



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
PROBATE AND ADMINISTRATION
SUCCESSION CAUSE NO.2201 OF 1999

IN THE MATTER OF ESTATE OF JOSHUA MUTHAMA KITHOME (DECEASED)

RULING

A petition for Letters of Administration intestate, to the estate of the late Josphua Muthama Kithome was filed by Joseph Kithome Kisilu, the father of the deceased.

A letter from the Chief of Makindu dated 24th September, 1999 stated that the deceased and his wife were “separated for all practical purposes of a marriage”.

In form P&A 5 the names of those who survived the deceased were given in paragraph 4. The name of the deceased’s widow Ann Muthama was included as well as the deceased’s daughter and son.

The deceased’s widow, Ann Nancy Wanjiku Ndungu moved the court with a Notice of Objection, based on the grounds that as the deceased’s wife, she had not been made a co-administrator to the deceased’s estate yet she is the mother of the deceased’s two children. She also cross petitioned for the grant of letters of administration to be issued to her. The deceased’s father filed an affidavit in answer to the objection filed by the deceased’s widow. The affidavit is dated 14th February, 2000. Most of the averments are complaints about the objector who was said not to have been interested in her marriage to the deceased and had infact abandoned him.

The objector, Ann Nancy Wanjiku Ndungu Muthama filed a further affidavit in reply to the affidavit of her father in law. It is dated 7th March, 2000.

In paragraph 14 of the affidavit she states,

“that even if we had problems in our marriage, we were husband and wife and neither of us moved to dissolve our marriage which subsisted until my late husband’s death and that it is very unfortunate that my fath er in law is indirectly trying to divorce me from my dead husband and to cause the disinheritance of me and my children.....”

In court during the hearing of the objection proceedings to nullify the Grant of Letters of Administration issued (but not confirmed) the petitioner Joseph Kithome Kisilu, the father of the deceased testified that he petitioned for letters of administration to his son’s estate alone because by the time his son died he was living alone at Tena estate in Nairobi, working as an engineer with Firestone.

He confirmed that the deceased was married to Nancy Wanjiku Ndungu on 3.10.96 for only 5 months,

then he was sent away from the house by Nancy who was by then pregnant, and already had a daughter.

According to the petitioner, Nancy instructed the school where the daughter used to go not to allow the deceased to see her.

The petitioner also produced the birth certificate of the 2nd baby Nancy had. He complained that Nancy did not disclose the details of the father of the baby when he was born. He nevertheless stated that she recognizes Nancy as the widow of her late son but he said her actions do not show totality of mind.

Nancy, the objector applicant testified that she got married to the deceased at All Saints Cathedral Nairobi on 3rd October, 1996. She produced a copy of her marriage certificate. The marriage had problems and on 15.3.97, her husband left the house. He left a note behind telling her that she could keep the items in the house. Her husband moved out of his own free will. The two were not divorced or legally separated.

In July 1997, the deceased called Nancy and they met at All Saints Cathedral. They met the pastor in an effort to reconcile them but unfortunately this did not work.

The objector even went to FIDA Kenya to try and seek help in order for them to reconcile, but this never worked.

The objector lamented that if her father in law gets letters of administration he would disinherit the children.

The 1st born child is the objector's daughter but the deceased accepted her as his daughter. The objector left out her husband's names in filing the forms to get the birth certificate, and even in the birth certificate because she complained that her husband did not visit her in hospital when she had the baby boy otherwise, he paid for her clinic visits at Masaba hospital. That he knew when the baby was expected yet he did not go to the hospital.

The objector did not go for to Makindu for the burial of her husband because there was too much hostility.

I have considered the evidence on record, the pleadings and submissions from both learned counsel.

The facts on record which were not disputed are that the deceased and the objector had a legal marriage which subsisted up to the date of the deceased's death.

Secondly, the objector who was a party to that marriage admitted that they the two had marital problems which caused them to live apart, but they were never divorced or legally separated. That they made attempts at reconciliation using the Pastor who performed their wedding ceremony, but this did not work out.

Then there is the issue of children. Whether the deceased's name was endorsed on the birth certificate of the second child or not, both the petitioner and the objector admitted that the second child was the deceased's son. Infact the petitioner who is the deceased's father put his names down as one of the survivors of the deceased. The petitioner also accepted the objector's 1st child, the daughter as a child the deceased had taken as his own and put her name as one of the survivor to the deceased's estate.

There is therefore no dispute that the two are children of the deceased and again, that the objector is the widow of the deceased.

I am very disappointed with the Chiefs letter in this Succession Cause. The Chief's letter is supposed to guide the court in giving a list of survivors when a chief decides to "speculate" on the relationship of a deceased and his wife without any tangible evidence as to whether the 2 were divorced or not, then that becomes a very serious matter. I reject the letter written by the Chief of Makindu in this case. It is of no evidential value

The petitioner admits that Nancy is his daughter in law, and the 2 children, the children of the deceased. I do not see that there is any dispute in this case. The deceased in this case left a widow and children. Under Sections 35 and 66 of the Succession Act, the deceased's widow has the first priority to administer his estate, where the deceased died intestate.

However, in this case since there is a continuing trust – i.e children aged below 18 years old, the Law requires that there must be 2 administrators. In this respect therefore I direct that a grant of letters of administration intestate be issued jointly to Ann Nancy Wanjiku Ndungu Muthama and Joseph Kithome Kisilu.

When it comes to the stage of petition for confirmation of grant I will expect the 2 to work out and agree on a mode of distribution – i.e. the respective identities of shares of persons beneficially entitled, as provided in the proviso to Section 71(2)(d) of the Succession Act Cap. 160, Laws of Kenya.

Dated at Nairobi this 28th day of February, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE