



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION NO. 289 OF 2014**

**IN THE MATTER OF THE ESTATE OF SNM (DECEASED)**

**N M K.....APPLICANT**

**VERSUS**

**N M N.....RESPONDENT**

**RULING**

1. SNM, the deceased, young man of 29 years died on 19.3.12 as a result of an electrocution accident at his place of work. A grant for the purpose of filing suit to claim damages, was issued to his father NMN, the Respondent herein and his mother VN on 22.7.19. Thereafter a full grant of letters of administration (the Grant) was issued to the Respondent and VN, now deceased, on 31.3.15.

2. On 17.8.16, NMK, the Applicant, filed a summons for revocation of the Grant, dated 4.8.16 on the ground that she as a wife of the deceased and her 2 children were excluded as beneficiaries of the deceased. On 31.10.16, the summons was dismissed for failure by the Applicant to attend Court on the hearing date.

3. Thereafter on 27.3.19, the Applicant filed a summons of even date seeking a raft of orders some of which are spent. The pending orders include:

- a) That the Grant be revoked.
- b) That the Court be pleased to make a finding that the Applicant and her 2 children, 12 year old AMN and 7 year old RNN are dependants and beneficiaries of the estate of the deceased.
- c) That the Court be pleased to make a finding that RMM, AMM, DM and MM, the siblings of the deceased are neither dependants nor beneficiaries of the estate.
- d) That the Court be pleased to add to the list of assets of the estate of the deceased, the proceeds of the judgment in Mombasa CMCC No. 2303 of 2013 NMN (suing as personal representative of the estate of SNM v Serena Beach Resort & Spa Limited) (the CMCC Suit) amounting to Kshs. 1,226,342.60, plus costs and interest.
- e) That a new grant be issued to the Applicant and the Respondent.
- f) That the grant so issued be confirmed.
- g) Costs.

4. The grounds upon which the Application is premised are: that the Grant has become useless and inoperative as VN, one of the administrators, died on 16.2.19, that the judgment in the CMCC Suit was delivered on 15.2.19 and the decretal amount is awaiting settlement as no appeal has been filed; that the administrators listed NSSF sums and company dues as the assets of the estate of the deceased and excluded the proceeds of the CMCC Suit; that the Applicant further claims that she cohabited with the deceased from 2007 and was regarded as his wife by his family; that the Applicant had a child, AM from another relationship which the deceased regarded as his own and took care of her needs; that the couple then had a child together, RNN; that the Applicant stayed at their matrimonial home in [particulars withheld] village, Wetaa sub location, while the deceased lived and worked in Mombasa at the Serena Hotel; that the Respondent and his family now wants to disinherit the Applicant and her children and excluded as beneficiaries of the estate of the deceased.

5. The Respondent opposed the Application by his grounds of opposition dated 29.3.19. He claims that the Applicant lacks the *locus standi* to file the Application; that the grant referred to does not exist; that as the surviving administrator, he has all the rights, duties and obligations

under the law. The Respondent also filed a replying affidavit sworn on even date. He confirms that a limited grant was issued to him in succession cause no. 134 of 2013 on the basis of which he filed the CMCC Suit. A stay of the judgment of 15.2.19 was granted and an appeal filed. Memorandum of Appeal in Civil Appeal No. 45 of 2019 was exhibited. He further confirms that the Applicant cohabited with the deceased. Upon his demise however, she went and got married to one Musembi Muindi. No customary marriage rights were performed during the lifetime of the deceased. As such, the Applicant is not entitled to anything from his estate. The Application is the Applicant's attempt to unjustly enrich herself. He urged that the Application be dismissed.

6. Parties filed written submissions which I have considered together with the cited authorities. The issues for determination are:

- i) Whether the Applicant has *locus standi* to file the Application
- ii) Whether the Applicant and her children are dependants and beneficiaries of the estate of the deceased.
- iii) Whether the siblings of the deceased are dependants and beneficiaries of the estate of the deceased.
- iv) Whether the proceeds of the judgment in the CMMC Suit should be included in the list of assets of the estate of the deceased.
- v) Whether the Grant should be revoked.
- vi) Whether a fresh grant should be issued to the Applicant and the Respondent.
- vii) Whether the grant should be confirmed.

#### Whether the Applicant has *locus standi* to file the Application

7. On whether the Applicant has *locus standi* to file the Application, it was submitted for the Respondent that the Applicant not being a wife of the deceased has no *locus standi* to bring this Application. I note that from the pleadings, the Applicant claims to have cohabited with the deceased from 2007 till his demise and they had one child together and the deceased took in her older child from another relationship. The fact of cohabitation was admitted by the Respondent in his replying affidavit though he went on to state that the Applicant remarried after the demise of the deceased.

8. Given the foregoing facts, does the Applicant have the legal standing to file the Application for revocation of the Grant? Section 76 of the Law of Succession Act provides:

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion...*** (emphasis added)

9. The law states that any interested party may apply for the revocation of a grant of representation. An applicant who seeks the revocation of a grant of representation must therefore demonstrate to the Court that he has sufficient interest to challenge the grant. Black's Law Dictionary Tenth Edition defines "interested party as:

***A party who has a recognizable stake (and therefore standing) in a matter.***

10. Does the Applicant have a recognisable stake in the matter herein that entitles her to contest the Grant that was obtained without her involvement? The undisputed fact of cohabitation of the Applicant with the deceased as well as her claim on behalf of her 2 children in my view give the Applicant a recognisable stake in the estate of the deceased. As such, the Applicant has the necessary *locus standi* to file this Application.

#### Whether the Applicant and her children are dependants and beneficiaries of the estate of the deceased.

11. The Applicant has laid a stake on the estate of the deceased, for herself as a widow and for her daughters, as children of the deceased. The Applicant contends that she cohabited with the deceased since 2007 and was for all intents and purposes regarded as the wife of the deceased. Relying on the case of MWG v EWK [2010] eKLR, she urges the Court to presume a marriage between her and the deceased and find she is a dependant under Section 29 of the Act. The Respondent opposes this and asserts that no Kamba customary rights were performed to confirm marriage between the Applicant and the deceased. He cited the cases of Re Estate of Stephen Kimuyu Ngeki [1998] eKLR and Dr Cotran's book *Marriage and Divorce*, 1<sup>st</sup> edition (1968).

12. With respect, the Applicant has made no claim that she was married to the deceased under Kamba Customary law. The submissions in this regard and the authorities cited are therefore of no relevance herein. What the Applicant seeks is that the Court presumes a marriage between her and the deceased due to her cohabitation with him and further that she was regarded as his wife. The assertion by the Applicant that she cohabited with the deceased from 2007 to his demise is in fact admitted by the Respondent in his replying affidavit. In view of the undisputed cohabitation and the fact that there was a child born of that cohabitation, I am prepared to presume that a marriage existed between the Applicant and the deceased. See the case of Hottensiah Wanjiku Yawe vs. Public Trustee C.A 13 OF 76 where it was held that long cohabitation as man and wife gives rise to presumption of marriage and only cogent evidence to the contrary could rebut such a presumption.

13. This however is not the end of the matter. The Respondent claimed in his replying affidavit that following the demise of the deceased, the Applicant left and got married to one Musembi Muindi. The Applicant did not controvert this averment by way of a further affidavit and

now seeks to submit that this was not proved. The Respondent's averments in this regard remain unchallenged. It is trite law that any statement of fact which is not controverted by the opponent is deemed to be admitted. In the premises, my finding is that the Applicant, having remarried after the death of the deceased is neither a beneficiary of his estate nor a dependant. The proviso to Section 35 of the Act confirms this as it provides:

***Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.***

14. As regards the children, it is common ground that AM is not a child of the deceased. She is a child of the Applicant from another relationship. From her exhibited birth certificate, she was born in 2006. She was therefore about 1 year old when the Applicant began to cohabit with the deceased. The Applicant claimed that the deceased during their cohabitation regarded Agnes Mueni as his child and provided for her needs. It was however submitted for the Respondent that the deceased did not acquire parental responsibility over Agnes Mueni as provided under the Children Act. This is a new issue now raised by the Respondent. There is nothing in his replying affidavit to support the submissions in this regard. It is well established that new issues cannot be raised in submissions and any issues so raised are best ignored. This was well articulated by Korir, J. in Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting And Training Limited & another [2014] eKLR where he stated:

***The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.***

15. My finding therefore is that the claim by the Applicant that the deceased regarded AMni as his child has not been not controverted. Section 29 of the Act provides:

***For the purposes of this Part, "dependant" means—***

***(a)***

***(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;***

16. Agnes Mueni, a child taken in by the deceased and maintained by him immediately prior to his demise, is a dependant of the deceased within the meaning of Section 29(b) of the Act.

17. That the child Rose Nduku is a child of the deceased is not disputed. There is an exhibited birth certificate showing that the deceased was her biological father. She is acknowledged in her grandmother's eulogy and further in the Respondent's submissions as a child of the deceased.

Whether the siblings of the deceased are dependants and beneficiaries of the estate of the deceased.

18. The deceased was survived by his father, mother (now deceased) and 4 siblings. The Applicant prays that this Court makes a finding that the deceased's siblings are not dependants of the deceased as they did not depend on him. Section 29(b) of the Act requires that for siblings of a deceased person to fall within the definition of dependant, they must prove dependency. For this Court to make a finding that the deceased's siblings are dependants of the deceased, it must be shown that they were being maintained by the deceased immediately prior to his death. No such evidence was adduced. It follows therefore that the siblings of the deceased are not dependants of the deceased within the meaning of Section 29 of the Act.

Whether the proceeds of the judgment in the CMC Suit should be included in the list of assets of the estate of the deceased.

19. The deceased died as a result of electrocution at his place of work. The Respondent filed the CMCC Suit to claim damages. It is noted that the Respondent as plaintiff in that case, described himself as ***Nicholas Mutua Ngira (suing as personal representative of the estate of Stephen Ngila Mutua.*** It is clear that the CMCC Suit was filed on behalf of the estate of the deceased. Further Section 83 of the Act provides the duties of a personal representative include *inter alia*:

***(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;...***

***(f) subject to [section 55](#), to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;***

20. Moneys payable to the personal representatives of the deceased by reason of his death form part of his estate and are to be distributed in accordance with the law. The proceeds of the judgment in the CMCC Suit are moneys payable to the estate of the deceased by reason of his death. They therefore form part of his estate and are to be included in the list of assets of the estate. This is obviously subject to the appeal that has been filed.

Whether the Grant should be revoked.

21. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act. The

Applicant in seeking revocation of the Grant has invoked the provisions Section 76(e) of the Act which provides:

**76 A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**

**(e) that the grant has become useless and inoperative through subsequent circumstances.**

22. The Applicant seeks the revocation of the Grant on account of the death of Veronica Nduku, one of the administrators. According to her, the Grant has become useless and inoperative. The Respondent on the other hand submits that as the remaining administrator all the powers and duties of the administrators now vest in him under Section 81 of the Act.

23. The Court agrees with the submissions of the Respondent. The death of one of 2 or more administrators does not necessarily render a grant useless and inoperative. Section 81 of the Act provides:

**Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:**

24. However, as has been shown above, the deceased is survived by a daughter RN who is 7 years old. As such, a continuing trust exists. As a result of this, an additional administrator is required. The proviso to Section 81 stipulates:

**Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.**

25. In the view of the foregoing, there is need for this Court to make a further grant to another person or persons.

Whether a fresh grant should be issued to the Applicant and the Respondent.

26. The Applicant prays that upon revocation of grant, a fresh grant should be made to her and the Respondent. The Act has conferred absolute discretion to the Court to make a determination as to the person(s) to whom a grant may be made. Section 66 of the Act provides:

**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—**

27. The Respondent is the father of the deceased while the Applicant is the mother of the child of the deceased. It would therefore be prudent for both to be administrators of the estate of the deceased.

Whether the grant should be confirmed

28. A grant of representation is confirmed upon a competent summons for confirmation being filed under Section 71 of the Act and upon the Court being satisfied that such grant should be confirmed. There is at present no summons before me for consideration. Consequently, I am unable to grant the orders sought in this regard.

29. In the result I find that the Summons dated 27.3.19 partially succeeds. I make the following orders as are necessary for the ends of justice:

- i) The NMK is not a dependant of the deceased.
- ii) AMN is a dependant of the deceased.
- iii) RNN, the biological child of the deceased is both a dependant and a beneficiary of the estate of the deceased.
- iv) RMM, AMM, DM and MM, the siblings of the deceased are not dependants of the deceased.
- v) The proceeds of the judgment in Mombasa CMCC No. 2303 of 2013 NMN (suing as personal representative of the estate of SNM v Serena Beach Resort & Spa Limited) (the CMCC Suit) amounting to Kshs. 1,226,342.60, plus costs and interest are hereby included in the list of assets of the estate of the deceased.
- vi) The Grant of Letters of Administration in the estate of SNM issued to NMN and VN on 31.3.15 is hereby revoked.
- vii) Fresh Grant of Letters of Administration in the estate of SNM is hereby issued to NMN and NMK.
- viii) Each party shall bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 17<sup>th</sup> day of January 2020**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

.....**for the Respondent**

.....**Court Assistant**