REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1456 OF 1999

IN THE MATTER OF THE ESTATE OF C M (DECEASED)

JUDGMENT

1. This cause relates to the estate of C M, who died on 19th March 1989.

2. Representation to his estate was sought in a petition filed herein on 12th July 1999, by J W C and W C, in their purported capacities as widow and daughter, respectively. He was expressed to have been survived by two (2) widows – J W and G N – and seven (7) children – W C, P N, J W, E W, M C, M W C and W C. He was expressed to have died possessed of two (2) assets: Komothai/Kibichoi/[particulars withheld]

3. Objections to the petition were filed, and eventually a grant was made to the widows, J W C and G N C, on 29th October 2004. J W C died on 22nd August 2004, necessitating rectification of the grant on 16th March 2005 to have her substituted with P N C.

4. The application the subject of this judgment is dated 6th May 2005. The application is premised on two (2) grounds, which really translate into one, that the administrator who substituted the one who died could not be trusted to fairly distribute the estate as there were many beneficiaries. The application is at the instance of W C, who was one of the original petitioners, but who was not granted representation as her name was replaced with that of her alleged step-mother. Her case, as set out in her affidavit, is that she was the only child of J W C, and consequently ought to have substituted her as administrator upon her death.

5. The response to the application is by the second widow of the deceased. She contests the claim by the applicant that she was a child of the deceased's first wife for the said wife never had a child. She explains that the applicant was a child of a sister of her dead co-wife. She used to frequently visit her aunt. She had her own parents, and when she got married she named her children after them, but not the deceased nor her co-wife. She then went on to narrate the trouble that the applicant had caused after the deceased's death as she sought to claim part of his estate.

6. There is another affidavit sworn by J M C, who alleges to be a son of the deceased. His case is that the deceased had three (3) wives, and not the two (2) alleged by the administrators. He alleges to be a son of the said third wife, L N. He asserts that the administrators concealed from the court the fact that the deceased had three wives.

7. The applicant swore a supplementary affidavit. She claims that the deceased's first wife had adopted her at a traditional ceremony. She has attached two (2) affidavits, by P K G and A N G, who claim to have been party to the alleged ceremony. She further alleges that after the deceased's death a meeting was held by the elders to resolve the issue of inheritance. She alleges that she had been named as a daughter of

the first wife in her funeral programme. She claims to have been living with the first wife of the deceased since 1974, leaving her only after she got married at the age of eighteen (18) when she got married.

8. There is also a bundle of witness affidavits. L N claims to be also a widow of the deceased, asserting that the deceased had three wives. The first wife did not have children, but she had been allowed by the deceased to adopt a child and she adopted the applicant. The alleged third wife alleges that she separated from the deceased in 1969 and left for Nairobi. P N G alleges to be an age mate of the deceased, and knew that he had married three wives and that the first wife had adopted a child. E N M and DK G also make similar allegations.

9. The hearing kicked off on 19th June 2006. The first to take the stand was the applicant, J W C. She testified that the deceased had three wives. She said that she had been adopted by her aunt, J W C in 1974, and the deceased took her in as his own child, paying his school fees and she lived in his property. It was her evidence that she did not know the children of L N for they did not live on the property. Curiously, she went on to name them! She alleged that she did not have a national identity although she had had five children, but asserted that she used the name C as she had been adopted by the wife of the deceased. She testified that she did not name any of her children after the deceased because when she got them she was no longer living in his property. She conceded that she had married a certain W.

10. The next in line was P K G. He stated that the deceased was his paternal uncle. He testified on the alleged function where a goat was slaughtered in 1975. Next came L N who testified to be the second wife of the deceased. She stated that her third name was M, being her father's name. She alleged that she had used her school certificate, which bore her father's name, to obtain her national identity card with her father's name. She alleged to have been married under customary law, had children with the deceased, some named after his relatives. She alluded to the alleged adoption ceremony of the applicant as a child of the first wife, although she was herself not present. J M N came next. He also dwelt on the alleged adoption of the applicant. The last witness for the applicant was J M N, he alleged to have bought land from the deceased.

11. The case for the interested party opened on 17th December 2014. He stated to be a child of the deceased. He asserted that the deceased had three wives. He complained that his side of the family was not involved in seeking representation to the estate of the deceased. He alleged to have grown up at both Nairobi and at Kibichoi. He stated that he had children, but alleged that the one named after the deceased had died. His witness was Winnie Waithera Ndindiri, who claimed that her father had acquired property from the deceased. The second witness for the interested party, David Kuria Gatembei, was the area Chief. He said he only knew of only two wives, J W C and G N C. He testified that the first wife had adopted a child, the applicant. He also named the persons who had reported to his office that they had bought property from the deceased, including Charles Kogi, John Mwaura Ng'ang'a and Ndindiri Waweru. He testified that some of the purchasers had actually settled on the land by the time he became Chief. He confirmed that he wrote the letter to introduce the family to court for the representation purposes.

12. The respondents' case opened on 6th July 2015. The first to testify was G N C. She stated that she was a widow of the deceased, and that her co-administrator was her son. She testified that the applicant was not a child of the first wife of the deceased. She asserted that no ceremony took place wherein the applicant was adopted by the deceased's first wife. She was said to have come into the first wife's compound after the latter died, even though she used to visit her aunt from time to time. She stated that the applicant was married with children, none of whom was named after the deceased or after the dead first wife. She asserted that L C was not a wife of the deceased. She denied that the alleged buyers had bought property from the deceased. She stated that the deceased did not involve them in the transactions, as he used to come home drunk. She alleged that the alleged sales were done by her co-wife, J W C.

13. The respondent's witness was Samuel Njoroge Wanyoike. He was a retired Assistant Chief and a neighbour and relative of the deceased. He said he was only aware of the deceased's two wives. He testified that although he did know L N, she never was a wife of the deceased. He never saw her at the deceased's homestead. He acknowledged that there was a Kikuyu ceremony for adopting a child, which

he described, but asserted that he never heard of any having been conducted with respect to the applicant. He stated that as a first cousin of the deceased he would have heard of such adoption, if ever there was one. He said he was also an official of his clan and he never heard of such a ceremony, and in any event such a ceremony could not have taken place without the consent of the clan. As Assistant Chief he did not approve the applicant obtaining a national identity card with the deceased's surname. He argued that the deceased could not have married a second wife if his first wife had adopted a child. Regarding the alleged purchasers, he testified that he knew all of them. He stated that the deceased used to be a heavy drinker, and on those occasions he would sell his land in bars. He stated that all the purchasers were in possession of the portions they had bought. When shown the document generated by the elders, which were in his hand, where the applicant was accepted as an adopted child of the first wife, he stated that he merely noted those who had claims to the estate, including the applicant and the alleged purchasers.

14. Revocation of grants of representation is provided for in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. Four general grounds are set out in that provision – where the proceedings to obtain the grant are defective, where grant is obtained fraudulently, where grant is obtained on untrue allegations of fact, where there are problems with administration of the estate and where the grant has become inoperative and useless on account of subsequent circumstances.

15. The applicant herein appears to ground her application on the fact that she doubted the ability of the second administrator to do justice in administration of the estate. In her affidavit, she appears to be unhappy that she was excluded from the list of survivors, yet she claims to be a survivor of the deceased on account of her having been adopted by the deceased's first wife. The ground she states in support of her application does not bring her application under section 76, but the facts deposed in her affidavit do bring it within section 76 of the Act.

16. The interested parties support the application, but for different reasons. J M C claims to be a child of the deceased by a surviving spouse who has not been recognized in the petition as a spouse. He argues that the grant was obtained irregularly in the circumstances. The alleged purchasers of estate property claim that they acquired stakes in the estate through purchase from the deceased, and they ought to have been acknowledged as creditors of the estate.

17. What I am required to determine in this case is whether the grant herein was obtained irregularly on account of the applicant not having been acknowledged as a child of the deceased, and not acknowledging J M C as a child of the deceased and the purchasers as creditors of the estate. I need to determine whether the applicant had been adopted by the first wife of the deceased, and if that was the case, whether that made her a child of the deceased, and therefore entitled to a share in the estate of the deceased. I will also need to determine whether J M C was a child of the deceased, and whether the purchasers had actually entered into valid sales of land transactions with the deceased.

18. I will start by examining the case of the applicant. She asserts that she had been adopted by the first wife of the deceased. She claims that there was a customary law ceremony conducted for that purpose and called persons who alleged to have been present. She did not lead any evidence from an expert in Kikuyu customary law on such ceremonies, neither was I pointed to any authoritative literature on that custom or to any case law. Her witnesses merely testified on what they allege happened but no effort was made to establish whether such a custom existed or not. It is notorious that a custom must be proved by way of concrete evidence. It was incumbent on he who asserts such a custom to prove it. I must acknowledge that the administrator's witness did assert that there was such a custom, and went on to give details of what ought to happen at the traditional adoption ceremony. However, other than the fact that he had been an Assistant Chief and a clan leader, there was no evidence that he was an expert in Kikuyu customary law, neither did he assert to be one.

19. There is no evidence that the custom alluded to by the applicant existed. Consequently, there cannot be any basis for giving any credence to the alleged ceremony that the applicant and her witnesses referred to and alleged happened. I find it curious that although the applicant asserted that she had been adopted by her aunt, she did not find it necessary to call any of her blood relatives to confirm it. She should have called her parents, to attest to the fact that they had informally given up their daughter for adoption. If her

parents are dead, she could have called her siblings, or her uncles, who could attest to that fact. I find the omission glaring.

20. The matter herein concerns the estate of the deceased husband of the applicant's aunt, not of her aunt herself. The applicant does not state that she had been adopted by the deceased, indeed she does not claim to be a child of the deceased, but rather of her aunt. She does not even submit that her being adopted by her aunt made her a child of the deceased, and therefore entitled to a share in his estate.

21. The deceased died intestate. According to Part V of the Act, which carries provisions on division of an estate upon intestacy, the persons entitled to an estate of an intestate are his surviving spouses, children and other relatives. The term 'child' and 'children' are defined in section 3(2)(3) of the Law of Succession Act states -

> *'(2) References in this Act to 'child' or 'children' shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.*
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> *(3) a child born to a female person out of wedlock, and any child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him.'*

22. The applicant is not a biological child of the deceased, and therefore she cannot on that score claim a stake to his estate. She can only lay a claim on the basis that she had been informally adopted by the deceased. Section 3(2) (3) state circumstances in which a child will be deemed to have been informally adopted by the deceased. A child will be deemed to have been informally adopted for succession purposes, by a male person, if he expressly recognized her or accepted her as a child of his own or he has voluntarily assumed permanent responsibility over the child. The provision is silent on informal adoption of a child by a female person, and it does not state that once a female person informally adopts a child such child shall then be regarded as a child of the woman's husband.

23. The applicant's case is built around her relationship with her aunt. She has led evidence that her aunt adopted her. She has not in her evidence talked of how she related with the deceased himself, other than evidence that he allegedly sanctioned the traditional adoption. There was no evidence that the deceased ever related with her in any way. Although she asserted that the deceased paid her school fees, she produced no documentary proof of that. There is therefore no basis upon which the court can determine whether the deceased had expressly recognized her or accepted her as his own child or that he had voluntarily assumed permanent responsibility over her. There is therefore no evidence that he had informally adopted her. Consequently, she cannot be treated as having been a child who survived the deceased and therefore qualified to get a share in his estate. She is a stranger to the estate, and has no legitimate claim whatsoever to his estate. She can only lay claim to the estate of her aunt, if indeed the aunt had legitimately, informally or customarily, adopted her.

24. I have come, in view of what I have stated above, to the conclusion that the applicant was not a child of the deceased in any conceivable way, and therefore she is not entitled to a share in his estate. Consequently, she did not qualify to be appointed administrator of the estate of the deceased. There was therefore no basis for the administrators to involve her in the process of applying for representation to the estate.

25. J M C stakes his claim to the estate on the basis that his mother had been married to the deceased. His mother is still alive, and I find it a little curious that she is not the one in the forefront in claiming her position as a widow of the deceased, for her claim to the estate as a surviving spouse is superior to her son. When she testified she alleged that she had been married under customary law, yet she led no evidence whatsoever of any customary law ceremonies ever having conducted with respect to the said marriage. She equally led no evidence that would assist the court presume marriage between them. The

two provincial administrators who testified did not recognize her as having been the deceased's spouse at any time. She was allegedly married in 1959, but as of 1st December 2008 when she testified she had not adopted the deceased name, and the surname she used was still that of her father. From the material before me, I am unable to conclude that she was a spouse of the deceased one way or the other.

26. Was J M C a child of the deceased, biologically or otherwise? His mother testified that she married the deceased 1959. J M C was allegedly born in 1960, and that she got her pregnancy in 1957-1959, during which period deceased was said to have been banished by the colonial government. Her child, allegedly named after the deceased's father, died in 1963. It was not indicated when he was born, and whether this was after or before J M C. Curiously, when J M C himself testified he told the court that he was born 1958. That would mean that he was born before his mother allegedly married the deceased, and at the time he had been allegedly banished. It is clear from the recorded evidence that he was not the biological child of the deceased. Given that there is insufficient evidence that his mother had married the deceased, there is no nexus between him and the deceased. He did not lead any evidence that he was ever informally adopted by the deceased, in terms of being accepted by him or recognized by him as his child or that he ever assumed permanent responsibility over him. He was not a child of the deceased, and therefore there was no basis upon which he could be brought on board in the administration of the estate of the deceased.

27. The other interested parties were persons who said that they had acquired a stake through purchase. Whereas the administrators deny such transactions, and blame the first wife for it, there is some evidence that the deceased might have sold portions of his property while drunk. The alleged purchasers are said to have taken possession, in terms of working on the portions or putting up structures thereon. The question that I have to answer is whether there is evidence that the deceased had sold any property to the purchasers?

28. The persons who testified on behalf of the purchasers did not produce any documentary proof that those transactions happened, yet it is trite law that a sale of land must be evidenced by a memorandum in writing. In addition to that, should the land in question be agricultural, in this case the land in question is in rural Githunguri, the Land Control Act, Cap 302, Laws of Kenya, would apply. The said sale must be sanctioned by the Land Control Board. The purported purchasers have not placed evidence before me to prove that the alleged sales were backed by consents of the relevant Land Control Board. It is alleged that these transactions were carried out in bars when the deceased was drunk, that suggests that the deceased could not possibly be said to have been in a state of mind to enter into a valid contract of sale. It raises issues as to the legality of the alleged sales. I am not convinced therefore that the purchasers had acquired any interest at all in the estate of the deceased. Ideally, before laying a stake in the estate they ought to have moved the Environment and Land Court to establish their claim as against the estate. From what is before me, I am unable to hold that they did acquire any property from the deceased.

29. The orders that I make in the end are as follows:-

(a) That the application dated 6th May 2005 is hereby dismissed, with costs to the administrators; and

(b) That, as the property which makes up the estate herein is situated within Komothai of Githunguri, Kiambu County; this matter shall be transferred to the High Court of Kenya at Kiambu for final disposal.

30. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF OCTOBER, 2016.

W. MUSYOKA

JUDGE