



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

P & A CAUSE NO. 79 OF 2005.

EMANUEL OWEYA ISANDA.....DECEASED.

A N D

JANE KADENYI OWEYA

MARGARET NJAMBI OWEYA.....PETITIONERS.

R U L I N G.

The late **Emmanuel Albert Oweya** (herein, the deceased) passed away on the 21st March, 2004. Thereafter, on the 4th April, 2005, **Jane Kadenyi Oweya** (herein, the petitioner) petitioned for grant of letters of administration respecting the estate of the deceased. The petitioner did so in her capacity as the widow of the deceased. The petition was therefore for her benefit and the children of the deceased being Faith Isanda, Jacqueline Isanda, Michael Isanda Oweya, Keith Isanda and Nigel Isanda. The assets listed in the petition included portions of land described as Kaplamai/Kachibora Block 4/Surungai/1, Marana/Shikunga/557 and Butsotso/Shikoti/12248.

Other assets were shares with Mwalimu Sacco Nairobi.

On 25th May, 2005, the grant of letters of administration intestate was issued to the petitioner and on 28th November, 2005 summons for confirmation of the grant were taken out by the petitioner. However, on the 5th December, 2005, summons for rectification of grant were taken out by the petitioner so that Michael Isanda Oweya may be included as a co-administrator to take care of the interest of the minor beneficiaries.

Apparently, both summons for confirmation and rectification were never pursued immediately most likely due to an objection lodged on 5th July, 2006, by **Margaret Njambi Oweya** (herein, the objector), who claimed to be the second wife of the deceased and who wanted to be included as a beneficiary of the estate of the deceased together with four children.

The objector went further to cross petition for grant of letters of administration respecting the estate of the deceased.

The cross petition was dated 7th September, 2006 and it listed the petitioner and her five children as beneficiaries in addition to the objector and her four children. The objector also filed an answer to the petition filed by the petitioner. The answer is also dated 7th September, 2006 and was essentially an objection to the issuing of the grant to the petitioner on grounds that the objector was not included as a second wife and was never consulted nor involved in the filing of the petition.

Nonetheless, on the 24th May, 2007, the objector withdrew her objection, cross petition and answer to the petition by the petitioner.

Thereafter, on the 10th June, 2007, fresh summons for confirmation of grant were taken out by the petitioner but on the 13th November, 2007, the objector filed an affidavit of protest against confirmation of grant on ground that she and her children had been excluded from the distribution of the estate property and that the property known as Butsotso/Shikoti/12248 had been included in the petition whereas it was jointly owned by the deceased and herself and after his death the property devolved to herself as the proprietor.

Other applications followed. These included an application by the petitioner to have the objector deposit into court monies received by herself on behalf of the estate of the deceased from the public trustee and Mumias Sugar Outgrowers.

The application at hand is the summons for confirmation of grant dated 10th June, 2007 and the attendant protest dated 13th November, 2007.

On the 29th November, 2007, the court directed that the application and the protest be heard by viva-voce evidence and in that regard, testified that she married the deceased as his second wife in December, 1984. She acknowledged that the deceased was by then married to the petitioner although she was not aware of the fact at the time of her marriage because the deceased had never told her. She became aware of the fact in 1990. At the time of her marriage to the deceased, she had a male child aged two (2) months whose father was not the deceased but one Silas Peter Kangethe. She cohabited with the deceased after their marriage and in the process they were blessed with three children born in 1990, 1994 and 1998. The deceased took full responsibility for her son.

The objector testified that the deceased and herself while living together purchased a portion of land in Kakamega i.e L.R. No. 12248 Butsotso/Shikoti, which they registered in their joint names. A title was later issue in her name after the death of the deceased. She indicated that she lawfully changed her name from Margaret Njeri Nganga to Margaret Njambi Oweya and stated that the deceased in his wealth declaration forms always declared her and the petitioner as his wives. She indicated that the deceased normally visited her parents' home in Kitale and had been introduced to her elder brother since her parents were deceased. She said that the deceased donated a cow during the funeral of her elder brother but confirmed that he (deceased) did not pay dowry for her.

The objector further testified that upon the death of the deceased, she filed a succession cause at the Kisumu court but the same was transferred to this court and consolidated with the present cause which had been filed by the petitioner and in which she was excluded along with her children. She therefore wants to be included as a beneficiary of the estate of the deceased together with her four children. Her witness, **Isanya Bungen Chilleo** (PW2), a nephew to the deceased confirmed that the deceased was married to the petitioner who lived in Cherangany and to the objector who lived in Kakamega. He (PW2) stated that the objector and the deceased stayed together for about ten (10) years prior to his (deceased) death.

Another witness, **John Mumasi Fundia** (PW3), a Land Registrar in Kakamega produced a title deed (P. Ex. 5) issued in the name of the objector on 10th August, 2007. He indicated that prior to that date, the subject property was in the joint names of the deceased and the objector.

In her testimony, the petitioner, contended that the objector was never a wife to the deceased and that she did not know her. She contended that the deceased and herself married in December, 1982. She produced the relevant marriage certificate (D.Ex. 1) and stated that the deceased and herself cohabited in various places within Trans Nzoia and had five (5) children who are now adults. She stated that the deceased was buried at the matrimonial home in Cherangany and that the objector did not attend the burial since she was not recognized as a wife to the deceased.

The petitioner produced a title deed for their matrimonial home (D. Exh. 7) and said that the deceased had

never informed her that he was married to the objector. She only learnt of the fact when the objector obtained a court order restraining the burial of the deceased. The case was however dismissed. Thereafter, the objector filed the present case and obtained an order blocking the processing of any claims pertaining to the estate of the deceased. The petitioner further contended that the child called Stephen did not belong to the deceased and that the deceased never had any children with the objector.

The petitioner testified further that at the time of his death, the deceased was an assistant Chief inspector of schools and that his benefits amounting to Ksh. 1,154,700/= were processed by the objector and deposited with the public trustee in Nairobi and Butere. However, part of the money was improperly withdrawn by the objector and her son.

The petitioner indicated that the portion of land known as Butso/Shikori/12248 belonged to the deceased who did not inform her that it was registered in his name and another person. She said that the file to the land was changed in the year 2007 without her knowledge. She only became aware of the new title in the name of the objector here in court and could not understand how a title could be changed when the matter was in court. She produced a title (D. Ex. 13) respecting the property situated in Maraba Butere and indicated that the objector has been interfering with that property.

The petitioner is not agreeable to the sharing of the estate property with the objector as she was not a wife to the deceased. She (petitioner) contends that the estate property should be shared between her and her children. She therefore called for the dismissal of the objection by the objector.

From all the foregoing evidence the basic issue for determination is whether the objector was a wife to the deceased thereby making her and her children dependants of the deceased and therefore beneficiaries of his estate.

The objector's alleged marriage to the deceased was disputed only by the petitioner who undoubtedly was illegally married to the deceased as confirmed by the relevant marriage certificate (D. Exh. 1). The objector alleged that she was married to the deceased in the year 1984 not being aware that he was already married to the petitioner. She said that she became aware of the fact in 1990 but nonetheless continued to cohabit with the deceased resulting in the birth of three children. Prior to the birth of the said children, the objector had another child with another person. She contended that that other child was taken in by the deceased thereby becoming his dependant.

As per the certificate of marriage (D. Exh. 1), the marriage between the petitioner and the deceased was contracted under the African Christian Marriage and Divorce Act (Cap 151) which is an Act of Parliament to provide for the marriage of African Christians and for the dissolution of such marriages.

The marriage certificate (D. Exh. 1) shows that the marriage took place in the month of February, 1981 meaning that from that date onwards, the deceased was never expected to undergo another celebration of marriage until the dissolution of the marriage as provided by law or until the demise of any one spouse.

The evidence herein as shown that the deceased did not adhere to his marriage vows and was at risk of committing the offence of bigamy by taking the objector or treating her as his second wife, a fact that he hid from both the objector and the petitioner.

Indeed, there was no formal marriage between the deceased and the objector but it is evident that they were involved in a relationship which qualified as a marriage but for lack of legal or formal strength. They cohabited and had three children together, a fact which was not at all or substantially disputed. A fourth child belonged to the objector and another person but there was not substantial dispute that the child was accepted and treated by the deceased as his own child.

In essence, the deceased and the objector held themselves out to all and sundry as man and wife. The objector and her children would therefore qualify as beneficiaries of the estate of the deceased as his dependants. To say the least, the objector was more or less a concubine to the deceased with the status of a “**defacts**” wife. This is fortified by the fact that the birth certificates of their children (P. Exh. 1, 2 & 3)

were in their names as father and mother, the fact that the title deed (P. Exh. 4) to the property known as Butsotso/Shikoti/12248 was issued in both their names as joint proprietors and was later rightly re-issued in the name of the objector as the surviving co-owner thereby removing the property from the ambit of this succession cause, the fact that an affidavit allegedly signed by both the objector and the deceased in 1997 (P. Exh. 6) indicated that they married in 1984 under African Customs and that they were staying together as husband and wife. The fact that the deceased's wealth declaration forms (P. Exh. 8) for the year 2003 showed that the petitioner and the objector was both wives to the deceased and their children his dependants and the fact that a letter from the chief (P. Exh. 10) showed that the objector was a second wife to the deceased and that they had four children.

The law is also in favour of the objector being made a beneficiary of the estate of the deceased.

Section 3 (5) of the Law of Succession Act provides that:-

“Notwithstanding the provisions of any other 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.”

So, if it is taken that the objector was married to the deceased in accordance with African customary Law she would fall within the protection of the aforementioned provision of the law since a customary marriage is potentially polygamous.

She would in the circumstances qualify as a dependant under section 29 of the Succession Act.

Even if the objector was merely cohabiting with the deceased she would still qualify as a dependant by dint of section 26 of the Succession Act. Indeed, the objector herein claims to be a wife of the deceased by her prolonged cohabitation with him thereby giving rise to a presumption of marriage between her and the deceased.

In sum, the present objected or protest by the objector is meritable. She ought not have been locked out of the estate of the deceased when the petitioner petitioned for necessary grant. The objector's children with the deceased and without the deceased should also have been included as beneficiaries.

Consequently, it is hereby ordered that the grant issued to the petitioner dated 25th May, 2003 be amended to include the names of the objector and her four children as beneficiaries. Additionally, the objector and her eldest child with the deceased together with the petitioner's eldest child with the deceased be included as administrators of the deceased's estate alongside the petitioner.

Each party would be at liberty to move the court for necessary confirmation of grant only and after they agree on the mode of distribution of the estate property in exclusion of the property known as Butsotso/Shikoti/12248 which belongs to the objector in her own right.

In the event that the parties fail to agree on the mode of distribution, each would be at liberty to apply for distribution by the court.

Ordered accordingly.

[Read and signed this 5th day of December, 2013.]

[In the presence of all parties.]

J.R. KARANJA.

JUDGE