



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCC NO. 467 OF 2007**

**IN THE MATTER OF THE ESTATE OF J M M.....DECEASED**

**BM M.....PETITIONER**

**L C.....1<sup>ST</sup> OBJECTOR**

**E T.....2<sup>ND</sup> OBJECTOR**

**S G.....3<sup>RD</sup> OBJECTOR**

**J U D G M E N T**

1. The objectors/applicants through summons dated 16<sup>th</sup> September, 2013 brought pursuant to Section 76 of the Law of Succession Act (Cap.160), Rule 44(1) of the Probate and Administration Rules and Section 68, and 80 of the Land Registration Act, 2012 sought orders that grant issued to the petitioner on 18<sup>th</sup> June, 2012 be revoked or annulled, titles to land parcel [particulars withheld] issued to the petitioner be cancelled the same do revert back to the name of the deceased and be distributed to all dependants.

2. The objector's application is premised on the grounds on the face of the application and supportive affidavit by L C dated 16<sup>th</sup> September, 2014.

3. The petitioner is opposed to the application for revocation of grant. The petitioner filed a replying affidavit dated 1/10/2013 in opposition to objectors application.

4. On 1<sup>st</sup> October, 2013 the court gave directions that the application be determined by way of viva voce evidence. The issues for determination were subsequently agreed as follows:-

***i. Whether the objectors are dependants/beneficiaries to the deceased estate?***

***ii. Whether the beneficiaries/dependants consents were obtained in petitioning for the grant?***

***iii. What are the deceased assets?***

5. The objectors in support of their case called 4 witnesses whereas the petitioner called 2 witnesses. I have carefully considered the pleadings, parties oral evidence and submissions by their respective counsel. The issues for determination in this cause shall be as agreed upon by the parties and as stated

herein above under paragraph 4 of this judgment.

6. The objectors gave evidence as OW1, 2 and 3 and called OW4 as their witness. The objectors case is that OW1 S G was wife to the deceased herein married under Meru Customary Law and were blessed with three children namely E T (OW2),G (deceased) and L C (OW3). That the deceased used to support the objectors and would visit them at Meru from Nanyuki.

7. OW1 knows the petitioner as her co-wife, being 2<sup>nd</sup> wife of the deceased who upon being married OW1 left for her parents home with her children but the deceased continued to support OW1 and her children. OW1 urged that at the time of the death of her husband she was sick and was not informed of his death consequently she did not attend his funeral and furthermore when the petitioner petitioned for the grant she was not informed nor was her consent sought. That she came to know of this cause later through her son adding her children were similarly not informed. During cross-examination she averred that J M paid dowry to her parents being a ewe, and heifer through a young man called M who was accompanied by an old man called M (deceased). She further confirmed the 2<sup>nd</sup> wife, the petitioner herein, was married under the then African Christian Marriage and Divorce Act. Further on being cross-examined OW1 stated that the deceased had a parcel of land at Maili Sita at [particulars withheld] (Meru) whose numbers she did not know and he settled at Maili Sita where there was a mud house. Whilst the land at Cathedral was occupied by her daughter L C. She stated that though the Chief knew her as the wife of the deceased he did not mention her in his letter. She also admitted that in the Eulogy of the deceased she was not mentioned nor her children.

8. OW1 further testified she knew the land at Timau though she had never stayed there adding that she did not know when the same was acquired by the petitioner and the deceased. She confirmed that she was personally not making any claim over the deceased estate but wanted her children catered for.

9. OW2 E T M gave similar evidence to that of OW1 as regards his paternity claiming that the deceased was his father and the petitioner was his stepmother. He gave the name of his siblings as per OW1's evidence, his mother. He averred that during the lifetime of his father the deceased herein they used to stay at Mwirine, then moved to Nkunga when his mother disagreed with his father and she returned to her parents with her children OW2 and Ow3. That by then their father was working at Nanyuki and he got land at Timau.

10. He contended he does not know when the petitioner was married but must be after his parents disagreed and his mother moved from the matrimonial home.

11. OW2 testified that the deceased had land at Nkunga, Timau(Laikipia) and another one within Meru. He stated that he assisted his father to get the land at Laikipia by giving him Kshs.50,000/- to subdivide the land. He got 10 titles whose numbers he could not tell.

12. OW2 testified that when the petitioner petitioned for grant of letters of administration of the deceased estate she did not seek his consent nor did she inform him. He added all deceased properties were not listed by the petitioner.

13. On being cross-examined OW2 testified his identity card do not have his father's name claiming that was a second identity card in which the name of M in the first identity card was removed, however, he applied for rectification of the name which has to date not been done. He added in his father's eulogy his mother's name and her children were not included.

14. OW3 L C in her evidence she agreed with the evidence of OW1 and OW2 regarding her paternity averring that the deceased was her father and that the petitioner was her step-mother. She also agreed with OW1 and OW2 as regards were they stayed with the deceased and where the deceased was working. She gave a few names of her step-brothers and sisters. She averred the deceased used to support them during his lifetime.

15. OW3 testified that the deceased funeral was attended by his two houses but as regards this cause she

was not informed or her consent sought. That she came to know of this cause when she was given notice to vacate from her father's land at [particulars withheld]720. She averred the land belongs to her father adding the deceased had land at [particulars withheld]438 which has been subdivided into several plots. During cross-examination OW3 testified her Birth Certificate burnt in the house and her National Identity Card did not bear her father's name. She testified she started staying at [particulars withheld]720 in 2000 where other people also came to the land namely G and N. She further testified she called elders who decided she stays on the land and the other people to vacate.

16. OW4 S M a Senior Retired teacher from Mwiriene testified that he knew the deceased as his uncle being step-brother to his father. That the deceased used to live at Mwirine before he moved to Nkunga and lastly to Laikipia. That he married his first wife in 1957 namely G. That the two had 3 children namely, T, G and C. That the 2<sup>nd</sup> wife is B G who has children but the witnesses knew only one by the name K.

17. OW4 testified that the deceased supported the families though he had separated with OW1, the first wife, who had returned to her parents while the deceased lived at Laikipia. He also had a land at Kambakia which he sold, leaving a portion now referred to as [particulars withheld]720 where C, OW3 lives with the family of N which is not a family of the deceased. That the deceased has a big land at Laikipia/Kalalu/438 which is over 150 acres averring that he does not know whether the deceased had distributed his land or not when he died.

18. On cross-examination OW4 testified that he was not there when the first wife was married averring that the petitioner is deceased's 3<sup>rd</sup> wife and did not witness the paying of the dowry.

19. PW1 B M M testified that the deceased died in 1999 and was her husband producing marriage certificate as exhibit P1. That when he married her he had no other wife as she had known him since 1957. That they started staying together as man and wife in 1960 and converted their marriage to statute one in 1964. That the two were blessed with seven children out of whom one passed on. She gave the names of the seven children as follows:-

**a. L K**

**b. P K**

**c. J M**

**d. S M**

**e. C M**

**f. C K**

**g. G N (deceased)**

20. PW1 testified that she does not know the 3<sup>rd</sup> objector, OW1, in this cause alluding to the fact that she saw her in the court for the first time. She averred that she did not know whether the 3<sup>rd</sup> objector was deceased wife as she had before marriage asked the deceased whether he had another wife and he told her he did not have any other wife. She further testified during the lifetime of the deceased she never saw the 3<sup>rd</sup> objector S G and averred her husband was not objector's husband. She denied knowing the 2<sup>nd</sup> objector and denied he was the son to the deceased as she did not see him or heard of him during the lifetime of the deceased.

21. She added the 2<sup>nd</sup> objector never visited her during the lifetime of her husband. As regards the 1<sup>st</sup> objector she testified she is unknown to her and that she did not claim to be a child of the deceased during his lifetime. She added the deceased never mentioned to have other children during his lifetime adding

the 2<sup>nd</sup> objectors never visited the deceased during his period of hospitalisation as the petitioner was staying with them at the hospital and did not see him nor did she see the objectors during his funeral. She produced the deceased eulogy exhibit P2 to demonstrate the objectors were not recognised as related to the deceased as children and wife respectively.

22. PW2 testified that the deceased had two parcels of land being [particulars withheld]720 and the other one at Laikipia/Kararu averring that the 1<sup>st</sup> objector entered into [particulars withheld]720 after the death of the deceased following which the petitioner filed a suit for eviction of the 1<sup>st</sup> objection being Meru HCCC 27 of 2012

23. The petitioner testified that her husband had left [particulars withheld]720 under the care of R K (deceased).

24. In response to objectors contention that their consent was not sought and that the petition was filed without their knowledge the petitioner averred that she had no obligation to notify the objectors of filing of the petition and opposed the application for revocation of the grant. During cross-examination she testified her husband's rural home was at Mirine and she had visited the home. She stated her husband told her he did not have another family. She stated she saw the first objector in court for the first time claiming in HCCC 27 of 2012 sued someone she had not known. As regards the 2<sup>nd</sup> objector she stated she does not know whether he is the son of the deceased. She stated Laikipia land has been subdivided. She further stated the land at Laikipia were transferred into her name in 2007 after death of her husband but not through succession case of her husband had signed the transfer before his death.

25. PW1 stated that she never stayed at [particulars withheld]720 but R K now deceased adding she knows today one N and his brother are staying there as well as the objectors. She confirmed she got a letter from the Chief who knew them. On re-examination PW1 testified that her husband signed the transfer forms for her. She added when she discovered the 1<sup>st</sup> objector's entry into the deceased land she send the sub-area to tell her to vacate from the land but she declined leading to the filing of HCCC 27 of 2012 for eviction orders.

26. PW2 J N testified that he stays at [particulars withheld]720. He stated that the deceased was known to him as he was his maternal uncle. He stated that he knows PW1 as wife to the deceased. He testified that he was born in 1962 and came to know the deceased in 1978.

27. PW2's evidence is that the deceased J M did not have another wife apart from PW1. He denied that the 3<sup>rd</sup> objector was wife to the deceased. He averred he could recall the deceased children but named only three of them. He averred that when his mother died in 2003 he went away to work and in 2004 the 3<sup>rd</sup> objector entered into the deceased land. He informed PW1 who advised him to inform the sub-area who told 3<sup>rd</sup> objector to vacate but she declined.

28. On cross-examination PW2 testified that PW1 is the only wife of the deceased. He stated the 1<sup>st</sup> objector got into the deceased land in 2004 and constructed a house in 2005. He testified that when 1<sup>st</sup> objector was told by elders to vacate she refused adding that she stays on the land with a man but the children comes and goes away.

29. I have carefully considered the pleadings, the *evidence by parties and their witnesses*, the counsel respective written submissions. The issue that this court is called upon to determine have been agreed upon by counsel and can be summarized as follows:-

**1. Are the objector's dependants/beneficiaries to the deceased estate?**

**2. Were the beneficiaries/dependants to the deceased estate consent obtained before petitioning for the grant?**

### **3. What did the deceased estate comprise of?**

30. The objectors asserted that they are beneficiaries/dependants to the deceased estate which is strongly contested by the petitioner. The burden of proof that the objectors are dependants to the deceased estate lies with the objectors and not with the petitioner.

31. **Section 29(a) of the Law of Succession Act** defines who the dependant is in an the estate of a deceased person. **Section 29(a) of the Law of Succession Act provides:-**

***29. For the purposes of this Part, “dependant” means (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.***

32. The petitioner on seeking grant of letters of administration to the deceased estate filed all necessary forms together with a filed chief’s letter dated 7<sup>th</sup> November, 2006 which listed the petitioner. B M as wife of the deceased as six children namely:-

***i. P K M***

***ii. L K***

***iii. C K***

***iv. J M M***

***v. S M***

***vi. S M M***

In form P&A 5 the petitioner and her children are the only persons named as surviving the deceased herein.

33. The 3<sup>rd</sup> objector averred she was married to the deceased under Kimeru Customary Law and that dowry was paid for her marriage. OW2 and OW3 were not born at the time of the alleged marriage and had no evidence to support the alleged marriage. OW4 on his part alleged OW1 was married in 1957 and had 3 children with the deceased but he could not state when the petitioner was married. During cross-examination he testified during the time of marriage of 3<sup>rd</sup> objector he was not there. He further stated he heard the deceased paid dowry. The evidence of OW4 on marriage of OW1 to the deceased is hearsay and inadmissible.

34. OW1 did not call any single witness who witnessed her customary law marriage to the deceased. She did not call the person who took dowry to her parents or anyone who witnessed the payment of dowry. She averred that Chief knew her but she opted not to confront the Chief to tell her why he omitted her name as wife of the deceased. She did not call any Administration Officer to confirm that she was indeed a wife to the deceased and a dependant. She did not produce her national identity card or any documentary evidence to show that she was wife to the deceased. In her evidence she stated she had not married after separation with the deceased yet she was not interested in his estate but wanted the children to get a share.

35. OW2 and OW3 gave similar evidence as regards the separation of OW1 and the deceased herein. The two did not according to their evidence stay with the deceased after the separation of the deceased and their mother. OW1 did not produce any single document to connect the deceased with her children. She

claimed the birth certificate of her children were burnt when the house in which the documents were was burnt.

36. I have carefully considered the explanation of non-availability of birth certificates by OW1 and OW2 and OW3 and I am not satisfied that the only evidence that the objectors could produce to show their relationship to the deceased was limited to Birth Certificates or documentary evidence as they could do so by calling independent oral evidence.

37. The matter before this court is serious as it relates to one's inheritance. The objectors did not even bother to produce police abstract to show such vital and relevant documents to the paternity had been burnt in a house. The objectors did not even see it fit to bring other documents such as Baptism card, school registration card, leaving certificate, chief's letter or District Officers letters or any relevant document which could connect them with the deceased such as school report or identity card.

38. I have upon consideration of the evidence tendered by the objectors and the evidence of the petitioner and their witnesses satisfied that the objectors have failed to prove on balance of probabilities that the 3<sup>rd</sup> objector was married to the deceased and that 1<sup>st</sup> and 2<sup>nd</sup> objectors are dependants to the deceased estate herein as they have failed to prove that the 3<sup>rd</sup> objector was wife to the deceased and 2<sup>nd</sup> and 1<sup>st</sup> objectors are children of the deceased. The objectors did not participate in the funeral of the deceased nor were they recognised as the deceased relatives. The evidence which is not challenged is that PW1 was married to the deceased in 1960 and marriage converted to statute in 1964 as per exhibit P1.

39. From the evidence of OW1, OW2, OW3 and PW1 the consent of the objectors was not sought and obtained by PW1 before petitioning for the grant. The only consent sought and obtained was that of PW1's children who PW1 considered as the only beneficiaries to the deceased estate. I have already found that the objectors were not beneficiaries to the deceased estate and their consent to petitioning for grant was not required. They were not supposed to be consulted either. I am satisfied from the evidence that the consent of the rightful beneficiaries was sought and obtained and there is no protest from them before this court for consideration.

40. The objectors did not have full details of the deceased estate. They talked of [particulars withheld]720 and parcels of land at Laikipia whose titles they did not provide. PW1 in her evidence talked of [particulars withheld]720 and of land at Laikipia/Kararu. In form P&A 5 the only property indicated is that of [particulars withheld]720. PW1's evidence is that the deceased before his death had transferred his property to her and she got the titles of the properties in 2007. The parties did not produce any search certificates or abstract of titles of other properties in the name of the deceased. The searches produced SKL 6 (a) to 6(L) are in the name of the petitioner. The properties are not in the deceased name and are not subject of this cause and as the same do not form part of the deceased estate. That if anyone challenges the registration the same should be through another forum but not through a succession cause.

I therefore come to the conclusion in this matter as follows:-

***i. That the objectors are not dependants/beneficiaries to the deceased estate.***

***ii. That the objectors consent was not required by the petitioners to petition for the grant of letters of administration in respect of the deceased estate.***

***iii. The deceased estate comprised of [particulars withheld]720.***

***I therefore order:-***

***(a) Objectors application dated 16<sup>th</sup> September, 2013 for revocation or annulment of grant of letters of administration, intestate issued to B MM on 18<sup>th</sup> June, 2012 be and is hereby dismissed.***

***(b) Titles to land parcel [particulars withheld] 618,619,620,621,622,623,648,647,649,650 and 651 should not be cancelled and do no form part of the deceased estate.***

***iv. Costs to the petitioner***

***DATED, SIGNED AND DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2015.***

***J. A. MAKAU***

**JUDGE**

***DELIVERED IN OPEN COURT IN THE PRESENCE OF:***

***MR. J. G. Gitonga for the petitioner***

***Mr. Igweta for the objector***

***C/clerk Mwenda/Penina***

***J. A. MAKAU***

**JUDGE**