



**REPUBLIC OF KENYA**

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

**PROBATE AND ADMINISTRATION CAUSE NO. 596 OF 2006**

**IN THE MATTER OF THE ESTATE OF J M M (DECEASED)**

**B N J.....APPLICANT**

**Versus**

**V K W**

**A K M.....PETITIONERS/RESPONDENTS**

**R U L I N G**

1. On the **10<sup>th</sup> June, 2008** the Applicant filed summon
2. **J M M** (deceased) died on the **30<sup>th</sup> December, 2005**. **V K W** and **A K M** petitioned for letters of administration in their capacity as the widow and mother respectively. Letters of administration intestate were issued on the **10<sup>th</sup> January, 2008**.
3. s for revocation and annulment of grant on the grounds that: The proceedings to obtain it were defective in substance; The grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case; and that the grant was obtained by means of an untrue allegation of an essential point of law to justify the grant notwithstanding the allegation having been made in ignorance or inadvertently.
4. In an affidavit in support of the application, **BNJ** (Applicant) depones that the Petitioners applied for letters of administration in total secrecy. She stated that she married the deceased in the year 1997 under the Kamba Customary Law and they were blessed with one issue, **K M**. Both of them were excluded from the list of dependants. She was neither consulted nor cited prior to the Petition being filed and unless the grant is revoked they will suffer irreparable damages.
4. In response to the application, **V K W** swore an affidavit stating that she married the deceased in the year 2005 under the Kamba Customary Law. No customs have been undertaken in respect of the Objector (Applicant) either directly or through the Applicant's elders and as such she is not the wife of the deceased. That the deceased never lived with the Applicant and the child **G K M** was born two (2) months before the demise of the deceased, therefore cannot be an issue of the marriage. Having not been a beneficiary of the Estate of the deceased it was not imperative to inform her of the intention to petition for letters of administration.
5. In a further affidavit the Applicant deposed that after marrying the deceased they stayed for a long time without a child that is why she allowed him to marry the 1<sup>st</sup> Petitioner. She stayed with the deceased at the 2<sup>nd</sup> Petitioner's home and equipped the household of the deceased. Further, she stated that the deceased was the father of her daughter and she was ready to subject her to DNA test for confirmation purposes and that the deceased had recorded that fact with the Kenya Wildlife Services.

6. The application was heard by way of *viva voce* evidence. In her evidence, OW1, **B NJ** stated that she married the deceased in 1997. They cohabited in Nairobi. She worked for [particulars withheld] while the deceased worked with Kenya Wildlife Services. They would also stay at the deceased's parents' home in Tala. She was chased away from Tala after the deceased's demise. She adduced in evidence her child's birth certificate, a letter from the Chief confirming the fact of marriage to the deceased, a letter from Kenya Wildlife Services recognizing her as a wife of the deceased and photographs she took with the 2<sup>nd</sup> Petitioner, her mother-in-law.
7. Arguing that she was married to the deceased under the Customary Law she stated that her father-in-law sent his brother **M N** to her home for introduction and denied an allegation that a ceremony was conducted in respect of the marriage between the 1<sup>st</sup> Petitioner and the deceased. She prayed to be made an administrator of the Estate and her daughter to be considered as a beneficiary.
8. On cross examination she stated that though all stages of payment of dowry were not exhausted proper introductions having been made the relationship was considered as a marriage.
9. OW2 **M K** the mother of PW1 stated that she recognized the deceased as her son-in-law because 4 elders – **N M** a brother to the deceased, **K M** his mother, **M** and **M N** in company of the deceased went to her home and told her that PW1 was married in their family. They gave her a token of **Kshs. 2,000/=** in that respect. On cross examination she stated that not all stages of marriage were undertaken because of misunderstandings following her daughter not conceiving immediately.
10. OW3 **M K** an uncle to the deceased confirmed having gone to the home of the OW1 with the deceased where it was agreed that the deceased and the Objector would live as husband and wife. He stated further that the deceased was survived by two (2) wives, the **Objector** and **V K** but at the time of his demise he had not paid dowry to either of the wives' parents.
11. OW4 **M M N** a sister to OW1 stated that she was present when OW3 visited their home.
12. OW5 **Peter Ngungu Kithaka** the Assistant Chief Tala Location adduced evidence of a letter he authored stating that the deceased was married to two (2) wives and was survived by three (3) children. And when the Objector's daughter was born he accompanied the deceased to hospital and they paid the hospital bill. On cross examination he stated that initially he had written a letter stating that the deceased had only one wife but after consultations with the elders he wrote a letter indicating the actual status.
13. In her testimony the 2<sup>nd</sup> Petitioner **A K M** stated that the deceased, her son was married to only one wife the 1<sup>st</sup> Petitioner herein who was blessed with two (2) children. On cross examination she stated that the Objector was a neighbour. When shown photographs where she appeared with the Objector she stated that she only appeared in her capacity as a neighbour. And, that she visited her in hospital when she gave birth as a neighbour.
14. The second Petitioner, **V K M** stated that having married the deceased she heard of a co-wife when her husband died. On cross examination she objected to the daughter of the Objector getting a share of his Estate because her husband never mentioned her. She denied having been told by Kenya Wildlife Services that the name of the person appearing as the wife of the deceased was that of the Objector. She however said that had it been brought to her knowledge she could not have objected to the Objector getting a share of the Estate.
15. The Petitioners called a witness, **A N M** an older brother of the deceased but not the eldest in the family who stated that he was sent to pay dowry at the home of the 1<sup>st</sup> Petitioner. He did not recognize the Objector as a wife to the deceased but stated that the issue was raised before the clan. On cross examination, having been shown photographs he identified images of his mother, **(1<sup>st</sup> Petitioner) B**, the deceased and their homestead.
16. The deceased herein died intestate. At the time of petitioning for letter of administration, the Petitioner indicated that he was survived by four (4) persons (beneficiaries)

- **V K W**

- **A K M**

- **B M M**

- **A K M**

The only net asset left by the deceased was indicated as **“Death Benefits – Ministry of Kenya Wildlife Services.”**

In support of the Petition was a letter from the Office of the District Commissioner signed by F. M. Kyania giving names of **V K W, B M** and **A K** as the heirs to the Estate of the deceased.

17. The Objector on her part adduced evidence of a letter from the Chief, Tala, giving a list of Beneficiaries of the deceased as:

- B N J
- V K W
- B M
- G K M
- A K M and A K M

Also produced in evidence is a letter from Kenya Wildlife Services in respect of the widow and orphans pension scheme of **J M** (deceased) where both the first Petitioner and the Objector were cited as persons entitled to benefits.

18. The 2<sup>nd</sup> Petitioner denied existence of a marriage between the Objector and her son. She was elusive in admitting that indeed photographs were taken of her and the Objector which did signify occurrence of a ceremony that both of them attended. Appearing in photographs with a party could establish a close relationship but may not necessarily prove existence of a marriage. In the matter however, OW4, the uncle of the deceased confirmed that following the existence of a relationship between the Objector and the deceased he was in a group of people who visited the home of the Objector for introduction purposes. It is admitted by the witnesses called by the Objector that only introduction was done. No dowry having been paid raises the question if indeed a marriage existed between the parties under the customary law.

19. The Petitioners went on to dispute if indeed the child sired by the Objector named after the 2<sup>nd</sup> Petitioner was the daughter of the deceased.

20. Evidence of a birth certificate adduced by the Objector showed that her father was the deceased. Although the 2<sup>nd</sup> Petitioner denies the existence of the relationship. She admits that indeed she visited the child at birth in hospital. The deceased having recognized both the 1<sup>st</sup> Petitioner and Objector by having their names included in the Orphans Pension Scheme would be evidence on a balance of convenience that he recognized the child as a beneficiary of the Estate.

21. The order sought is revocation (or annulment) of the grant. Section 76 of the Law of Succession Act provides thus:

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –**

- a. **that the proceedings to obtain the grant were defective in substance;**
- b. **that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**
- c. **that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
- d. **that the person to whom the grant was made has failed, after due notice and without reasonable cause either –**

- i. **to apply for confirmation of the grant within one year from the date thereof, or such longer**

- period as the court has ordered or allowed; or*
- ii. *to proceed diligently with the administration of the estate; or*
  - iii. *to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*
- e. *that the grant has become useless and inoperative through subsequent circumstances.”*

22. It is apparent that the Petitioners were aware of the existence of the Objector and her child **G K** at the time of petitioning for the grant. Therefore they concealed from this court something material. From the evidence adduced they were intent on denying the child what was due to her from the Estate of the deceased.

23. In the circumstances the application is meritorious. The grant issued is therefore revoked.

24. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 16<sup>TH</sup> day of JUNE, 2015.**

**L. N. MUTENDE**

**JUDGE**