



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. APPLICATION NO. 135 OF 2001

(IN THE MATTER OF THE ESTATE OF MARTIN MAINA KIHARA (DECEASED))

ESTHER WANGECHI MAINA.....APPLICANT

VERSUS

JOSPHAT MWANGI CHORO.....RESPONDENT

JUDGMENT

On 23rd October, 1997, **Martin Maina Kihara** (deceased) was murdered in his home at Kanyenyaini in Murang'a County. According to the certificate of death filed in this cause, the deceased died as a result of cardiac failure due to haemorrhage caused by a stab wound.

The applicant, her son **Simon Mugitu Maina** and her brother **Charles Karigu Mugitu** were charged with the murder of the deceased in the **Nyeri High Court Criminal Case No. 19 of 1998**.

While testifying as the first prosecution witness during the accused persons' trial, the deceased's brother, **James Kamau Kihara**, informed the court that the first accused person, who is the applicant herein was the deceased's wife and that, **Simon Mugitu Maina**, the second accused person, was the couple's son. It was Kihara's evidence that because of the longstanding differences between the deceased and the applicant, the deceased sought to marry a second wife; incidentally, the deceased made his intentions known to the applicant and his entire clan. Since the applicant could not approve of this marriage and going by the underlying tumultuous relationship between the applicant and the deceased, it was Kihara's evidence that the applicant together with the deceased's son and her brother must have murdered the deceased to scuttle his intended marriage to a second wife.

At the conclusion of the trial, all the accused persons, including the applicant herein were acquitted.

In March, 2001, soon after the applicant's acquittal, the respondent herein petitioned for grant of letters of administration intestate in respect of the deceased's estate; according to the petition which he filed in the **Principal Magistrates' court at Kangema in Succession Cause No. 48 of 2001**, the respondent described himself in the petition as the deceased's step-brother. He listed the deceased's brother, **James Kamau Kihara** and one **John Chege Maina** whom he described as the deceased's step brother as the deceased's only other survivors; the respondent subsequently obtained the grant on 15th May, 2001.

By an application dated 24th September, 2001, the applicant, inevitably, filed an application in this court seeking to have grant revoked or annulled mainly on the ground that the respondent had withheld from the court the information that the deceased was survived by the applicant as his widow and Simon Mugitu Maina, his son.

The record shows that on 22nd October, 2007, the court summarily revoked the grant and issued a fresh one in the joint names of the applicant and the respondent.

Subsequently, and more particularly on 15th October, 2001, the applicant filed a summons for confirmation of grant and in the affidavit in which she swore in support of the summons she proposed to share out the deceased's estate comprising land parcel **Loc./Kanyenyaini/1920** between herself and her son only; according to her proposal, she was to get 2 acres while her son was to get one acre.

The respondent protested against the confirmation of grant and in that regard he filed an affidavit of protest in which he now named **James Kamau Kihara** (described as the deceased's brother), **Raymond Njuguna Kihara** (also described as the deceased's brother) and **Stephen Ndibui** (whom he described as the deceased's step brother) as the only survivors. On this occasion the respondent described himself not as the deceased's step brother as he had earlier stated in the affidavit in support of the petition for grant of letters but as the chairman of the '*njara ruhi*' clan to which the deceased is alleged to have belonged. This time round he did not consider himself as a survivor of the deceased contrary to what he indicated in the affidavit in support of the petition.

The protestor's case is that the deceased never married and neither did he have any children. Interestingly, he does not wish to have any part of the deceased estate but has deposed that since it is the deceased's brother **James Kamau Kihara** who has been cultivating the deceased's land, he should be registered as its sole proprietor.

It is noted that even as the respondent appears to vouch for the deceased's brother, the latter did not swear any affidavit either opposing the confirmation of grant or proposing any form of distribution different from what the applicant proposed.

On 28th February, 2012, parties agreed to have summons of confirmation of grant and the protest resolved by way of written submissions which they subsequently filed and exchanged between themselves. I have given due regard to these submissions and I agree with the counsel for the applicant that the primary issue in this contest is whether the applicant and **Simon Mugitu Maina** were respectively the wife and the son of the deceased; once this question is resolved, the answer to the question of how the estate should be distributed should logically fall into place.

According to the record of the criminal proceedings against the applicant and her co-accused, a copy of which was attached to the further affidavit she swore in response to the protest, the deceased's brother, **James Kamau Kihara**, gave evidence under oath that the applicant was the deceased's wife and Simon Mugitu Maina was his son; he suspected both of them to have eliminated his brother because he wanted to marry a second wife. He confirmed that the deceased married the applicant in 1986. This evidence was also captured in the judgment that the court ultimately delivered acquitting the accused persons.

If **James Kamau Kihara** acknowledged under oath, in a judicial proceeding, that the applicant and **Simon Mugitu Maina** are the widow and son respectively of the deceased, he would not have any basis in law to lay any claim either by himself or through the respondent on the deceased's estate. It has been noted that he did not file any affidavit questioning the distribution of the deceased's estate as proposed by the applicant or laying any claim on the estate; neither has the respondent nor the persons he listed in the protest and in the affidavit in support of his petition as the deceased's survivors.

In the premises, I am of the humble view that the distribution of the deceased's estate is subject to section **35(1)(b)** of the Act which provides for inheritance of widows or widowers surviving their spouses; it states as follows:-

35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –

a. the personal and household effects of the deceased absolutely; and

b. *a life interest in the whole residue of the net intestate estate:*

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

Legally speaking, therefore, it is only the applicant who, under **section 35(1) (b)** is entitled to the deceased's estate except that her interest in the estate is subject to either her lifetime or her remarriage to any person whichever comes earlier. Under **section 35(2)** of the Act the applicant reserves the right of power of appointment in respect to her lifetime inheritance; that provision states as follows:-

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date

Much as the applicant is entitled to the whole residue of the net intestate estate of the deceased, subject to a lifetime interest she has chosen to confer to her son the right to a share in the estate in the confirmation proceedings; this course does not appear to be inconsistent with the law and I have no qualms with it since the applicant could achieve the same result by exercising her power of appointment under **subsection (2) of section 35**.

In view of the foregoing circumstances and having regard to the provisions of the law that I have cited, I cannot find any basis in the protest or anywhere else upon which this court can interfere with the applicant's proposed distribution of the deceased's estate. In a nutshell I find that respondent's protest has no merit and is therefore dismissed with costs. It follows that the summons for confirmation of grant dated 15th October, 2009 is allowed and the grant confirmed; the estate shall be distributed as proposed in paragraph 6 of the affidavit of **Esther Wangechi Maina** sworn on 15th October, 2008 in support of the summons of confirmation of grant.

Dated, signed and delivered in open court at Nyeri this 13th day of February, 2015

Ngaah Jairus

JUDGE