luhya customary law in 1988 as a first wife of the deceased and dowry paid in 1993.
2. The respondent did not make any fraudulent allegations, misrepresentation of facts and or concealed any material facts when applying for grant of letters of administration ad litem in cause number 22 of 2018.
3. The applicant is not the only widow of the deceased and has not come to court with clean hands.
4. The respondent has not intermeddled with the estate of the deceased.
5. The application lacks merit and should be dismissed with costs to the respondents.

Background to the application:

4. Both the applicant and the respondent claim to be widows of the **late Joshua Ouya Omuganda** who died intestate in Nairobi on the 8th January, 2018. After the death of the deceased the applicant and the respondent could not agree as to who had the right over the burial of the deceased. The applicant alleged that she was the only legal wife of the deceased with whom she had solemnized their marriage in church. The respondent on the other hand alleged that she was the first wife of the deceased through Luhya customary law and that she had since two children with. That the applicant was the second wife of the deceased. When the parties failed to agree as to who had a right to bury the deceased, the respondent filed a suit at **Milimani Commercial Courts CMCC No. 47 of 2018** seeking inter alia, for a declaration that she was the only surviving legal wife of the deceased and that she had the exclusive rights to bury the remains of the deceased with the help of the clan elders and the extended family. The court ruled in the applicant's favour and held that the respondent had not proved any valid marriage between her and the deceased. It further held that the applicant was the only legal wife of the deceased.

The respondent was not satisfied by the outcome of the judgment and she has filed an appeal that is yet to be determined.

5. Meanwhile the applicant obtained a grant of letters of administration ad litem and filed **Kakamega Civil suit No.67 of 2018** against a certain person who was intermeddling with the estate of the deceased. The respondent consequently obtained another grant of letters of administration ad litem purporting to be a widow of the deceased that she used to file an application to be enjoined in Kakamega Civil No. 67 of 2018 claiming that she was a widow to the deceased. The applicant could not take it lying down. She then moved this court in the application dated 12th March, 2018 seeking for the revocation of the grant issued to the respondent.

6. The applicant contends that the limited grant ad litem issued to the respondent was fraudulently obtained by the respondent purporting to be a wife to the deceased without the respondent disclosing that the deceased had a lawfully wedded wife, the applicant. That there has never been any marriage between the respondent and the deceased save that the deceased had sired two issues with the respondent out of wedlock which issues are now adults and whom the applicant recognizes. That the interest of the respondent's adult children will be considered once a succession cause is filed in respect to the deceased's estate. That the fact that the respondent sired children with the deceased did not make her a wife to the deceased.

The applicant beseeched the court to revoke and/or annul the limited grant issued to the respondent as she had no locus standi to take it out. She, the applicant, annexed a photocopy of her marriage certificate with the deceased.

7. The respondent on the other hand says that she is the first wife of the deceased while the applicant is the second wife. That the deceased married her in accordance with Luhya customary law and paid dowry to her family. That she has sired two children with the deceased. That in the Milimani Civil Suit No. 47 of 2018, the trial court found that indeed the deceased had paid dowry for her. That she sought for the grant of letters of administration in her capacity as a widow to the deceased. That she made full disclosure of the beneficiaries of the deceased in her application and included the name of the applicant herein and the names of her children. That being a widow to the deceased she has an interest in his estate and has a right to apply for grant of letters of administration on her own behalf and on behalf of her children. That her interest in her application to be enjoined in Kakamega Civil Suit No. 67 of 2018 is to preserve the estate of the deceased until the final distribution of the estate to the rightful beneficiaries.

The respondent annexed a copy of the judgment of the Court in Milimani CMCC No. 47 of 2018.

Findings of the court in CMCC No. 47 of 2018 .

8. The court stated in paragraph 91 that:

In the course of the trial, it became clear to me that indeed, there were two dowry payments in respect of the Plaintiff and the 1st Defendant... I was satisfied that the 1st Defendant's dowry payment was made sometimes in 1993 while the Plaintiff's followed later in 1997.

9. In paragraph 97 the court said:

In view of the foregoing, I find and hold that the 2nd defendant (sic: 1st defendant) has not proved the existence of a valid marriage between her and the deceased.

10. Paragraph 98 :

Having established that the plaintiff is the only legal wife having the requisite proximity for purposes of this burial dispute, I now have to determine the extent of her rights..."

11. Paragraph 100:

In my view and having found that the 1st defendant is not a wife, any overt actions by the defendants to so recognize her could have amounted to interference."

Submissions by the Advocates for the parties:

12. The advocates for the applicant, **Malalah & Co. Advocates**, submitted that the trial court in **civil case No. 47 of 2018** recognized the applicant as the lawful wife of the deceased. That the court found that the respondent was not a wife to the deceased. Therefore that petition

for letters of administration by the respondent contained false information that she was a widow to the deceased.

13. Further that the application for stay of execution of the court's order in Milimani CMCC No.47 of 2018 was denied by that court. That no stay has been granted. That that means that the determination of the lower court still stands.

14. That the applicant being a widow to the deceased ranks in priority to the respondent in applying for grant of letters of administration as provided by section 66 of Law of Succession Act. That the applicant and the other surviving beneficiaries of the estate were never consulted nor did they consent to respondent petitioning for the said grant.

15. That rule 26(1) of the Probate and Administration Rules provides that no grant of representation shall be granted unless notice is given to every person entitled in the same degree. That the respondent did not give such notice to the applicant before petitioning for the grant.

16. The advocates for the respondent **Oduk & Co. Advocates**, on the other hand submitted that the respondent is a widow to the deceased in accordance with Luhya customary law. That the trial court in CMCC No.47 of 2018 made a finding that the respondent was married to the deceased and dowry had been paid for her. That payment of dowry is proof of marriage under Luhya customary law. That **section 43(2) of the Marriage Act** provides that payment of dowry is proof of marriage under customary law. Hence that the respondent is a widow to the deceased in accordance with the law and has the right to make an application for grant of letters of administration ad litem in her right as a widow to the deceased. That the solemnization of the marriage between the deceased and the respondent did not invalidate the customary marriage between the deceased and the respondent. That the marriage is recognized by the law under the provisions of **section 3(5) of the Law of Succession Act** which states that:

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

17. The advocate submitted that the fact that the court made a finding that dowry for the respondent was paid gives the respondent a right as a wife.

The advocates further submitted that both the applicant and respondent are widows to the deceased and that the applicant does not rank higher in priority over the respondent. That the respondent did not require the consent of her children or that of the applicant before making an application for grant of letters of administration ad litem. Nor did she require to give notice of doing so to the applicant. That the intention of the respondent is applying for the grant was to preserve the estate of the deceased and not to intermeddle with it.

18. The advocates submitted that the respondent in her petition disclosed the name of the applicant and her children. She therefore did not conceal any material fact to the court. That the applicant has not demonstrated that the respondent concealed any material facts to the court.

Analysis and Determination:

19. The question before the court is whether the respondent is entitled to the letters of administration ad litem as a matter of law and fact.

Before the court considers that question, it has to consider the question as to who has a right to apply for a grant of representation.

The guide as to who can apply for a grant of representation is provided by **section 66 of the Law of Succession Act** that states that:

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) not applicable

(d) not applicable

It is therefore clear that for one to apply for a grant of representation for an intestate deceased, he/she has to demonstrate that he/she is:

(1) a spouse

(2) a beneficiary entitled to intestacy.

Rule 26(1) of the Probate and Administration Rules provides that no grant of representation shall be granted unless notice is given to every person entitled in the same degree as or in priority to the applicant.

20. The respondent herein says that she petitioned for grant of letters of administration ad litem in her capacity as a widow to the deceased. The question then is whether the respondent was a wife/widow to the deceased.

That question was determined in **Milimani CMCC No.47 of 2018**.

The advocates for the applicant argue that the determination of the trial court was that the respondent was not a wife to the deceased. The advocates for the respondent on the other hand argue that though the court in its judgment held that the respondent was not a wife to the deceased, it nonetheless found that the deceased had paid dowry for her in accordance with Luhya customary law. That payment of dowry under Luhya customary law formalizes a marriage. That in effect the respondent was a wife to the deceased.

21. However my reading of the judgment is that the determination of the trial court was that though there was dowry payment for the respondent by the deceased, there was no valid marriage between the two. Whether the trial magistrate was correct in that finding is a subject of appeal. There has been no stay ordered in the judgment of the lower court. As far as the matters stand now, the determination was that the respondent was not a wife to the deceased. Consequently that the respondent is not a widow to the deceased.

22. The judgment of the lower court was a **judgment in personam**, declaring the status of the respondent in relation to the deceased. Unless the judgment is upset on appeal, the status of the respondent is that she is not a widow to the deceased.

23. In addition to the respondent not proving that she was a widow to the deceased, she did not prove that she was a beneficiary to the estate. A person who is not a widow or a beneficiary to the estate of a deceased person has no locus standi to apply for a grant of representation in respect to the estate of that deceased person.

24. This court has powers under Section 76 of the Law of Succession Act to annul/ revoke any grant of representation that is obtained fraudulently by making of a false representation. The section states that:

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).....

(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 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) -(e).....

25. The respondent herein obtained the grant by making of a false misrepresentation that she was a widow to the deceased. The grant was obtained fraudulently. The application to revoke the grant is in the premises merited.

26. In the foregoing, it is my holding that the grant of letters of administration ad litem issued to the respondent was obtained fraudulently, by the making of a false statement that she was a widow to deceased. The application to revoke and/or annul the limited grant of letters of administration issued to Mary Namboka Rapando by this court on the 5th March, 2018 is allowed. The grant is accordingly annulled and revoked.

The respondent to bear the costs of the application.

Order accordingly

Delivered, Dated and signed at Kakamega this 27th day of June, 2018

J. NJAGI

JUDGE

In the presence of :-

Miss Mbarofor applicant

N/A.....for respondent

N/A.....court assistant

Parties:

Applicant.....Absent

Respondent.....Absent