



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)**

**SUCCESSION CAUSE NO. 20 OF 2011**

**IN THE MATTER OF THE ESTATE OF P.W.M – (DECEASED)**

**RULING**

The summons for revocation of grant dated 10th January 2011 seeks revocation of a grant made on 22nd March 2010 to W.M and N.M. The grant sought to be revoked was made by the Kajiado Senior Resident Magistrate.

The grant was made to the mother and brother, respectively, of the deceased, P.W.M. The applicant herein claims to be the widow of the deceased. She says that she had a son with the deceased and that they were cohabiting before the deceased's demise. Her complaint is that the respondent did not include her name in the list of the survivors of the deceased and, more importantly, they did not involve her when they sought the grant. On their part, the respondents argue that the applicant was not married to the deceased and therefore she was not entitled to a share in his estate.

Counsel appearing in the matter agreed to dispose of the application by way of affidavits and written submissions. Both sides filed their submissions and requested the court to rule on the basis of the affidavits. I must state that in applications of this nature, where what has to be proved is a marriage which is not statutory, it is foolhardy to proceed to dispose of the matter by written submissions. In this case, it is not alleged that there was a customary law marriage and therefore no evidence has been led to demonstrate performance of the requisite customary law rites of marriage. All there is an allegation of cohabitation. It is not stated when the cohabitation commenced, its quality and for how long it lasted. The applicant is simply clinging on the fact of the birth of the child that she says was sired by the deceased, and the fact that she attended the deceased's funeral. She has attached some photographs to her affidavit. Her story is contested by the respondents, and the authenticity of her documents scorned upon.

Whether the applicant was married under customary law is a matter that could only be established by oral evidence. It is well documented in case law that customary laws have to be proved. This then means that a person who alleges existence of a customary law marriage must prove existence of a such a marriage. He or she must lead evidence to establish the requisite customary law rites of marriage relating to that marriage and to demonstrate that such rites of marriage had been performed. Such matters cannot be disposed of in affidavits. In any event, the applicant made no effort in her affidavits to prove existence of a customary law marriage between the deceased and her.

In the absence of proof of a customary law marriage, the only other way of establishing a marriage relationship between the applicant and the deceased was by getting the court to presume marriage between the applicant and the deceased. The principles for presumption marriage out of a prolonged cohabitation were set out in the case of *Hortensia Wanjiku Yawe -vs- The Public Trustee* Court of Appeal for East Africa Civil Appeal No. 13 of 1976, and in other decisions that followed. Evidence to establish cohabitation amounting to a marriage can only be clearly brought out in oral evidence. The applicant has only made a feeble attempt to lead evidence on that score.

The application herein is premised on **Section 76** of the Law of Succession Act. The grant was made by a court at Kajiado. The allegation is that the process of obtaining grant was defective, the letters were obtained fraudulently by the making of false statements, that there was concealment of matter from the court and that there were untrue allegations of fact. The Kajiado process is under attack. I note, however, that the lower court file, where the proceedings under attack were conducted, was not availed to this court for the purpose of these revocation proceedings. It was not called for by the court, neither did counsel request that it should be availed. The material that was placed before the Kajiado court for the purpose of

obtaining the grant and which the court considered in determining whether to make the grant or not were not placed before this court to help me determine whether or not the Kajiado process was defective, or whether it was fraudulent, or whether there was concealment of matter from that court.

It should be noted that allegations of fraud border on an accusation of commission of a criminal offence. In civil matters, allegations of fraud are treated as more serious than other allegations. Pleadings on fraud are stricter. The allegations should be supported by sufficient particulars. It is said here that the grant was obtained fraudulently, consequently the pleadings on the point ought to be to a higher standard. I note that the particulars of fraud are bare, totally insufficient to support an allegation of fraud.

After taking everything into account, I find that the applicant has not proved her case to the required standard. I consequently dismiss her summons dated 10th January 2011 with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>th</sup> DAY OF May, 2013.**

**W. Musyoka**

**Judge**