



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 279 OF 2011

IN THE MATTER OF THE ESTATE OF S. K. C (DECEASED)

BETWEEN

S. J .S 1ST OBJECTOR/APPLICANT

C. W. N 2ND OBJECTOR/APPLICANT

VERSUS

E. J. K Alias

E. J. K 1ST PETITIONER/RESPONDENT

K. K. K 2ND PETITIONER/RESPONDENT

RULING

The application before me for determination is Chamber Summons dated 2nd May, 2013 filed by the Objectors, S. J. S and C. W. N.

They pray that court orders that Ksh. 115,500/= be paid out from the deceased death gratuity held by the Public Trustee to the following:-

- (i) V. K - Kshs. 28,000/= being school fees for standard eight for the year 2013 to **[particulars withheld]** School.
- (ii) K. K - Kshs. 37,500/= being school fees for standard seven (7) for the year 2013 to **[particulars withheld]** SCHOOL.
- (iii) W. K - Kshs. 28,000/= being school fees for standard eight for the year 2013 to **[particulars withheld]** ACADEMY.
- (iv) Kshs. 50,000/= being maintenance and upkeep for V. K, K.K and W. K for the year 2013.

The same is based on the following grounds:-

- (a) Prior to the death of the deceased, he was paying the school fees and maintaining the dependants herein.
- (b) The deceased worked as a Senior Sergeant with Administration Police.

(c) The application is made for the best interest of the minor dependants herein.

(d) The law requires that the orders of the court are made for any transaction to be done in respect to the deceased property.

It is further supported by the affidavits of both Objectors sworn on 2nd May, 2012. The same is opposed vide a Replying Affidavit sworn by E. J .K, the 1st Respondent herein on 2nd July, 2013.

The background to this application is that the deceased S. K. C died intestate on 5th September, 2009. Following his death, the 1st and 2nd Respondents petitioned for Grant of Letters of Administration of the estate. The same were granted on 20th June, 2012.

The 1st Respondent was the deceased's first wife while the 2nd Respondent is one of the deceased's sons. The Respondents on the other hand are the other wives of the deceased.

The Objectors have stated that the Respondents acted in malice and have decided to subdivide the deceased's property (which includes gratuity) without a court order and further without obtaining the Objector's consent. They state that they did not consent to the making of the grant of Letters of Administration and did not sign the same. They state that although they have tried to resolve the dispute amicably, the Petitioners (Respondents) have not been co-operative. Their case is that they are also widows of the deceased and they rank first in priority and deserve a share of the estate of the deceased.

The Objectors' advance a case that three of the deceased's children defaulted in paying their school fees and they want the fees be paid from the gratuity of the deceased held by the Public Trustee.

On her part, the 1st Respondent argue that the Objectors (Applicants) are strangers to her and are only after the proceeds of the deceased's estate. She avers that the money sought by the Objectors would not be recovered in the event the objection before court does not succeed.

Counsel for the Respondents further submitted that the gratuity of the deceased should not be interfered with as the court is yet to determine whether the Objectors were dependants within the meaning of the Law of Succession Act. He submitted that the Objectors should produce prove that the deceased paid the minors' school fees before his death because in practice, where a deceased worked for the public service, the beneficiaries of the gratuity are stated which was not the case in this case. He also said that details of the gratuity have not been furnished to the court, so that court would determine whether the Objectors and their children were beneficiaries.

On his part, counsel for the Objectors referred the court to annexure SJS.1, annexed to Supporting Affidavit of the 1st Objector which is a condolence message to the wives of the deceased upon the demise of the deceased. He said that the Objectors are named as the 2nd and 3rd wives of the deceased respectively.

He also referred court to annexure SJS.2 which is a letter from the Chief identifying the two Objectors as his 2nd and 3rd wife of the deceased respectively. He urged the court to allow the application, adding that before the death of the deceased, the Objectors were able to support their children from their earnings in small businesses. That as the children have now further grown, their needs have increased as a result of which they cannot meet even the school fees. He cited that one of the children is in standard eight (8), hence the requirement for the school fees.

The first issue for determination is whether the Objectors and their children fall within the ambit of the definition of the deceased person's dependants.

Section 29 of the Law of Succession Act defines a dependant as follows:-

"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."

By all implication, it is clear that the deceased was polygamous. The two annexures in support of this application are persuasive enough that the two Objectors were wives of the deceased. It matters not that the deceased did not necessarily meet the Objectors children's school fees prior to his death. The Objectors have explained why this did not happen - they were then able to meet the basic minimum needs of the children. Moreover, in a polygamous marriage, the formalization of it is not by documentation. It therefore does not make sense for the Respondents to require a marriage certificate for the Objectors to be produced.

Therefore, by the mere fact of the Objectors' recognition by area Chief that they were wives of the deceased, I hold that themselves and their children were dependants of the deceased as defined under Section 29 of the Law of Succession Act.

Section 27 of the Act gives the court the discretion in making orders regarding dependants. It provides as follows:-

"In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provisions for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

On the other hand, Section 28 of the Act gives guidelines on which factors to consider in making the above order. It provides as follows:-

"In considering whether any order should be made under this Part, and if so what order, the court shall have regard to -

- (a) the nature and amount of the deceased's property;**
- (b) any past, present or future capital or income from any source of the dependant;**
- (c) the existing and future means and needs of the dependant;**
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
- (e) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;**
- (f) the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant."**

Further by a majority decision (Akiwumi and Shah, JJA as they then were), in the case of **JOHN GILATA MWANGI & OTHERS -VS- JONATHAN NJUGUNA MWANGI & OTHERS NAIROBI CIVIL APPEAL NO. 213 OF 1997**, it was held that Section 28 of the Law of Succession Act is in mandatory terms and the court should only consider the matters set out in the provision.

Without a doubt, it is my view that the Objectors have met the considerations spelt out under S. 28. Their children are not able to continue with education due to lack of school fees and maintenance money which the deceased would have provided if he were alive. It is further not shown that the deceased had given any gift or bequest to these minors or the Objectors before his death. There are also no qualms regarding their conduct towards the deceased. Moreso, in consideration of the amount of the deceased property which is the gratuity, the sum will not be greatly affected if the money is ordered released to the minors. No irreparable loss has been

demonstrated that the Respondents will suffer if the money is ordered to be released for the minors school fees and upkeep. The request made by the Objectors is based on the best interest of the children.

I do accordingly exercise my discretion and allow the application as prayed pending the determination of the full cause. This order shall be served upon the Public Trustee for compliance. Each party shall however bear its own costs of this application.

It is so ordered.

DATED and DELIVERED at ELDORET this 1st day of August, 2013.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Kiboi Advocate for the Objectors/Applicants

Mr. Namiti holding brief for Mr. Korir for the Respondents/Petitioners