REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Succession Cause 710 of 2006

IN THE MATTER OF THE ESTATE OF G A J R (DECEASED)

E A A….....APPLICANT/OBJECTOR

VERSUS

R G O….....RESPONDENT/PETITIONER

R U L I N G

The matter before the court is a summons dated 17th July, 2006 for Revocation of Grant of Letters of Administration issued to the Petitioner/Respondent on 2nd June, 2006. The applicant, EA A, states that the respondent is the first wife of G A J. R and that the applicant is the 2nd wife. She further avers that while the Respondent was married to the deceased under the Marriage Act, she on the other hand was married to him under Luo customary law as reinforced by an affidavit of marriage duly sworn before a Commissioner for Oaths.

The applicant further swore that she had been so married to the deceased since 1988 and had lived with the deceased openly and to the full knowledge and information of the Petitioner and other members of the family who included the first wife J A A. She also claimed that during her marriage with the deceased, the couple was blessed with two children of their marriage – C. A. A. – 16 years old and I V.A. – 9 years old.

It was her further case accordingly that she and her two children were entitled to inherit part of the estate of the deceased jointly with the first wife and her children. She claimed that she did not discover that the Respondent, on behalf of the first house, had applied and obtained a Grant of Letters of Administration Intestate without informing her or including her and her children as beneficiaries.

The summons for revocation was based on two main grounds:-

a) That the Petitioner/Respondent herein obtained the Grant fraudulently and concealed material facts in that she failed to disclose that the applicant and her two children were dependants, the applicant being a second wife and the children being the deceased's children by the applicant's marriage to him.

b) That the applicant's two children being minors, the law required the applicant to administer the deceased's estate with at least a co-administrator.

c) That the petitioner told falsehood by claiming in the petition that the deceased left a Co-operative Bank Loan of Ksh.717,328/-

d) That the petitioner concealed the existence of a property of the deceased in South C. area.

When the summons for revocation came up for hearing the parties relied on sworn affidavits. Mr. Sagana for the objector argued that the applicant was under legal obligation to disclose that the deceased had two wives and had children of each of the two houses. He argued that the petitioner should also have revealed that the applicant's children are minors and that a co-administrator was by law required to be appointed but was not appointed. He also argued that although the Petitioner's marriage a monogamous marriage under the Marriage Act, the applicant's Customary Marriage was valid and more so for the purpose of inheritance.

Mr. Okeyo for the petitioner/respondent opposed the application for revocation. He stated that the objector had failed to prove that the Grant needed to be revoked. That the applicant had failed to produce evidence to prove that she was entitled either as a beneficiary or as a person entitled to be appointed as an administrator. That she had failed to prove that she was validly married under Luo customary law as a second wife to the deceased who would as a result be entitled to share the estate of the deceased with the first wife and her children. Mr. Okeyo further argued that the petitioner/respondent had neither concealed any relevant information on the alleged second marriage nor concealed any information during the petitioning for the grant. Mr. Okeyo also argued that the fact that the marriage by the deceased G A J. R, is concededly monogamous, meant that it excluded any other or additional marriages under any custom or religion, so that it eliminated the possibility of the alleged marriage with the objector. Mr. Okeyo further said that the certificates of birth of the two children of the applicant did not sufficiently prove that the children are the deceased's children. He concluded that even if the evidence relied on by the objector were to be accepted and relied on, the court would not still find need to revoke the grant but would only need to order for rectification thereof.

I have carefully considered the material and arguments presented by both sides. The issues which I find should be considered are as follow:-

a) Was there a customary, second marriage by the deceased with the Objector and if there was, was it a valid marriage under the law?

b) If a valid legal marriage did not exist between the deceased and the objector, would the latter and her children have a claim upon the deceased's estate by virtue of any other law?

c) If there was a recognizable customary marriage, would that necessarily lead to the revocation of the Grant as prayed?

The main issue in this application hinged on whether or not the applicant was in law a second widow of the deceased. The applicant argued that she was married to the deceased under Luo customary rites. She relied on an affidavit called "Affidavit of Marriage". She claimed that the deceased married her in 1988 and the two stayed and cohabited as husband and wife until he died in 2005. She claimed that she got two children with him. That in 1997 he and the applicant went to a Commissioner for Oaths who drew the Affidavit of Marriage which the two duly executed. That in it they declared the manner in which they had been married, which was that they had done it in accordance with Luo rites. The applicant admitted that the Commissioner for Oaths who drew the "affidavit of Marriage" still practices law but that she did not back this application with the commissioner's affidavit confirming that he indeed had drafted the same and that the deceased and the applicant indeed executed the affidavit before him. Mr. Okeyo seized this default, if default it was, and argued that applicant's failure to support this application with the said Commissioner's affidavit, reducing the validity and/or reliability of the said affidavit of marriage to almost nothing.

I have carefully considered the argument above by Mr. Okeyo. I do not, however share his view. This is because the said affidavit of marriage unless declared invalid for any other reason, was for what it is worth on its face, a valid official document properly drafted and sworn under the relevant law and properly presented by applicant before this court to prove that the deponents therein swore it on the date shown thereon. In my opinion, in the absence of evidence that it is defective or illegal, which is not

alleged by Mr. Okeyo, the document is what it officially says. If the Respondent thought that it was a false document or a document not properly sworn before the Commissioner for Oaths, Mr. Kowade, then it was upon the respondent to prove so by filing an affidavit to that effect from Mr. Kowade. Alternatively the respondent would call Mr. Kowade to orally confirm on the court record that the affidavit was not drawn by him nor sworn before him. I accordingly hold that the said affidavit of marriage is what it depicts. That is to say, that the Objector/applicant in company of the deceased, went before the Commissioner on 10th November, 1997 and swore that they were married according to Luo customary rites since 1988, and that the relatives, friends and neighbours of both deponents recognised them as so married.

The respondent through Mr. Okeyo also pointed at the signature of the deceased on the above mentioned affidavit of marriage and complained in paragraph 6 of the replying affidavit that the signature was not the deceased's known signature nor, he added, did it look like it. He did not reveal the source of his expertise although he had looked at the said signature and to state his opinion, however raw. The court looked at the said signature as well and using the raw knowledge and every day experience compared it with deceased's signatures on the Tax Return Form Exhibit. "RGOA2" attached to the replying affidavit and to another of deceased's signature on the Charge dated 26th April, 1976 exhibit "RGOA3 (a), 18". The three signatures in my strong opinion, look exactly alike. The strong resemblance of the signature in Exhibits "RGOA 2" and "RG0A3 (a), 18" to that in the said "affidavit of marriage", besides and in addition to, the fact that it is an official document, persuades me to come to the conclusion that the affidavit of marriage was deliberately made and sworn by the deceased, G J Ademba Ragot. In the circumstances, I have no reason to doubt its contents.

Other evidence touching the alleged customary marriage includes the fact that the respondent apparently lived in Nairobi with his father the deceased in the same house with the applicant/objector. The applicant accordingly argued that the respondent knew and accepted the applicant as his father's second wife under custom. There is also the evidence that during the funeral arrangement of the deceased, which is an event generally known to be done by members of the larger family of a deceased, the family of the deceased G J. A R, deliberately chose to announce and advertise in the Daily Nation of 11.11.2005 the deceased's wives. It gave them as J A and ElA, the latter being the applicant herein. Such advertisement and announcement, in my opinion, are customarily done in honour of the deceased, all members of the family, friends and neighbours of the deceased. The process to advertise is also known to be solemn and truthful and is not known to be used for the purpose of misleading the public. This also leads me to the conclusion that the second marriage by the deceased to the applicant/objector herein, was widely known and at least respected by the deceased's family who drew the advertisement.

Finally on this issue, it is not disputed, and there is adequate evidence to support the fact, that the deceased had deliberately nominated the applicant to be the nominee and trustee for the two children of his marriage with her, the Afya Co-operative Sacco Ltd Shares. At his death its returns amounted to Ksh.703,350/- In normal circumstances nominees of such shares are very close members of the family such as wives or children of the marriage. The court believes that the deceased nominated the applicant because she regarded her as his other wife.

The fact that the births of the two children claimed to be of the marriage indicated that the deceased was their father, is in my view alone, of little persuasion that they are his children. However, they were born during the existence of the marriage and the presumption is that they are the children of the deceased.

Having reached the conclusions that the applicant/objector was validly married to the deceased and that the two children, Clarice Auma Ademba and Isaac Victor Ademba, are their legitimate children, the next relevant issue to resolve is whether the Grant of Letters of Administration issued to the Respondent Robert George Oluoch, was valid and whether it was validly issued.

The deceased according to the facts accepted by this court, died 3rd November, 2005. He left surviving him, his two wives J A A and E A A with children P M R, R G O R, R A A and P O of the first wife and Clarice A A and I V A of the second wife.

It was not denied that the Grant issued to Robert George Oluoch was issued without considering the applicant as a second wife of the deceased and without considering that the applicant and her two children were entitled to share in the estate of the deceased. Section 3 (5) of the Law of Succession, Cap 160 of the Laws of Kenya, provides:-

"***Not withstanding 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 section 29 and 40 thereof, and her children are accordingly children within the meaning of this Act".***

The way I understand the above provision is that the fact that a marriage is monogamous in a potentially polygamous society, does not bar a polygamous marriage being successfully and validly celebrated. That is to say that in a polygamous society a potentially polygamous marriage can be successfully celebrated before or after a monogamous marriage. In such marriages, as by the above provision, the potentially polygamous marriage is a valid marriage and the wife and children of the said marriage are "wife" and "children" within the meaning of the word in the law of Succession Act. Such wife and children will accordingly have equal rights with the wife and the children of a monogamous marriage wife.

Assuming that my interpretation above is correct, then the position in this case will be as follows:-

That the deceased's first wife J A and second wife, the applicant or whosoever they would jointly grant consent to petition, would petition for the Grant of Letters of administration. Instead what happened is that R G O, a son of the first wife A A, did so with the relevant consent from those entitled to apply from the first house only, thus failing to secure a similar consent from the second widow, the applicant? In my view the omission might be serious enough to warrant a revocation of the grant. Much so because the issue of appointment of a co-administrator for the protection of the two minor children was not given adequate attention.

There is no doubt however, that the respondent herein was otherwise eligible for appointment, as administrator and his appointment would not be questionable except for the fact that he failed to obtain the consent to apply from the second house (wife) and for failure to seek appointment by court of a co-administrator for the sake of the minor dependants of the deceased's state.

I have carefully considered the prayer and the grounds offered for revocation. I have formed the view that despite the defaults stated above, the Grant need not be revoked. It can instead be reconstructed with a view to reconsider the mode of distribution, to make sure that all the estate of the deceased is fully gathered and included, and also to make sure that both widows and all their children are given opportunity to make fresh proposals for a just and fair mode of distribution. The latter may where necessary and equitable, take into account "gifts" if any, extended by the deceased under section 42 of the Law of Succession Act.

The orders that commend themselves to the court accordingly, are as follows:-

ORDERS

1) The Grant issued to R G A on 2nd June, 2006 is hereby modified to the extent that a second or co-administrator in the name of E A A is hereby appointed thereunto.

2) Distribution of the deceased's estate is hereby set aside for the purpose of availing an opportunity for a fresh distribution which will take into account the existence of the 2nd widow E A A her two children, C A A and I V A.

3) The applicant/objector and respondent/petitioner are to take a fresh hearing date for addressing the court orally or in writing or both in respect to a fair and equitable redistribution of the deceased's estate.

4) Costs of this application to be decided at the end of the exercise in (3) above.

Dated and delivered at Nairobi this 11 of July, 2007.

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D A ONYANCHA

JUDGE