



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
Succession Cause 207 of 2006**

JESSICA ATIENO ONYONY..... APPLICANT

VERSUS

CECILIA ANGELA MARWAH..... 1ST RESPONDENT

ANDREW MARWAH..... 2ND RESPONDENT

RULING

By summons dated 22.06.06 brought under rule 73 of the Probate and Administration Rules (an omnibus provision) made under the Law of Succession Act, Cap.160, the applicant sought the following orders:-

1. That the application be certified urgent for hearing *ex-parte* in the first instance.
2. That this honourable court be pleased to issue an order to restrain Cecilia Angela Marwah and Andrew Koroso Marwah (1st and 2nd respondents herein) from disrupting, alienating, wasting, transferring, disposing of, distributing and/or in any other manner purporting to administer or interfere with the estate of the late John Bosco Marwah, especially the residential House No.B35/F 8 situate in Hazina Estate South B on Land Parcel No.69/75 and comprised in Sectional Plan registered at Registrar of Land (sic) as Sectional Title No.75/93, motor vehicles Registration No.KAG 666 L, KXS 800, KZU 204, KAQ 268 J either by themselves, jointly and severally, their respective agents, servants, employees, assigns and/or personal representatives pending the hearing and determination of this application, further court orders and/or directions.
3. That this honourable court be pleased to issue an order to restrain the respondents (petitioners) herein from disrupting, alienating, wasting, transferring, disposing of, and/or in any other manner interfering with the applicant's peaceful and quiet possession of the residential House No. B 35/F 8 situate in Hazina Estate South B within Nairobi Area on Land Parcel No.69/75 and comprised in Sectional Plan registered at Registry of Lands as Sectional Title No.75/93, either by themselves jointly and severally, their respective agents, servants, employees, assigns and/or personal representatives, pending the hearing and determination of this application, further orders and/or directions.
4. That a mandatory order to compel the 1st and 2nd respondents aforementioned to continue to remit to the applicant a stipend of Kshs.10,000/= or such additional amount as this honourable court shall assess being monies earned from the estate of the late John Bosco Marwah particularly the Mark Hotel at Isebania, pending the hearing and determination of this application, further court orders and/or directions.

5. That the costs of this application be borne by the 1st and 2nd respondents.

The grounds upon which the application is based are that:-

- A. The respondents/petitioners willfully failed to name the applicant and the deceased's daughter Katherine Gati Marwah as beneficiaries of the estate.
- B. The grant of letters of administration was obtained fraudulently by the 1st and 2nd respondents/petitioners who made fraudulent or false statements in the petition.
- C. The respondents (petitioners) failed to make a full, frank and fair disclosure of the entire estate of the deceased.
- D. The respondents (petitioners) have sought transfer of ownership of House No. B 35/F 8 situate in Hazina Estate, South B within Nairobi Area in utter breach of the rights and interest of the applicant.
- E. The respondents (petitioners) willfully intend to render the applicant herein and the deceased's daughter aforementioned abject destitute.
- F. The petition is an abuse of the process of this honourable court.

The application is supported by the applicant's affidavit sworn on 22.06.06.

Substantive hearing of the summons application started before me on 17.07.06 whereat the applicant was represented by learned counsel, Mr. C.O. Jaoko while the respondents were represented by learned counsel, Mr. A.S. Kuloba.

Applicant's counsel said the applicant is a widow of the deceased who got married to him under Luo/Kuria customary laws in August, 2003 (sic). Counsel told the court that the applicant had a child, Katherine with the deceased following the marriage and that the matrimonial home was in Hazina Estate, South B, Nairobi. Counsel added that the deceased died on 08.11.05; that the family of the deceased met in Kuria and decided the 1st wife (1st respondent) would apply for letters of administration. It was applicant's counsel's case that the applicant believed the 1st respondent would hold the estate in trust for herself and all other beneficiaries but that has not been so. Counsel went on to say that in June, 2006 the applicant discovered that the respondent had decided to act against the interests of the applicant, especially regarding the property in South B. Counsel complained that after deceased's death, Betty Rashid & Co. Advocates wrote to the National Social Security Fund (NSSF), with whom the deceased was said to have a mortgage over L.R. Block 35/F 8 Hazina (Suit Property, a Flat), *inter alia*, asking NSSF to cause the ownership of the Flat to be transferred into the joint names of the respondents herein who were described as administrators of the deceased's estate but who had not consulted the applicant over the matter. Applicant's counsel submitted that the applicant was a dependant of the deceased and a beneficiary of his estate. Counsel relied on Court of Appeal Civil Appeal No.139 of 1994, Irene Njeri Macharia -vs- Margaret Wairimu Njomo & Patrick Muriithi Harrison which he said considered the provisions of section 3 (5) of the Law of Succession Act *vis-a-vis* section 3 (2) of the African Christian Marriage and Divorce Act, Cap. 151 as well as section 37 of the Marriage Act, Cap. 150. It was applicant's counsel's contention that the applicant is a dependant, beneficiary and a wife within the meaning of section 3 (5) of the Law of Succession Act. Counsel added that the respondents failed to disclose material facts in their petition for letters of administration. He complained that the applicant's daughter was named as a dependant of the deceased but not the applicant. Counsel also contended that the deceased's assets added by hand in the affidavit of the respondents sworn on 10.12.05 in support of the petition for letters of administration were not disclosed and that liabilities ascribed to the deceased's estate are non-existent. It was also the applicant's case that there is a specific attempt by the respondents to disinherit and dispossess the applicant while the respondents purport to need the property in south B (House No. B 35/F 8) occupied by the applicant among others to defray liabilities of the deceased's estate. Applicant's counsel submitted that in alleging that the applicant was not a wife and dependant of

the deceased and also initially consulting her and seeking her consent regarding application for letters of administration, the respondents engaged in self-contradiction. Applicant took exception to being described by the 1st respondent as a cohabitee and asked that the 1st respondent's replying affidavit sworn on 10.07.06 be struck out under Order XVIII rule 6 as being scandalous of the applicant. Applicant's counsel also urged that the costs of the application be borne by the respondents who were acting in their own selfish interests and not in the interests of the deceased's estate.

On the other hand, respondent's counsel opposed the application. He relied on the 1st respondent's replying affidavit sworn on 10.07.06. Counsel said the respondents denied the applicant's allegations that the respondents were on a mission to perpetrate a fraud upon the applicant. He (counsel) defended the 1st respondent's description of the applicant as a cohabitee of the deceased on the basis that the deceased had no capacity to marry the applicant since he had previously contracted a valid statutory marriage under the Marriage Act, Cap.150 and in essence that the deceased's purported subsequent customary marriage to the applicant was null and void *ab initio*. He relied on section 37 of the Marriage Act in this regard. He also referred to Matheka -vs- Matheka (1995 – 1998) 1 EA 190 in the same connection. Counsel defended non-inclusion of the applicant among beneficiaries of the deceased's estate on account of her not being a lawful wife of the deceased. Counsel referred to paragraph 20 of the 1st respondent's replying affidavit denying any attempts by respondents to evict the applicant or render her destitute and that the respondent's actions were taken with a view to protecting the deceased's estate for the benefit of all beneficiaries.

The general tenor of the 1st respondents' response to the application is that her marriage to the deceased, being statutory and previous to the applicant's purported Luo/Kuria customary law marriage, takes precedence over the applicant's purported customary law marriage to the deceased and that the applicant's application should be dismissed with costs. The respondents essentially denied the complaints made by the applicant against them.

In reply, applicant's counsel submitted that Matheka's case alluded to by respondents is irrelevant as in his view it relates to provision for children and not a succession case. He said that section 3 (5) of the Law of Succession Act must be considered as one reads section 37 of the Marriage Act. He pointed out that section 84 of the Law of Succession Act requires an administrator to act as trustee and that the petitioners/respondents have acted in breach of trust. Counsel said the applicant may have consented to the respondents petitioning for letters of administration but that she did not renounce her rights as a wife of the deceased and a beneficiary of his estate as renunciation would have been under rule 18 of the Probate and Administration Rules, which he said the applicant did not do. It was applicant's counsel's case that the respondents had mis-managed the deceased's estate and urged that they should be punished under section 45 of the Law of Succession Act relating to intermeddling with property of deceased persons.

On 29.09.06 applicant's counsel complained that subsequent developments affecting some items of the deceased's estate had taken place which he wished to bring to the attention of the court and to seek relief in respect thereof. The items in question are motor vehicles Reg. Nos. KZQ 121 and KWG 206, which applicant's counsel said had been disposed of. He was allowed to bring up the subject by affidavit evidence and on 05.10.06 the applicant swore a further supplementary affidavit to the effect that the petitioners/respondents had disposed of the said motor vehicles Reg. Nos.KZQ 121 and KWG 206 in September, 2006 and that a third motor vehicle Reg. No. KAJ 361 N also belonging to the deceased's estate was in the process of being disposed of. In the same affidavit, the applicant reported having received a copy of NSSF Application Form for Tenant Purchase Scheme dated 23.05.02 to the effect that the deceased had named the 1st respondent herein as his next of kin in respect of Hazina Estate Flat No.35 – 8, which I assume to be the subject House No. B 35/F 8. The applicant termed that Form a forgery and maintained that the genuine Form regarding the person nominated by the deceased as his next of kin in respect of the said House is the one dated 24.05.02 naming her (applicant) as the next of kin. There is thus controversy regarding whom the deceased nominated as his next of kin in respect of House No. B 35/F 8.

The 1st respondent responded vide her supplementary affidavit sworn on 13.10.06 to the 'new

developments' complained of by the applicant. With regard to the motor vehicles Reg. Nos. KZQ 121, KWG 206 and KAJ 361 N, the 1st respondent said they had not been specified in the applicant's prayers for interim restraining orders. The 1st respondent deposed that the motor vehicles in question have been business assets of the Hotel Isebania known as the Mark Hotel Ltd. established by the deceased and all along managed by the 2nd respondent and the 1st respondent; that the proceeds of sale for the first two of the vehicles have been ploughed back into the Hotel of whose benefit the applicant has continued to enjoy a stipend of Kshs.10,000/= a month. The 1st respondent accused the applicant of insincerity and selfishness by crying foul over the disposal of the vehicles and undertook to render a full account of the same if need arises. With regard to the NSSF Form dated 23.05.02 to the effect that the deceased nominated her as his next of kin for Flat No.35-8 Hazina Estate, the 1st respondent deposed that it was discovered by the 2nd respondent after the summons dated 22.06.06 had been argued and was not within her (1st respondent's) knowledge at the time the summons was argued. The 1st respondent accused the applicant of not coming to court with clear clean hands.

I have given due consideration to arguments and counter-arguments of the parties.

The central and crucial question is whether the applicant is or is not a widow of the deceased. For her to be accorded the status of the deceased's widow, she has to have been the deceased's lawful wife.

The 1st respondent produced a certificate of marriage contracted between her and the deceased herein on 24.02.84 under the Marriage Act. That is a statutory marriage. It is the 1st respondent's evidence that that marriage was never dissolved. That evidence remains uncontroverted.

For her part, the applicant exhibited an affidavit sworn by the deceased and herself on 23.10.02 to the effect that the two of them married each other on 01.04.01 under and in accordance with Kuria and Luo Customary Marriage which 'governed' both of them. It is, therefore, the applicant's case that she was a lawful wife of the deceased and his widow following the deceased's death.

Section 37 of the Marriage Act under which the deceased and 1st respondent got married on 24.02.84 provides as follows:

'37. Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.'

I must observe, with respect, that this section is not very happily worded. However, I shall reserve detailed discussion thereof to a latter occasion.

The first limb of section 37 of the Marriage Act makes it clear that after contracting the statutory marriage to the 1st respondent under the Marriage Act on 24.02.84, the deceased ceased to have any capacity to enter into a valid marital union with any other woman. It, therefore, follows that his subsequent purported customary marriage to the applicant on 01.04.01 during the subsistence of his statutory marriage to the 1st respondent was null and void *ab initio*.

Applicant's counsel submitted that as one reads section 37 of the marriage Act, one must consider section 3 (5) of the Law of Succession Act. The latter section provides;

'3. (5) Notwithstanding 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 sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.'

In my view the intention of this section seems to be the opening of an avenue for a woman married under native law and custom to be regarded as a wife with particular reference to section 29 of the Law of Succession Act relating to what a dependant is and section 40 of the Act relating to how the estate of a deceased husband who was polygamous is to be divided. Was the deceased in the present case polygamous? In my view he was not because his first marriage was the statutory one under the Marriage Act. That is a monogamous marriage. As such, without its dissolution, the deceased had no capacity to marry another woman during the subsistence of the marriage under the Marriage Act. His purported customary marriage was, therefore, a nullity and incapable of conferring upon the applicant the status of a wife as far as statute law is concerned. Whether or not the applicant can claim for herself beneficial interest in the estate of the deceased would depend on concrete evidence that the deceased treated her in a manner suggesting he wanted her to enjoy the status of a dependant. The only evidence suggesting that possibility in the present application is the NSSF Form dated 24.05.02 purporting that the deceased nominated the applicant as his next of kin in respect of Hazina Estate, Nairobi Flat No. 35 – 8. I have already noted that there are conflicting claims as to whether the deceased nominated the applicant or 1st respondent as his next of kin. Forgery has been alleged. These are matters of evidence which would appropriately be canvassed in an application for dependency, which the present application is not.

The applicant complained about the inclusion of only her daughter with the deceased in the petitioners'/respondents' petition for letters of administration but not herself. Her exclusion is explained by my finding that her purported customary marriage to the deceased was a nullity, having been in contravention of written law, i.e. the Marriage Act. As there appears to be no dispute that the applicant's daughter Katherine was sired by the deceased, the said daughter was correctly included as a dependant of the deceased. There also appears to be no dispute that House No. B 35/F 8, Hazina Estate South B, Nairobi belonged to the deceased. I find the said House to be part of the deceased's estate. As the applicant is said to be in occupation of the House, no doubt with her daughter, Katherine, the applicant's occupation of the said house should not be disturbed pending settlement of the mode of distribution of the deceased's estate in the context that the deceased's daughter, Katherine will eventually get a share of the deceased's estate whose (Katherine's share's) magnitude is yet to be determined. I make the following final orders:-

1. House No. B 35/F 8 situate in Hazina Estate South B, Nairobi said to be under the occupation of the applicant is hereby deemed to be part of the deceased's estate and shall be included among the properties to be administered by the petitioners/respondents BUT the occupation thereof by the applicant and her daughter Katherine shall not be disturbed pending settlement of the mode of distribution of the deceased's estate.
2. Motor vehicles Reg. Nos. KAG 666L, KXS 800, KZU 204 and KAQ 268 J are also deemed to be part of the deceased's estate and shall be included among the properties to be administered by the petitioners/respondents pending settlement of the mode of distribution of the deceased's estate.
3. The respondents shall continue to remit Kshs.10,000/= per month earned from the estate of the deceased towards the maintenance of the deceased's daughter Katherine pending settlement of the mode of distribution of the deceased's estate.
4. The proceeds of sale of motor vehicles Reg. Nos. KZQ 121 and KWG 206 shall be made part and parcel of the deceased's estate, to be duly accounted for in the mode of distribution of the deceased's estate.
5. Motor vehicle Reg. No.KAJ 361 N, if sold, the proceeds of its sale to be treated as in 4 above. If the said motor vehicle has not been sold, the same to be retained as part of the deceased's estate pending settlement of the mode of distribution of the deceased's estate.
6. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 31st day of October, 2006.

B.P. KUBO

JUDGE