



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 58 OF 2001

IN THE MATTER OF THE ESTATE OF KAMUI MAVUTI (DECEASED)

SUSAN MUKONYO KAMUI.....PETITIONER

VERSUS

JENNIFER WAIRIMU NJOGU.....OBJECTOR

RULING

Introduction

It has become necessary to give a brief background to this ruling to explain the delay on resolving the same which is highly regretted. A grant of letters of administration intestate was issued to the Petitioner herein on 4th May 2001 with respect to the estate of Kamui Mavuti (hereinafter referred to as “the Deceased”). The Petitioner is a wife of the Deceased.

The Objector herein, who alleges to be the second wife of the deceased under Kamba customary law, subsequently filed a summons for revocation of the grant dated 16th April 2003 on the grounds that the grant was obtained fraudulently by the making of a false statement, and without seeking the consent of other persons with equal priority. Further, that the estate is already the subject matter of Administration Cause No 184 of 2000 before the Public Trustee.

The matter was heard before Joel Ngugi J. and the parties filed their submissions. The case was then reserved for judgment, but unfortunately the case file could not thereafter be traced. A notice of motion dated 10th August 2015 brought under certificate of urgency requested for orders for reconstruction of the file, which orders were granted by this Court on 14th October 2016, and a fresh hearing of the Objector’s application was also ordered and directions given in this regard.

The Evidence

The Court on 11th October 2015 directed that the Objector’s application would proceed to hearing by way of viva voce evidence, and the Objector testified as OW1 and called one additional witness during the hearing. The Petitioner on her part also testified as PW1 and called two more witnesses.

The Objector’s Case

The Objector testified that their clan had gone to the District Commissioner and it was agreed by the clan that the property of the deceased be divided between the two houses of the Deceased. She indicated that the Petitioner did not agree to the orders by the clan and as a result she filed for letters of administration

secretly.

The Objector testified that she is also entitled to be an administrator of the late husband's estate since she is a wife married to the Deceased under the Kamba Customary Law in 1991. She indicated that the deceased had taken to her father 3 goats according to the Kamba customs and they slaughtered one. She went on to state that she had stayed with the deceased in Makindu from 1991 to 1994 after their marriage, and had sired one child Martin Mavuti born in February 1992.

She requested court to adopt her affidavit sworn on 16th April 2003 in support of her summons and also an affidavit sworn by Stephen Mutuku Mavuti on 28/08/2000 who has since died as her evidence. She also requested for a ruling on her summons for preservation of the deceased property dated 16/02/2016.

Upon cross examination, the Objector confirmed that she is from the Kikuyu tribe but that she had gotten married under the Kamba Customary Law and they were living in Kamba land with the deceased. Further, that her father and uncle were both present during the marriage ceremony, and that she did not invite her sisters and brothers to the ceremony since they were far and her father was okay with them not being present. She also told court that two of the deceased's brothers were present too. She confirmed that the letter from the District Commissioner did not indicate all the alleged family members that attended the meeting where they agreed that the deceased's property be shared between the two homes.

The Objector denied that there ever being a marriage between the Deceased and the Petitioner, and also denied that she had child with one Stephen Mutuku. On the application dated 16/02/2016 for preservation of the deceased property, the Objector indicated that the Petitioner was tampering with the deceased's property and that she is lying that it was her father's property. The Objector indicated that she knew the Petitioner's father.

The second witness for the Objector ("OW2"), was Pastor Gideon Ndaisi who told court that he was the chairman of the "Aini /Aoini Nthengo" clan and he was very conversant with the present case through a letter he received from the District Commissioner, wherein and they were told to sit as a clan and decide on how to divide the property of the deceased according to the Aini /Aoini Nthengo clan Constitution.

He went on to indicate that in July 2002 they called the clan members as well as the Petitioner and Objector. That the Petitioner however refused to come for the meeting, whereat the brothers of the deceased confirmed that Objector was a wife of the deceased, and the Public Trustee in a letter dated 4th July 2002 indicated that the property of the deceased ought to be divided between the two. The petitioner thereafter went ahead and sold some of her property.

OW2 also stated that a committee that consisted of members from home was set up for the sub-division and they all recognized that Jenifer Wairimu was their brother's wife.

In his cross examination he indicated that he had not broken any law under the clan constitution since according to the clan constitution the Secretary General can write a letter on behalf of the clan. He explained that the chairman can also write letters to explain certain things but the letter dated 10/12/2002 was written by the secretary. OW2 went on to tell court that he did not know whether Jenifer and Stephen had a close relationship. He indicated that the committee members of the clan were 13 and most of them were alive but he cannot explain why he is the only one that Jenifer had called upon to witness. He also indicated that he did not know of any church wedding between the Petitioner and the Deceased.

The Petitioner's Case

The Petitioner told court that the Deceased was her husband since 1973 until the day he died on 22nd December 1995. That they were first married under the Kamba Customary Law, and that on 17th December 1995 they had a church wedding at Makindu Catholic Church. She further indicated that the wedding was announced for 3 weeks, she produced copy of the Marriage Certificate as Exhibit 1.

She went on to indicate that she did not know the Objector, she only came to know her when she brought the objection case in court. She further denied there ever being a meeting between her, the Objector and the clan members on division of the deceased's property. She confirmed that she knew Stephen Mavuti and indicated that his affidavit that Jenifer was a wife to the deceased was all lies. She went on to present a photograph as Exhibit 2 and indicated that the Objector from the photograph appeared to be Stephen's wife.

PW1 finally indicated that according to the Kamba Custom when a man marries a second wife he should introduce her to the first wife, this was not the case with Jenifer since she had not been introduced to her. She requested the court to adopt her statement dated 13th December 2013 and her replying affidavit dated 7th August 2007 as her evidence.

In her cross-examination PW1 stated that she did not know who the Objector was, she indicated that she has never seen her, or her children. She confirmed that the wedding took place at the Catholic Church and the deceased was in a perfect condition health wise. She confirmed that she signed the marriage certificate at the funeral but during the wedding she did not know that the deceased was going to die.

In re-examination PW1 said that she did not know if the Deceased signed the marriage certificate during the wedding ceremony, and that under the Catholic faith one cannot be allowed to marry in church if he has contracted another another wedding under the customary law.

PW2 was Ruth Mavuti who was a sister to the deceased. She testified that she knew the Petitioner as the wife of the deceased and that she only knew the Objector as a businesswoman but not as a wife to the deceased. She confirmed that she was illiterate and did not know how to read and write and therefore denied ever signing an affidavit "JWN 4". She only confirmed having signed a statement dated 13th December 2016 and she appended a thumb print.

She further testified that she attended the deceased and Susan's wedding on 17th December 1995 and was also present during the customary wedding of Susan, but that she has never witnessed any ceremony for the Objector. She said that she only knew the Objector as a woman who used to stay in Makindu market and she had a hotel. Further, that she also used to see Stephen Mavuti, her brother, going to see the Objector at the hotel and that when the Objector's daughter died she was buried on Stephen's land.

During cross examination PW2 denied that she knew the Objector as the co-wife of Susan. She indicated that she knew all the women married in their homestead but Jenifer was not one of them. She also denied having sworn an affidavit in Makindu.

PW3 was Mwendwa Muthoka, who confirmed that on 16th December 2016 she made a statement and signed and prayed to court to adopt it as her evidence. She went on to testify that the Anoni clan had a constitution and he had a copy of it. According to the Constitution under Article 7(k) the Secretary General is the one who deals with correspondence of the clan. He therefore indicated that a letter signed by the Clan Chairman cannot be valid. He went on to say that a plain letter by the chairman cannot be a document of the clan. He went on to produce a copy of the constitution as Exhibit 3.

In his cross examination he indicated that there was no meeting held to sub divide the property of the deceased and that he did not attend any customary wedding of the deceased to Jenifer. He also indicated that there was nothing they did at John's house. He however confirmed that he was present and wrote the minutes of the clan meeting held on 24th July 2002 that were attached to the Objector's affidavit. The Court at this point directed the Objector to avail a certified translation of the said minutes.

In re-examination he stated that neither the Objector nor the Petitioner were present at the meeting of 24th July 2002.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner and Objector. The issues to be decided are firstly, whether they Objector is a wife of, and beneficiary of the deceased, and secondly, if so, whether the grant issued to the Petitioner should be revoked.

On the first issue, the Objector claims that she entered a customary marriage with the deceased and also cohabited with the deceased. From her evidence, she claimed that that dowry was paid for to her father by the deceased under Kamba customary law. OW2 who was the Chairman also testified that the clan had severally met and discussed the issue of the Petitioner and Objector who were recognized as wives of the Deceased by the clan, and the distribution of the Deceased's properties between the two wives and houses of the deceased. He produced a letter dated 30th July 2002 to this effect to the Petitioner and Deceased.

This averment was supported by an affidavit sworn on 28th August 2000 Stephen Mutuku Mavuti and Ruth Kamemwa Mavuti, a brother and sister in law to the Deceased who confirmed that the Objector was married to the Deceased under Kamba customary law. The Objector informed the Court that one of the deponents, Stephen Mavuti is since deceased, and this averment was not disputed by the Petitioner.

The second deponent to that affidavit, Ruth Kamenwa Mavuti, testified as a witness for the Petitioner and denied ever swearing the said affidavit, and claimed not to know how to write and therefore could not have sworn it. The said affidavit is shown to have been sworn before a magistrate at Makindu Law Courts. She did not bring any evidence that she had reported any forgery of her signature or of the affidavit. This inconsistency in my view adversely affects the credibility of PW2 as a witness.

Likewise, I find that the Petitioner was not truthful in her testimony, particularly in denying that she was aware of the existence of the Objector and of the proceedings between the two of them as regards distribution of the deceased's state, in light of the various correspondence on the dispute herein that was attached to the Objector's summons for revocation. In particular I note that the correspondence from the local administration and clan indicated that the Petitioner is also addressed and/or represented. This finding also points to a material non-disclosure on the part of the Petitioner that will be come relevant in determining the second issue before the Court.

PW3 who was Mwendwa Muthoka produced the constitution of the "Aini /Aoini Nthengo" clan under which he claims he was the only one authorized to write and produced minutes of the clan and not OW1. He stated the clan met and was not satisfied that the Objector was a wife of the Deceased. However upon cross-examination he confirmed that he was the one who wrote minutes dated 24th July 2002 as Secretary General of the clan and in the said minutes it is clearly stated that the agenda was to distribute the deceased's properties between the Objector and Petitioner. He was therefore not a reliable and truthful witness.

The formalities of a Kamba Customary marriage in terms of payment of dowry and cohabitation were demonstrated on a balance of probabilities by the Objector, whose evidence I found to be consistent. Some of the formalities of a Kamba customary law is described in **Restatement of African Law Volume 1: The Law of Marriage and Divorce** (1968) by Eugene Cotran at page 24-25 were met in terms of the father of the Objector being given two goats by the Deceased known as the *mbui sya ntheo* to signify consent to the marriage.

In addition, the letter by the District Commissioner of Makueni to the Assistant Administrator General at the Public Trustee was to the effect that after investigations it was revealed that the Deceased was married to two wives, namely the Petitioner and Objector, as was the letter produced by the OW2, the Chairman Aini Aoini Clan and the minutes that were authored by the Petitioner's own witness, PW3. Therefore I find that the Objector was the Deceased's wife by cohabitation and habit and repute. Consequently, the Objectors' child, who was born during her cohabitation with the Deceased is also considered a child of the deceased and a beneficiary to the Deceased's estate.

On the second issue, the grounds for revocation of a grant is provided in section 76 of the Law of Succession as follows:

“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) that the proceedings to obtain the grant were defective in substance;

(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 obtained 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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

I have perused the Petition for Letters of Administration Intestate, and affidavit in support of the said Petition filed herein by the Petitioner on 5th March 2001. The Objector and her child are not listed therein as the beneficiaries of the estate of the deceased, despite their relationship with the deceased which I have found was well known to the Petitioner. There is also no consent by the Objector to the said Petition.

I therefore find from the foregoing that there was concealment of material facts and/or untrue allegations made by the Petitioner, and that any and all of the distribution of the deceased's estate so far has been illegal. In the premises, these succession proceedings will require to start afresh.

I accordingly order as follows:

- 1 The grant of letters of administration intestate issued Susan Mukonyo Kamui on 4th May 2001 with respect to the estate of Kamui Mavuti (Deceased) be and is hereby revoked.
2. Any distribution, transfers and dispositions of any kind to and/or by Susan Mukonyo Kamui of the property of Kamui Mavuti (Deceased), and any other subsequent dealings with the said properties be and are hereby declared unlawful and null and void and shall be cancelled forthwith.
3. A new grant of letters of administration shall issue to Susan Mukonyo Kamui and Jennifer Wairimu Njogu as joint administrators of the estate of Kamui Mavuti (Deceased).
4. Susan Mukonyo Kamui shall within 60 days of the date of this ruling file in Court and serve Jennifer Wairimu Njogu with an account of all dealings with the properties Kamui Mavuti (Deceased) from the date of the said Deceased's death until the date of this ruling.
5. The joint administrators shall thereafter file a fresh summons for confirmation of grant within 60 days.
- 6. The *status quo* that shall obtain as regards the properties and assets belonging to the**

estate of Kamui Mavuti (Deceased) pending the confirmation of grant of administration shall be that the Petitioner and Objector shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Petitioner and Objector shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets.

7. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 16th day of October 2017.

P. NYAMWEYA

JUDGE