



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NUMBER 312 OF 2013
IN THE MATTER OF THE ESTATE OF JAMES NGIGI NJUGUNA (DECEASED)

E N N

J N N.....PETITIONERS

VERSUS

A N.....OBJECTOR

JUDGMENT

1. **E N N** and **J N** petitioned for Grant of Letters of Administration Intestate for the Estate of **J N N** who died intestate on the 1st April 2013 in their capacity as **daughter** and **son** of the deceased.

In their petition filed on the 16th May 2013, they stated the following as surviving the deceased:

1. **E N**
2. **E N**
3. **E N**
4. **M N**
5. **J N**
6. **B K**
7. **J N**

They also stated the following as the assets left behind:

Gilgil/Karunga Block [particulars withheld] and Kiambogo/Kiambogo Block [particulars withheld] (Mikutanio). The Chief of Miti-Mingi Location in his letter dated 2nd May 2013 had confirmed the above as the children of the deceased with his two deceased's widow **K N** and **A N**.

2. On the 23rd July 2013, an objection to the making of grant was filed by one **E N** who described herself

as widow to the deceased **J N N**. Her grounds of objection were that her interest as widow ranked higher than that of the petitioners and that she did not give her consent to the filing of the petition, and further that her children with the deceased were deliberately left out as beneficiaries. She thereafter filed a petition by way of cross-petition for grant on the 18th September 2013 under the name **A N**, widow.

In addition to the beneficiaries stated by the petitioners, she added another six children being her children as follows:

1. **J K**
2. **P W**
3. **P N**
4. **S N N**
5. **P N**
6. **B K.**

3. The 1st question to determine is whether the objector **E N**, is the same person also known as **A N**, both described as “**Widow**” of the deceased and the petitioner by way of the objection and cross-petition.

In her answer to the Petition for grant, **A N** stated that she is widow of the deceased and herself and her children did not give their consent to the petitioners to petition for grant.

4. At the beginning, of the hearing of the objection proceedings, parties by their advocates recorded a consent that proceedings in the burial dispute of the deceased being **Nakuru CMCC No. 281 of 2013** and **CMCC No. 283 of 2013** (consolidated) and judgment delivered on the 23rd April 2013 thereof be adopted and to form the objectors evidence together with documents filed on the 3rd February 2015. The petitioner relies on her petition and calls no further evidence.

5. The court has perused the burial proceedings in the trial court of the deceased in the above two cases. It has come out clearly that **the Objector named E N and the petitioner by way of Cross Appeal Alice named N** are one and the same person.

In the burial proceedings, the objector and plaintiff therein is **A N N** and her testimony fits well into the objection proceedings in this succession cause.

6. The issues that arise from the burial proceedings together with the petition, objection and cross petition are three fold:

1. whether the objector **A N** was a wife and widow to the deceased.
2. whether **A N's** six children are children of the deceased and therefore whether they are beneficiaries of the estate.
3. whether the objectors cross petition for grant of Letters of Administration to the estate of the late **J N N** is merited.

7. **Objector's Case**

It is **A N's** case that she was married to the deceased in 1982 and sired six children with the deceased and resided at Miti-Mingi with him upto 1992 when they separated and went to live at Elburgon with her children.

She acknowledges that the deceased had other two wives, the 1st wife **K N** and another **A N** married in 1992 after she separated with him and that both had children. In her testimony before the Magistrates court in **PMCC No. 281 of 2013**, she gave a detailed history of the family. That, it is her sons, P N and S N who were called by neighbours of the deceased at Miti-Mingi when their father, the deceased fell ill and that they are the ones that took him to hospital and mortuary when he died.

She testified that the other two wives died and that she was the only surviving wife. It was her testimony that she and her children used to visit the deceased at Miti-Shamba.

8. In the Burial dispute, several witnesses testified that **A N** the objector was a wife to the deceased and that they knew her as neighbour when she used to live with the deceased before the separation, and that the objectors children used to visit their father. In particular **PW5, Njiri Ngutie** testified that he was a neighbour and knew that the deceased had three wives and knew all of them including **A N**, and confirmed that they separated after a disagreement. He further confirmed that **A N's** sons used to visit the deceased. It was his further testimony that on the 16th January 2013 the deceased called him to his home where he (deceased) subdivided his *shamba* at Miti-Mingi to the three houses-wives. He testified that the sons of the 2nd and 3rd houses were present but those of the 1st house were absent.

9. **PW4 Douglas Waweru** testified that he lives at Miti-Mingi and is a neighbour of the deceased for over 20 years. He was in the meeting of 16th January 2013 where the deceased divided his land at Miti-Mingi. He testified that he heard that the deceased had three wives but knew only one, **N** who died in 2012. He stated that in the meeting, the deceased's sons were present but knew **N**, son of **N**. He confirmed that the deceased divided the land to the three houses, that the objectors house was given land one(1)Acre to the right, while **N's** house was given $\frac{3}{4}$ Acre at the middle and the third house was to get the remaining piece. He also testified that he knew one wife was alive and that her sons should be involved in the burial dispute of their father. He however, testified that he had not met **A N** the objector and only saw her in court. He said that the deceased divided the land to his sons and not to the wives.

10. **PW2 P N N and PW3 B** both testified that they were sons of the deceased with **A N** the objector, as their mother and they lived at Elburgon with their mother. It was their testimony that they used to go to visit their father at Miti-Mingi and that on the 16th January 2013, their father called all the Sons from the three houses for a meeting but only sons of the 2nd and 3rd houses attended.

Both testified that during the 16th January 2013 meeting in the presence of *Wazees*, the deceased subdivided his Miti-Mingi land to the three houses – first house was given 1 acre to the right side, the middle $\frac{3}{4}$ acre was given to the 2nd house and the 3rd house was given $\frac{3}{4}$ acre to the left side.

They further testified that the above subdivision was put down in writing, was written by one of the *Wazees* but did not indicate where he wanted to be buried. They stated that they knew their father had some land at Gilgil but they never went there. They testified that the deceased used to visit them and their mother at Elburgon. Pictures were produced in court showing the attendees of the 16th January 2013 meeting that included the deceased, his sons and the witnesses the neighbours, who witnessed the sub division of the Miti-Mingi land.

11. The Petitioners Case

The Petitioner **E N** testified that her father, the deceased married her mother **K N N in 1992** and that she did not know the objector who she saw in court for the first time. She further testified that she lived in Mombasa and did not know **A N's** children, that she knew of the Gilgil land and that it was not subdivided.

DW2 Karanja Njuguna described himself as the elder brother of the deceased. In his testimony, he acknowledged only two wives of the deceased, and that he saw **A N** the objector and her children during the burial preparations. He however stated that he was not a frequent visitor to his deceased brothers home and was not in a position to know if he had married and chased away **A N**. He told the court that he

was not called to the 16th January 2013 meeting by his deceased brother and that he heard from Njiri, a neighbour of the 16th January 2013 meeting as he was a witness.

12. **In the judgment in the burial dispute case PMCC 281 of 2013**, the Learned magistrate after analysis the evidence made a finding that the deceased **K N** and **A N** were wives to the deceased. She stated that the status of **A N** the objector was not clear as she failed to prove on a balance of probability that indeed she was the a widow of the deceased. She stated that the issue of **A N**'s claim as a wife/widow would be exhaustively handled by the succession court. She however allowed **A N**'s four sons to participate in the burial arrangements of the deceased together with the rest of the family at Miti-Mingi land parcel.

13. **Analysis of evidence and determination**

From the above evidence as tendered in the burial dispute and the findings made by the trial court, this court, and as rightly stated by the Learned Magistrate, is to determine the status of the objector, **A N** and her four sons.

Section 66 of the Law of Succession Act, Chapter 160 Laws of Kenya states:

“when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a Grant of Letters of Administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:

- (a) Surviving spouse or spouses with or without association of other beneficiaries
- (b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part V.
- (c) the Public Trustee -”

14. So is **A N**, the objector a wife in terms of the Act?

Section 3 of the Act defines a “wife” to include a wife who is separated from her husband and the terms “husband” and “spouse”, “widow” and “widower” shall have a corresponding meaning. Evidence was tendered that the objector was a wife to the deceased but was separated in 1992 after which the other wife, **K N** was married also in 1992. The neighbours to the deceased, **PW4** and **PW5** testified that they knew the objector as a wife of the deceased and her children were born at **Miti-Mingi** before she separated with the deceased. Indeed, they stated that the objectors sons used to visit the deceased and this came out clearly as they were the ones called by neighbours when the deceased fell ill and they took him to hospital and to the mortuary. They were allowed by the trial court to participate in the burial preparations of their father.

15. The court does not believe evidence tendered by the Petitioner, **E N** a daughter to the deceased, that she did not know her father had married another wife. It could be so, that she did not meet the objector or her sons as she stated that she lived in Mombasa, but in my view that does not change that the deceased had married the objector who went away before her mother was married.

16. I have considered the objector's documents filed on the 3rd March 2015.

The objector's Church Baptismal card issued in 1980 gives her names as **A N N** together with AIPCA Church membership card both issued in 1988 all bear the above names.

I have carefully scrutinised the objectors childrens immunization, Birth certificates, Baptismal cards and their identity cards.

The names as appear in all the above documents are:

1.P N N

2.P N N

3.S N N

In particular, I have considered the Birth Certificates of the children. They all show that the father of the children is J N N, the deceased while their mother is shown as A N K.

17. I am satisfied that the above children are offsprings of the deceased and the objector, and therefore beneficiaries to the estate under review.

As to their mother, no proper explanation was given to the Magistrates court as to why she did not adopt the name of the deceased if she was indeed married to him and specifically during the issuance of the 2nd generation identity cards in 1996, a fact considered by the Magistrate in the burial dispute case. To this, it is clear she had separated from the deceased in 1992 while the 2nd generation Identity cards were being issued in 1996. It is my view that failure to adopt her husbands name does not change her status as a married to the deceased, though separated in 1992.

It is my considered view that failure cannot change a proven fact that the said A N was married and separated from the deceased. As stated above, **Section 3 of the Act** a wife includes a separated wife as a wife of the deceased. After careful consideration, it is my finding that the objector, A N was a wife of the deceased. That answers issue Number 1.

18. As to the children of the objector (issue No. 2) there is no cloud at all that they are not children of the deceased. The Birth certificates, baptismal certificates all confirm that their father is the deceased. From the evidence of the deceased's elder brother DW2 and the petitioner, a daughter of the deceased, obvious hostility is demonstrated to the 3rd house hence their testimony that they did not know the objector and her sons.

19. To answer the third issue as framed, whether the objectors cross- petition ought to be granted, I am guided by the provisions of **Section 66 of the Act**, that the court has the final discretion as to whom a grant ought to be granted.

Having made the above findings that the objector was a wife of the deceased but separated, it is my considered opinion that her “**house**” interests in the deceased's estate ought to be taken care of, and protected. I have looked at the petition as presented. The objector and her children were omitted as beneficiaries. It is my finding that being children of the deceased they ought to be included as beneficiaries and

(a) Surviving spouse or spouses with or without association of other beneficiaries

(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part V.

(c) the Public Trustee ---”

20. **Section 3 of the Act** defines a “**wife**” to include a wife who is separated from her husband and the terms “**husband**” and “**spouse**”, “**widow**” and “**widower**” shall have a corresponding meaning. Evidence was tendered that the objector was a wife to the deceased but was separated in 1992 after which the other wife, K N was married also in 1992. The neighbours to the deceased, PW4 and PW5 testified that they knew the objector as a wife of the deceased and her children were born at Miti-Mingi before she and separated with the deceased. Indeed, they stated that the objectors sons used to visit the deceased and this came out clearly as they were the ones called by neighbours when the deceased fell ill and they took him

to hospital and to the mortuary. They were allowed by the trial court to participate in the burial preparations of their deceased father.

21. This court does not believe the evidence tendered by the Petitioner, E N that she did not know her father had married another wife after the death of the mother. It could be so, that she did not meet the objector or her sons as she lived in Mombasa, but in my view that does not change the fact as established that the deceased had married the objector who went away before her mother was married, in 1992. In view of the above findings, the court directs that the objectors children with the deceased ought to be included as beneficiaries and co-administrators to stand in for their mother's house and interests. This is informed by the obvious hostility demonstrated between the petitioners and the objector as stated above.

22. Accordingly, the court finds that the objection is merited and proceeds to make the following orders:

1. That the objection proceedings are allowed and the petition and cross petition by the petitioners and the objector respectively are set aside.
2. That one of the Petitioners(of the 3rd house) and one of the sons of the 2nd house and one of the sons of the 1st house, as may be identified by their respective houses shall jointly apply afresh for letters of administration for the Estate of the deceased, the **Late J N N**.
3. That all the deceased's children from the three houses including children of the objector, A N shall be included as beneficiaries.
4. That all the deceased's assets and liabilities shall be identified and shown as such in the application for letters of administration.
5. That this being a family dispute, there shall be no orders as to costs.

Dated, signed and delivered in open court this 28th day of January 2016.

JANET MULWA

JUDGE