



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Succession Cause 131 of 2009

IN THE MATTER OF THE ESTATE OF SAMSON THOMAS WANYELO ::: DECEASED

ELIZA WAKESHO THOMAS APPLICANT

VERSUS

VELENTINA WONGE MWAKIDEU RESPONDENT

JUDGEMENT

The Applicant Eliza Wakesho Thomas has filed this summons seeking revocation of Grant of Letters of Administration in respect of the estate of Samson Thomas Wanyelo (the deceased) which grant was issued to the deceased wife Veleentina Wonge Mwakideu. The Applicant is a sister to the deceased and in the absence of their parents claims to be the rightful heir to the deceased estate.

The matter was heard by way of Viva Voce evidence on 31st July 2009.

From the Death Certificate produced by the Respondent as an exhibit S/No. 438049 and dated 7/8/1997 it is clear that the deceased died on 15th May 1997 aged 41 years at Aga Khan Hospital Nairobi. The Respondent applied for and obtained a Grant of Letters of Administration Intestate on 5th June 2008. Confirmation of that grant was made six months later on 22nd January 2009. All this time the Applicant took no steps to file any objection to stop the issue or confirmation of the grant. In her evidence the Applicant claims that she was unaware that the Respondent had moved to court to seek letters of Administration. However the Affidavit for grant was sworn by the Respondent and one Edward I. Mpare whom the Respondent tells court is the deceased cousin. It would be highly unlikely that the deceased cousin would be a co-administrator without the knowledge of the Applicant who was the deceased sister. I do not accept this to be the truth and find that the Applicant must have been fully aware of the issue of the Grant to the Respondent.

In her summons the Applicant gives three reasons why the grant issued in favour of the Respondent ought to be revoked.

1. ***The Administrator was not the lawful wife of the deceased***
2. ***The Administrator has got married to someone else***

3. The Administrator is misusing the deceased Estate

The Applicant in her evidence told the court that the Respondent was not the deceased legal wife. She claims that they merely lived together but that no dowry was paid. Firstly the fact that no dowry was paid does not in and of itself preclude the existence of a valid marriage. Secondly the Applicant has not tendered sufficient evidence to prove her contention that the Respondent was not the deceased's wife. No other family members or members of their community have been called to testify as to the exact nature of the relationship between the Respondent and the deceased. The law states that "**she who alleges must prove**". The Applicant has merely alleged that the Respondent was not the wife of the deceased but she has failed to prove this on a balance of probability. Furthermore the Applicant claims that the Respondent left after the deceased had died but that their mother did plead with her to return but to no avail. If the Respondent was not the deceased wife then why would the family be pleading with her to return to their home. The fact that the deceased mother wanted the Respondent to return to the family home is indicative of the fact that she was a wife.

The applicant further claims that the Respondent has re-married after the death of the deceased. Once again this remains a mere allegation with no evidence to prove the same. The Applicant claims that the Respondent has had two husbands after the deceased death – a Ugandan man and a man she currently lives with. The Applicant has not given court the names of any of these two men – neither has she stated under what system of law the Respondent got married to them. On her part the Respondent in her evidence insists that she was the deceased's wife and denies having married any other man. The Applicant concedes that the couple had two children together – once again I find that the Applicant merely throws out an allegation which is totally unsubstantiated by any evidence whatsoever.

Lastly the Applicant claims that the Respondent is misusing and wasting the deceased's estate. Again no particulars are given of this waste. Which assets exactly are being wasted by the Respondent and what is the nature of this wastage? These crucial questions remain unanswered. The Applicant concedes that the Respondent lives with and maintains the two children she bore with the deceased. I have no doubt that the two children are being raised and maintained using the proceeds of their father's estate. This cannot amount to wastage. The applicant claims that the Respondent is living in the deceased's house with another man. However under cross examination by the Respondent the Applicant did concede that in actual fact the Respondent purchased the house after the death of the deceased. That house cannot therefore be said to be the deceased's house. This shows that the Applicant was not being entirely honest when she asserts that the Applicant lived in the deceased's house.

The Applicant in her Summons for revocation states that a fresh grant ought to be issued to herself since as the sister to the deceased she is the rightful heir to her estate. The Applicant did in her evidence concede that the deceased left behind two children when he passed on. Under the Succession Act Cap 160 Laws of Kenya the Applicant is not entitled to claim in parity with or in priority to the deceased biological children. The Applicant has failed to demonstrate the legal basis of any claim she may have to the deceased's estate over and above that of the deceased own wife and children.

On the whole and based on the foregoing I find this present summons for revocation to be totally without basis. The applicant has merely tossed out a series of allegations all of which she has entirely failed to prove on a balance of probability. As such I have no hesitation in dismissing this present application on its entirety. Each party to bear their own costs.

Dated and delivered at Mombasa this 18th day of September 2009.

M. ODERO

JUDGE

18/9/2009