



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 8 OF 2015**

**IN THE MATTER OF THE ESTATE OF S G (DECEASED)**

**B I J .....1<sup>ST</sup> PETITIONER**

**G I K .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**C K .....INTERESTED PARTY**

**J U D G M E N T**

1. **S G (“the deceased”)** died on 20<sup>th</sup> April, 2014. On 23<sup>rd</sup> June, 2014, the Chief of Kianjai Location wrote a letter of introduction wherein he introduced the 1<sup>st</sup> petitioner as the mother of the deceased. He also listed the following as the survivors of the deceased:-

1. **B M** - 16 years
2. **L K** - 12 years
3. **R K** - 14 years
4. **L K** - 10 years

2. On 14<sup>th</sup> January, 2015, **B I J** and **G I K** (“the petitioners”) petitioned for letters of administration of the estate intestate and set out the following as the survivors of the deceased:-

- a) **B I J** - mother
- b) **B M** - son
- c) **L K** - daughter

3. On 16<sup>th</sup> February, 2017, the grant was issued to the petitioners as mother and brother of the deceased, respectively.

4. On 3<sup>rd</sup> April, 2017, the petitioners applied for confirmation of grant and proposed to distribute the estate as follows:-

- a) P/NO. [particulars withheld] Kianjai Adjudication Section - M B
- b) P/NO. [particulars withheld] Kianjai Adjudication Section - M B
- c) P/NO. [particulars withheld] and P/NO. [particulars withheld] Uringu 1 Adjudication Section - B I in trust for L K (minor)
- d) All monies in accounts in the following banks to go to B I:-
  - i) National Bank of Kenya
  - ii) Cooperative Bank of Kenya

iii) Harambee Sacco Fosa Account

iv) Dhasiti Sacco

v) Faulu Kenya

vi) Equity Bank

5. On 4<sup>th</sup> May, 2017, **C K** (“the Interested Party”) applied to be joined in this cause as an interested party on the ground that she was a wife of the deceased with whom she had two children namely, R K and L K. She contended that she, together with the said two children, were dependants of the deceased under **Section 29 of the Law of Succession Act CAP 160, Laws of Kenya**. She annexed the children’s birth certificates in support of her contention. Her said application was treated as a protest.

6. The protest was ordered to be tried by way of viva voce evidence. The parties were directed to file their affidavit evidence on which they were to be cross-examined. On 29<sup>th</sup> January, 2018, the protestor indicated that she will rely on her protest and filed a witness statement. On the other hand, the petitioners filed an affidavit evidence by G I K.

7. At the trial, the protestor did not turn up and Ms. Nyaga for the petitioners applied that the protest be dismissed for want of prosecution or evidence. The court declined that invitation and directed that it will hear the parties and consider the protest that was on record.

8. **RW1 I K G** testified on behalf of the petitioners. He relied on his affidavit evidence sworn on 27<sup>th</sup> January, 2018. He told the court that the deceased was married to one **M G N**. That the two died on the same day. That the two were blessed with two children, M B (20yrs) and L K (16yrs). That the two children were left in the custody of the 1<sup>st</sup> petitioner who was their grandmother.

9. It was **RW1’s** testimony that the protestor was not a wife of the deceased. He denied that the two children of the protestor belonged to the deceased. That the names of the two were inserted by the area chief at the time of writing the introductory letter to which the petitioners had seriously protested. That there was bad blood between the area chief and the deceased and that that was the reason the area chief wanted to mess up the administration of the estate of the deceased. He produced a document showing that the protestor had indicated that the father of R K was unknown in an application dated 12<sup>th</sup> April, 2014 for assistance by a local NGO known as Compassion.

10. I have considered the entire record and the testimonies of the parties as contained in their various depositions. The issues for determination are; **whether the protestor is a wife of the deceased; whether the protestor’s children belong to the deceased; whether the said children are entitled to share in the estate of the deceased either as children or dependants of the deceased; how the estate should be distributed.**

11. The protestor alleged in her original letter to court dated 29<sup>th</sup> March, 2017 that she was a wife to the deceased. That the 1<sup>st</sup> petitioner was her mother in law. In her formal application to be joined in these proceedings as well as the protest, the protestor did not indicate when and how she was married to the deceased. Her allegations were obviously denied by the petitioners.

12. Marriage is not a secret arrangement or function between a man and woman. Even where it is secretly undertaken, most likely, there would be witnesses. Further, such a secret marriage is later pronounced by cohabitation whereby the community living with the couple come to acknowledge that the concerned couple are man and wife.

13. In the case of **Re Ogola’s Estate (1978) KLR 18**, the court held that the deceased had no capacity to take other wives under any law so long as the statutory marriage was subsisting. In this case, the deceased was statutorily married which is evidenced by the marriage certificate (“**GIK 1**”) dated 26<sup>th</sup> April 2008. Marriages under the African Christian Marriages and Divorces Act Cap 151 (repealed) were monogamous.

14. In **Re Ruenji’s Estate (1977) KLR 21** the court held that:-

***“It is clear that a marriage under the African Christian Marriage and Divorce Act is meant to be a Christian marriage (see Section 3) and that parties become legally bound to each other as man and wife so long as both of them shall live, and that their marriage cannot be dissolved during their lifetime except by a valid judgement of divorce, and that if either of them (before the death of the other) should illegally contract another marriage while their marriage remained undissolved, the offender would be guilty of bigamy, and liable to punishment for that offence (see section 9(3)). Thus it is perfectly obvious that a marriage under the African Christian Marriage and Divorce Act is monogamous in nature and neither spouse can legally remarry during the lifetime of the other spouse without obtaining a decree of divorce from a court of competent jurisdiction.”***

15. In the present case, the protestor did not tell the court when, how and where she was married to the deceased. She also told the court that she did not have any witness and that she was satisfied in relying on her protest. To my mind, there was no evidence on record to show that the protestor was a wife of the deceased.

16. The next issue is whether the children of the protestor are children of the deceased. The protestor produced Certificates of Birth Nos. [particulars withheld] and [particulars withheld] dated 30<sup>th</sup> September, 2013, respectively. The births are indicated to have been registered on the same day the Certificates were being issued, viz 30<sup>th</sup> September, 2013.

17. This court is aware that a mother is always the person who knows who the father of a child is. The protestor is the mother of her said two children. I am alive to the fact that the petitioners denied the fact of the deceased having sired the two children. **RW1** produced a copy of an

application for assistance from an NGO known as Compassion allegedly filled by the protestor on 12<sup>th</sup> April, 2014 wherein she indicated that the father of R K C was unknown.

18. I am also alive to the fact that the protestor did not file any rejoinder to the Affidavit evidence of **RW1**. She did not deny the allegation made about her alleged statement to Compassion about the paternity of one of her children, R K C. However, This notwithstanding, the court is alive to the fact that she produced Birth Certificates for the two children which clearly showed that the deceased was the father of the said children. The petitioners did not satisfactorily, or at all, challenge the said Birth Certificates which were issued on the same day that the births were registered, to wit, 30<sup>th</sup> September, 2013. This was well before the deceased's death. A Birth Certificate is a public document which is presumed to be genuine unless properly challenged. In this case, the Birth Certificates of the two children were not challenged and the contents thereof are taken to be authentic under Section 80 of the Evidence Act.

19. The petitioners contended that the names of the protestor's children were inserted by the area Chief without their consent and that they protested against it. I note however, that there was no evidence of any such protest that was produced in support of that allegation. Further, it is the petitioners who produced and relied on that introduction letter to commence the current proceedings. They never called the Chief/writer of that letter to challenge the contents of that letter. **RW1's** contention that the Chief was out to cause confusion in the administration of the estate of the deceased remained unsupported.

20. In this regard. I am satisfied that there is *prima facie* evidence that the children of the protestor were children of the deceased by virtual of the Birth Certificate that were produced in evidence and not challenged. They are entitled to a share in the estate.

21. Accordingly, the estate is to be distributed as follows:-

- a) P/No. [particulars withheld] Kianjai Adjudication Section B M.
- b) P/NO. [particulars withheld] Kianjai Adjudication Section B I to hold in trust for L K (minor)
- c) P/No [particulars withheld] Uringu 1 Adjudication section C K to hold in trust for R K (minor).
- d) P/No [particulars withheld] Uringu 1 Adjudication Section C K to hold in trust for L K (minor)
- e) All monies in the following banks
  - i) National Bank of Kenya
  - ii) Cooperative Bank of Kenya
  - iii) Harambee Sacco Fosa Account
  - iv) Dhasiti Sacco
  - v) Faulu Kenya
  - vi) Equity Bank

to go to and be held by B I for the upkeep of B M, L K, R K and L K, in equal shares.

It is so ordered.

**DATED and DELIVERED this 26<sup>th</sup> day of September, 2018.**

**A. MABEYA**

**JUDGE**