



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION NO. 56 OF 1996

IN THE MATTER OF THE ESTATE OF DANSON AVINEL MUINDE alias
DANIEL MUINDE KYALO..... (DECEASED)
AND
SAMUEL MUINDE SOO.....PETITIONER
VERSUS
PRISCILLA MUTHONI NJOROGI)
CAROLYNE NGINA MUINDE).....OBJECTORS

R U L I N G

- 1). The application dated 25-7-2005 seeks orders that the letters of administration made on 29-5-1996 to Samuel Soo Muinde be revoked (or annulled) on grounds that:
 - 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 an essential point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.**
- 2). The objectors, Priscilla Muthoni Njoroge and Carolyne Ngina Muinde claim to be the widow and daughter of the deceased respectively. According to the affidavit in support, the deceased prior to marrying the 1st objector had another wife who he had divorced. That the deceased had two children with the former wife. The names of the children are given as Rose Mwendu Muinde and Jackline Mueni Muinde. That after the deceased married the 1st objector they lived together for many years and were blessed with two children. That if the 2nd objector and one Holiness Kamene Kyalo.
- 3). It is further stated that although the respondent knew that the 1st objector was the widow to the deceased, he maliciously with the intention of disinheriting the 1st objector and her children concealed material facts from the court. That the grant was obtained without the consent of all the beneficiaries who were above 18 years of age. That the grant was made to one person despite the fact that some of the

beneficiaries were minors. It is alleged that the respondent at the time of obtaining the grant was supporting the 1st objector and her children financially but stopped providing for them in 1999 and also stopped paying school fees for the children. That the respondent turned violent and took the 1st objector's belongings to her father's home in Mua Hills.

4). The application is opposed. According to the replying affidavit the deceased at the time of death left no surviving spouse. That although the deceased had cohabited with the 1st objector, the union was never legalised and the 2nd objector as a child born out of that union is illegitimate. That the deceased had two children whose mother he had divorced. That at the time of his death the deceased had terminated the cohabitation with the 1st objector. That after the death of the deceased the 1st objector went to the home of the deceased's father claiming to have cohabited with the deceased and born two children. That out of sympathy and on humanitarian grounds the respondent started to financially support the two children and their mother but stopped in the year 1999 due to lack of appreciation. According to the respondent he could not have included the 1st objector and her children as beneficiaries as they were not recognised by the law as the legal wife and children of the deceased.

5). The respondent as the administrator herein filed HCCC Machakos No. 54 of 2000 against the 1st objector accusing her of trespassing on the land parcel No. 308 Iveti Adjudication Scheme. The respondent sought orders of eviction to restrain the 1st objector from entering or remaining in wrongful occupation of the said land. On 17-5-2000 the said civil suit was consolidated with this succession cause.

6). The objector proceeded by way of *viva voce* evidence. The 1st objector, Priscilla Muthoni testified as the first witness (PW1). Her evidence essentially reiterates the contents of her affidavit. Her evidence is that she lived with the deceased from the year 1979 and 1984 when she went to live with her parents with the consent of the deceased. That by the time the deceased died in the year 1992 she was still living with her parents but the 2nd objector (Carolyne) was living with her father the deceased.

7). The 1st objector further testified that she attended the deceased's funeral and stayed at his Shimba Hills home for about three months. That the brothers to the deceased among them the respondent later built for her a house at their Kaliluni home in Machakos and furnished it for her. The 1st objector continued living at the said family home as the deceased's widow with the respondent paying the school fees for her two children with the deceased. The 1st objector and her two children still live at the said Kaliluni home.

8). The 2nd objector testified (PW2). Her evidence is that she lived with her father the deceased prior to his death. That she was not notified when the court was petitioned for the grant of letters of administration intestate and expressed her surprise at having been omitted from the list of beneficiaries. According to the 2nd objector, some of her late father's properties have not been disclosed herein. The 2nd objector expressed her wish to administer the estate of the deceased.

9). PW3 Teresia Kavee Dedan the 1st objector's mother and PW4 Michael Mungai Mutunga the uncle testified on the customary marriage between the deceased and their daughter the 1st objector.

10). The administrator of the estate of the deceased Samuel Soo Muinde testified (DW1). His evidence essentially reiterates his affidavit evidence. His evidence is that the 1st objector was a househelp who worked for the deceased's family. He was not sure if the 2nd objector was a daughter to the deceased but that she was maintained by the deceased. His further evidence is that the 1st objector and her two children lived at his farm house where the 1st objector was assisted in taking care of the 2nd objector and her little sister. The administrator who lives in the U.S.A stated that he visits Kenya and used to write to the objector.

11). DW2 Elizabeth Kavinya Nyaunyo gave evidence that she got married to the deceased and lived with him in Nairobi between 1971 to 1981. That the deceased moved on transfer to Mombasa with their children and the house help (1st objector). That DW2 could not get a transfer from her employer and used to visit the family in Mombasa over the weekends. DW2's evidence is that the 1st objector was not married to her co-wife and that the 1st objector left their home in the year 1984 leaving her daughter

(2nd objector) behind. They employed another house help who continued taking care of the children. DW2 was later transferred to New York where she moved with her two daughters and left the deceased with the 2nd objector.

12). DW3 Philip Ndunda Muinde who is the elder brother to the deceased gave evidence that the deceased had not married the 1st objector. His evidence is that no “NTHEO” (three goats) were taken to the family of the 1st objector in accordance with Kamba customary law. He knew the 1st objector as an employee of the deceased.

13). I have considered the evidence adduced herein and the written submissions filed by the counsels for their respective clients.

14). It is not in dispute that the 1st objector was initially employed as a house help in the deceased's home. It was the 1st objector's evidence during cross examination that she was employed in the home of the deceased as a house help. The 1st objector also conceded that DW2 Elizabeth Munyiva was a wife to the deceased and they had two children. What does not clearly come out from the evidence of the 1st objector is at what stage the employer/employee relationship turned into a marriage. Her evidence however that is a customary marriage was conducted between her and the deceased in the year 1992.

15). The 1st objector's evidence on the marriage is that the deceased gave dowry to her parents as a sign that he had married her at a ceremony where they were treated to a feast by her parents and attended by her brothers, some relatives and a neighbor. She further testified that the deceased and his parents were also present. During cross examination, the 1st objector was categorical that there was no exchange of any goats or cows. The evidence of the objector's mother (PW3) and the uncle PW4 confirms that the ceremony which they described as a dowry payment took place when the deceased provided the money for the purchase of three the goats and paid the expenses for the ceremony. Bedsheets, a sweater and a blanket were given to the family of the 1st objector. The family of the 1st objector prepared traditional liquor for their visitors.

16). Did he aforesated ceremony amount to payment of dowry to signify a marriage between the deceased and the 1st objector? The ceremony was carried out under the Kamba customary law according to the 1st objector's mother (PW3) while according to the uncle (PW4) it was conducted under Kamba traditions as they live in Ukambani. The issue of marriage is highly contested. DW3 the brother to the deceased who qualifies to be described as a Kamba elder had the view that the ceremony did not amount to a marriage and that being the elder brother to the deceased, he would have known about it. The objector's side did not call any expert on Kamba customary marriages to shed light on whether the ceremony amounted to a marriage. He who alleges must prove.

17). The 1st objector's evidence establishes that she went back to her father in the year 1984 and did not resume cohabitation with the deceased upto the time of his death in the year 1992. In the 1st objector's own words, she left the deceased in the year 1984 because the deceased had another wife who had sued her asking for her children. Although the 1st objector's claim is that she became married to the deceased under customary law, during cross examination she stated that she did not know the details of the nature of the marriage between the deceased and the woman she described as the separated mother of the two daughters of the deceased.

18). With the foregoing analysis of the evidence on record, I find that the 1st objector was not a wife to the deceased. The objector's evidence has failed to prove that the alleged customary marriage met the requirement of Akamba customary law. The 1st objector's own evidence further establishes that the cohabitation between her and the deceased had come to an end. It is also clear from the evidence of the 1st objector and her mother that she was expectant when she returned to her father's home. It is also clear from the evidence of the administrator (PW1) and PW2 that the 2nd objector lived with the deceased. The evidence of PW1 and that of the 1st and 2nd objector clearly reflects that the two children of the objector that is Carolyne and Kamene live with the 1st objector at the deceased's ancestral home at Kaliluni in Machakos. It is also not in dispute that they have a home there which was established by the family of the deceased after the deceased passed away. To my mind, this shows that the two children (Carolyne and

Kamene) had become accepted as the children of the deceased by his family. The family of the deceased cannot therefore turn around and purport to evict the said children or their mother from the said home. The two children are beneficiaries in the state of the deceased and ought to have been disclosed the court when the grant was made.

19). The two aforesaid children were minors at the time the grant was made. Section 58 of the Law of Succession Act was therefore not complied with. Section 58 (1) (a) provides as follows:

“(1) Where a continuing trust arises:-

a. No grant of letters of administration in respect of an intestate estate shall be made to one person

0. With the fore going, I find merit in the application and I allow the same. Direction be taken for a fresh grant to issue so that the estate of the deceased can be distributed afresh. Cost in the cause.

Dated, signed and delivered at Machakos this 9th day of December, 2015.

B. THURANIRA JADEN

JADEN