



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
IN THE MATTER OF THE ESTATE OF H M
M (DECEASED)
SUCCESSION CAUSE NO 47 OF 2015

M M A.....APPLICANT/OBJECTOR

VERSUS

J M M.....RESPONDENT/PETITIONER

RULING

INTRODUCTION

1. The Respondent/ Petitioner herein sought a Grant of Letters of Administration Intestate for the Estate of H M M (hereinafter referred to as “the Deceased”) in the Senior Principal Magistrate’s Court, Voi as there was no High Court at the time.
2. He presented his Petition in his capacity as the Deceased’s son. The persons who had equality in priority to apply for the said representation but gave their consent in Form 38 were shown as J K and J M, the deceased’s daughter.
3. The Petition for a Grant of Letters of Administration Intestate was gazetted on 23rd August 2013 as Gazette Notice Number 12268. There was no objection within the stipulated period of thirty (30) days whereupon the said Grant was issued on 3rd November 2011.
4. The Petitioner filed two (2) similar applications dated 26th June 2015 and 24th July 2015 and filed on 26th June 2015 and 24th July 2015 seeking confirmation of the said Grant. In essence, there are two (2) applications seeking confirmation of the Grant of Letters of Administration Intestate and they are yet to be heard.
5. The Applicant herein who was the Deceased’s wife was not involved in the process as the Petitioner argued that she divorced from the Deceased over forty (40) years ago. She filed the present application pursuant to the provisions of Section 76 of the Law of Succession Cap 160 (Laws of Kenya) in the High Court of Kenya, Voi as all Probate & Succession causes that were being handled by the lower court had since been transferred to it.
6. In her application, the Applicant sought the following orders:-

1. **THAT the proceedings to obtain the grant (sic) defective in substance.**
2. **THAT the court be pleased to appoint the Objector herein as administrator and the petitioner be omitted (sic) and/or removed in the petition.**
3. **THAT the respondent be condemned to pay the costs of this application.**

THE APPLICANT'S CASE

7. In her Affidavit in support of her application, the Applicant averred that she was the Deceased's wife and between them, they had two (2) daughters and two (2) sons. Only one (1) son was still alive.

8. She also filed a Further Affidavit on 26th February 2016 in response to the Respondent's Replying Affidavit annexing a letter dated 3rd January 2007 from the Assistant Chief showing that she was the Deceased's wife. She denied ever having been divorced from the Deceased and that although they had separated at some point, they were re-united at the time of his death.

9. She accused the Petitioner of attempting to defraud the Deceased's estate and of taking advantage of her advanced age. She was categorical that the Petitioner applied for the said Grant without her knowledge and that if her application was not allowed, she would be disinherited by a stranger.

THE RESPONDENT'S CASE

10. On his part, the Respondent filed Grounds of Opposition dated 7th September 2015 on the same date. His Replying Affidavit was also sworn and filed on the same date. The said Replying Affidavit reiterated the contents in the Grounds of Opposition. He added that the land in question was acquired jointly by his father and the Deceased and thus the Applicant had no right whatsoever to lay a claim on it as it did not even form part of their matrimonial property and was acquired after "her exodus."

11. The Grounds of Opposition were as follows:-

- a. **THAT the application was frivolous and an abuse of the court process.**
- b. **THAT the Applicant was an extortionist out to derail justice and was driven by malice and lack of morals.**
- c. **THAT the Applicant was a stranger to her family since she divorced the deceased more than forty years ago and never attended his funeral.**
- d. **THAT if at all the Applicant had any morals and rights to claim, she should have been the one to file the application and not to object days before the letters of administration were granted.**
- e. **THAT the application should be dismissed with costs.**

LEGAL ANALYSIS

12. During the hearing of the aforesaid application, the Applicant told the court that she had separated from the Deceased for about eight (8) years due to his incessant drinking and neglect of his parental and marital responsibilities but that as the time of his death, she had reconciled with him. She even stated that she attended the funeral and thereafter stayed at her daughter's house, J , for about two (2) months. She told the court that the said J since passed away.

13. On the other hand, the Respondent stated that by the time he was born, the Applicant had moved out of the matrimonial home and that she was not allowed to step into that land. He even contended that she should return the dowry that she was given.

14. A personal representative means an executor or administrator, as the case may be, of a deceased person's estate. Estate means the free property of a deceased person. In this case, half of the undivided share in the L.R. No [particulars withheld] (hereinafter referred to as the "subject property"), which was how the property was registered, constituted the free property of the Deceased's estate while the other half of the undivided share remained the free property of P M M, who the Respondent averred was his

father.

15. The Law of Succession is clear that where a deceased has died and has left a wife and children, then the wife shall have a life interest in the whole of the residue of the estate, which interest shall determine upon her re-marriage. The taking out of letters of administration is dependent on the degree of consanguinity to a deceased person. In other words, the person with the priority to apply for representation of a deceased's estate is the wife or wives and child or children ahead of any other kindred.

16. Where the deceased has left no surviving spouse or children, the interest shall devolve upon the deceased's kindred as set out in Section 39 of the Law of Succession and in the following order of priority:-

- a. **father, or if dead;**
- b. **mother, or if dead;**
- c. **brothers and sisters and any child or children of deceased brothers and sister, or if none;**
- d. **half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, if none;**
- e. **the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.**

17. It is evident from the above that the Respondent acknowledged that the Applicant was a wife to the Deceased. Whether she was divorced or not, the Applicant remained the Deceased's dependent by virtue of Section 29(a) of the Law of Succession. The said provision stipulates that a "dependent" includes:-

"the wife or wives, or former wife or wives (emphasis court), and the children of the deceased whether or not maintained by the deceased immediately prior to his death;"

18. On this ground only, the Respondent had no moral authority to attempt to disinherit the Applicant because she had left the matrimonial home before his birth as he alleged.

19. Evidently, the Respondent was way below the order of priority of applying for the Grant of Letters of Administration Intestate to the estate of the Deceased herein because in his own admission during his oral submissions to the court, he stated that his father was still alive. He therefore had no right to apply in place of the Applicant herein.

20. There was no reason that was advanced to show why the Applicant never applied for a Grant of Letters of Administration for the Deceased's estate. Be that as it may, it was irrespective that the Applicant had not taken out the said Letters of Administration as the Deceased's estate could have as well have remained un-administered.

21. Having said so, it was clear from Exhibit marked "MMA 1" annexed to the Applicant's Further Affidavit that she was issued with a letter dated 3rd January 2007 by David Mashombo Asst Chief Rong'e Nyika Sub-location Rong'e Location Tausa Division that she was the Deceased's wife and they had three (3) children namely, A W M , J W M and D M M.

22. A perusal of the Petition for the said Grant shows that the Respondent misrepresented himself as a son to the Deceased herein. This was an act of perjury as that was not the correct position. He further stated on oath that the Deceased left P M , J K and J M as his only surviving dependents. He did not even appear in the said Petition as a surviving dependent.

23. In a letter dated 5th August 2013 by the same Asst Chief, J W M was shown to have been the only Deceased's dependent. The Respondent was clearly shown to have been a son to M P M. The question that arises therefore is, what *locus standi* did he had to file the said Petition? The answer is that he had none and was a total stranger to the Deceased's estate.

24. It is very clear from the circumstances of the case herein that the Respondent obtained the Grant was

fraudulently by the making of a false statement or by the concealment from the court of something material to the case. This is a clear cut ground for the revocation of a grant as well set out in Section 76(b) of the Law of Succession.

25. In addition, the Respondent he told the court during his submissions that he had sold the land to third parties. He had no authority to sell the Deceased's undivided share to third parties as the Grant for Letters of Administration Intestate to the Deceased's had not been confirmed. He acted contrary to the provisions of Section 83 of the Law of Succession Act that clearly outlines the duties of a personal administrator.

26. Undoubtedly, by virtue of selling the Deceased's free property, even before the Grant of Letters of Administration Intestate could be confirmed, which in any event for argument sake as he had no right to take out the said letters in the first place, he was guilty of intermeddling with the Deceased's estate.

27. Section 45 of the Law of Succession Act which provides as follows:-

1. **Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**
2. **Any person who contravenes the provisions of this section shall—**
 - a. **be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**
 - b. **be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

28. Having therefore considered the Applicant's present application, this court was satisfied that she had made a good case for the revocation of the Grant for Letters of Administration of the Deceased's estate that were issued to the Respondent herein. Keen attention must be paid before grants of letters of administration intestate are issued to weed out fraudulent acts by persons who are out to swindle deceaseds' estates. It is not a matter to be taken lightly as Probate and Succession cases are a matter of life and death for dependents. In fact, it is not a disputed fact that probate matters are highly emotive and could lead to death hence the need to take the issue very seriously.

29. The Applicant who appeared before this court was advanced in age and had to be escorted by her grandson to court. It cannot be fair that persons should be allowed to take advantage of such senior citizens in our society merely because they are illiterate. This was indeed a case of a person who has taken it upon himself to be the investigator, the prosecutor and judge of the Applicant's marital status and her rights under the Law of Succession. That cannot in any way be said to be fair in the rules of natural justice.

30. The court observed the Respondent's demeanour in court. He had great contempt for the Applicant short of being abusive to her. Stern action must therefore be taken against the Respondent to act as a deterrent to such conduct to him and to others who may think of defrauding helpless and illiterate dependents.

DISPOSITION

31. In the circumstances foregoing, the upshot of this court's decision is that: -

- a. **The Grant of Letter of Administration Intestate in the Deceased's estate herein that was issued to the Respondent herein on 3rd November 2014 is hereby revoked forthwith.**
- b. **As the court found the Respondent to have been guilty of the offence of intermeddling in the Deceased's estate, the Respondent is hereby fined a sum of Kshs 10,000/= and to serve one (1) year imprisonment. In default of paying the fine of Kshs 10,000/=, the Respondent shall serve one (1) month's imprisonment.**

c. The Respondent shall be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled.

32. The chamber summons applications dated 26th June 2015 and 24th July 2015 and filed on 26th June 2015 and 24th July 2015 and that are hereby marked as overtaken by events.

33. It is so ordered.

DATED and DELIVERED at VOI this 31st day of March 2016

J. KAMAU

JUDGE