



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 778 OF 2007
IN THE MATTER OF THE ESTATE OF J A O (DECEASED)

RULING

1. Before court for determination is a summons for annulment of grant dated 22nd May 2007 and taken out under sections 66 and 76 of the Law of Succession Act, Cap 160, and rules 44 and 73 of the Probate and Administration Rules. The applicant prays that the letters of administration granted to J W and S O on 25th September 2006 be annulled, that J W be ordered to produce an inventory of the administration of the estate of J A O since and after the grant of letters of administration was made on 25th September 2006, that the respondent pay punitive and/or exemplary costs, and that certain persons be summoned to appear in court.
2. The application is predicated on the grounds that the proceedings to obtain the grant were defective in substance as one of the alleged administrators, S O, died before the grant of letters of administration were issued, that the grant was obtained fraudulently by making of a false statement and gross misrepresentation of facts as the alleged administrator, J W, was not a spouse of the late J A O. It was a further ground that the grant was fraudulently obtained by concealment from the court of information material to the case, among others.
3. The respondents have opposed the application. The 3rd respondent, J W, swore a replying affidavit on 31st January 2008. It is averred that the respondent and the deceased lived together as husband and wife until his death and that prior to his death the deceased had expressly indicated in his official documents that the respondent was truly married to him. It is further averred that the party had one child, namely S O A, now aged two years. It is further contended that the proceedings leading to the issuance of the grant of letters of administration were properly and diligently done.
4. The application was prosecuted by way of written submissions. It was submitted on behalf of the applicant that J W and A W were not wives of the deceased, J A O, under any recognized system of law and that they were mere imposters aiming to benefit from the deceased's estate. It was further submitted that the affidavit sworn by J W on 31st January 2008 consists of mere falsehoods, and that the applicant, and other any family members were not notified and or involved in the purported marriage. It is further the Applicant's submission that the claim that the deceased was accompanied by one of the uncles, S O representative of the deceased family is not true because the said S O is now deceased hence such an averment is a mere afterthought. It is their submission that it is highly suspicious that S O A was the son of the deceased because the documents attached are not dated nor signed, and that the attached certificate of birth of S O A was issued on 19th June 2006, less than a month after the death of the deceased, a clear indication that the said certificate was solely manufactured for the purpose of obtaining of the grant.
5. It was submitted that A W, is a stranger to the proceedings because all the identification

- documents attached to her affidavit bear the names A M N and not A W A. Further that she is a mere imposter having not shown or demonstrated that she is a widow to the deceased under any section 66 of the Law of Succession Act cap. 160. It is stated that the title document in respect of Ngong/Ngong/ *[particulars withheld]* is registered in the name of the deceased only. It is their submission that C N was never a child of the deceased as the documents attached do not give any proof.
6. On whether C G N now referred to as C N, and S O A were dependants of the deceased, the applicant submitted that C G N, now referred to as C N, was born long before the parties came into contact with each other as admitted by the deponent in paragraph 9 of her affidavit. It is submitted that there being no marriage between the deceased and the deponent under any system of law the said C N cannot be a dependant of the deceased according to **Section 29** of cap the Law of Succession Act. It was also submitted that S O A is not a dependant of the deceased in terms of Section 29 of Cap 160 laws of Kenya given that the documents attached were made after the death of the deceased.
 7. On whether the objector, namely J B O, should be issued with the letters of administration intestate, it was submitted that since the deceased was not survived by a spouse or a child, the objector, being an elder brother pursuant to **Section 39(i) (c)** and **Section 66 (b)** of the Law of Succession Act qualifies to be issued with the letters of administration intestate.
 8. On her part, J W submitted that she was a wife to the deceased and therefore has priority over the objector in applying for grant of letters of administration in respect to the estate. She points to her father's sworn affidavit indicating payment of dowry, photographs reflecting the introduction ceremony in Kisii in the presence of the deceased's three paternal uncles and brother, J K, and the introduction of the child at Kisii.
 9. On whether S O A is heir of the deceased's estate for the purposes of succession, she submits that under Section 29 (a) S O A was a child of the deceased, and that the said child was expressly recognized as the deceased's own under Section 3 (2) of the Law of Succession. The Respondent relied on *In the Matter of the Estate of James Ngengi Muigai P&A No. 523 of 1996* where Koome J held that “ *the children whose paternity were contested were children of the deceased since they had used the name of the deceased during his life time and passed out as his children.*” It was further submitted that birth certificate confirms that S O was a son of the deceased.
 10. On whether the objector should be issued with Letters of Administration, it was submitted that the law clearly provides that the surviving spouse has priority over other parties in respect of the making of grant of letters of administration. It was agreed that *section 39 (1)* of the Laws of Succession Act provides that the estate shall devolve to the mother, father, brothers and sisters of the deceased only in circumstances where the deceased was not survived by a spouse or a child. It was her submission that the objector does not have priority over the surviving spouse and heir.
 11. On whether A W A and J W are the deceased's widows and therefore entitled to grant of letters of administration, it was submitted on behalf of A W A that she was a wife to the deceased and therefore has priority over the objector in applying for the letters of administration in respect to the estate herein. It was her submission that she started cohabiting with the deceased in 2000 and lived with him until his demise on 4th May, 2006. Further that there is sufficient evidence that she lived in the same house with the deceased at the time of his demise and was even arrested and detained at Ongata Rongai Police Station in connection to her husband death.
 12. It is submitted that A W A benefited from the deceased's medical cover on the basis of being a wife to the deceased. It is further submitted that the funeral programme bore her name marking her as one of the wives of the deceased and so does the death and funeral announcement. A W A relied on the case of *Mbogoh vs. Muthoni & Anor* Civil Appeal No. 311 of 2002 where the Court held that “ *It did not matter whether statutory or customary marriage requirements were strictly proved. The High Court had to go further and consider whether on the facts and circumstances available on the record, the principle of presumption of marriage was applicable*”.

13. She also relied on *MWG vs. EWK* Civil Appeal No. 20 of 2009 where Justice Bosire stated that:

“...it is a concept borne from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing their union by going through recognized form of a marriage, then a presumption of marriage arises.....the law subject to the requisite proof bestows the status of ‘wife’ upon the woman to enable her qualify for maintenance or a share of the estate of her deceased husband.”

14. It was submitted that A W A has sufficiently proved that she was a wife to the deceased and is entitled to apply for grant of letters of administration of the deceased’s estate and to benefit from the estate as the deceased’s surviving spouse.

15. With regard to whether C N is a dependant of the deceased’s estate for purposes of succession, it was submitted that it is not in dispute that C N is a son to A W A and this automatically qualifies C N to be considered as a step son to the deceased and therefore entitled to benefit from the estate. Further, that there is evidence that the deceased provided for C and had him enlisted as a beneficiary under his medical cover as a son. They cited the decision in *In the Matter of the Estate of the Late S W M* Nairobi High Court Civil Appeal No. 6 of 2002 where it was held that;

“...a child that the deceased has taken into his family as his own is a child for the purposes of succession...”

16. Arising from the above, it was submitted that C is rightfully a son to the deceased and therefore a rightful heir to the deceased’s estate.

17. On whether S O is a dependant of the deceased’s estate for purposes of succession, it was submitted that he is entitled by the virtue that he was recognized both in the eulogy and the obituary as a son to the deceased. As to whether the objector should be issued with letters of administration, the Respondent cited Section 66 of the Law of Succession Act and submitted it is provided that the surviving spouse has priority over other parties over the issuance of grant of letters of administration.

18. This court has carefully considered the application, the affidavits in support, the replying affidavits and the submissions by the rival parties herein. In the very considered view of the court, the respondents, A W A and J W, have proved satisfactorily that they were wives to the deceased and therefore are entitled to apply for the grant of Letters of Administration and to benefit from the estate of the deceased as such. Indeed, a perusal of the records reveals that the deceased is referred to among others as the husband to A W and J W. I have seen the funeral programme for the deceased and at paragraph 5 of the eulogy it is stated that **“he was husband to A W and J W”**. The applicant has not explained why A W and J W were referred to as the wives of the deceased in both the funeral announcement and in the eulogy, if indeed the deceased never married. Being an elder brother to the deceased one would assume that he participated and was involved in the production of both documents. It was the objector’s position that the deceased died a bachelor and had not formalized any marriage relationship with any women under any system of law. It is noteworthy that the objector does not say whether or not his deceased brother cohabited with any woman known or unknown to him. As a matter of fact, the court is satisfied that the facts and circumstances of this case leads it to presume that even if, as was alleged by the objector there was no known marriage relationship under any system of law between the deceased and the respondents, the deceased was married to both A W and J W.

19. On the second issue as to whether C N is a dependant of the deceased’s estate for purposes of succession, this court holds that having found that A W A was a wife to the deceased and the said C N being a step-child of the deceased is indeed qualified and entitled to benefit from the estate. In the instant case, it is evident that the deceased provided for C N and even included him in his medical cover as shown in the British American Insurance Policy No. **[Particulars withheld]**. Yet again, the objector has not told this court why the said C N is referred to both in the funeral

announcement and eulogy as a son to the deceased. The same applies to S O who has also been recognized as a son both in the eulogy and funeral announcement and the birth certificate. The said S O is being a son to the deceased and was dependent on him and as such he is entitled to benefit from the estate of his late father.

20. With regard to whether the objector should be issued with the letters of administration, this court, having found that A W and J W were wives to the deceased for purposes of succession, holds that the objector does not qualify and therefore cannot be issued with letters of administration as he does not have priority over the surviving spouse and the children of the deceased herein. He does not meet the requirements provided for in **Section 66** of the Law of Succession Act.

21. The upshot of the above is that the application herein lacks merit and is hereby dismissed.

DATED, SIGNED and DELIVERED at NAIROBI this 26th DAY OF September, 2014.

W. MUSYOKA

JUDGE

In the presence of Mrs. Thongori for advocate for the applicant.

In the presence of Mr. Ndungu advocate for the respondent.