



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**IN THE MATTER OF THE ESTATE OF J N K (DECEASED)**  
**SUCCESSION CAUSE 897 OF 1998**  
**JUDGMENT**

**PLEADINGS**

The deceased, J N K died on 23rd January 1998.

The Petitioner C M T alias N alleged widow of the deceased filed petition on 30th April 1998 for grant of letters of administration. The petitioner included their son E W N aged 16years old then as beneficiary of the deceased's estate.

The assets that comprised of the deceased's estate were;

- a. Bank Account Delphis bank, Mombasa**
- b. Land in Mtwapa, Mombasa**
- c. Savings in Soweto Welfare Mombasa**
- d. Pension ( KRA)**
- e. Land Bibirioni- Limuru**
- f. Maai Mahiu -Naivasha**
- g. Subukia Pyrethrum Society**

The Objector G N K brother to late J N K (deceased) filed Notice of Objection to Making of Grant to the Petitioner on 10th June 1998 the following grounds;

- a. The Objector is eldest brother to the deceased;**
- b. The petitioner was and is not wife/widow of the deceased, she was not married to the deceased and is therefore not beneficiary of his estate;**
- c. The petitioner never cared for the deceased during his lifetime;**
- d. the Objector took care of the deceased when he fell sick until he died and he was named**

**next of kin in the deceased's documents;**

**e. The Petitioner included the Objector's properties as part of deceased's estate;**

**f. Land in Bibirioni/Limuru, Maai Mahiu- Naivasha and Subukia Pyrethrum Society;**

The Objector filed Answer to Petition for Grant and Cross- Petition for grant of representation on 26th June 1998 for the deceased's estate.

### **HEARING**

On 18th May 1999 before Hon. Justice Mulwa; PW1 J M testified that the late J N K and Objector N are brothers and children of his younger brother who was deceased. He took care of them after his younger brother's death, their mother remarried and had 3 more children. The brothers could not do anything without informing him. The deceased did not inform him of any marriage to anyone especially under Kikuyu customary law. The deceased did not introduce him to any woman as his wife and no one came up to claim to be the deceased's wife. He did not know the Petitioner C M N and she was never introduced to him. The deceased did not build any home for her.

In cross examination, he stated he did not know of E W N alleged to be son of the deceased. He did not attend the deceased's funeral he was unwell and could not tell what transpired. The deceased was close to the Objector his brother and visited him in Limuru.

On 21st September 1999, PW2 C M testified before Hon. Justice Mulwa and stated that the deceased was her late husband. They were married since 1980 and a son E W N who was born in 1982 and at the time was 17 years old. She produced the birth certificate as Exhibit which shows father as J N K, the deceased. She produced the deceased's death certificate.

The widow stated that the deceased and his brother , Objector in this matter went to her home and paid dowry Ksh 7,000/-, 5 crates of soda,4 crates of beer and 2 goats and this was done in 1982, a month before she gave birth to their son E. The deceased's family recognized her as wife to the deceased, including the deceased's brother S W who worked with Customs, Mombasa. She produced the deceased's NHIF card which has her name as wife of the deceased.

The widow outlined properties that constitute the deceased's estate as shown in her petition. She confirmed, she received the Insurance policy proceeds from Alico as their son was the named beneficiary. She complained that the Objector claimed the land in Bibirioni/Limuru was his yet it belonged to the deceased.

In cross examination, she stated that she and the deceased separated in 1985 and she lived with her parents, before that she lived with the deceased in Eastleigh. Dowry was paid by deceased and her sisters and head of delegation was one K an Uncle to the deceased.

The petitioner informed Court that she has 5 children but only mentioned 1 child in the Petition but they were all the deceased's children. She also reiterated that the Objector paid dowry with his late brother, the deceased.

She refused to divulge the cause of her separation from her husband as it was between him and her. She admitted that she did visit or attend to the deceased while he was sick. She was not aware of his sickness and was not aware he was hospitalized and they did not meet during his last days.

She attended the deceased's funeral but was not mentioned as his widow and children as the Objector refused.

On 17th November 2014, this Court over the matter and confirmed from respective Counsel for the parties that once typed proceedings were availed, we would proceed from where the matter stopped.

Proceedings were typed.

On 29th June 2016 DW1 G K, the Objector testified that he is older brother to the deceased of the 2 children of their mother and father. He took care of the deceased his younger brother, took him to school and he finished and was working. He fell ill and he took care of him until he died and he buried him on his land. He took care of the deceased for 2 years as he suffered from cancer. He travelled to Coast General Hospital and then to Kenyatta National Hospital to take care of his brother. He washed him and fed him and did everything for him. He lived in a room in his house in Limuru as he did not build a house.

The deceased was not married. The Objector did not pay dowry for the Petitioner or anyone else as wife to the deceased. They did not visit the Petitioner's home as she alleged. PW1 their Uncle did not know or go to the Petitioner's home. The Petitioner did not care for the deceased, she not there when he took care of him all by himself until his death.

The Objector was surprised to see the Petition in the Kenya Gazette and he promptly filed the Objection to making of Grant application against the Petitioner and their other brother S M who also did not take care of the deceased.

The matter proceeded ex parte as the Petitioner was served through Counsel on record vide affidavit of service filed on 29th June 2016.

The petitioner did not file written submissions and the Objector did so on 9th August 2016.

### **DETERMINATION**

The issue for analysis is who should obtain the grant for administration of the estate of the deceased. **Section 66 of Law of Succession Act** is instructive on this matter.

However, it is contended by Petitioner that she is wife/widow of the deceased and her son child of the deceased by virtue of payment of dowry to her parents/home and her name in the NHIF document as wife and her son's name as beneficiary of Insurance proceeds from Alico.

The basis of proof in civil matters is that he/she who alleges must prove on a balance of probabilities.

In the instant case, the Petitioner did not prove Kikuyu customary marriage between her and the deceased because;

a) Essentials of a valid Kikuyu marriage as outlined in **Restatement of African Law: The Law of Marriage and Divorce by Eugene Cotran** pg 15 were not proved. These are;

- a. Parties must have capacity to marry and to marry each other**
- b. The parties to the marriage and their respective families must consent to the union**
- c. The *ngurario*; a ram is slaughtered**
- d. The *ruracio*; Part of the dowry is paid**
- e. The Commencement of cohabitation**

The Petitioner did not call any witness/ family member from her or deceased's side to confirm any, some or all of the above rites that were conducted.

PW1 Uncle to the deceased did not know her. She alleged the deceased's brother S M knew and accepted her as deceased's wife she did not call him to testify. She alleged the Deceased's sisters were there during payment of dowry ceremony and she did not call any of them to testify to this fact. Better still any of her

family members to attest to the fact that the deceased came and paid dowry. The Objector denied that he accompanied his late brother to pay dowry to the Petitioner's family, and she was not in Court to contest this allegation in cross-examination.

Therefore the issue of a Kikuyu customary law marriage between the deceased and Petitioner is not proved. She was not wife to the deceased.

The 2nd issue is whether one E W N was child/son of the deceased. The birth certificate produced in evidence as Exhibit was obtained after the deceased's death. Whereas he was born on 29th October 1992, the certificate was procured on 11th March 1998; 2 months after his death .In the absence of DNA testing it would be difficult to confirm paternity.

Secondly, the Petitioner admitted in cross-examination that she had 5 children and they all belonged to her husband the deceased. Yet in her petition she named only one child. What cogent evidence is there to confirm the said child was biologically the deceased's or that he had accepted parental responsibility over him?

Thirdly, by 1998, the child was 17 years old, why did his mother the Petitioner not allow him to visit or know his father if at all. Both Petitioner and son seem to have lost touch and contact with the deceased especially when he was critically ill until his death and only surfaced at the point of administration of his estate.

I find the Petitioner and child not beneficiaries of the deceased's estate. This is reinforced by **Section 28 (e) of Law of Succession Act**; the conduct of claimants to the deceased. They had nothing to do with the deceased by the Petitioner's own admission; the Petitioner separated from deceased in 1985 and remained separated till he died. she did not take care of him when he was sick. There is no evidence that he met or knew of his son and or other 4 children.

On the other hand, the Objector's testimony that he was in contact and took care of his younger brother throughout his life is not controverted by any evidence. The Objector took care of deceased for 2 years when he was sick till his death and he buried him on his land. The Petitioner alleged the land Bibirioni-Limuru, Maai Mahiu- Naivasha and Subukia Pyrethrum Society belonged to the deceased. Yet the Petitioner provided no proof. The Objector resides on the suit property and no other family member tendered evidence to show the property belonged to the deceased and not the Objector. The Petitioner's allegation is not borne out by evidence.

**DISPOSITION**

- 1. The Petition filed by Petitioner on 30th April 1998 for grant of letters of administration is dismissed.**
- 2. The Cross Petition filed by Objector on 26th June 1998 is granted; the Objector shall obtain grant of letters of administration for the deceased's estate and shall be sole administrator and beneficiary of his estate.**
- 3. Each party to bear own costs.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 27TH JUNE 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

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