



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE 89 OF 1996

IN THE MATTER OF THE ESTATE OF AGGREY MAKANGA WAMIRA

AND

IN THE MATTER OF APPLICATION FOR LETTERS OF ADMINISTRATION BY

HELLEN PHILLICE MAKANGA

RULING

Aggrey Makanga Wamira (hereinafter the deceased) was aged 40 years old when he died on 26.3.1996. The cause of death is stated in the death certificate to be “Immune Deficiency State”. He was carrying on business as a petrol station dealer in Mariakani in Kilifi district and owned some properties there, although there is some dispute as to their identities.

There is no dispute that the deceased was married to only one wife under Luhya custom. She is Hellen Phylice Makanga (Hellen). Since their marriage in 1977 they had 6 children the first one being Gladys Andanje (Gladys) who was born on 20.8.1978 and was therefore just under 18 years when the father died. The youngest was aged 3 years.

The deceased and his family were residing in Mariakani but when he died he was taken to his ancestral home in Khisa location Western province and was buried in his father’s compound where he had constructed his house. After the burial, Hellen came back to Mombasa and with the assistance of her brother-in-law, Isaac Etemesi and cousin, John Wekesa, she was able to complete application forms for the grant of Letters of Administration for the estate of her late husband. That was on 30.9.96. Since her eldest daughter had attained the age of majority, she joined her as a co-administrator of the estate. She did so because there were children in school and she also needed to maintain them by running the business hitherto run by her husband which she was familiar with.

The father of the deceased, *Yakobo Amira Omulule (Yakobo)* got wind of the intentions of Hellen. He was born in 1929 and was therefore aged about 67 years when the deceased died. He resides at Khisa, Kakamega doing subsistence farming and depended on the deceased for some of his livelihood. His wife is still alive and he had three other sons. He objected to the Notice published in the Kenya Gazette by Hellen on 13.12.96 and filed his objection on 18.1.97.

Yakobo made the objection on the ground that he had an interest in the estate of the deceased as the father and he feared that his interest would be prejudiced by the appointment of the wife and daughter of the deceased whom he alleged was a minor. He asserted that Hellen being a young inexperienced widow could not administer the estate properly and in any event she was likely to remarry and leave the children

destitute. He filed an answer to the petition on 2.2.98 and went further to file a cross petition on the same day for grant of Letters of Administration to himself, and the widow of the deceased Hellen.

Directions were given that *viva voce* evidence be taken from the parties and the matter proceeded to hearing for one day.

By the time of hearing, Yakobo's original advocate on record had been given leave to withdraw from acting for him and he appointed Mrs Khaminwa of M/S Khaminwa & Khaminwa Advocates while Mr Njoroge was instructed by M/S Kiarie Kariuki & Co Advocates to appear for Hellen and Gladys.

It was Yakobo's evidence that soon after the death and burial of his son, he asked the widow to perform some customary rites but she refused at first until he forced her to comply. The matter of applying for Letters of Administration was not discussed. He was in good terms with Hellen and only wanted his name to be included to assist her in administering the estate in case anything happened to Hellen or she decides to remarry. That way the interests of the young children of the deceased would not be jeopardized. He was aware, unlike Hellen who had listed only two properties of the deceased, that the deceased had other properties including a motor vehicle and cash in banks which he listed in his cross-petition. He admitted in cross-examination however that as soon as the son died, he took the only motor vehicle from the Mariakani business to Kakamega where he started using it to generate income for his own use. He denied that he and his other sons broke into the deceased's house and took away all documents relating to his property. He also denied that he had not assisted the wife and the children of the deceased since that time or would find it difficult to travel to Mombasa due to old age if he was made a coadministrator of the estate. He added that he wanted to ensure that he got something small from his late son's estate.

For her part Hellen stated that she fell out with her father-in-law and two of her brothers-in-law when they broke into her house at Mariakani and stole documents relating to her husband's properties on 26.3.96. That is why in her petition she has listed only two properties as she was unaware of the other properties listed in Yakobo's cross petition. She requested that the property be included in her petition. Yakobo also forcibly took away the family vehicle and is now using it for commercial purpose at Kakamega. He remits no part of the income for the family's upkeep. Demands that he should return the vehicle have not been heeded. Their relationship has since been strained as they do not even greet each other nor does Yakobo visit them in Mariakani. She was capable of looking after the estate of her late husband with the assistance of her grown-up daughter and did not need the assistance of her father-in-law. She had no objection in giving him part of the estate when she distributes it. But there would be a deadlock in such distribution and administration of the estate if the father-in-law was joined in.

It was put to Hellen that her husband died because of Immune Deficiency and it was desirable therefore that another mature person should join in the estate as a precaution. She seemed to see no problem with that however as she believed he died of malaria and coughing. She herself has not been diagnosed to be sick. At any rate her daughter, Gladys was now of adult age and was capable of taking care of the other children.

Gladys who was 21 and in Form III when she testified affirmed that she had joined her mother in applying for Letters of Administration of her father's estate. She was not a minor when they made the application as alleged by Yakobo and the application was not therefore a nullity. She exhibited her birth certificate. She stated that she would have no difficulty in administering the estate and if her mother was not there she would apply to join another child of the deceased who would be of age or a responsible relative of her choice. She knew Yakobo was her grandfather and loved him but Yakobo himself had no respect for them and did not treat them as his grandchildren. It would be difficult to administer the estate when Yakobo has to be collected from Kakamega every time the need arose. He never travelled to Mombasa on his own.

In her submissions Mrs Khaminwa for Yakobo stated that the objection made by the father and his desire to join the deceased's wife in the administration of the estate had no ill will; his only desire being to assist Hellen who is young and illiterate. She sought other people's assistance to apply why not the father? Mrs Khaminwa was of the view that the administration of this estate should infact go to the Public Trustee or

if the young Gladys should remain then the father should also be included in the grant. There were no serious disagreements as alleged and distance would not be an impediment. The object should be to preserve family cohesion.

Mr Njoroge on his part referred to the objections made and submitted that the evidence did not bear them out. Section 35 of the Succession Act provides that the estate shall devolve on the wife and there is no evidence as alleged that she was unable to administer the estate. Section 66 also referred to surviving spouse. The father would only come in under section 39 where no spouse or children were left. The father who is 70 years old and illiterate would not bring any extra advantage to the estate. On the contrary he would be a liability. He has already intermeddled in the estate by forcibly taking away some property. He is responsible for the bad blood existing between the parties. The cross-petition and the objection must therefore fail.

I have considered the objection made to the applicant's petition and the cross-petition. I have also considered the oral evidence tendered and the submission of counsel.

The starting point would be a restatement of the law on intestacy. It is well covered under part V of the Law of Succession Act cap 160 Laws of Kenya. Under section 35(1).

"35(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person".

Section 40 is not relevant since the deceased was not polygamous. Then under section 66, the Court is given a discretion in the appointment of the person or persons who will administer the estate. It states:

"66 When a deceased has died intestate, the Court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of Letters of Administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficiary interests as provided by part V;

(c) the Public Trustee and

(d) creditors:"

It is clearly therefore the case under written law that a surviving spouse has preference over other persons to be given a grant for the administration of the estate of the deceased spouse.

I suspect in this matter problems have arisen because the surviving spouse was the wife. I also suspect that the objector was motivated more by a conviction borne out of custom and customary traditions than anything else that the wife of a deceased ought not to take charge of her deceased husband's estate. The objector talked about forcing the wife to accept some Luhya customary rites which he did not disclose. He may well have been referring to funeral rites, but after the funeral further customary rites relating to the appointment of an administrator are performed. In his *Restatement of African Law* at page 42, Cotran, states that the administrator (*omulindi*), on intestacy is appointed by the elders. He continues:

"Normally the deceased's eldest son is appointed, if he is of age or alternatively the elders may nominate

a brother of the deceased. The *omulindi* has three principal functions:-

- (i) to be the head of the family and as such to represent the family for all purposes
- (ii) to be guardian of the widow and children of the deceased in certain cases, and
- (iii) to act as administrator of the deceased's estate."

Under Luhya custom therefore the widow has no role to play in the administration of the estate. I believe that is the view taken by the objector in this case. That is because when he was asked in cross-examination to give reasons why he thought the widow would not administer the estate properly as stated in his objection, he said he had no reason. He only wanted to be joined in the grant. He had no response when it was proved that the daughter was not a minor but had attained the age of majority before the application was made. He only felt that she was too young.

The Succession Act became operative in 1981. Even before then however, the Courts had given definite views on the capacity of widows to administer their deceased husband's estates, customary law bigotry notwithstanding. I cannot better the exposition given by Madan J (as he then was) in *Re Kibiego* [1972] EA 179 and I will therefore adopt it:

"Whatever Cotran's source of Nandi Law may be, I am of the opinion that in today's Kenya, in the absence of a valid reason such as grave unsuitability, a widow of whatever race living in the country is entitled to apply to the Court for the grant of Letters of Administration, more so when the children, as in the instant case, are minors. A widow is the most suitable person to obtain representation to her deceased husband's estate. In the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children. It would be going back to a medieval conception to cling to a tribal custom by refusing her a grant which is obviously unsuited to the progressive society of Kenya in this year of grace. A legal system ought to be able to march with the changing conditions fitting itself into the aspirations of the people which it supposed to safeguard and serve".

On the evidence on record I find no grave unsuitability of the widow in this case to administer her late husband's estate. There are provisions of safeguarding the estate in the event of her remarriage which she swears she does not intend to do. There is no medical report to confirm that she was suffering from the same ailment her husband died from or other illness. At any rate there are legal provisions covering that eventuality. Her illiteracy is not a bar and would not be alleviated by joining the objector who is equally illiterate. The second applicant, Gladys has no legal disability in being joined as a joint administrator. They are both capable of taking care of the interests of the objector as the deceased's father.

All in all I find no merits in the objection made and I dismiss the objection. I also strike out the cross petition made by Jacob Amira Omulule. Each party shall bear its own costs.

Dated and Delivered at Mombasa this 19th day of January 2000.

P N WAKI

JUDGE