



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 693 OF 2001**

**IN THE MATTER OF THE ESTATE OF NAFTAL ONGUSO MUTURI- DECEASED**

**RULING**

1. The application by way Chamber Summons dated 20<sup>th</sup> May 2013 seeks several orders, the main one being a declaration that the grant of letters of administration intestate made to the respondents was null and void. The application is founded on Section 76 of the Law of Succession Act.
2. The said application is not properly drafted. Applications founded on Section 76 of the Law of Succession Act provide for revocation of a grant and not its declaration as null and void. Nullifying a grant and revoking it are two separate matters. Revocation is of something that is valid, while nullification is a declaration that the thing was null from inception. Whether a grant can be revoked in an application that seeks its nullification is a moot point.
3. The provisions of the Probate and Administration Rules do not envisage the filing of a Chamber Summons where one seeks orders under Section 76 of the Law of Succession Act. The law provides for the filing of a Summons for Revocation of Grant.
4. I will not deal with the technical issues surrounding the Chamber Summons dated 20<sup>th</sup> May 2013. I believe that they can be addressed at the disposal of the application.
5. The central issue for determination in the application is whether or not the applicant was ever married to the deceased. This will resolve the question as to whether she is a surviving spouse of the deceased and therefore entitled to a share in his estate.
6. Whether or not there was a customary law marriage, or even a marriage to be presumed from cohabitation, is a matter of fact. It cannot be resolved purely on affidavit evidence. The best approach should be oral evidence that is subjected to test by cross-examination of the witnesses.
7. I will not do justice to the application dated 20<sup>th</sup> May 2013 by determining it on the basis of the filed affidavits. I will not therefore make a decision on its merits. Instead I shall give directions on its final disposal.
8. The directions I give in the circumstances are as follows:-
  - a. That the application dated 20<sup>th</sup> May 2013 shall be heard at Nairobi for two (2) days before a single judge;
  - b. That it shall be disposed of by way of affidavit and oral evidence;
  - c. That the parties are hereby granted leave to file further affidavits sworn by the persons they propose to call as witnesses, if such persons have not filed such affidavits already;
  - d. That the leave in (c) above is for thirty (30) days; and
  - e. That the matter shall be given a hearing date at the registry on priority.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> DAY OF January 2015.**

**W. MUSYOKA**

**JUDGE**