



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 200 OF 2011

IN THE MATTER OF THE ESTATE OF JEREMIAH KIYUKA NYAMWAYA (DECEASED)

JUDGMENT

1. The cause relates to the estate of Jeremiah Kiyuka Nyamwaya. He died on 29th September 2010.
2. Representation to his estate was sought vide a petition lodged in court on 3rd February, 2011 by Alice Kemunto, Wycliff Mogeni and Fiona Kerubo, in their alleged capacities as wife, son and daughter, respectively of the deceased. They listed themselves as well as Sandra Valentine Mo A Kiyuka and Fay May Bosibori Kiyuka as the survivors of the deceased. He was expressed as to have died possessed of motor vehicle G.K. 831X (Peugeot 504), Kericho/Kipchimchim/1213 (Plot No. 20), Ngong/Ngong/44269, KANTAFU Komorock Estate Phase IX (Plot No. 1345) and Membership No. 33173 2008/94. A grant of letters of administration intestate was duly made to them on 3rd November 2011.
3. On 24th November 2011, Fancy Chepngetich Shenan lodged an undated application for the revocation of the grant made on 3rd November 2011. In her affidavit in support of the application, sworn on a unknown date in 2011, she alleged to be a widow of the deceased having married him under customary law. She further alleged to have had one child with the deceased known as Morgan Mogeni Kiyuka. She alleged that that fact was concealed from the court by the administrators, insisting that she should have been listed as a beneficiary of the estate.
4. An affidavit of service sworn by one Robert Kipngetich on 10th January 2012 was filed herein on 24th January 2012. It shows that the summons for revocation of grant was served on the respondent administrators on 29th December 2011. There is nothing on record to indicate that the respondents replied to the application.
5. Directions were given on 7th February 2012 that the meeting was to be held on 20th March 2012.
6. Come 20th March 2012, the hearing commenced. The applicant, Fancy Chepngetich Shenan, testified as PW1. Her case was that she married the deceased in 2007. He paid dowry sometime in 2008. She produced some photographs of the occasion and identified the persons who participated in the event. The couple had a child, and a certificate of birth was produced which bore the name of the deceased as father of the child. She produced photographs taken on the occasion when the applicant's mother-in-law visited to see the newborn child. The deceased died on 29th September 2010, at a time when the couple was living at Ngara Estate. During the illness, the deceased lived with the applicant, and his two children from his first marriage,

Wycliff Kiyuka and Fiona Kerubo Kiyuka. When the deceased became gravely ill, the two children forced the applicant out of the Ngara residence, and she was forced to seek refuge with her sister at Kericho. The deceased died shortly thereafter. She attended the funeral, and met her co-wife there for the first time. The co-wife after the burial stormed her residence and took away clothes and occupied a plot that the deceased and the applicant intended to develop on. She wanted the grant made in her joint names with her co-wife, but she did not object to the other two respondents being added as co-administrators. She added that some assets – such as a motor vehicle that was in foreign registration numbers, pension funds and shares in a co-operative society – were omitted from the list of beneficiaries.

7. The next witness, PW2, was Meshack Kemoni. He testified on 22nd May 2012. He described himself as a neighbor of the deceased. He allegedly assisted the deceased in dowry arrangements when he was marrying the applicant. He said that he stood in for the deceased's father. He described how he, and others, visited the applicant's parents at Kericho and paid dowry – five cows. He stated that the first respondent was the first wife of the deceased.

8. The third witness, PW3, was Wilson Kipkoskei arap Maina. He was the father of the applicant. He stated that the deceased was married to his daughter, in a ceremony that took place in 2008, when he paid dowry of five (5) cows. He confirmed that the two had a child together.

9. The last witness, PW4, was Moraa Rebecca Nyamwaya. She testified on 24th September 2014. She said that she was the mother of the deceased. She identified the first respondent as the first wife of the deceased, with whom they had four children including the second and third respondents. The first respondent was said to have left the deceased after eight (8) years, taking the two youngest children and leaving behind the second and third respondents. She never came back. She had not been married formally. She identified the applicant as the deceased's second wife, married after the first one had left the matrimonial home. She confirmed the evidence of the earlier witnesses that dowry was paid for the applicant, and that she had one child with the deceased. After the deceased died, the clan decided to pay dowry for the first wife because of the children. She asserted that the first respondent had no contact with the deceased for over eight (8) years after she left the homestead, and that she only showed interest on him after he died. She was cross-examined by the first respondent.

10. After the last witness closed her evidence on 24th September 2014, I granted leave of thirty (30) days to the respondents to file and serve their replies to the application. I adjourned the hearing thereafter to 8th December 2014.

11. I did not sit on 8th December 2014 and the matter was allocated 27th January 2015 as the next hearing date. On the appointed date the applicant attended court, but the first respondent was absent despite service of the hearing notice dated 16th December 2014 being served on her, as per the affidavit of service sworn on 16th December 2015 and filed in court on 27th January 2015. The applicant closed his case. As the respondents were not in court and had not filed any replying papers, I adjourned the matter with a view to preparing judgment.

12. The application for revocation of grant filed herein on 24th November 2011 is unopposed. The respondents despite being aware of it did not file any replies to it. They did not call any oral evidence at the hearing, and therefore the testimonies of the applicant and her witnesses are uncontroverted. I am satisfied that the applicant was validly married under customary law to the deceased. She was his wife, and upon his death she and her child should have been involved in the succession proceedings.

13. The application before me is predicated on Section 76 of the Law of Succession Act. Under that provision the court is empowered to revoke a grant of representation where the

proceedings to obtain it are found to have been defective or founded on fraud and misrepresentation.

14. Applications for grant of representations are presented under Section 51 rule 7 of the Law of Succession Act of the Probate and Administration Rules. Under those provisions certain details or information ought to be disclosed. They require that there must be disclosure of all the surviving widows and children of the deceased.

15. From the material before me, it is plain that the names of the applicant and her child were not disclosed as survivors of the deceased. This then means that there was a violation of Section 51 of the Act and rule 7 of the Rules. The process to obtain the grant was defective to that extent. It was also based on fraud and misrepresentation. The respondents created a false impression that the deceased did not have other survivors, save the first respondent and her children. This then means that the grant made herein on 3rd November 2011 is available for revocation on the grounds of a defective process to obtain the grant and fraud, misrepresentation and concealment of important matter from court.

16. In exercise of the discretion that is granted to me by Section 76 of the Law of Succession Act, I do hereby revoke the grant made on 3rd November 2011. A fresh grant of letters of administration intestate shall issue accordingly to Alice Kemunto and Fancy Chepngetich Shenan. Fancy Chepngetich Shenan and her child, Morgan Mogeni Kiyuka, shall accordingly be listed as survivors of the deceased. As this is a family matter, I shall order that each party shall bear their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE