



IN THE MATTER OF THE ESTATE OF AMBROSE KITHUMA NZIOKI alias AMBROSE NZIOKI - DECEASED

WINFRED MUENI MUASYA

REGINA MUTONO ELIJAH PETITIONERS

VERSUS

AGNES MUENI MUSILU alias AGNES MUENI NZIOKI OBJECTOR

RULING

On 28th September 2010 the objector Agnes Mueni Musilu, alias Agnes Mueni Nzioki filed an objection dated the same date. The objection is in the following terms:-

THAT, I am the 2nd wife of the deceased one Ambrose Kithuma Nzioka alias Ambrose Nzioki Kithuma and I was not included as a beneficiary in this cause in respect of the estate of the deceased together with my only child NNN.

Winfred Mueni Muasya, one of the petitioners, filed a replying affidavit to this application. The affidavit was sworn by herself on 7th October 2010. She stated that she was the only wife of the deceased and was so married under the African Christian Marriage and Divorce Act. She annexed a copy of a marriage certificate dated 17th April 1993. She stated that she had only one child SNA.

Both the objector and the petitioner, through their advocates P.M Mutuku & Company for the objector and Sila & Company for the petitioners, filed written submissions.

Mr Muema, for the objector and Mr Sila, for the petitioners appeared in court and adopted the documents filed.

I will start by saying that, though there has been a reference in documents filed and submissions, to an application by the petitioners dated 11th February 2011 for payment of school fees for the child of Winfred Mueni Muasya, in my view, that application has been spent. Hon. Justice P.K. Kariuki on 21/2/2011 made orders authorizing withdrawal of certain amounts of money from the Public Trustee for the child SNA. At the time the application was filed in 2011, the child was in form four. Therefore, she must have completed fourth form by now.

Be that as it may, it is fact that the 1st Petitioner was married to the deceased under the African Christian Marriage & Divorce Act. This is not disputed. They had one child. In 1996, the 1st Petitioner filed for separation in Machakos Separation & Maintenance Cause No. 10 of 1996 in the Principal Magistrate's Court. No divorce has been disclosed so far. Thereafter, it appears that the deceased lived together with the objector. There is also a living child of the objector called NNN. There is no evidence of any celebration of a marriage between the deceased and the objector however. It is not in dispute that the deceased lived with the objector and took care of the child. The 1st Petitioner claims that the child Nancy

did not belong to the deceased.

In my view, section 29 of the Law of Succession Act, covers and protects the child NNN as a dependant of the deceased. However, there is no evidence that the deceased married the objector. At least, an independent affidavit should have been filed by her to prove open cohabitation. None was filed. In addition, the subsisting monogamous statutory marriage between the deceased and the 1st petitioner, meant that the deceased did not have capacity to marry again. Therefore, the presumption of marriage could not arise.

With the facts and evidence before me, I find that the objector does not qualify to be a wife or dependant of the deceased. The child NNN though, is a dependant of the deceased, and has to be catered for in the estate of the deceased. The child is a dependant in terms of section 29 (b) of the Law of Succession Act, as a child **“whom the deceased had taken into his family as his own”**.

In my view, the above findings dispose of both the application dated 28th September 2010 filed by Agnes Mueni Musilu alias Agnes Mueni Nzioki, and the application dated 11th February 2011 filed by Winfred Mueni Muasya.

Having found as above, it is prudent now for the administrators/petitioners to proceed further with processing the matter to the confirmation of the grant, taking into account that the child NNN is also a dependant or beneficiary. Costs in the cause.

It is so ordered.

Dated and delivered at Machakos this **19th** day of **June** 2012.

George Dulu

Judge

In presence of:-

Ms. Thiongo holding brief for Mr Sila for petitioners

N/A for objectors

Nyalo – Court clerk.