



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2511 OF 2000

IN THE MATTER OF THE ESTATE OF JOHN LINUS ALUOCH

(DECEASED)

PHOEBE ACHIENG ALUOCH ..... OBJECTOR/APPLICANT

VERSUS

EUNICE EVALINE ATIENO

JAMES OYUGI NGWENO ..CO-PETITIONERS/RESPONDENTS

JUDGMENT

The Objector in this matter is Phoebe Achieng Aluoch widow of the late John Linus Aluoch who died on 28th September 2000 having been married on 22nd November 1975 at Our Lady of Peace, Nairobi South Catholic Church under The African Christian Marriage And Divorce Act (Cap. 151). The deceased left her with seven children and no evidence has been adduced to prove that that marriage has ever been lawfully dissolved or divorce granted.

On the other hand the deceased had a lover in the name of Eunice Evaline Atieno who claims their love lasted for many years until the deceased died. On 8th September 1992 a daughter Maryann Akinyi, so claims Eunice Evaline Atieno, resulted from that love affair before the deceased and Eunice Evaline Atieno started living together under customary law sometime in 1999 and continued to live together until the deceased died.

From the evidence it cannot be disputed that the deceased was living with Eunice Evaline Atieno in a house at Hurlingham in Nairobi until the time of his death. As a result Eunice Evaline Atieno had access to and remains in possession of the deceased's voter's card, National Assembly Pass, Driving Licence and a Cheque Book from National Industrial Credit Bank Ltd. She also says she had the deceased's identity card which she surrendered on filing an application for the deceased's certificate of death. She therefore took advantage of the fact of her possession of those documents to petition this court for a grant of letters of administration to the estate of the deceased. The petition filed on 17th November 2000 mentioned Eunice Evaline Atieno and her daughter she then called Anne Mary Akinyi, to be the only two beneficiaries in the estate of the deceased. Eunice Evaline Atieno to whom I will from now also be referring as the First Petitioner, mentioned Bank Account No. 005 353000 at the National Industrial Credit Bank Ltd and Motor Vehicle Registration No. KWY 309 Peugeot Saloon as the only assets in the estate of the deceased. She filed the petition jointly with one James Oyugi Ngweno who claimed to be the Deceased's brother in law and has not dared to come up in this court to challenge the evidence of the Objector that she, the Objector, does not know him. The Objector filed this objection to oppose that petition.

It is curious to note that in these proceedings members of the family of the deceased have kept a aloof and therefore the fight between these two women has gone on without the family's assistance as witnesses. One may ask whether the deceased did not leave any parent or brother or sister or sister in law other than Grace Aluoch who gave evidence as Objector's witness number three.

However to cut a long story short as the rest can be found in the recorded evidence, the evidence before me has proved that the two petitioners being Eunice Evaline Atieno and her brother James Oyugi Ngweno knew, or at least the former, knew that the Objector was a lawful wife of the deceased. She knew that the deceased has seven children with the Objector and were alive. But she concealed them from the court. The First Petitioner must have known or must have had reason to believe that the Deceased had assets other than those mentioned in the petition; yet she never bothered to include them.

The First Petitioner claims to have been married to the Deceased under customary law being Luo Customary Law. But she has not adduced evidence of that marriage. Her evidence that they started cohabiting with the deceased as husband and wife in 1999 is suspect in the absence of supporting evidence and it may be that they started co-habiting in that very year the deceased died.

Similarly her evidence that her daughter Maryann Akinyi was fathered by the deceased is suspect. Born on 8th September 1992 when the first Petitioner was not co-habiting with the deceased. The child's certificate of birth D. No. 82703 the basis of the First Petitioner's claim that the child was fathered by the Deceased was issued on 8th October 2001 after the petition herein had been filed in this court on 17th November 2000. At that time the First Petitioner must have been alive to the fact that she needed good evidence to support her claim that the child was fathered by the Deceased. She therefore obtained that certificate of birth in which it is written that the father of Maryann Akinyi was John Linus Aluoch. The First Petitioner has not produced the Notification of Registration of Birth issued when she was discharged from the maternity admission respecting the said child. On the basis of the evidence before me, I am not persuaded to agree that the said child must have been fathered by the Deceased. Furthermore, the child may have lived with the Deceased at the time the First Petitioner lived with the Deceased. The First Petitioner and the Deceased may have done some things together such as purchase of some items. But that was no proof that the Deceased and the First Petitioner were married and that the First Petitioner and her child were dependants of the Deceased within the meaning of the provisions of the Law of Succession Act. Moreover the Deceased having previously entered into a Christian marriage under the African Marriage and Divorce Act, he was incapable of entering into any other lawful marriage while his first marriage subsisted.

In conclusion therefore, I find that the Petitioners in the petition filed on 17th November 2000 herein concealed from the court the fact that there were other beneficiaries to the estate of the Deceased and that those beneficiaries included the widow of the Deceased a lawful wife. They concealed the fact that there were other assets in the estate of the Deceased. I further find that although the First Petitioner may have been a lover of the Deceased, the two had not married each other under Luo customary law or under any other law recognized in this country. The first Petitioner was not therefore a widow of the Deceased and as such she is not entitled to a grant of letters of administration In testate to the estate of the Deceased. I entertain reasonable doubt whether the child Maryann Akinyi is fathered by the Deceased and I do not therefore direct that she, either alone or with her mother, be included among beneficiaries in the estate of the Deceased. Consequently, the Objection of Phoebe Aching Aluoch dated 18th January 2001 is hereby upheld; the petition filed by Eunice Evaline Atieno and James Oyugi Ngweno on 17th November 2000 dismissed and the Objectors petition by way of Cross Application for a grant, filed on 6th March 2001, be and is hereby granted as prayed.

Exhibits 4, 5, 6 and 7 produced by the First Petitioner Eunice Evaline Atieno be released to the Objector when the time for lawful release of same comes – unless otherwise subsequently ordered by court.

The two petitioners Eunice Evaline Atieno and James Oyugi Ngweno to pay costs of the objection and cross petition..

Dated this 24th day of October 2002.

J.M. KHAMONI

JUDGE