



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 345 OF 2003**

**IN THE MATTER OF THE ESTATE OF S M N – DECEASED**

**G M.....PETITIONER**

**VS**

**D M N.....OBJECTOR**

**JUDGMENT**

1. From the Death Certificate on record, **S M N (“the deceased”)** died on 2<sup>nd</sup> July, 1972 and the cause of death was that he was shot with a poisoned arrow. The Death Certificate shows his age at the time of death as being 35 years.
2. In a copy of a letter of introduction dated 15<sup>th</sup> July, 2003 signed by one **Japheth M. Gitora** chief of Nduruma Location, the following were set out as the survivors of the deceased:-
  - a) G M - (25 years) son
  - b) R K - (14 years) daughter
  - c) M K - (age not given) daughter
  - d) G M - ( “ ) son
  - e) J M - ( “ ) son
3. On 3<sup>rd</sup> November, 2004, **C K**, ( “original petitioner”) petitioned for letters of administration for the estate of the deceased intestate. In addition to the persons named in paragraph 2 above, she included **E M** and **T N** as also those surviving the deceased. She disclosed that she was petitioning as the wife of the deceased. She further disclosed the property known as **Abothuguchi/U-Kaungone/[Particulars withheld]** as the only asset forming the estate.
4. On 29<sup>th</sup> January, 2004, the grant was issued to the said **C K**. On 31<sup>st</sup> March, 2004, **D M N (hereinafter “the Objector”)** filed an application for leave to file an objection and cross petition. In the same application, he also sought orders that the grant issued to the **C K** be revoked.
5. The grounds upon which the objection was made were that; the petitioner had misrepresented the material facts; the grant was obtained by means of untrue allegations of facts essential; that the deceased had divorced the **C K** who had in turn married one **K M**; that all those disclosed as survivors of the deceased were neither children nor dependents of the deceased.
6. The objector further contended that the letter of introduction by the area Chief was not genuine but a forgery. Together with the application, the objector lodged a Cross-Petition wherein he prayed that he be appointed the administrator of the estate and that it was only he, and the deceased’s grandson, **J M** who were entitled to share in the estate.
7. The original petitioner opposed the said application vide the Replying Affidavit sworn on 20<sup>th</sup> April, 2004. In that response, she swore that; she was a wife of the deceased and had not divorced him; that the Objector was a brother of the deceased and therefore not entitled to be appointed the administrator of the estate.
8. That all those entitled had been included in the distribution including **J M** as a beneficiary on humanitarian grounds; she denied that the letter from the chief was a forgery. She urged that the application be dismissed.

9. The original petitioner passed away on 15<sup>th</sup> January, 2007 and was substituted by her son, **G M** as the petitioner and administrator of the estate of deceased.

10. On 10<sup>th</sup> January, 2012, the said **G M** applied for and the grant was confirmed on 1<sup>st</sup> February, 2012 as follows:-

a) **G M** - 3 ½ acres

b) **P M** - 2 acres

c) **E M** - 2 acres

d) **R K** - 2 acres

e) **J M M** - 2 acres

f) **J K M** - 2 ¼ acres

g) **A K M** - 1 ¼ acres

h) **M M M** - 2 ¼ acres

i) **L K** - ¼ acres

11. Since the grant was confirmed without any notice to the Objector, by an application dated 25<sup>th</sup> June, 2012, the Objector applied to set aside the orders of confirmation. By a Ruling delivered on 26<sup>th</sup> June, 2013, Lessit J allowed the application whereby she restrained the petitioner from dealing with the estate property, dismissed the application to set aside the confirmation and directed that the application for revocation be determined on the basis of two issues; namely:-

**a) Whether the objector has locus standi to file an objection and cross-petition in this cause.**

**b) Whether the beneficiaries consented to the mode of distribution of the estate of the deceased.**

12. At the hearing of the application, the objector called 2 witnesses while the petitioner called none. **OW1 Japheth Muthiga Gitura** told the court that he was the Chief of Nduruma Location since 1994. He knew the deceased well as they were neighbours in Nkandone Sub-location of Nduruma location; that the deceased was married to the original petitioner (**C K**) but they were divorced whereby the deceased married another woman who bore **C M**. **C M** gave birth to **J M** but died during delivery. The said **J M** remained under the guardianship of the objector.

13. **OW1** further testified that **C K** returned after the demise of the deceased; he disclaimed the copy of the letter dated 15<sup>th</sup> July, 2003 which was used to initiate these proceedings. He asserted that it was a forgery of another letter he had written in 1999. He produced a letter dated 17<sup>th</sup> March, 2004 in which he had disclaimed the letter dated 15<sup>th</sup> July, 2003. **OW2 D M N** relied on his affidavit in support of the application dated 10<sup>th</sup> March, 2004.

14. Neither the petitioner nor his advocate attended court on the two occasions the matter came up for hearing. The evidence of the objector's witnesses therefore remained unchallenged.

15. Having considered the entire record, this court's opinion is that the issues for determination are; **Whether the objector has locus standi to file an objection and cross-petition in this cause; who the beneficiaries of the estate are; whether the grant be revoked and how should the estate should be distributed.**

16. On whether the objector has locus standi to file the objection application, it was common ground that the objector is a brother of the deceased. **Section 7 of the Law of Succession Act Cap 160, Laws of Kenya ("the Act")** provides inheritance in cases of intestacy. Under **the Second Schedule**, a table of Consanguinity is set out. Under that table, after the first line of inheritors, a brother is on the 3<sup>rd</sup> degree of consanguinity and therefore entitled to petition for letters where there is no spouse, child, grandchildren, and/or parents of the deceased.

17. I am aware that the deceased died in 1972 and that his estate was therefore not subject to the Act which applies to estates of deceased persons who died after 1981 when the Act came into force. Accordingly, the estate was subject to the Meru customs. Under the Meru customs, a brother was entitled to inherit from his deceased brother in the absence of a widow or children (**See Eugene Contran on customary law pg.37**). Accordingly, my finding is that the objector had locus to bring the application for revocation as well as cross-petition.

18. The second issue is who the beneficiaries of the deceased are. The evidence on record is that the deceased was married to **C K** but they divorced. The deceased married another woman who bore him a daughter by the name **C M**. **C M** got a child **J M**. She died when giving birth to **J M**. He was 15 years old at the time the objection was filed. **J M** therefore is a grandchild to the deceased. He is a beneficiary.

19. The objector made specific allegations on oath that, the petitioner and the deceased divorced before the deceased died; that the petitioner

was then married to one **K M** and that all the children the petitioner had lined up in the petition were not children of the deceased. That **T N** who is included as one of the survivors is a co-wife of the petitioner to the said **K M**.

20. On the face of these specific allegations made on oath, the petitioner did not deny any of them with any specificity. She was content to casually state in her replying affidavit sworn on 20<sup>th</sup> April, 2004 that; she was the wife of the deceased; that she had not been divorced; that the objector was a brother to the deceased and had no right to the deceased's estate; that all the persons entitled to benefit from the deceased, including **J M** a grandson of the deceased who would ordinarily not be entitled to benefit, had been informed and named in the petition. That the deceased had given her trouble ever since she was married to the deceased. That was all **C K** stated in response to the allegations made against her.

21. **C K** had the opportunity to deny and explain the allegations made against her but she did not. This court is alive to the fact that both the statements made on oath by the objector and the petitioner were not tested in cross-examination. The petitioner died before the hearing while the administrator who took over from her failed to attend court with his advocate on the day the objector testified to test his testimony. His testimony therefore remained unchallenged.

22. The court is therefore left with no alternative but to examine the statements made on oath by the two parties to ascertain which one to believe. Firstly, as already stated, the original petitioner did not make any specific denial that; the children she had lined up in the petition did not belong to the deceased but one **K M**; that none of the said children was born within or during the subsistence of the marriage between the petitioner and the deceased or sired during the lifetime of the deceased; that **T N** whom she had included as a beneficiary was her co-wife to **K M**.

23. In the documents the petitioner filed together with the petition, the following information was clear; that the deceased died in 1972 aged 35 years; that her eldest child **G M** was aged 25 years in March, 2003 when the letter of introduction by the chief was being written. That being the case, the said **G M** was born in or about 1978 which is six years after the deceased had died. Clearly, if the first born of **C K** was born after his demise none of her other children can be his or his dependants.

24. The petitioner included the names of **E M** and **T N** in the petition as those surviving the deceased. The two were not included in the letter of introduction by the chief dated 15<sup>th</sup> March, 2003. Their relationship with the deceased was never disclosed. The objector indicated that **T N** was the petitioner's co-wife to **K M**, a fact that was not denied.

25. Accordingly, this court makes a finding that neither the petitioner nor **G M, G M, R K, E M, M K** and **T N** are beneficiaries of the deceased. The petitioner could not have lived with another man with whom she sired children then return after the demise of the deceased to inherit from him.

26. In his affidavit in support of the application for revocation, the objector swore that the copy of the letter dated 15<sup>th</sup> March, 2003 allegedly from the Chief of Nduruma Location was not genuine but a forgery. The petitioner denied that fact and urged that the objector be punished.

27. At the trial, **OW1 Japheth Muthiga Gitura** appeared and testified. He told the court that he had been the Chief for Nduruma Location since 1994. That the copy of the letter dated 15<sup>th</sup> March, 2003 was not authored by him although it was shown to have been written by him. He wondered where the original of that letter was. He asserted that it was a forgery of a letter he wrote on 15<sup>th</sup> February, 1999 in respect of the estate of one **M T**. He produced that letter (**OExh.1**) to show that it was the one that was manipulated to produce the copy of the letter dated 15<sup>th</sup> March, 2003

28. **OW1** further testified that, he had on 17<sup>th</sup> March, 2004 written a letter to the court disclaiming the copy of the letter dated 15<sup>th</sup> March, 2003 that commenced these proceedings as not having been written by him. He produced that letter as **OExh.2**.

29. The evidence of **OW1** was neither denied nor challenged. I saw him testify in court. The court believed him. Further, I have seen **OExh.1 and 2**. They support the testimony of **OW1** in all respect. I have also seen the copy of the letter dated 15<sup>th</sup> March, 2003 which the petitioner used to commence these proceedings. It is a copy and not original. No one explained where the original went as **OW1** had questioned. That copy has the following words appended thereon with the stamp of **Mukira Mbaya Advocate and Commissioner for Oaths:-**

*“I have seen the Original and this is a true Photo copy of the same”*

*Signed 29/10/03 ”*

30. To my mind, I accept the explanation given by **OW1**. The copy of the letter dated 15<sup>th</sup> March, 2003 was a manipulation and or a forgery of his letter dated 15<sup>th</sup> February, 1999 (**OW1**).

31. From the foregoing, I am satisfied that under **section 41 of the Act**, **J M** is a beneficiary of the deceased. Further, in the circumstances of this case, the evidence shows that after the demise of the deceased, the objector took over the guardianship of the deceased's grandson. He is also entitled as a beneficiary to some extent.

32. It should however be borne in mind that the objector has his own land which he inherited from his father as the deceased did.

33. In **Eugene Contran's Restatement of African Law :2 Kenya II Law of Succession, (Sweet and Maxwell 1969)** at Page 37, according to the Meru custom, the property of an unmarried man is inherited by his father, if alive or in his absence, his younger full brother or in his absence, his next elder full brother. In the present case, it has not been disputed that the Objector is a brother of the deceased. Further, for the purposes of succession, the deceased is an unmarried man in that his first wife, the **C K** left him and remarried thereby ending their union

while the second wife died.

34. The next issue is whether the grant should be revoked. It is clear from the evidence on record that neither the original petitioner nor **G M** was entitled to petition for the grant. Further, the petitioner used fraudulent means to obtain the grant. She presented to court a forged letter of introduction from the chief. She further lied that the persons she set out in **Form No. P&A 5** were children of the deceased, which was not the case.

35. Accordingly, the grant cannot stand. The same is hereby revoked. The cross-petition succeeds. I appoint the objector and **J M** as joint administrators of the estate of the deceased.

36. Since I have found that those entitled to benefit from the estate are the objector and the said **J M**, and for the reasons set out above that the objector has his own land, the estate will be distributed as follows:-

**L.R No. Abothuguchi/L.Kaongo/[Particulars withheld] (6.8 Ha)**

**a) J M - 4.8 Ha**

**b) D M N - - 2. Ha**

36. Although the petitioner was engaged on an outright fraudulent mission, I am minded that this is more of a family dispute and I will therefore not order any costs.

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

**A. MABEYA**

**JUDGE**