



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 773 of 2002
IN THE MATTER OF THE ESTATE OF JAOM (DECEASED)

RULING

JAOM ('O'), died on 21/10/2001. AAM ('A') and NCM ('N') who claimed to be his widow and son respectively obtained a grant to administer his estate on 10/6/2002. I shall now refer to the two as 'the administrators'

PMM ('M'), who claims to be O's first wife, having married him on 16/2/1963, applied on 7/2/2003 to have the said grant revoked or annulled mainly because it was in her view obtained fraudulently by the making of a false statement by the petitioners.

A and her son N, who claim that not only is M intermeddling with and destroying property on land known as M[...] ('the subject property'), which forms part of the estate, but that she has constructed a house thereon without their authority, moved this court in July this year, in an application in which they seek orders to restrain her from such the said actions. They also pray for a mandatory injunction to compel M to remove all the structures which she has put up on the estate property; that she be restrained from further construction thereon and finally that the Officer Commanding Mumias Police Station be directed to ensure compliance.

M who opposes the application, denies all the accusations which have been leveled against her and she claims to be O's wife and thus a beneficiary of the estate; that she has always lived on the subject land

It was the submission of Mr. Makaloo, the petitioner's counsel that in view of the fact that his clients are the administrators of the estate of the deceased, M whose marriage to the deceased was lawfully terminated, has no right to interfere with the estate property and that she should therefore be stopped from inter-meddling.

Mr. Kitheka was however of the view that his client is not a stranger in this cause mainly because though she had obtained an order against the deceased for separation and maintenance, the marriage was never dissolved and she is still married to him, and she still is his dependent and she ought to benefit from his estate, and though she had constructed a house on the property, she had not carried out any destructions. It was also his submission that neither of the two widows has overriding rights over the other and that they both have life interest in the estate, and that in the circumstances, M ought to be allowed to continue residing on the premises.

I have considered this application and the submissions of both counsel and I have taken note of the fact M having obtained orders for separation and maintenance against the deceased on 15/1/1971, she would be hard pressed to convince this court that she continued living with the deceased thereafter, and though I agree with Mr. Kitheka that those orders did not amount to a divorce, it would nevertheless mean, and I can safely assume that they went their separate ways and never cohabited thereafter.

It is evident from the photographs which formed part of the affidavits of both parties that M has of late constructed a house on the subject parcel. Indeed she admits that she completed the construction early this year. It is also evident from the photographs which were exhibited by the administrators, which fact though denied by M is nevertheless evident that she cleared a field of sugarcane and other crops from the portion where she constructed her house, which in my humble opinion, would mean that her allegations that she was merely rehabilitating a house which had been destroyed by whirlwind can not lie.

It is trite that "*the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative* (section 79 of the Law of Succession Act ('the Act')).

I find that she has intermeddled with the estate and that she has also destroyed crops and constructed a house without the authority of the administrators, who are vested with all powers pertaining to the estate.

I need not reiterate that though the law of succession recognizes all the wives of the deceased person, former and present, it is however imperative that where a dispute arises such as in this case, the parties must wait for the dispute to be resolved before the aggrieved party decides to intermeddle with the estate. Indeed this is clearly spelt out in section 45 (1) of the Act, which provisions must be adhered to

strictly, for it is provided therein that, *'except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person'*.

I do in the circumstances find this application to be meritorious and do grant the administrators the following orders:

- **An order to restrain the respondent PMM by herself, her servants, agents and/or employees from destroying, damaging, alienating, trespassing or wasting any part of the deceased's estate by cutting down any part of the sugar cane plantation or in any other way dealing with the deceased's estate properties and pending the hearing of her application.**
- **An order to restrain M from building any other structures on the estate property and further to restrain her from occupying or using in any manner whatsoever any part of the estate property.**
- **The Officer Commanding station Mumias Police Station do ensure compliance with these orders.**

However, having found that M was still legally married to the deceased at the time of his death, I would in the interests of justice, and with a view to avoiding wastage of funds, order that the parties agree on what M should inherit, for which reasons I decline to grant a mandatory order to compel her to remove the structures that she has put on the suit property, whose fate will be decided once they agree on her share, and if not, after her application for provision as a beneficiary is heard and determined by this court. In the meantime M should comply with the two aforementioned orders.

Costs of this application shall however be in the cause.

Dated and delivered at Nairobi that 25th day of November 2008.

JEANNE GACHECHE

Judge

Delivered in the presence of: