



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 19 OF 2000

IN THE MATTER OF THE ESTATE OF TERESA NYABATE ASANGO (DECEASED)

-AND-

IN THE MATTER OF ANNULMENT OF REVOCATION OF GRANT BY

MONICA NYABOKE JOHN APPLICANT

VERSUS

ASKAH MOCHECHE MOMANYI RESPONDENT

RULING

1. The summons for confirmation of grant dated 11th May 2016, were taken out by Monica Nyaboke John (applicant), one of the two persons given the mandate by this court to administer the estate of the late Teresia Nyabate Asango (deceased) which comprises of a single parcel of land described as LR NO. NYARIBARI CHACHE/B/B/BOBURIA/5054.

It is proposed by the applicant that the said parcel of land be sub-divided into two equal portions for necessary distribution to the two houses of the deceased who had allegedly entered into a marriage relationship with the applicant's late mother (Bathseda Bosibori) and the respondent, Askah Mocheche Momanyi, under the Gusii Customary Law's woman to woman marriage.

2. Apparently, the respondent and the applicant's late mother were treated as the first and second widows respectively of the deceased. This clearly implied that the relationship between the deceased and his two "widows" was nothing less than an African customary polygamous marriage.

The prominent feature of such marriages is its polygamous character which constitutes the central point of conflict between Christian marriage and African customs.

Polygamy is readily permitted among Africans living under their custom law and therefore, the rights and obligations arising therefrom are legally recognized.

3. It would not be farfetched for this court to opine that a woman to woman marriage in as much as it is based on African customary law is potentially polygamous.

Under Gusii customary laws, a woman or widow who has no children or who only had female children is allowed to enter into an arrangement to take another woman as her wife and to choose a man who will sire children with the new wife.

It was therefore not abnormal for the deceased to have two “wives” if circumstances allowed.

4. In this case, proof of the existence of a valid marriage between the deceased and the applicant’s late mother was the bone of contention which ought to have been resolved in the objection proceedings which preceded the ultimate grant of letters of administration by this court to the applicant and the respondent on 23rd March 2016. This is the grant which was issued on the 6th April 2016 and which the Applicant now seeks to have confirmed but for the protest raised herein by the respondent vide her replying affidavit dated 8th June 2016.

5. In that affidavit which is essentially an affidavit of protest to the summons for confirmation of grant the respondent deponed that two other applications relating to this matter are pending. These are the applications dated 12th September 2011 and 17th May 2013 made by the applicant and the respondent through their respective counsels.

In both applications, the parties did on the 23rd May 2013, agree to a stay of proceedings order pending the disposal of the applications. Pursuant to that order, written submissions in respect of the applications were filed and highlighted by the parties but due to some lapses the court did not make its ruling on the applications.

6. The respondent also deponed that in a previous suit, being CMCC No. 55 of 2008, the court made a finding that there was no legal marriage between the deceased and the mother of the applicant as her former marriage with a person called Orango had not been dissolved. That, the applicant’s brother, Alfred or Wilfred Mongare, was aggrieved by the court’s decision and filed an appeal in this court being Civil Appeal No. 146 of 2008.

The respondent averred that the said appeal is still pending to date.

7. Learned counsel for the respondent, **Mr. Bw’omwando**, submitted to the effect that Appeal No. 146 of 2008 is indeed pending, but that notwithstanding, the applicant claimed that she was an heir to the deceased and filed an application dated 26th May 2008, for the revocation of the grant which was issued to the respondent in the year 2000.

Learned counsel, contended that the applicant had no “locus-standi” to file that application and since there is a pending appeal against the decision of the lower court declaring the respondent the rightful owner of the estate properly, the summons for confirmation of grant ought not be allowed prior to the hearing and final disposal of the appeal.

8. In his rejoinder to the respondent’s submissions, learned counsel for the applicant, **Mr. Bosire**, submitted that the initial grant was obtained by the respondent in a secretive manner thereby prompting the applicant’s application for revocation of the grant. That, the grant was eventually revoked by the court which thereafter ordered the issuance of a fresh grant in favour of both the respondent and the applicant. That, the respondent filed a notice of appeal against that order and in the process obtained a stay of execution pending the hearing and determination of the appeal. However, the applicant later moved the court for striking out the notice of appeal and setting aside the stay order. It was after that, that the applicant took out the impugned summons for confirmation of grant.

9. With regard to the pending Appeal No. 146 of 2008, the applicant submitted that it has been given a hearing date in the month of April 2017 although its outcome would have no bearing to this matter.

The applicant contended that the issue of the marriage between the deceased and applicant’s mother was dealt with in the application for revocation of the initial grant and therefore, the applicant is entitled to the estate of the deceased such that the present protest by the respondent ought to be dismissed.

10. In a final rejoinder, the respondent contended that the revocation of the initial grant was without merit.

From all the foregoing, the basic issue emerging for determination is whether the grant made by this court on 23rd March 2016 and issued on 6th April 2016 should be confirmed at this juncture as proposed by the applicant.

It is clear that the respondent is not in favour of confirmation on the main ground that there is a pending appeal No. 146 of 2008 which should first be heard and determined before the grant is confirmed. Apart from the appeal, the respondent appears to suggest that the applicant is not entitled to the estate of the deceased as her mother was not validly married to the deceased and she (respondent) remained the sole “wife” of the deceased on the basis of the Gusii customary practise of “woman to woman” marriage.

11. With regard to the alleged marriage between the deceased and the applicant’s late mother, it is this court’s view that the issue does not fall for determination at this juncture and ought to have been ventilated in the application for revocation of the initial grant and if it was ventilated and decided by the court in favour of the applicant through her late mother, the only recourse available to the respondent for purposes of re-opening the issue was by way of appeal.

Indeed, the applicant has indicated herein without any dispute from the respondent that an appeal was indeed filed but the notice of appeal was struck out and all consequential orders set aside after necessary application by the applicant.

It is not for this court to decide whether or not the decision was merited.

12. Be that as it may, the record shows that the initial grant in favour of the respondent was issued on **27th April 2000** and confirmed on **6th February 2000**. This, was abnormal for the grant could not have been confirmed before being issued. Either, there was a typographical error in the relevant documents or there was something untoward in this matter.

Nonetheless, it took about eight years for the applicant to move the court for revocation of the grant. This was done vide the application dated 26th May 2008, which was allowed on 26th July 2010 in a ruling made by the court on that date.

13. However, the said ruling was later reviewed by a subsequent ruling made on 16th May 2011, pursuant to an application for review dated 25th August 2010, by the respondent. The initial grant was thus ultimately revoked on that 16th May 2011 and an order issued to have a fresh grant issued in the joint names of the applicant and the respondent. The fresh grant was made on 23rd March 2016 and issued on the 6th April 2016, and is indeed the subject of the present summons for confirmation of grant which are herein opposed by the respondent vide her affidavit of protest dated 8th June 2016.

14. The main reason for the objection is that there is a pending appeal No. 146 of 2008, by a brother of the applicant against a decision of a lower court in CMCC No. 55 of 2008, in which the respondent was declared the rightful owner of the estate property subject of this succession cause.

The respondent would rather have the appeal heard and concluded prior to the confirmation of the grant as proposed by the applicant.

The applicant is however of the view that the outcome of the appeal whether it succeeds or fails would have no bearing to this matter.

15. The annexures in the respondent’s affidavit of protest include a copy of the plaint in CMCC 55 of 2008 and a copy of the decree issued in favour of the respondent showing that the defendant in the suit (brother to the applicant) was restrained from burying their late mother, Bathseda Bosibori, on the estate property and interfering with the respondent’s quiet possession and enjoyment of the property.

The decree also showed that the respondent was declared the lawful registered owner of the property.

16. Apparently, it was on the basis of the impugned grant that the respondent was able to register the estate property in her own name on the 15th February 2001. But, with the revocation of the grant by the court on the 16th May 2011, and the issuance of a fresh grant on 6th April 2016, the registration of the property in the name of the respondent became obsolete. Thus, the respondent's success in CMCC No. 55 of 2008 was somehow rendered invalid and was more or less a pyrrhic victory.

17. In the circumstances, this court holds the view similar to that of the applicant that the success or failure of the pending appeal would have no bearing on this matter. If it is not too late, the only window open to the respondent to pursue her perceived right over the estate property to the exclusion of the applicant is to appeal the decision of this court to revoke the original grant made in her favour.

Otherwise, the protest mounted by her against the summons for confirmation of grant dated 11th May 2016, is unmerited. She may opt to agree with the proposal made by the applicant for the distribution of the estate property or contest the same and move the court accordingly.

In the meantime, the applicant may take a date in the registry for the hearing of the summons for confirmation of grant.

18. It is accordingly ordered and each party shall bear their own cost of the protest.

[Read and signed this 30th day of March 2017].

J.R. Karanjah

Judge

In the presence of

M/s Shitwabo holding brief for

Mr. Gichana Bosire for applicant

Respondent/Protestor present in person

CC Raymond