



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 206 OF 2012.**

**IN THE MATTER OF THE ESTATE OF JOYCE GATWIRI M'IKUNYUA.... DECEASED**

**JAPHET KITHINJI MUGUNA .....PETITIONER**

**VERSUS**

**JULIA KANANA MWITI.....1<sup>ST</sup> APPLICANT**

**PHINEAS MURIUNGI.....2<sup>ND</sup> APPLICANT**

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

The applicants JULIA KANANA MWITI, the 1<sup>st</sup> applicant and PHINEAS MURIUNGI, the 2<sup>nd</sup> applicant through Chamber summons brought under Section 76 of the Law of Succession Act and Rule 17, 44 and 73 of the Probate and Administration Rules sought that temporary grant of letters of administration made to the petitioner be annulled and/or revoked and they be granted leave to file objection proceedings and cross petition out of time. The applicant further sought for an order closing all the bank accounts of the deceased listed in paragraph 6 of Form P&A 5 until the determination of this cause. The applicants application is based on the grounds on the face of the application namely that they are dependants of the deceased who was their aunt as she had infact adopted them since she had no children of her own. That she used to educate and maintain them. That the deceased married the petitioner in her late age and did not sire any children. That the succession cause was filed secretly and applicants came to know of it lately from family relatives.

The 2<sup>nd</sup> applicant swore an affidavit in support dated 10<sup>th</sup> November, 2012 averring that their names were included in the funeral programme as amongst the children of the deceased numbering seven. The applicant reiterated the ground on the face of the application in support of their application.

The applicants' application is opposed. The petitioner filed a Replying Affidavit dated 2<sup>nd</sup> April, 2013 in which the petitioner deponed that the deceased was his wife after the marriage on 16<sup>th</sup> December, 2005 at Katheri Methodist Church. That before the said marriage the two had cohabited as husband and wife at their matrimonial homes at Katheri. That before their marriage the deceased had acquired L.R. Parcel No.4805 Athinga/Athanja Adjudication Section and Parcel No.3797 Kianjai/Adjudication Section; which lands were developed by the couple during their marriage, which lands are now subject of disputes in Meru High Court in E&L Court No.156 of 2012 and Tigania PMCC 51 of 2012. That following the deceased demise she was interred on L.R. Abothuguchi/Katheri/527 registered in the name of the petitioner and being their matrimonial home. The petitioner has deponed that the deceased had no children and only assisted the applicants herein. He contends that the applicants have no colour of right

or interest in the deceased property. He contends that at no time did the deceased adopt the applicants as her children as the applicants grew under the protection and care of their parents who are still alive. He contends that the 1<sup>st</sup> applicant Julia Kanana Mwiti is married with her own children and resides at her matrimonial home at Kainginyo Meru County and that she is a teacher by profession. He contends that he last saw the 1<sup>st</sup> applicant during the funeral of the deceased.

As regards the 2<sup>nd</sup> applicant the petitioner contends that he grew under the care and protection of his parents and he gave his father's name as Ephantus Kimathi who is still alive and a retired Administrative Police Officer. He averred that the deceased assisted the 2<sup>nd</sup> applicant by paying school fees when his father was serving a prison sentence. He gave the 2<sup>nd</sup> applicant's mother as Salome Mwari who is still alive and residing at her matrimonial home. He further averred that the 2<sup>nd</sup> applicant is engaged in gainful employment in Mombasa County. The petitioner similarly deponed that he saw the 2<sup>nd</sup> applicant at the deceased funeral. He denied having filed the petition secretly relying on HCCC E&L C. NO. 156 of 2013 as a caveat was filed in court on 3<sup>rd</sup> May, 2012. He contended that the applicants were not dependants of the deceased but of their respective parents. He averred the applicants are not deceased children under the provision of the Constitution, Children Act, and the Law of Succession Act. He further deponed that the copy of Eulogy annexed in respect of funeral programme of the deceased should be dismissed as a mere piece of paper, tailored for the purpose of these proceedings. He further deponed that the grandfather of the applicants filed a "caveat" dated 3<sup>rd</sup> May, 2012 but has not filed any objection as indicated. The petitioner in his conclusion stated that the monies deposited in accounts in question comprises the joint savings between the deceased and the petitioner from the sales of their farm products.

On 5<sup>th</sup> June, 2013 following Counsel request the application was ordered to be determined by way of viva voce evidence. The applicants gave evidence through the 2<sup>nd</sup> applicant and called two witnesses. OW1 Phineas Muriungi testified that the deceased adopted him as her son under the Meru Customary Law. He stated his real mother's name is Salome Mwari Ikonyo sister to the deceased herein. That the deceased adopted him as she had no children of her own. That the deceased died on 7<sup>th</sup> May, 2011.

O.W.1 averred that he started staying with the deceased since he was 3 years old and that the deceased educated him upto college level and all the time he was staying with the deceased. He admitted the petitioner is husband to the deceased and that the two married in 2002. That their customary marriage was in 2001 and the petitioner paid the dowry to Gedion Ikonyo, the applicant's maternal grandfather. He testified that Julia Kanana, the 1<sup>st</sup> applicant is his cousin and both of them used to stay with the deceased and that the deceased had adopted her. That the deceased educated her and during her wedding the deceased gave her to her husband. He testified that the petitioner has his own five children. OW1 testified that he stayed with the deceased upto 2011 when he was kicked out of the home of the deceased by the petitioner. He averred he was adopted because his mother went back to school and that his grandfather gave him to the deceased because she was able to care for him and educate him. He went on to say if the deceased had not married, her estate would have gone to him and the 1<sup>st</sup> applicant. He referred to deceased Funeral programme which he stated was prepared by them and testified his name was among the alleged 7 children of the deceased. He gave the names of the seven purported children of the deceased who included the two applicants. He testified that he came to know of this succession cause through his grandfather and prayed that he be included amongst the heirs so that he can get a share from his mother's property.

During cross-examination OW1 testified that he grounded his affidavit on the grounds on the face of the application. He admitted he saw the replying affidavit dated 23<sup>rd</sup> April, 2013 and found no need to file a response to it. He admitted in his affidavit he referred to the deceased as his aunt and that he did not mention he lived with the deceased upto 2011. The 2<sup>nd</sup> applicant testified his father's name is Ephantus Kimathi and that he was at one time imprisoned. That he is well trained and he started working in 2009 and used to visit the deceased home regularly. That between 2007-2009 the deceased started having health problems and that the petitioner used to take care of her. He further testified that the deceased and the petitioner used to work on their land, used to bank their money in the bank. He confirmed that his

parents and that of his co-applicants are all alive. That the 1<sup>st</sup> applicant is married and employed. He testified that he was not aware of HC E&L NO.51 of 2012. He also confirmed that he has no document to confirm the deceased adopted him. The 2<sup>nd</sup> applicant testified that his father was not involved in his adoption but his mother, however, no documents were executed. He admitted that he does not know what was given during the alleged adoption ceremony and that he is not conversant with the Meru Customary Law as regards customary adoption. He further stated that the deceased never adopted children of the petitioner. OW2 Silas Kaburu relied on his statement dated 14<sup>th</sup> November, 2013 in which he had deponed that the 1<sup>st</sup> applicant was adopted in 1973 and the 2<sup>nd</sup> applicant in 1987 by the deceased as she was barren. That she educated the two to college level. He stated that was not strict adoption in the real sense because she was aunt to the applicants. He stated that the deceased was married to the petitioner in 2005. He concluded by averring that strict adoption proceedings were not followed since the deceased was adopting her sister's children. During cross-examination, OW2 testified that the deceased was his step sister and that in 1973 she adopted one Julia the applicant and in 1987 the 2<sup>nd</sup> applicant Phineas Muriungi because she was barren. That she educated the two upto college level. That she paid for initiation of the 2<sup>nd</sup> applicant. He testified that their adoption was not a strict adoption in the real sense because she was their aunt and they were being adopted from her family lineage. That when the 1<sup>st</sup> applicant was married the deceased took the skin of the ram; that had been given as part of the dowry according to Kimeru tradition as the mother of the 1<sup>st</sup> applicant. He testified the deceased adopted the two as she had no hope of getting married. He admitted strict adoption was not followed. During cross-examination OW2 testified that he referred to petitioner as Japhet Kithinji Mwiti by an error. He further testified under Meru Customary law it is not possible to adopt a child in absence of his/her parents. He went on to state that what is given by the adopter for the purposes of adoption varies from the nature of adoption to another; admitting that is so in adoption of a minor to that of an adult according to the Meru Customary Law. He testified in adoption of a child there is a ceremony in which a goat and drinks are offered whereas for an adult a goat is given and an oath taken.

OW2 testified that the 1<sup>st</sup> applicant was given to the deceased by Gedion and Mutwamwari whereas the 2<sup>nd</sup> applicant was given by Gideon and another. In re-examination OW2 testified that the applicants were not adopted in accordance with the Meru Customary Law.

The petitioner gave evidence as PW1 and called no witness. The petitioner's case is that the deceased was his wife. That they got married on 4/1/2002 under customary law and converted their marriage to statute marriage on 16<sup>th</sup> December, 2005 and continued living together as husband and wife till 8/5/2011 when the deceased passed on. He testified that he knew both applicants and denied that they were adopted by the deceased. He also averred that they never lived with the deceased. He testified that the applicants' parents are still alive and live together. That the 1<sup>st</sup> applicant is a teacher by profession. That the 1<sup>st</sup> applicant used to visit them and go away. PW1 in opposition to the applicants' case relied on his affidavit dated 22<sup>nd</sup> April, 2013 and annexed documents.

During cross-examination PW1 testified that the deceased did not have any child when he met her but she was educating the applicants by paying their school fees. That the deceased told him she was just assisting the two applicants and no one told him the two had been adopted as children of the deceased. He testified under Meru Customary Law before a child is adopted the clan of the child is involved and elders from both sides has to meet and that payment depends on sex of the child. He stated that the funeral programme was incorrect as it was prepared by the funeral committee without his involvement. He denied the contents of the programme as far as it alleged the deceased was survived by 7 children as she never had even a single child nor adopted any of his children. That after the close of the parties case both counsel agreed to put in written submissions and highlight on the same. The applicants submissions were filed on 15<sup>th</sup> January, 2014 by Mr. J. D. Mbaya learned Advocate whereas Mr. E. Ogoti, learned Counsel filed applicant's submission on 3<sup>rd</sup> March, 2014.

I have very carefully considered the pleadings, and affidavits by both parties and their Counsel written oral submissions in support and in opposition of the application.

The issue for determination in this application can be summarized as follows:-

***(i) Whether the applicants are dependants of the deceased by virtue of the adoption by the deceased under Meru Customary Law or otherwise?***

***(ii) Whether or not the applicants have satisfied the conditions for warranting revocation of temporary grant of letters of administration?***

***(iii) Whether the applicants are entitled to be granted leave to file objection to the proceedings and cross petition out of time?***

The applicants in their application, and oral evidence as well as their written and oral submissions averred that they were adopted by the deceased on various dates and occasions under Meru Customary Law. The 1<sup>st</sup> applicant did not give evidence in support of her claim whereas the 2<sup>nd</sup> applicant gave evidence and one witness called in support of the applicants claim. The 2<sup>nd</sup> applicant averment is that his adoption was through his grandfather one Gedion Ikonyo because his mother had gone back to school. The 2<sup>nd</sup> applicant did not file details as to how the 1<sup>st</sup> applicant was adopted by the deceased but simply stated that the 1<sup>st</sup> applicant was adopted as daughter of the deceased. The applicants claim to have been adopted because the deceased had no children of her own and she educated the two upto college level. The two purported to have been adopted under Meru Customary Law. OW2 step brother to the deceased in his witness statement under paragraph 8 stated that there was no strict adoption in the real sense of the applicants as they were being adopted by their aunt. He further stated strict adoptive procedures were not followed since the deceased was adopting her sister's children. He however in cross-examination admitted that the 1<sup>st</sup> applicant was adopted under Meru Customary Law to which he conceded it is not possible to adopt children whose parents are still alive and without their consent and in their presence. He further conceded that the children are given by elders in presence of clan from both sides of the parents and the adopter. That for a child goat and drinks must be given in a ceremony in which food is served.

The petitioner is in agreement with the applicants' witness as regards the ceremony that has to be performed in Meru Customary adoption to be valid. The petitioner denied there having been any Meru customary adoption of the applicants by the deceased. The petitioner's replying affidavit dated 23<sup>rd</sup> April, 2013 seriously challenged the applicants assertion of adoption and further stated that each of the applicants grew up under the protection and care of their parents who are still alive. The petitioner further stated that he did not file this petition secretly. The applicants did not bother to challenge the petitioner's affidavit by way of filing supplementary affidavit. I find that the petitioner's affidavit is uncontroverted. The applicants having embarked to prove that they were adopted under Meru Customary Law by the deceased they were duly bound to prove their allegation on balance of probability. I find that the applicants miserably failed to do so. They did not call their grandfather who is still alive to confirm adoption nor any elder or clan member nor did they adduce any evidence on any adoption ceremony. I do not agree with the applicants submissions that in adoption matters that close relatives need not observe the customary adoption if they are indeed interested in adopting a close relative. The deceased good gesture of helping a needy nephew or niece, by paying school fees and providing care should not be mistaken for adoption. I find no basis in the applicants assertion that since the deceased educated them and since she was barren she had adopted them. The two have failed to prove that there was any intention of the deceased to adopt them and that she did adopt them as her own children either under Meru Customary Law or any known law under the statute.

For the purposes of this part "dependant" means:-

***(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"***

The law of Succession Act defines child under Section 3(2) in reference to the Act to:-

***"(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.”***

Under the definition of the Child under the Law of Succession Act the applicants were not born to the deceased nor is there evidence that the deceased expressly recognized or in fact accepted the applicants as her own children nor was there any evidence that she had voluntarily assumed permanent responsibility over the two applicants. The deceased apart from educating the two applicants and providing for their care during their primary and college days has had nothing to do with the two after they got employment. The applicants were not even helping the deceased when she fell sick. She was left under the care and protection of the petitioner. There is no evidence of her calling the two applicants and even discussing with them about her future when she was sickly. No evidence was adduced to show the deceased expressly recognized or in fact accepted the two applicants as her own children. I find there is no basis of the applicants claim that they were deceased adopted children under Meru Customary Law nor is there independent evidence of them being deceased dependants.

On whether the applicants have satisfied the conditions for warranting the revocation of the grant the applicants relied on the provisions of **Section 76(a) and (d) of the Law of Succession Act** which provides:-

***“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion.***

***(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 a***

***fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due***

***notice and without reasonable cause either-***

The applicants did not call evidence in support of their allegation that the grant was filed secretly by the petitioner. The petitioner in his affidavit dated 23<sup>rd</sup> April, 2013 attached annexure “JMK2” PMCC 51 of 2012 filed on 4/4/2012 and letter dated 7<sup>th</sup> May, 2012 by applicants counsel to Deputy Registrar over this succession cause. Under **Rule 26(1),(2) of the Probate and Administration Rules** it is provided:-

***“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.***

***(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”***

The applicants being not children of the deceased or dependants do not fall under the category envisaged under Rule 26 of the Probate and Administration Rules; consequently they were not entitled to notice of the petition for the grant of letters of administration nor was their consent necessary and as such they cannot be heard to claim that the grant was filed without their notice or knowledge or secretly.

I therefore find and hold the applicants have failed to satisfy the conditions set out under Section 76 of the Law of Succession Act to warrant revocation of the grant.

The last issue for consideration is whether the applicants are entitled to file objection to the proceedings and cross-petition out of time. The petition for grant was gazetted on 8<sup>th</sup> June, 2012. **Section 67(1) of the Law of Succession Act** provides that an objection to application for grant of representation be filed within 30 days from the date of publication of the application. **Section 68 of the Law of Succession Act** provides that notice of objection to the application for a grant of representation shall be lodged with court in such a form as may be prescribed within the period specified by the notice. In the gazette notice issued in this cause dated 8<sup>th</sup> June, 2012, 30 days' notice was given for filing objection to issuing of the grant. The applicants filed their chamber summons on 19<sup>th</sup> November, 2012 after 5 months had lapsed and after grant had been issued to the petitioner on 29<sup>th</sup> October, 2012. The applicants did not file their objection within the prescribed period of 30 days after gazette. No explanation has been given in their application for the delay.

The court having considered the nature of the applicants claim and having found that they have no interest to the deceased estate and the applicants having failed to file an objection in time or giving reasonable cause for the delay I am satisfied the applicants are not entitled to be granted leave to file objection to the proceeding and cross-petition out of time.

The applicants in this succession cause filed chamber summons in support of their prayers, however without dwelling much on technicalities, I feel that I should point out that in Succession Causes matters there is no provision for filing chamber summons or notice of motion but summons supported by affidavits as provided in the Probate and Administration Rules.

In view of my findings in this cause I find no merits in the applicant's application dated 10<sup>th</sup> March, 2012 and the same is dismissed, but since the parties are related, I will order that each party bear its own costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 2<sup>ND</sup> DAY OF APRIL, 2014

**J. A. MAKAU**

**JUDGE**

**Delivered in open court in the presence of:**

Mr. E. Ogoti for the applicant

Mr. J. D. Mbaya for the petitioner.

**J. A. MAKAU**

**JUDGE**