



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
SUCCESSION CAUSE NO. 483 OF 2015
(CONSOLIDATED WITH NAIROBI SUCCESSION CAUSE NO. 1490 OF 2015)
IN THE MATTER OF GSE (DECEASED)
RULING

1. DDM, who I shall hereafter refer to as the applicant, filed an application herein, dated 11th April 2016, seeking that the grant of letters of administration intestate, made to REE, hereinafter referred to as the administratrix, on 9th November 2015, be revoked. The grounds advanced for the revocation being that the grant was obtained secretly, through concealment of matter from the court and that there was no full disclosure of the assets of the estate. The factual background to the application was set out in the affidavit sworn by the applicant, on 11th April 2016, in support of the application. The application was opposed by the administratrix, through an affidavit that she swore on 8th June 2016.

2. Directions were given on 26th September 2018, for disposal of the application by way of *viva voce* or oral evidence. Later on, on 25th July 2019, the parties changed position and opted for disposal through written submissions, which they filed. The matter turns on the question of the status of the applicant as a widow of the deceased, it would have been preferable that oral evidence was taken, since that would be the best evidence to address matters pertaining to customary marriages and marriages to be presumed from prolonged cohabitation. Anyhow, since the parties settled on written submissions, I shall determine the matter based on the facts presented in the affidavits on record and the arguments made in the written submissions.

3. The issues for determination that I have distilled from the affidavits and the written submissions are:

- a. Whether the applicant and her children are survivors of the deceased and, therefore, persons who are beneficially entitled to shares in the estate;
- b. If (a) is in the affirmative, whether the administratrix knowingly concealed the fact that the applicant and her children were beneficiaries of the estate;
- c. Whether the administratrix failed to make a full inventory of the estate; and
- d. Whether the grant made to the administratrix, on 9th November 2015, ought to be revoked or annulled.

4. On the first issue, it was the applicant's case that she was a survivor of the deceased and should, therefore, be considered a beneficiary of his estate having been his widow. She faulted the administratrix for not disclosing that fact in her petition. She added that she and the deceased had three children, who the administratrix failed to disclose in the petition. She claimed that she married the deceased in 1992 under Luhya Customary Law. Even though she worked at [Particulars withheld] Kakamega, she would visit the deceased in Nairobi where he worked, during weekends and her off days, and would stay with him during her leave. She added that the deceased eventually established a home for her at Mulwanda, and that their marriage subsisted until the time he died in 2015. She averred that after the burial of the deceased, the administratrix ganged up with her children and chased her away from the said matrimonial home, a fact that, she argued, was not controverted by the administratrix, thereby lending credence that the administratrix was aware of her existence. She stated that dowry was paid in 2002, as evidenced by a copy of a written agreement dated 26th January 2002 which she annexed to her affidavit. The ceremony, at which the dowry was allegedly paid, was allegedly witnessed by HA and DAS, brothers of the deceased. She said that the deceased gave out two head of cattle and Kshs. 100,000.00 to her family. It was her position that the deceased had severed his relationship with the administratrix in 1980, and that the administratrix had even sued him over division of matrimonial property.

5. The applicant's other argument, in case she failed to establish a customary law marriage, was that a marriage could be presumed between her and the deceased on the basis that had between them three children, namely RSA, HAE and DAM, as evidenced by their certificates of birth that she placed on record. She also argued that they had jointly acquired various properties. She further argued that she and the deceased

were generally viewed as a couple by the community they resided in, as could be seen in the letter written by the chief. She submitted that her relationship with the deceased was covered by Section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya.

6. On her part, the administratrix averred that the deceased had not built a house for the applicant, and that she never was a resident at Mulwanda matrimonial home. She said that it was her and the deceased who built the matrimonial home at Mulwanda, after an earlier one burnt down. She asserted that she was the only *bona-fide* legal widow of the deceased, having married him under the African Christian Marriage and Divorce Act at the All Saints Cathedral, as evidenced the certificate of marriage placed on record. She argued that the deceased could not legally contract any other lawful marriage with any other woman, whether under customary or any other law, and that by the time the deceased passed away, they were still married, though she was working in Nairobi. She classified the alleged relationship between the deceased and the applicant as an illicit affair, which could not confer on the applicant the status of a wife, and neither could the area chief confer such status. She stated that to the best of her knowledge, the deceased never had any children outside their marriage and that the applicant did not provide any proof that the deceased sired the children listed by her, and she called for each of the said children to be subjected to a deoxyribonucleic acid (DNA) test.

7. I have gone through the pleadings and submissions filed both parties. I have looked at the documents annexed by both of them as evidence to advance their cases. It is common ground that the administratrix was a wife of the deceased and remained as such until the deceased's death. The certificate of marriage on record clearly attest to the fact of that marriage. In as much as the deceased and the administratrix were separated since 1980, no evidence was presented that their marriage was ever dissolved.

8. There is material on record that the deceased and the applicant were married under Luhya customary law, going by the document on record of the dowry agreement that was executed on 26th January 2002. The authenticity of that agreement was not challenged by the administratrix. She also did not challenge the statement on record signed by HA, a brother of the deceased, to the effect that he participated in the said dowry ceremony in 2002, and that the applicant lived with the deceased as his wife. The administratrix did not challenge the fact that the ceremony happened, her case was that the deceased was incapable of contracting any other valid marriage in view of the subsisting statutory monogamous marriage to her. That is the correct legal position with respect to the law of marriage. However, for purposes of succession, by virtue of section 3(5) of the Law of Succession Act, the subsequent customary law marriage between the deceased and the applicant was valid, and the applicant was a wife of the deceased, notwithstanding that his earlier monogamous marriage to the administratrix.

9. I find that there is sufficient evidence that the applicant had been cohabiting with the deceased, and theirs was not just a one-off fling. The applicant annexed copies of certificates of birth of her three children, who she claimed were sired by the deceased. The said certificates indicate that the deceased and the applicant were the parents of the three children: RSA, HAE and DAM, born on diverse dates between 1994 and 2003. The authenticity of the birth certificates was not challenged, and I, therefore, hold that the said certificates were valid documents. It is my finding that the three were children of the deceased, and, therefore, his survivors in terms of Part V of the Law of Succession Act, and they should be beneficiaries of his estate. The fact that they were born on the diverse dates, adds to the fact that the deceased and the applicant were in continuous cohabitation. On whether the two were generally reputed to be husband and wife, I have taken into account the contents of the Chief's letter, filed simultaneously with the applicant's petition for letters of intestate, and the statement of HA. The applicant was mentioned and recognized as a wife of the deceased in the funeral programme. Indeed, from the narrative in the eulogy, he was at home with the applicant, at the time he was taken ill for the last time, and it was the applicant who took up the responsibility of rushing him to hospital. He died in her presence. The children of the applicant are also mentioned and recognized in the said programme as having been the children of the deceased, and some of them even gave tributes at his funeral. The material before me gives clear indicators that the applicant was a wife of the deceased, and I have no hesitation in making that finding.

10. The conclusion on the first issue is that the applicant was a wife of the deceased, and that her children, that is to say RSA, HAE and DAM were children of the deceased. The applicant and the three children are thus survivors of the deceased and persons beneficially entitled to shares in his estate.

11. Having found that the applicant and her children are survivors of the deceased and, therefore, beneficiaries of the estate, the next issue to consider is whether the administratrix knowingly concealed those facts from the court in her petition for representation.

12. The petitioner was that she was not aware that the deceased had any children outside of their marriage, and that was why she did not include them in her petition. I have noted the applicant averred that after the petitioner separated from the deceased, the administratrix did not surface at all during the period she and the deceased cohabited, neither was she in any form of communication with the deceased. The applicant further stated that she had never set her eyes on the administratrix at all, and that the administratrix never visited the homestead where she and the deceased lived.

13. In view of the above, it is possible that the administratrix never knew about the existence of the applicant and her children, because she had never met them. I would, therefore, give her the benefit that she was genuinely not aware of the existence of the administratrix and her children, and conclude that she did not knowingly conceal the fact of their existence in her petition for letters of administration.

14. The applicant has complained that the administratrix did not give a full inventory of the property of the deceased. In the petition, the administratrix listed Kisa/Mushiangubu/[...] and Kisumu/Karateng/[...] as the only assets of the estate of the deceased. On her part, the applicant listed twenty (20) assets in that she claimed belonged to the deceased, and, additionally, annexed certificates of official search evidencing the same. The administratrix did not controvert that assertion by the applicant, and, in fact, the record indicates that the administratrix mentions some of the properties as being assets of the estate of the deceased but then the same were not listed in her petition. For example, in her supporting affidavit sworn on 21st October 2016, she deposed, at paragraph 7, in part, that:

“...it has also come to my attention that the said DDM has purported to enter into a lease agreement with third parties for the lease of Title Nos Kisa/Mushiangubu/[...] and [...] which forms part of the estate...”

15. Above averments by the administratrix that she knew that the said properties formed part of the estate but she chose not to include them

in the list of assets in her petition for letters of administration. That, taken together with her not challenging the properties mentioned by the applicant, as forming part of the estate, demonstrates that the administratrix did not give a full inventory of all the assets of the estate of the deceased. To this end, therefore, I find that the administratrix did not give a full inventory of the assets of the estate in her petition.

16. Having found that the administratrix unknowingly excluded the applicant and her children as survivors of the deceased and beneficiaries of the estate, and that she knowingly excluded some assets from the schedule, the question that I have to consider next is whether the grant made to her on 9th November 2015 can stand.

17. Section 76 of the Law of Succession Act provides as follows:

“76.Revocation or annulment of grant

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—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

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

18. I have already concluded that the administratrix did not willfully and knowingly exclude the applicant and her children from the list of the survivors of the deceased. That would then mean that there was no fraud on her part, but the non-disclosure still distorted the picture, and, to that extent, the process of obtaining her grant was defective. The non-listing of all the assets is not that serious, for it can be cured at the stage of confirmation of grant. However, since the deceased died a polygamist, having married more than once, it is only democratic that the two houses, or sides of his family, be represented in the administration of the estate.

19. The final orders that I am disposed to make in the circumstances are as follows :

a. That the summons for revocation of grant, dated 11th April 2016, is hereby be allowed, with the result that the grant made to REE, on 9th November 2015, is hereby revoked;

b. That I hereby appoint REE and DDM, as administratrices of the estate of the deceased, and a grant of letters of administration intestate shall issue to them;

c. That I hereby declare that DDM, RSA, HAE and DAM are survivors of the deceased and persons beneficially entitled to shares in his estate;

d. That the administratrices appointed in (b), above, are hereby directed to file an inventory of all the assets and liabilities of the estate, detailing the value and current status of the said assets;

e. That the said administratrices shall file a summons for confirmation of their grant, whether jointly or severally, listing all the properties of the estate and proposing a mode of distribution of the properties amongst all the persons beneficially entitled therein;

f. That the matter shall be mentioned after sixty (60) days for purposes of compliance;

g. That each party shall bear their own costs; and

h. That any party aggrieved by the orders, and, generally, by the ruling, herein, has twenty-eight (28) days, to challenge the same at the Court of Appeal.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 14th DAY OF February, 2020

W MUSYOKA

JUDGE