



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO. 1687 OF 2008

IN THE MATTER OF THE ESTATE OF HELLEN BWOSI – (DECEASED)

RULING

1. Hellen Bwosi, the subject of these proceedings, died on 1<sup>st</sup> May 2008 at Nairobi.
2. Representation to her estate was sought by Harry Kihima Bwosi and Bradley Ngedi on 18<sup>th</sup> July 2008. The petitioners described themselves as widower and brother, respectively, of the deceased. She was said to have been survived by the two petitioners and three children, all minors. She died possessed of shares in several companies, a motor vehicle KAL 512A, house number 252 Komarock Estate Phase II and money in an account with the Barclays Bank of Kenya Ltd.
3. Representation was made to the two petitioners on 14<sup>th</sup> November 2008 and a grant of letters of administration intestate in that behalf was issued on the same day.
4. The said grant was confirmed on 16<sup>th</sup> March 2009. The assets making up estate of the deceased were ordered to be registered in the names of the administrators to be held in trust for the minor children of the deceased, namely: June Isigi Bwosi, Moses Isindu Bwosi and Emanuel Agesa. A certificate of confirmation of grant to that effect was issued on the same day.
5. On 15<sup>th</sup> May 2009, a Summons for Revocation of Grant of even date was filed in the cause by Doreen Isindu, on her own behalf and that of her grandmother Ezibe Anguzuzu Isindu. She asserts that she is a daughter of the deceased, yet she and her grandmother were not involved in the process of obtaining the grant. She complains that the second administrator, Bradley Ngedi, was not a brother of the deceased as alleged in the petition.
6. When the application was served, the first respondent, Harry Kihima Bwosi, swore an affidavit on 28<sup>th</sup> May 2009 in reply. In principle, he admits that the applicant is a daughter of the deceased from a previous relationship, although he avers that she was never disclosed to him by the deceased. He also acknowledges that Ezibe Anguzuzu was the mother of the deceased. He avers however that the two were not all at dependent on the deceased before her demise. Indeed, he argues that the applicant was dependent on her own biological father or at any rate she ought to in accordance with Maragoli customary law.
7. He has attached documents to his affidavit as evidence of his marriage to the deceased. There are three affidavits or statutory declarations where it is averred that the first respondent and deceased married under Luhya customary law on 10<sup>th</sup> July 1993. There is also a letter from the registration of persons department confirming that the deceased's application to change her name to adopt that of the first respondent as a surname had been approved. There is a letter from the chief of Central Maragoli confirming the marriage. There are also certificates of birth of Moses Sammy Isindu and Emmanuel

Agesa confirming them to be the children of the deceased with the first respondent.

8. To this the applicant responded through her affidavit sworn on 26<sup>th</sup> June 2009. She confirms that the deceased and the first administrator lived together between 1983 until the deceased's demise. She also confirms that the first administrator was the father of June, Moses and Samuel, and that he lived with these children and the deceased at Komarock Estate. She asserts that she also lived with them in the same house between 1982 and 2008 when she moved out of the house. She asserts that she was dependent on her mother, the deceased.

9. She has attached to her affidavit two documents, from the Nairobi Baptist Centre, where she undertook a computerized secretarial course, which indicates that it was her mother, Hellen Bwosi, who was responsible for her college fees.

10. Both parties have filed detailed written submissions. The first administrator's submissions are dated 8<sup>th</sup> November 2011 and were filed in court on 9<sup>th</sup> November 2011. The submissions by the applicant are dated 6<sup>th</sup> December 2011 and were filed in court on 7<sup>th</sup> December 2011.

11. From the material before me, it is common ground that the first administrator is acknowledged by the applicant as having been a spouse of the deceased. Indeed, her complaint relates to Bradley Ngedi's involvement and not that of the first administrator. It is also common ground that the applicant is the biological daughter of the deceased. The first administrator's concern is that she was not dependent on the deceased and therefore she is not entitled to a share in the estate. In his view, she has no interest in her mother's estate, instead she should look up to her biological father, who has not been named in the proceedings.

12. What I have to decide is whether the applicant is heir to the estate of her deceased mother. I should also determine whether she should have been disclosed as a survivor of the deceased in the petition filed herein on 18<sup>th</sup> July 2008.

13. The deceased herein died intestate in 2008. Her estate therefore fell for distribution in terms of the provisions of the Law of Succession Act which came into force in 1981. It would appear that she hailed from Vihiga of Kakamega County. Her intestate estate is therefore for distribution in accordance with Part V of the Law of Succession Act as the residents of the Kakamega County are not affected by the provisions in *Sections 32 and 33* of the Act.

14. She was survived by a spouse and children, and therefore *Section 35* of the Law of Succession Act applies. According to *Section 35* of the Act the persons entitled to a share in her estate include her surviving spouse and her children. Her children here refers to all her biological children whether born within or outside wedlock and any child that she might have adopted. Part V of the Act does not mention dependants and therefore the surviving spouse and surviving children are entitled to a share in the estate regardless of whether they were dependent on the deceased or not during her lifetime.

15. The applicant is a biological daughter of the deceased. She is therefore a surviving child of the deceased within the meaning of *Section 35* of the Act. She is therefore entitled to a share in the estate.

12. On whether the applicant's name ought to have been disclosed as a surviving child of the deceased in the petitioner, *Section 51(2)* of the Act is relevant. It sets out the information that must be disclosed in the application. *Section 51(2) (g)* requires that in case of total or partial intestacy the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased and of the children of any child of the deceased ought to be disclosed. Quite clearly this provision was contravened as the applicant as a surviving child of the deceased was not disclosed neither was her grandmother, the surviving parent of the deceased.

13. *Section 51* of the Act ought to be read together with Rule 7 of the Probate and Administration Rules, which also deals with applications for grant. Rule 7 (1) (e) (i) of the Probate and Administration Rules is

in similar terms with *Section 51(2) (g)* of the Act.

14. To that extent therefore the procedure for obtaining the grant was defective and there was concealment of important matter from the court.

15. There is also the matter of Bradley Ngedi. He is listed in the petition as a brother of the deceased. From the material before me it is clear that the said Bradley Ngedi was not a brother of the deceased, but a brother in law. His name ought not have been listed in the column for survivors of the deceased.

16. A case has been made out for the revocation of the grant made on 14<sup>th</sup> November 2008 to Harry Kihima Bwosi and Bradley Ngedi for the reasons that I have stated above.

17. In view of the above, I will make the following final orders:-

(1) The grant made herein on 14<sup>th</sup> November 2008 is hereby revoked.

(2) Doreen Isindu shall be entered into the list of the surviving children of the deceased and apportioned shares in the estate of the deceased.

(3) Harry Kihima Bwosi and Doreen Isindu are hereby appointed administrators of the estate of the said Hellen Bwosi and a grant of letters of administration intestate shall issue to them accordingly.

4. The confirmation orders made on 24<sup>th</sup> February 2009 and 16<sup>th</sup> March 2009 are hereby reviewed so as to include Doreen Isindu as a beneficiary equally with June Isigi Bwosi, Moses Isindu Bwosi and Emmanuel Agesa.

5. The certificate of confirmation dated 16<sup>th</sup> March 2009 shall be amended

(a) to substitute the name of Bradley Ngedi as a trustee with that of Doreen Isindu.

(b) to delete the word “minor” in the column for shares of heirs.

(c) to add the name of Doreen Isindu in the column of shares of the heirs.

(6) The estate shall remain in trust until all the children attain the age of eighteen, with liberty to apply for earlier distribution.

(7) The costs of the application shall be born by the estate.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> DAY OF January, 2014.**

**W. MUSYOKA**

**JUDGE**