



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO.2663 OF 2009**

**IN THE MATTER OF THE ESTATE OF Z S A (DECEASED)**

**C N G.....APPLICANT**

***VERSUS***

**A M K.....1<sup>ST</sup> RESPONDENT**

**P K M.....2<sup>ND</sup>RESPONDENT**

**J U D G M E N T**

Z S A, the deceased to whose estate these proceedings relate died on 24<sup>th</sup> June 2008. On 18<sup>th</sup> December 2009, A M K and P K M (the Respondents) petitioned this court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. The dependants of the deceased were identified in the petition as A M K, widow and M N A, the minor daughter of the deceased. The Respondents were issued with a grant of letters of administration intestate on 2<sup>nd</sup> March 2010. The said grant was confirmed on 1<sup>st</sup> November 2010. A M K was the sole beneficiary of the properties that comprise the estate of the deceased.

Meanwhile, C N G (the Applicant) also petitioned the court at Nakuru (*i.e.* **Nakuru HC Succession Cause No.478 of 2009**) to be issued with a grant of letters of administration in respect of the same estate of the deceased. In the petition, the Applicant described herself as the widow of the deceased. She also named E M A as a dependant of the deceased by virtue of being the daughter of the deceased. A grant of letters of administration intestate was issued to the Applicant by the said court on 14<sup>th</sup> December 2009. The grant was confirmed to the Applicant on 20<sup>th</sup> July 2010. In the certificate of confirmation of grant, the Applicant was sole beneficiary of all the properties belonging to the estate of the deceased.

Matters came to head when the Applicant and the Respondents discovered that two succession proceedings in respect of the estate of the deceased had been filed in different courts. The first salvo was fired by the 1<sup>st</sup> Respondent, A M K. She filed summons in the Nakuru succession cause pursuant to the provisions of **Section 76** of the **Law of Succession Act**. She sought to have the grant of letters of administration intestate issued to the Applicant revoked on the grounds that the Applicant had failed to disclose something that was material to the court. The material disclosure that the Applicant is alleged to have failed to make was that the 1<sup>st</sup> Respondent was also a widow of the deceased by virtue of the fact that she (the 1<sup>st</sup> Respondent) was married to the deceased under Kikuyu Customary Law. The Applicant filed a response to the said application denying the allegation made by the 1<sup>st</sup> Respondent to the effect that she was a wife of the deceased. On learning that the Respondents had obtained a grant of letters of administration intestate in respect of the estate of the deceased in Nairobi, the Applicant also filed similar

summons to the one filed by the 1<sup>st</sup> Respondent seeking to have the grant issued to the Respondents revoked on the grounds that the Respondents had obtained the said grants by fraudulently making false statements and concealing from the court that there were dependants of the deceased and further that the 1<sup>st</sup> Respondent had falsely declared that she was a wife of the deceased. The 1<sup>st</sup> Respondent filed an affidavit in opposition to the application.

When the matter was first mentioned before this court on 30<sup>th</sup> March 2011, this court directed the two succession files to be consolidated. The succession cause filed in Nakuru was transferred to this court for the purpose of consolidation. The court further directed that all the issues in dispute will be heard and determined by this court. The parties to the case agreed that the issues in dispute raised by the two applications for revocation of grant be heard at the same time by counsel for the parties making oral submission. The submission was made on the basis of the various affidavits that the parties had filed in the two succession causes.

Mr. Amol for the Respondents submitted that the Applicant had obtained a grant of letters of administration intestate in the Nakuru case by fraud. He explained that the Applicant annexed consents in the application purportedly made by S W K and S A. Unfortunately, the two would not possibly have given their consents because both were deceased at the time the petition was lodged. He submitted that S A died in 2004 and therefore he could not have been in a position to execute the consent when the petition was lodged by the Applicant in 2009. He acknowledged the fact that the deceased was married to the Applicant. He did not dispute the fact that the deceased was married to the Applicant under the **Marriage Act** at the District Commissioner's Office at Thika on 19<sup>th</sup> November 2004. However, it was the Respondents' case that at the time of the deceased's death, the deceased and the Applicant had separated. As proof of this, learned counsel relied on a children's case which was filed by the Applicant against the deceased in **Nairobi Children's Case No.554 of 2007**. In that case, the Applicant had sued the deceased to provide maintenance for her daughter, E M. The deceased filed a defence in which he disowned the Applicant as his wife. He also denied that he had sired the said daughter with the Applicant. A paternity issue arose in the case. The Children's Court ordered a DNA test to be carried out. The test established that indeed E M was not the biological daughter of the deceased. He further submitted that after the deceased had separated from the Applicant, he commenced cohabitation with the 1<sup>st</sup> Respondent. This cohabitation started from December 2005. The deceased lived with the 1<sup>st</sup> Respondent until his death. Learned counsel conceded that M N, the daughter of the 1<sup>st</sup> Respondent was not the biological daughter of the deceased. However, it was his submission that the deceased had assumed parental responsibility in respect of the said M N so that at the time of his death, he was maintaining the said M N as his daughter. He urged the court to find that the deceased had married the 1<sup>st</sup> Respondent under Kikuyu Customary Law and further that she, together with her daughter, should be considered to be the dependants of the deceased.

On her part, Miss Makori for the Applicant submitted that the 1<sup>st</sup> Respondent was in effect an impostor. It was the Applicant's case that the deceased lacked capacity at the time to enter into any marriage with another woman since he was married to the Applicant under the **Marriage Act**. She submitted that the 1<sup>st</sup> Respondent had not placed any evidence on record that she got married to the deceased under Kikuyu Customary Law. She further explained that the court cannot make a finding that the deceased got married to the 1<sup>st</sup> Respondent by virtue of long cohabitation because the deceased, if at all, did not live with the 1<sup>st</sup> Respondent for a sufficiently long period to establish a reputation in society as husband and wife. She was emphatic that the 1<sup>st</sup> Respondent had not placed any material before the court to enable this court reach the determination that she was married to the deceased at the time of his death. As regard the Children's Court case, learned counsel submitted that at the time of her marriage to the deceased, the deceased accepted her child as his daughter and therefore the DNA test result should not distract the court from making a finding that the deceased had indeed stayed and maintained the said daughter and therefore she qualifies to be considered a dependant of the deceased. She further submitted that the 1<sup>st</sup> Respondent was not blessed with any children with the deceased during her alleged cohabitation. Because of this, she submitted that the deceased did not cohabit with the 1<sup>st</sup> Applicant for sufficiently long period of time to establish a reputation as husband and wife. She urged this court to find that the 1<sup>st</sup> Respondent

and her daughter are not dependants of the deceased.

This court has carefully considered the facts of this case. First things first. There is no dispute that C N G (Applicant) was the wife of the deceased. She is therefore a dependant of the deceased by virtue of **Section 29(a)** of the **Law of Succession Act**. She got married to the deceased on 19<sup>th</sup> November 2004 at the District Commissioner's Office in Thika. The marriage was celebrated under the **Marriage Act**. In the certificate of marriage, it was acknowledged that the deceased and the Applicant were previously married under Customary Law. They were thus converting their customary marriage into a statutory one. It was established that the deceased did not sire E M, the daughter of the Applicant. She was born on 20<sup>th</sup> June 1990. However, it was clear from affidavit evidence that when the deceased married the Applicant, he assumed parental responsibility over the said child. The Children's Court did not have the opportunity to make finding in respect of the question whether by virtue of the fact that the deceased married the Applicant, and the fact that the Applicant lived with the deceased together with her daughter, whether the deceased had thus assumed parental responsibility.

It was clear from the pleadings filed at the Children's Court that the deceased did not categorically state that he did not live with the said child while he was married to the Applicant. It is in that regard that this court holds that by virtue of the fact that the deceased married the Applicant, and also by virtue of the fact that he lived with the Applicant and the said child, he had assumed parental responsibility by operation of **Section 24(2)** of the **Children Act** which provides as follows:

*“Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.”*

“Parental responsibility” is defined in **Section 23(1)** of the **Children Act** to mean

*“all the duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.”*

**Section 23(2)** of the said **Act** specifies the duties to include maintaining the child. This court therefore holds that E M, the daughter of the Applicant is a dependant of the deceased under **Section 29(b)** of the **Law of Succession Act** because she was *“being maintained by the deceased immediately prior to his death.”*

As regards the 1<sup>st</sup> Respondent, she conceded that her daughter M N was not the biological daughter of the deceased. She stated that she got married to the deceased under Kikuyu Customary Law. She did not however adduce any evidence to support her claim that indeed such customary marriage did indeed take place. She further told the court that she started cohabiting with the deceased in December 2005 when the deceased separated from the Applicant. The Applicant disputes this fact. However, having evaluated the facts of this case, it was clear to the court that indeed the Applicant and the deceased marital relationship became strained around that period. That is the reason why the Applicant filed the case for maintenance of her daughter at the Children's Court in November 2007. It was clear to the court that at the time the Applicant filed that case at the Children's Court, she was not living with the deceased.

What is interesting in this case is that the 1<sup>st</sup> Respondent has not produced any document to support her claim that she cohabited with the deceased. However, the Applicant did not adduce any cogent evidence to displace the assertion by the 1<sup>st</sup> Respondent that she had cohabited with the deceased until the time of his death. This court therefore finds, on a balance of probabilities, that the 1<sup>st</sup> Respondent established her case that she had cohabited with the deceased for about three (3) years prior to her death. Although she did not present any proof to the court that she got married under Kikuyu Customary Law, this court holds that the 1<sup>st</sup> Respondent is a wife of the deceased by virtue of long cohabitation that established their reputation as husband and wife. In **M W G –vs- E K [2010] eKLR**, the Court of Appeal held that the existence of a marriage was a question of fact which could only be determined on the basis of evidence

placed before the court. Bosire JA held at page 2 as follows:

***“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.”***

The above position is the correct position where a party wants the court to presume the existence of a marriage where it has been established one of the parties lacked capacity to enter into such marriage where it is established that such party was married under statute.

However, that position changes when the man dies. **Section 3(5)** of the **Law of Succession Act** states as follows:

***“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 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.”***

The law is stranger than fiction: that a man married under statute which is monogamous may cohabit with another woman and even sire children with her, and during his lifetime, such woman would not be legally recognized as his wife. This is because the law states that he lacks legal capacity to enter into another marriage. However, the situation radically changes when the man dies. The law now states that such woman is recognized as a wife of the deceased and her children are also recognized as dependants of the deceased under the **Law of Succession Act**.

In the present case, it was clear that the 1<sup>st</sup> Respondent established to the required standard of proof on a balance of probabilities that she cohabited with the deceased for a period of three (3) years before his death. She is therefore a wife of the deceased by virtue of **Section 3(5)** of the **Law of Succession Act**. She is therefore a dependant as provided under **Section 29(a)** of the **Law of Succession Act**. Her then minor daughter is a dependant of the deceased under **Section 29(b)** of the **Law of Succession Act** because she was maintained by the deceased by virtue of living together with her mother during the period of cohabitation. The deceased had therefore assumed parental responsibility under **Section 24(2)** of the **Children Act**.

In the premises therefore, this court holds that the Applicant and the 1<sup>st</sup> Respondent are wives of the deceased for the purposes of this succession. Their children are dependants of the deceased. The grants of letters of administration intestate that was issued to them in the two (2) succession causes are hereby revoked. The certificates of confirmation of grant issued to them are similarly revoked. A new grant shall be issued to C N G and A M K. C N G is hereby ordered to file summons for confirmation of grant within thirty (30) days of the date of this Judgment. She shall make proposal on how the estate of the deceased should be distributed to the beneficiaries. She shall serve the summons upon A M K. A M K shall be at liberty to file an affidavit of protest if she shall not be satisfied with the proposal on distribution. Thereafter, either party shall be at liberty to seek further directions from this court. As is usual in such cases, there shall be no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL, 2014**

**L. KIMARU**

**JUDGE**

