



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 98 OF 2016

IN THE MATTER OF THE ESTATE OF GCB (DECEASED)

AND

IN THE MATTER OF AN APPLICATION TO REVOKE A GRANT

MJ OBJECTOR

CORAM: Hon. Justice R. Nyakundi

Odhambo Advocate for the applicant

Katsoleh Advocate for the objector

JUDGMENT

The objector **MJC** by way of summons for revocation of grant supported by an affidavit sought the following orders:

(1) That the grant herein granted to EB and CCA on 17.4.2017 be suspended and thereafter be revoked and annulled.

The grounds on which the application for revocation orders are sought are that:

(1) That the grant was obtained through non-disclosure of material facts.

(2) That the petitioner filed this petition in secrecy with the sole aim of depriving the applicant's a share of the estate.

(3) That the petitioners failed to fully disclose the full inventory of the issues and liabilities of the deceased.

The application is made pursuant to Section 76 of the Law of Succession which provides for revocation and annulment of grant of letters of administration.

The respondent opposed the objectors claim on revocation for the reasons that she was not a dependant of the deceased.

Background

From the petition filed by the respondent its undisputed that **GCB** the deceased, died on 28.10.2014. He was the owner of the following properties and assets:

(a) Kilifi Town House Plot No. [...] LR [...].

(b) Bofa Shungila Howe Plot No. [...].

(c) Kilifi – Mtondia Plot No. [...], Plot Kilifi/Mtondia [...].

(d) Bamburi/Mombasa Plot No. [...].

(e) Kilifi – [...]

(f) Motor vehicle – Saloon KBD – [...] Nissan Saloon KAV [...]

(g) Bank accounts:

(i) Barclay Bank

(ii) Equity Bank

(iii) National Bank

(iv) Co-operative Bank

(v) CFC Stanbic Bank

According to the letter from the office of the president, the deceased is stated to have been survived by:

<i>?EB</i>	-	<i>Widow</i>
<i>?CCA</i>	-	<i>Son</i>
<i>?SCM</i>	-	<i>Son</i>
<i>?RNC</i>	-	<i>Daughter</i>

Following the death of the deceased, the respondent petitioned and obtained a grant of letters of administration dated 25.4.2017 from this court. It is as a result of this grant of letters of administration that the objector filed for revocation that as a beneficiary she was left out of the whole scheme of distribution of the estate.

The objectors case

The objector case was based on the testimony of **MJC (PW1)** who claimed that she was married to the deceased under Chonyi/Kalenjin Customary Law. That they cohabited together as husband and wife until 28.8.2007 when their marriage was dissolved as decreed by the court at Kilifi in **CMCC NO. 613 OF 2006**. That further to the divorce (PW1) told the court that despite of the divorce there was no return of dowry and the issue of marriage was ordered to be receiving maintenance and child support from the deceased.

It was further her testimony that the deceased left behind part of the property to the estate for her benefit but the respondent forcibly evicted her from the aforesaid subject property, necessitating the present objection proceedings.

According to the objector's testimony the grant of letters of administration obtained by the respondent be revoked because it was fraudulently obtained, and for having concealed material factor. As a consequence, the court was misled and a wrong decision made to issue grant of letters of administration.

The objector's witness **Judith Rehema** told the court that as a neighbour she has known the deceased and the objector when they purchased the property in which they lived and cohabited until his demise.

The next witness called by the objector was **PW3 – Emmanuel** also a neighbor and a friend to the deceased. In regard to their relationship, PW3 gave evidence that during their lifetime, the deceased and objector were blessed with a child of the marriage. PW3 stated that he knew of no other wife except the objector.

It was also the objector's case from the testimony of **PW4 Charles Khaemba** that he worked for the deceased family for about 2 years before his death. On that basis PW4 told the court he came to know the family and their child by the name **(D. B)**.

The respondents case

The respondent sworn evidence challenged the objector's claim in rebuttal that she was legally married to the deceased. To the extent of asserting the correct position, the respondent told the court that she initially married the deceased in Switzerland in the year 2000 but later relocated to Kilifi County in 2003. That in the course of her relationship with the deceased, she came to learn that the objector had married the deceased under Customary Law.

The respondent however stated that the marriage was nullified on 28.8.2007 in **Civil Case No. 613 of 2006**. Further, the respondent testified that at the point of dissolution of the marriage, the objector ceased to be a wife of the deceased except if paternity of the child could be established she will readily admit him as a beneficiary to the Estate of the deceased.

According to **DW2 – MB**, it was her evidence that the objector had a relationship with the deceased which he did not recognize as a marriage but mere girlfriend/boyfriend because they never lived together. Further **DW3 – CA**, the eldest son to the deceased rendered an account that the deceased was only married to the respondent and not the objector.

In the circumstances of the case of the respondent the net estate of the deceased will not be available for the benefit of the objector and her son.

Analysis

From the summons for revocation by the objector and the evidence adduced by the parties to the claim, I see two central issues emerging for determination:

(i) Whether the objector is a dependant to the deceased estate.

(ii) Whether the objector has satisfied the test for revocation of grant of letters of administration as laid down in Section 76 of the Law of Succession.

Issue No. 1

The Law of Succession in terms of Section 29 defines dependant to mean:

(a) The wife or wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

(b) Such of the deceased parents, step-parents, grand parent, grand children, 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 and where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of his death.

As it comes out from the provisions in terms of Section 29, the definition of dependant extends to cover ***“former wife or wives.”*** My understanding of the provisions is that it enables ex-wife or wives who were under reasonable provisions and support by the deceased prior to his death to be still considered as dependants of the deceased even after the marriage has been dissolved.

I find the operative words are such that even after a marriage has been dissolved and the decree absolute issued by the court there would be a claim under The Matrimonial Causes Act for distribution and sharing of the marital estate, hence the cannon and rule of interpretation under Section 29 of the Act.

The focus on the need and reasonable expectation of the dependency in the present case was discussed by the court in the matter of the Estate of **Reuben Nzioka Mutua (Deceased) P&A Cause No. 843 of 1986 UR** where the court observed inter alia on the interpretation of the amendment to Section 3 of the Law of Succession.

“I have read the provision of the amendment carefully and my conclusion is that Mr. Situma misunderstood them completely. The amendment I that it talks of or envisages a situation where for example, a man whom I will refer to as A married woman B under Customary Law and that marriage is valid and recognized under the custom. Subsequently, he meets another lady C and the two contact a marriage under statute. Upon A’s death and for purposes of inheritance to A’s estate, B is considered a wife by the Succession Act, despite the fact that C is the one with a marriage certificate, having been married under Statute Law, The Succession Act will consider B a wife and therefore is entitled to inherit from the Estate of the deceased. The amendment will come to B’s aid because she will be a woman married under a system of Law which permits polygamy.”

In the present case the tenor of the affidavit and *viva voce* evidence adduced by the objector is that she was married to the deceased under Chonyi/Kalenjin Customary Law. That the deceased upon contracting the marriage cohabited with the objector and during the subsistence of their union they were blessed with one issue for purposes of this proceedings shall be referred to as **(DB)**. The objector’s evidence together with her witnesses set out to a greater extent distinct evidence of pecuniary advantage provided to her and the child by the deceased prior to and until the time of death. Therefore, quite apart from the respondent rejoinder, the inference could be drawn from the evidence before this court that the objector was married to the deceased under Customary Law.

As the objector has highlighted notwithstanding, the allegations made by the respondent and her witnesses she was not a mistress to the deceased but legally married wife under Customary Law system of marriage. I am persuaded by this legal position that the objector is not creating a special status of recognition as a dependant but the deceased during his lifetime positioned himself as a husband to the objector.

Thus accruing from the Judgment in **SRMCC at Kilifi No. 613 of 2006** the deceased may be for good reason filed for divorce against the objector that their marriage celebrated under Customary Law has hit the rocks and the odds are in favour of its dissolution. The Learned trial Magistrate in the Judgment declared as follows that:

“The marriage under Chonyi Customary Law between the plaintiff (deceased) and the defendant (objector) is hereby dissolved. The counter claim is allowed only to the extent that the plaintiff shall pay Kshs.10,000/= per month being maintenance for his son (D. B). Each party to bear their own costs.”

This Judgment together with the evidence by the objector illustrates the existence of a valid customary marriage, which informed the deceased to approach the court for divorce. Certainly, with this there is no force in the argument advanced by the respondent to purport to portray the objector as a mistress or concubine to the deceased.

Can a mistress in such a situation be subjected to divorce proceedings with the sole aim of tarnishing the disposition and reputation. Obviously, the intention and conduct of the deceased is clear, by filing for divorce he recognized the legal rights previously associated with the objector, as being within the status of a marriage.

The most important statutory provisions, which endeavors to seal the case for the objector is to be found under Section 44 of the Evidence Act which reads as follows:

“A final Judgment, Order, or Decree of a competent court which confers upon or takes away from any person any legal character or which declares any person to be entitled in any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character or the title of any such person to any such thing is admissible.”

(2) Such Judgment, order or decree is conclusive proof –

(a) That any legal character which it confers accrued at the time when such Judgment, order or decree came into operation;

(b) That any legal character to which it declares any such person to be entitled accrued to that person at the time when such Judgment, order, or decree declares it to have accrued to that person;

(c) That any legal character which it takes away from any such person ceased at the time from which such Judgment, order or decree declared that it had ceased or should cease.

(d) That anything to which it declares any person to be so entitled was the property of that person at the time from which such Judgment, order or decree declares that it had been or should be his property.

Therefore, the Judgment on record from a competent court goes to prove that the deceased was married to the objector. The respondents evidence that the objector lived with the deceased as a girlfriend and even went further to challenge paternity of the issue of the marriage is not sustainable in view of the very clear decision by the Principal Magistrate, Kilifi as supported by the statutory provisions under Section 44 of the Evidence Act.

Further Section 34 of the Act provides that unless the context otherwise provides:

“Evidence given by a witness in a judicial proceedings is admissible in a subsequent proceeding or at a later stage in the same procedure, for the purpose of proving the facts which it states in the following circumstances:

(i) Where the witness is dead, or cannot be found, or is incapable of giving evidence.”

It is kept out of the way by an adverse party or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable.

In the case of subsequent proceedings, the proceedings is between the same parties or their representatives in intent.”

To turn to the evidence and the provisions of Section 29 of the Law of Succession, whether the objector and her child were dependants is a matter of fact to be established by rules of evidence. It does not matter what personal views an adverse party holds to the issue in contention. In this objection proceedings it has emerged clearly that the objector is the widow of the deceased and in this respect there is no doubt that her and the child are dependants survived by the deceased together with the respondent pursuant to Section 29 of the Act.

The court in **Civil Case No. 613 of 2006** made an order for maintenance and support in favour of the child having regard to the circumstances at the time. This use of the word maintenance is one of the several markers under Section 29 of the Law of Succession on the concept of dependency which connotes both a moral and legal obligation in favour of the eligible beneficiaries to the Estate of the deceased.

While noting the evidence by the respondent, the consequence of death of the deceased did not have the effect of depriving the objector and her child appropriate provision under intestate estate.

The trial court finding on paternity of the minor **(DB)** was prima facie evidence and conclusively determined the totality of the relationship between the objector and the deceased. In other words, the identity and paternity of the child is beyond a doubt.

In my humble opinion, the testament by the deceased in an application to British American Insurance Co. to be issued with Life Insurance Policy dated 15.3.2012 blatantly determined and made provisions in favour of **(DB)** as the son and the objector as the wife. I do not believe for a moment that they got to be nominated by the deceased as beneficiaries of the life policy without a lawful contract of marriage. In the proposal form the deceased identifies each as a wife and a son respectively.

In this context the court should not interfere with the dispositions where applicable, existing or accruing after the death of the deceased. Thus, in this proceedings the relative strength and legitimate claim by the objector is answered affirmatively. That settles issue no. 1 to the objection proceedings.

Whether the objectors claim warrants revocation or annulment of the grant to Letters of Administration?

The question which must be addressed before reaching relevant orders is to take into account the evidence and Law pursuant to Section 76 of the Act. The Dichotomy of Section 76 of the Law of Succession provides as follows:

“(a) That a grant of representation, whether confirmed or not may at anytime be revoked or annulled if in view of the court it appears that the proceedings to obtain the grant were defective in substance.

(b) That the grant was obtained by the making of a false statement or by conclusive from the court something material to the case.

(c) That the grant was obtained by means of an untrue allegations of fact essential in point of Law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.....”

The implications arising from these provisions of the Act are that any application brought by beneficiary(s) or in the case of creditors interest the court in a proper case made in accordance with Section 76 revoke or annuls the grant of Letters of Administration.

For the purposes of interpretation, the court considering the same set of facts in the matter of the **Estate of Yusuf Mohammed (Deceased) MSA High Court P& A Number 434 of 1995, the applicants contended that the petitioners falsely alleged that the deceased was survived by three children only and that he did not consent to the issue of the grant of the petitioners. The court found that there was other survived the deceased who were not disclosed in the petition and who were not notified of the same and proceeded to revoke the grant.**

The court considering the same set of facts in the matter of the **Estate of David Kamenthu alias David Maina Kinyanjui (Deceased) Nairobi High Court P& A Cause Number 1301 of 2002, the applicant successfully petitioned for revocation of grant of Letters of Administration with respect to the Estate of the deceased for the petitioner alleging that he was the only person who summoned the deceased. It was held: “that the grant was obtained fraudulently by the making of a false statement of material fact.”**

These decisions are instructive of the implications of Section 76 on revocation and annulment of grant of Letters of Administration. It is important to state that the facts of the Succession Cause as they appear from the Affidavits and Petition made by the respondent the deceased died intestate on 28.10.2014. Thereafter, the respondent was issued with a letter from the Chief dated 4.5.2015 indicative of the fact that he was survived by **Elizabeth Barua (widow), Swalehe C. Malinga (son) and Rahima Chiwai (daughter)**. The respondent and **Chiwai Chiriba** by virtue of the petition and attachments obtained a grant of letters of administration as the administrators survived of the Estate on 25.4.2017.

The application made by the objector in her sworn witness statement and evidence in court as a widow of the deceased bore cogent and credible evidential material that the grant was obtained by means of untrue allegation and misrepresentation of the true beneficiaries to the Estate.

This evidence was corroborated by other witnesses PW2, PW3 and PW4 who swore in court to have known the objector and her son as the dependants to the deceased.

The fact that the respondent swore an affidavit and secured a letter from the Chief recognizing only her as the widow and to other children in exclusion of the objector and her son is in itself a concealment of a material and essential factor which renders the grant issued defective and inoperative in the circumstances.

During the hearing of the objection proceedings it transpired that the respondents and the co-administrator continue to willfully and without reasonable cause exhibit ignorance and denial of survivorship of the objector and her son as beneficiaries to the Estate.

I venture to differ with the evidence by the respondents and submissions by counsel that there is a doubt that the objector is not a widow of the deceased who was required to consent to the petition for grant of Letters of administration. Therefore, the process of obtaining and making of the grant by the court in favour of the respondent and co-administrator was flawed with irregularities, false representation and breach of due process.

As a result, under Section 76 of the Act, the respondents must suffer the consequences of breach of the Law, the result will be that the grant of Letters of administration intestate dated 26.4.2017 be and is hereby revoked.

For the above reasons, a declaration is hereby made

(i) That the objector MC and her son D.B are dependants to the deceased Estate pursuant to Section 29 (a) of the Law of Succession Act.

(ii) That an order do hereby issue revoking the grant of Letters of Administration for reason of being defective on untrue allegations, lack of consent ad concealing of material factor from the family court.

(iii) The grant so issued on 25.4.2017, be recalled and surrendered to the Deputy Registrar High Court, Malindi forthwith.

(iv) That a declaration in terms of Section 66 of the Law of Succession do issue for the respondent EB and MC to be issued with grant of Letter of Administration to the Estate of the Late GB.

(v) On the other had a permanent injunction be granted against the the dealings of the Estate of the deceased GB pending the application and confirmation of grant.

(vi) The costs of this litigation be in the cause.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 16TH DAY OF JANUARY 2020.

.....

R. NYAKUNDI

JUDGE

Stay declined

In the presence of:

1. Mr. Gicharu holding brief for Mr. Obaga for the objector
2. Mr. Bunde for Odhiambo for the respondent