



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 271 of 2003

J U D G M E N T

The deceased, Albert Kihara Ndunyu, died in Aga Khan Hospital in Nairobi on 18th April, 1997. One Margaret Nyakarura Baragu who had earlier lived with him in a form of marriage and jointly with her own brother called Arthur Murage Baragu, thereafter, filed this Petition for a Grant of Letters of Administration Intestate. The Grant was issued to the two on 24th April, 2003.

The Objector herein, Maina Ndunyu, is the elder brother of the deceased. He apparently was not aware that Margaret Nyakarura Baruga (hereafter referred to as “**Margaret**”) had applied for and had obtained the Grant for the administration of his deceased younger brother’s estate. He was however aware that Margaret, had one time for a period of four (4) to six (6) years joined and lived with the deceased as wife in accordance, with Kikuyu Traditions. He also knew or believed that Margaret later ended the customary marriage by deserting the matrimonial home of the deceased and getting married to another man with whom she produced a girl child, her second child.

The objector also asserted in his affidavit supporting this objection, that Margaret had so completely terminated her marriage with his brother, the deceased, that she could not even bother to visit him in Aga Khan hospital when he was ailing before his death. And to crown it all, she and her original family members refused to attend the deceased’s funeral.

The Objector also, in the alternative deposed, that Margaret was in any case not really married to the deceased Albert Kihara Ndunyu. This was so because the relevant Kikuyu Customs were not strictly followed by the deceased, in marrying Margaret. So, her joining him in his house and home was merely a “**come-and-we-stay**” arrangement which never culminated into a Kikuyu Customary Marriage, notwithstanding that the couple begot a child, namely, Martin Macharia Kihara. That such arrangement between the two, came into an easy and quick end when Margaret walked out of the matrimonial home.

Armed with the above facts and arguments, the Objector decided to challenge the legality and sustenance of the said Grant of Letters of Administration issued to Margaret on 24th April, 2003. He filed a summons for the Revocation or Annulment of Grant dated 1st August 2003. The main ground upon which he challenged the Grant was that he “**was not consulted, being a family member and more so the first born when the Letters of Administration were applied for**”

Margaret filed a response in a replying affidavit, followed by two supplementary replying affidavits. She asserted that the Objector has no legal right to challenge the Grant of Letters of Administration issued to her. That the Objector was not the heir to the deceased since Margaret was a wife to the deceased and she and her two children sired by the deceased, survived him. Margaret also asserted that whether it was true that the Objector paid school fees for the deceased and buried him on his land when he died, were not sufficient legal reasons to entitle him to seek revocation of the grant or seek inheritance of the deceased’s property.

Margaret then also stated that she joined the deceased in marriage in 1985 in marriage accordance with Kikuyu traditions when the deceased, accompanied by another brother of the deceased, namely, Thomas Karige Ndunyu, and other family members, visited her home after she had started to cohabit with the late Albert Kihara, and paid dowry of Ksh.3,000/- sometimes in 1987.

Margaret conceded in her deponements that she and her late husband separated because of his serious state of drunkenness. She however maintained that they could meet and have sexual relations which led to her pregnancy of the second child, Elizabeth. She also deponed that when the deceased was ailing in Aga Khan Hospital she used to go and see him and sometimes briefly take care of him.

Her defence can be summarized as follows: that she was married to the deceased properly in accordance with Kikuyu customs; that she cohabited with her husband and produced one boy child before she was forced by her husband's drunkenness to leave their matrimonial home; that their marriage remained intact until he died after giving her a second child – a girl; that he died leaving her as his wife and was accordingly survived by her and her two children; that she was accordingly entitled to obtain the grant of letters of administration to her husband's estate and the Objector had not shown or proven that she was not entitled to obtain the grant.

During the hearing of the Objection, the Objector and Margaret who was the petitioner, repeated the evidence and the facts they and their witnesses had deposed in the various affidavits.

I have carefully perused the evidence contained in the file record. It is common ground that the petitioner, Margaret Nyakarura Baragu, joined the deceased Albert Kihara Ndunyu, now deceased in some kind of marriage. The Objector conceded that fact but argued that the marriage later got terminated by Margaret when she separated from Albert due to his drunkenness. On the other hand the Objector argued that there was no valid marriage between two because the cohabitation between them was never conducted according to Kikuyu Customs.

I have on the other hand carefully considered the Objector's above arguments. I am not persuaded by them. There is evidence from Margaret that some major customary rites, were conducted. Elders, including the other older brother of the deceased, namely, Thomas Karige Ndunyu, accompanied the deceased to Margaret's home and there paid ksh.3000/- as dowry. This was sometimes in 1987 when Margaret had cohabited with her husband and begotten one male child. As the objector admitted, he was not present when the dowry was paid.

I also find that although Margaret left her matrimonial home in Buruburu Nairobi, she did so to escape her husband's cruelty in form of the much drunkenness which had humiliated her to the extent of preferring to desert her home. There is no evidence, however, that their marriage broke down completely. The court accepts her evidence that they would meet from time to time and have sexual relationship which led to the pregnancy of the second child.

The Objector on the other hand failed to adduce evidence to prove that Margaret remarried to another man after separating from the deceased. There is no evidence accordingly that the marriage between the two was at any stage terminated. Indeed the court accepts the further evidence from Margaret that she used to visit her husband at the Aga Khan Hospital before his death.

Having come to the above conclusions, it is now necessary to consider the issue as to who between Margaret and the Objector, Maina Ndunyu was entitled to petition for and obtain the Grant of Letters of Administration of the late Albert Kihara Ndunyu.

Under the provisions of Section 35 of the Law of Succession, Cap 160 the person entitled to petition for the Grant of Letters of Administration is the widow of the deceased who survives him. It states: -

“S.35 (1) Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to: -

- a) *the personal and household effects of the decease absolutely; and*
- b) *a life interest in the whole residue of the net intestate estate*
- c) *provided that if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.”*

In this case, the deceased left behind a widow and two children as I have already earlier found. In the circumstances, she was the one entitled to petition for the Grant of Letters of Administration, intestate. However, assuming that the Objector’s Summons for Revocation or Annulment of the grant issued was sought on proper grounds, he was not, in my view, the person entitled to petition for the grant since the surviving spouse of the deceased existed. Indeed even in the situation where there is no surviving spouse, the next entitled persons in terms of priority would be – Children, then father, then mother and then brothers or sisters – the last category being where the Objector herein would be placed.

It is my view and finding accordingly, that the Objector herein, Maina Ndunyu, had no entitlement to petition for a grant of Letters of Administration intestate to the estate of the deceased younger brother Albert Kihara Ndunyu. In my further view, he even had no locus to file this objection as he has no interest thereon.

I will however, also wish to examine the form of his Objection which is before the court. His ground for challenging the issuance of the grant to Margaret was that he “***was not consulted, being the family member and more so, the first-born when the Letters of Administration were applied for***”. I carefully considered the evidence before the court. It is my finding that his evidence does not prove that it was legally necessary to consult him before the petition for the grant was filed by Margaret. Nor is such consultation, provided by law as one of the grounds upon which the court should revoke or annul a grant otherwise properly or lawfully issued.

The grant issued to Margaret was not defective in substance. It was not obtained by making of false substantive statement. The applicant has not been shown to have concealed any material facts to the issue before the court. The Objector has not proved that Margaret obtained the Grant by means of untrue substantive allegations of fact essential in any point of law.

For the above reasons, this court finds that this objection and prayers to revoke the Grant of Letters of Administration issued to Margaret Nyakarura Baruga on 24th March, 2003, are without merit in fact and in law. The court accordingly, dismisses the Summons with costs to the Petitioner/Respondent.

The issue of waste of part of the deceased’s estate was indirectly raised in these proceedings. The Petitioner/Respondent complained that the Objector has constantly failed to comply with interim orders of court that he should deposit the monthly rents obtained from the deceased’s property in Nairobi and elsewhere. The court will leave it upon the petitioner to bring before the court proper application to assist her gather any part of the estate being wasted by any person. The law is that the estate of every deceased person, is accountable until it is properly distributed.

Dated and delivered at Nairobi this 26th day of November, 2012.

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D A ONYANCHA
JUDGE