



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

SUCC CAUSE 976 OF 94

1. KIMANI MATHENGE MURIUKI)

2. LUCINA MITHAYO WANJERI).....PLAINTIFF

3. IMMACULATE NGUKU WANYANGA)

VERSUS

1. PATRICIA M. MURIUKI)

2. THOMAS KIHAGI MURIUKI)RESPONDENT

RULING On 11.5.93, the Respondents filed a petition for Grant of letters of administration intestate in respect of estate of Carey Kihagi Muriuki who died on 29.11.93 in succession cause no. 765/94.

On 27.5.94 the present applicants not being aware of existence of the succession cause filed the present application on 27.5.94.

On 22.6.94, the Deputy Registrar ordered that P & A cause no. 765/94 be consolidated with the present application and that Probate and Administration Cause No, 765/94 be the main file. On 7.2.95 grant was given to the two Respondents.

On 18.6.96, I ruled that although the present application should have been made in the succession file the procedural error was rectified by the order of the Deputy Registrar dated 22.6.94 which in effect made the present application an application in the succession case. There was no appeal against the Ruling of 18.6.96. Mr. Kamonde for the Respondent still insists that the order of 18.6.96 is wrong but as I have already made a decision, I am functus Oficio I have no jurisdiction to revisit the issue.

Carrey Kihagi Muriuki married Patricia Margaret Muriuki on 20.5.67 in Canada under a monogamous marriage. There are two children of that marriage namely; Thomas Kihagi Muriuki and Paul Mwangi Muriuki. Immaculate Nguku Wanyaga agrees that deceased was married to Patricia under a monogamous marriage but she deposes in the supporting affidavit sworn in support of this application that she went through a kikuyu customary marriage with deceased and Kihagi Mathenge Muriuki and Lucina Wanjeri Muriuki are children of that customary marriage.

The respondents deposes in the replying affidavit sworn on 22.7.94 that deceased was never married to Immaculate under Kikuyu customary law.

They further depose that Kihagi Mathenge was Begotten through an adulterous association between deceased and Immaculate and that Lucina was not the deceased's child and never lived with the deceased.

Immaculate Conceded in her evidence that she never lived with deceased as husband and wife. She testified that she met deceased about 1976/1977 Deceased was living with his wife and children in their house at Riverside The two became friends and deceased started visiting her at at her house in Jamhuri estate. Later deceased “more or less moved” into her house. Kihagi Mathenge was born out of that relation on 10.5.80. In October 1980, deceased bought a house at Gigiri and Emmaculate, deceased and Kihagi Muriuki moved into that house leaving Patricia and her two children to live at Riverside. Immaculate does not say when she left the Gigiri house but her lawyers letter dated 31.1.83 show that she left Gigiri house in October 1982. Lucina Mithayo Wanjeri was born on 6.12.82 after Immaculate had left Gigiri home and while her mother was living with her sister at Makadara estate.

Emmaculate is categorical in her evidence that she is not claiming to be a wife of the deceased for the purposes of this case. Her lawyers letter dated 31.1.83 expressly informed deceased that Emmaculate was not his wife and that he had no capacity to marry her having already been married under a monogamous marriage. She did not attempt to prove that she went through a customary marriage with deceased. So she cannot be deemed as a wife under S. 3(5) of the Law of Succession Act and she is not therefore a dependant under S. 26 of the law of Succession Act.

Her application for provision for a dependant fails.

As for Kihagi Mathenge Muriuki and Mithayo Wanjeri; I start by quoting S. 3(5) of the law of succession Act (LSA) which provides;

“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 purposes of this Act, and in particular section 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.” This section deals with rights of a woman married under a void or voidable marriage and the rights of the children of that marriage. As Immaculate Nguku concedes that she was not married to deceased under a customary marriage which allows polygamy, it follows from S. 3(5) of the LSA that Kihagi Mathenge Muriuki and Maina Mithayo Wanjeri are not children of a void marriage and therefore are not considered as children within the meaning of the LSA. If I had found that they are children of a void or invalid marriage I would have held that they rank equally with two legitimate children of deceased and that they would qualify as dependants within the meaning of S. 29 (a) of the L.S.A whether or not they were maintained by deceased immediately prior to his death (see section 3(3) L.S.A.)

But Mr. Ngunjiri for Applicants submits in the written submissions dated 19/4/96, filed in respect of a previous application, but adopted for this application, that the two children are never the less children as defined in S. 3 of the LSA

By the definition in S. 3(2), a child includes, in relation to a male person, a “child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent Responsibility”

Mr. Kamonde submits both in the written submissions dated 26.4.96 in respect of a previous application and in the written submissions dated 21.10.99 in respect of the present application, that, there are three categories of children- that is, legitimate children, legitimated children by the provisions of the law which extend the meaning of the word child and putative children who are not either legitimate or legitimated by the provisions of the law.

He contends that S. 29(a) of LSA deals with legitimate children which includes children of later customary marriage as provided in S. 3(5) of LSA It is his view that children of Immaculate were born out of an adulterous association and can not be deemed children under S. 29(a) of LSA and that they cannot also fall under the category of “Other children” in S 29(b) which deals with relatives who have no blood relationship with the deceased.

Lastly; he submits that the children in this case claim to be dependants under S. 29(b) of the LSA but that

the application cannot succeed because that section covers relatives and in any case they have not proved that deceased was maintaining them immediately prior to his death. Section 3(5) LSA deals with children of a void or voidable marriage.

Children of a void or voidable marriage are illegitimate but by S. 3(5), if their mother went through a customary marriage, the children would be deemed legitimate and would be dependants under S. 29(a) LSA.

But there are other classes of illegitimate children as distinct from illegitimate children born out of an invalid marriage. They could be issues of a relationship of a man and woman who do not eventually marry. Those children would not qualify as dependants unless the father had recognized or accepted them as children of his own or he had voluntarily assumed permanent responsibility over them. If he does so, the children rank equally with the legitimate children by virtue of S. 3(3) of LSA and they would qualify as dependants under S. 29(a) of the LSA whether or not they were being maintained by deceased prior to his death.

That was the recommendation of the commission on the Law of Succession - (see paragraphs 155, 156, 157, 158 and 110 of the Report of the Commission on Law of succession - 1968)

So, if it is proved that Kihagi Mathenge Muriuki and Lucina Mithayo Wanjeri are natural children of the deceased and that deceased recognised them or accepted them as his own children or voluntarily assumed permanent responsibility over them they would qualify as dependants under S. 29(a) LSA notwithstanding that their mother was not married to the deceased.

As for Kihagi Mathenge Muriuki; it is not disputed by respondents that he is a natural child of the deceased. What they say is that he is illegitimate He was born when his mother and deceased were living together and he lived with the deceased. His certificate of birth shows that deceased was his father. He is named after father of the deceased. He was integrated in the deceased other family. He travelled abroad with his father on one occasion and joined his fathers other children and were photographed together.

Thomas Kihagi Muriuki (2nd Respondent) corresponded with him as his own brother. (see letter dated 4.10.92).

He was recognized by the funeral committee uninfluenced by his mother as child of the deceased. He has given evidence of how he lived with his father and how his father was maintaining him and paying his school fees. He appears in a photograph (Ex 2(b) with first respondent and others.

The evidence is overwhelming that deceased recognised him as his own child and even assumed permanent responsibility over him as evidenced by the cheques deceased used to give to his mother (Ex 8(b) and (c) and deceased arrangement for his proper education (Ex 11), among other evidence. I am satisfied that Kihagi Mathenge Muriuki is a dependant of the deceased under S. 29 (a) L.S.A and does not even have to show that he was being maintained by deceased prior to his death.

As for Lucina Muthayo Wanjeri, she was born after her mother left the deceased. It is the burden of the mother to prove on a balance of probabilities that deceased was the father of the child. Her mother merely said that deceased was the father without providing concrete evidence..

Respondents dispute that she is a child of the deceased. Her certificate of birth shows that her mother did not give name of the deceased as her father.

It would appear she was not named after the mother of the deceased.

Deceased questioned the name in his letter dated 11.11.83 in answer to a request by her mother for help. There is evidence that Lucina did not live with deceased although it is accepted that she used to visit deceased occasionally. There is no concrete evidence direct assistance's by deceased.

It is true that she accompanied deceased abroad once and deceased referred to her as his daughter in the affidavit to support application for passport. It is also true that she was named in the funeral programme as a child of the deceased. But deceased was dead and had no control of the events after his death. I do not think that the mere occasional references of Lucina as his child in a few documents without concrete evidence that deceased was the natural father of the child; that they lived together as father and child; that she was absorbed in the family of deceased or that deceased voluntarily assumed permanent responsibility over her, is sufficient to show that she was a dependant of the deceased in such sensitive matters as inheritance.

I conclude therefore that it has not been proved that Lucina is a dependant .

I am required to make a reasonable provision for Kihagi Mathenge Muriuki. In doing so I should take into account the matters in S. 28 of the Act and in Rule 46(1) of Probate and Administration Rules if contained in the verifying affidavit.

The verifying affidavit of Immaculate Nguku Wanyanga lists so many properties as belonging to the deceased. The Respondents in the affidavit to support the petition for Grant of letters of administration only list four properties. They aver in para 7 of the affidavit sworn on 22.7.94, in answer to the petition for reasonable provision, that they were not aware of the properties mentioned because Immaculate may have carried away the documents They further depose that deceased assets have been inflated and that some of the properties do not exist or that they do not belong to deceased wholly. So the nature, situation and extent of deceased properties has not been ascertained or agreed. Further the needs of the other beneficiaries have not been ascertained. Petitioners have not annexed abstracts of title of the immovable proportion and documents of title in respect of other assets like shares The liabilities of the estate has not been disclosed or ascertained. The value of the net estate is not known.

In the above circumstances, I am unable to assess a reasonable provision for him. But in my view that does not stop the court from requiring the parties to file further affidavits to enable the court to assess the reasonable provision for Kihagi Mathenge Muriuki. Court has inherent powers under Rule 73 Probate and Administration Rules to make orders as may be necessary for the ends of justice. Alternatively, parties can attempt to reach an agreement.

From the foregoing I rule that Lucina Mathayo Wanjeri and Immaculate Wanyanga are not dependants and dismiss their application with costs of Lucina to be paid from the estate but no order as to costs regarding application by Immaculate M. Wanyaga. I further rule that Kihagi Mathenge Muriuki is a dependant and is entitled to a reasonable provision from the estate.

I postpone the assessment of what is a reasonable provision for him until parties file supplementary affidavits particularly ascertaining the nature, situation and amount of deceased estate, liabilities and needs of all other beneficiaries and all other relevant matters. Thereafter parties to fix a date for assessment if no agreement is reached.

E. M. Githinji

Judge

3.3.2000

Mr. Ngunjiri present

Mr. Kamonde present

Mr. Kamonde

I apply for leave to appeal. I also apply for leave to take photocopies of the exhibits I also apply for leave to take photocopies of the courts proceeding and Ruling or certified copy of the Ruling.

Mr. Ngunjiri

I apply for leave to appeal. I also apply for certified copy of the Ruling.

E. M. Githinji

Judge

Order: Leave to appeal given to petitioners and respondents leave to Mr. Kamonde to take photostat copy of the proceedings.

Ruling to be typed immediately and copies supplied as prayed.

E. M. Githinji

Judge

Leave to all parties to take photocopies of the exhibit.

E. M. Githinji

Judge