



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 338 OF 2015

IN THE MATTER OF THE ESTATE OF A N N N (DECEASED)

P M N.....1ST APPLICANT

R M J.....2ND APPLICANT

VERSUS

J M N.....CITEE

RULING

1. This ruling concerns two applications dated 2nd and 8th September, 2015. The Applicants P M N (1st Applicant) and R M J (2nd Applicant) allege that they are the biological and adopted daughters respectively of the deceased and M W N N (deceased). The applications are for orders of the court to release the funds in deceased's account No. [particulars withheld] held at Equity Bank Kenya Limited, Gatehouse Branch or account number [particulars withheld] Housing Finance Company Nakuru Branch to cater for their school fees and school related expenses.

2. The 1st Applicant was admitted into [particulars withheld] University and seeks a total of Kshs. 254,609/=, that is Kshs. 111,592/= for tuition, Kshs. 55,000/= for accommodation and Kshs. 32,000/= for her maintenance. The 2nd Applicant has also successfully applied to the [particulars withheld] of Hospitality and Technology, Nakuru Campus. She seeks Kshs. 99,700 constituting of Kshs. 51,700 tuition fees and Kshs. 48,000 to cater for text books, uniform, equipment and her maintenance.

3. The application dated 2nd September 2015 was heard and the first prayer granted in part to the effect that the sum of Kshs. 111,952/= be paid directly to Kenyatta University of Agriculture and Technology to cater for the tuition fees of the 1st Applicant. By the consent of the parties this order was rectified on 9th September, 2015 to provide that the amount shall be withdrawn from the account at Equity. As per the order of the court, the prayer that remains for determination is whether the accommodation and maintenance expenses should also be paid out of the account of the deceased. The 2nd application has not been determined.

4. The basis of the applications is that the applicants were children of the deceased and therefore his dependants who are entitled to be maintained by the estate. The primary document that was filed in support of this contention is an affidavit sworn by A M N N, the brother of the deceased on 14th May, 2014. This affidavit was sworn in opposition to an application filed in Succession Cause No. 59 of 2014

mentioned above.

5. In that affidavit, the affiant deposed that after separating with the Citee in 1993, deceased married M in the year 1995 under Kikuyu Customary Law. He annexed a statutory declaration sworn by the two to this effect on 28th March, 1995. Their union was blessed with one issue, the Applicant.

6. The 2nd Applicant was adopted in the year 2003 by the deceased when she was 10 years old. The deceased swore an affidavit on 8th March, 2011 in support of an application by the 2nd Applicant to be issued with a birth certificate. He deposed that he found the 2nd Applicant abandoned along the Nakuru-Bahati Road sometimes in May 2003. After unsuccessfully trying to find her parents, the deceased enrolled her in [particulars withheld] Academy and has since been her guardian.

7. A M N maintained that the deceased's family had always regarded M as the deceased's wife and the 1st and 2nd Applicants as the biological and adopted daughters of the deceased. His brothers T W N, R Mi N and C N N all swore affidavits on 14th Mau 2014 confirming his averments.

8. J M N was the deceased's first wife and the Citee in these proceedings. By her Replying Affidavit sworn on 29th September, 2015 she opposed both applications on the ground that the Applicants are not dependants of the deceased. She contended that the 1st Applicant's mother M was in an adulterous union with the deceased between the year 1993 and 1998. She annexed to her affidavit a letter from M where she apologized for her affair with the deceased. According to the Citee, the 1st Applicant has no legitimate claim to the deceased's property. In addition, she contended that there is no basis for the prayer for payment of the substantial sum for school fees as the 1st Applicant attained a B+ and is therefore eligible for admission in a public university where the fees are subsidized.

9. In response to the 2nd application she rejected the contention that the 2nd Applicant is the deceased's adopted daughter. She alleged that the deceased was philanthropic in his lifetime and used to pay for school fees for other children who could not afford. Therefore the 2nd Applicant cannot claim to be the deceased's daughter solely because he used to pay for her school fees.

Determination

10. I have considered the applications and the affidavits of the parties as well as their rival submissions.

11. The Citee had filed a succession cause No. 59 of 2014 also relating to the deceased herein where she petitioned the court for Letters of Administration Ad Colligenda Bona to enable her run the deceased's properties namely Account No. [particulars withheld] at Equity Bank Kenyatta Avenue, Nakuru and Account No. [particulars withheld] Housing Finance Company, Nakuru, L.R. No. 9348 and L.R. No. 9215. This application was disallowed, and therefore that succession was determined. The Applicants had also filed applications for school fees and maintenance in that cause. At the time, the 1st Applicant was attending [particulars withheld] Girls Secondary School and the 2nd Applicant was a student at [particulars withheld] Institute of Business Studies. Both applications were allowed.

12. The Rulings were not annexed to these proceedings, and it is not clear whether the court determined the question of whether the Applicants are the dependants of the deceased. From the record, it is clear that the Applicants will require maintenance from the estate of the deceased until they complete their studies, and the question of whether they are dependants of the deceased is central to these orders. Therefore it is one that must be determined finally at this juncture.

13. It was not disputed that the Applicants have enrolled in institutions of higher learning and that they need financial support. The dispute was whether they are dependants of the deceased who should be maintained by the estate until the estate is fully administered.

14. The Citee's counsel argued in submissions that this is an issue that can only be heard by way of viva

voce evidence. I do not support this contention. The prayers in the application are for maintenance, and they revolve around the issue of dependency. The evidence regarding this issue may be adduced by way of affidavit or viva voce. In the instant case, the parties elected to argue the application by way of affidavit as neither made an application for witnesses to give viva voce evidence. The Citee was not barred from making an application to cross examine any affiant. She cannot now claim that the issue was not properly argued or that it is premature.

15. Section 29 of the Law of Succession Act defines a dependant as-

(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)

16. The Citee did not contest the contention that the 1st Applicant was the deceased's and M W N N's child. Her contention was that she was borne out of an adulterous union and is therefore not a legitimate child or dependant of the deceased. It was established by the evidence that the deceased and Magdaline W N N were husband and wife married under Kikuyu Customary Law. They swore an affidavit acknowledging this fact and represented to the rest of the family that they were married.

17. Section 3 (5) of the Law of Succession Act provides that

Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

18. Therefore, the 1st Applicant has a right to the deceased's property which right is protected by the above provision.

19. With regard to the 2nd Applicant, the deceased expressly assumed parental responsibility over her. In the affidavit to support her application for issuance of a birth certificate he indicated that he was her guardian. He represented to his family that she was his adopted child who he had taken as his own. She is therefore regarded as his child under Section 3(2) of the Act which provides-

(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

20. For the above reasons, I find that the Applicants are children of the deceased and are therefore entitled to be maintained by his estate pending its full distribution.

21. Accordingly, I make the following orders-

(a) In relation to the application dated 2nd September, 2015, the prayer for payment of school fees was allowed and the sum of Kshs. 111, 592/= has already been allowed. Therefore, I direct that the sum of Kshs. 55,000/= being the total costs of accommodation for the 1st

Applicant, P M N be released from the deceased's account no. [particulars withheld] at Equity Bank Nakuru Branch and paid directly to [particulars withheld] University . The sum of Kshs. 42,000/= being the costs of maintenance and upkeep shall be released directly to the 1st Applicant.

(b) That the sum of Kshs. 51,700 be released from the deceased's account no. [particulars withheld] at Housing Finance Company, Nakuru Branch and paid directly to the [particulars withheld] Institute of Hospitality and Technology, Nakuru Campus to cater for the tuition fees for the 2nd Applicant, R M J. The bank is ordered to release a further Kshs. 48,000/= being the accommodation costs directly to the 2nd Applicant.

(c) I direct that the citation be set down for hearing to expedite the administration of the estate of the deceased.

(d) The parties shall bear their own costs.

Dated, Signed and Delivered at Nakuru this 23rd day of November, 2015

A.K. NDUNG'U

JUDGE