



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1706 OF 2012

IN THE MATTER OF THE ESTATE OF JOSEPH GITITU MUKUI (DECEASED)

SCHOLASTICA WAHITO WANJEHIA..... APPLICANT

VERSUS

DAMARIS WANGUI GITITU.....1ST RESPONDENT

SILVIAH WANJIRU GITITU.....2ND RESPONDENT

BENARD MUKUI GITITU.....3RD RESPONDENT

RULING

1. The deceased Joseph Gititu Mukui died intestate on 11th April 2012 at M.P. Shah Hospital in Nairobi. On 31st July 2012 the respondents petitioned this court for grant of letters of administration intestate. They stated that they were the widow, daughter and son, respectively, of the deceased. A grant was issued to them on 16th September 2014, and on 10th November 2015 it was confirmed and a certificate issued to them. They were ordered to be registered to hold the estate of the deceased in trust for all the beneficiaries. The other beneficiaries of the estate were Dorcas Wanjiku Gititu, MWG (minor) and BMG (minor). The estate comprised nine (9) parcels of land, monies in five (5) bank accounts and 2200 shares with Safaricom. The estate was estimated to value Kshs.40 million.

2. On 23rd November 2015 the applicant/objector filed the present summons to have the grant revoked and or annulled. Her case was that she was the second wife of the deceased with whom she had a daughter and yet she had been excluded from the petition, grant and distribution of the estate. She stated that she married the deceased under Kikuyu customary law in 1997, and that this was known to the 1st respondent. She found the deceased without any property, she stated, and that everything that he subsequently acquired was with her assistance. In the summons, the applicant sought that, among other things, the court orders that the distribution in the certificate of confirmation should not be implemented. In other words, the estate be preserved until the issue whether or not to revoke and/or annul the grant be heard and determined.

3. The 1st respondent filed a replying affidavit in which she denied that the applicant was a widow of the deceased with whom she had a child, or at all. She stated that following the death of the deceased the

applicant sued her in **Thika CMCC No. 269 of 2012** in which she sought to be declared to be a widow of the deceased who should participate in the burial. She also sought that her child be declared to be the child of the deceased. According to the 1st respondent, the court dismissed her case. The applicant had obtained a birth certificate for her daughter. The 1st respondent complained to the police alleging fraud in the acquisition of the certificate. The application was successfully prosecuted in relation to the same, she said. Therefore, according to her, the applicant and her daughter were not entitled to participate in these proceedings as they were not beneficiaries of the estate of the deceased.

4. The parties were represented by Mr Orege (for the applicants) and Mr. Mwangi (for the respondents). On 9th December 2015 it was agreed that they address the court through written submissions on the issue whether or not the estate should be preserved pending the hearing and determination of the rest of the application. The submissions were filed, hence this ruling.

5. I have looked at the judgment ('SW 4') in **CMCC 269 of 2012** case. It is clear from it that the deceased was married to the 1st respondent under the **African Christian Marriage and Divorce Act (Cap 151)**, and that marriage was solemnised in 1999. This was a monogamous marriage. The Court observed that the deceased had no capacity to contract another marriage. The applicant's case was that she had married the deceased in 1997 under customary law, that dowry had been paid and she called witnesses to the ceremony. The court found that her evidence could only be useful in a subsequent succession case. There was, therefore, no determination whether or not the applicant was a widow of the deceased. It is clear that under **section 3(5) of the Law of Succession Act (Cap 160):-**

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

It follows that the issue whether or not the applicant was a wife of the deceased for the purposes of the **Law of Succession Act** is still live as it has not been determined. That proof will be in these proceedings.

6. Secondly, after the respondents filed this petition, and before the same was gazetted or grant issued, the 1st respondent did on 28th November 2012 apply for a special limited grant to allow her access the accounts of the deceased to withdraw Kshs.153,250/= monthly to cater for her school fees and that of her children and other necessary expenses. The grant was issued on the same date. On 5th December 2012 the applicant filed an application seeking to prohibit the respondents from dealing in the property of the estate. She asked that an independent agent be appointed to manage the estate. On 21st June 2013 she filed another application against the respondents seeking school fees and upkeep for her daughter. On 9th October 2013 she petitioned for letters of administration *ad colligenda bona* for the purposes of collecting and getting in and receiving the estate of the deceased. In each case she was represented.

7. On 21st June 2013 the Court on its own motion revoked the limited grant issued to the 1st respondent on the basis that it was issued in error and that there were pending objection proceedings. The Court asked that the Deputy Registrar gazettes the petition

“so that the pending issues relating to the estate may be determined by the court. ”

On 22nd September 2014 the grant was issued to the respondents and the same was confirmed on 10th November 2015. In each case, there was no reference to the applicant. The respondents say that there was no objection filed in response to the gazette and therefore nothing stood in the way of the grant and confirmation. The applicant states that she was always on record with her applications and/or objections, and therefore she ought to have been served at every stage and heard before any grant was issued or confirmed.

8. Now that the respondents have a confirmed grant they are entitled to distribute the estate. The

applicant is laying a claim to the estate. If the estate is distributed, the application for revocation may be rendered nugatory. The fear by the applicant is a legitimate one. This is a court of equity. It should intervene so that the interests of the applicant are not frustrated. The preservation of the estate shall give the respondents the opportunity to show, when the application for revocation comes for hearing, that they have a valid and legitimate grant.

9. In the circumstances, I allow the application and order the preservation of the estate and all its properties to allow for the main application to be heard and determined. So that no party goes to sleep, I ask that the parties come to court on **18th January 2016** to take directions on the hearing of the application. Costs shall abide the main application.

DATED and SIGNED at NAIROBI this 15th December 2015.

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 16th day of December 2015

M. MUIGAI

JUDGE