



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 39 OF 2015**

***(IN THE MATTER OF THE ESTATE OF KR ALIAS KS (DECEASED))***

**MNK.....APPLICANT**

**VERSUS**

**NWK.....PROTESTOR**

**JUDGMENT**

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

KR died on 24 September 1988. He was domiciled in this republic and he hailed from Nyangio sublocation in Kirinyaga county; this also was his last known place of residence.

The deceased was survived by two widows and several children. His first wife was EMK while the protestor was his second wife.

The first wife petitioned for grant of letters of administration intestate of the deceased's estate on 26 February 2012; the grant was, however, made in the joint names of the petitioner and her co-wife. Unfortunately, the petitioner died on 12 November 2016, obviously before the conclusion of this cause. She was substituted in these proceedings by the present applicant. In the affidavit in support of the application, the applicant described herself as the daughter of the deceased and his first wife.

By a summons dated 27 November 2017 for confirmation of grant, the applicant sought to share equally between herself and the protestor the deceased's intestate estate comprising of Title No. Kiine/Nyangio/282 and Title Konyu/Gakuyu/116 measuring 1.2 acres and 2.1 acres respectively.

The protestor was not satisfied with this proposed scheme of distribution and so she filed an affidavit of protest to that effect. In this affidavit she deposed that contrary to her allegations, the applicant was neither the deceased's nor the deceased's first wife's child. As a matter of fact, the applicant had her own parents but who passed away about four years ago. The applicant knew them and their home; she had even attended the burial of the applicant's mother. It was her evidence that the applicant only lived with the deceased's first wife to assist her with the home chores. She later married and to date she has her own family.

The protestor further deposed that the applicant is not entitled to any share of the deceased's estate; she reiterated these depositions when she testified during the hearing of the protest. She added that the first wife was barren and so she did not have any child with the deceased. The protestor and her deceased husband were, on the other hand, blessed with seven children.

She also testified that the applicant was only a niece to the deceased's first wife; she was a daughter to the deceased's first wife's brother. To augment her point, she testified that the applicant's parents received her dowry. The entire estate, according to her should devolve upon the deceased's children.

The applicant admitted in her testimony that she has her own parents and that she came to the deceased's home in 1965 while she was about five years. She testified that she specifically came to live with the deceased's first wife because she did not have a child of her own. She left in 2001 when she got married. According to her evidence, the deceased's wife took her in as her own child but, on the other hand, she was to assist and take care of her. She concluded her testimony by saying that she should get a share of the deceased's estate because she was the daughter of his wife.

The sole point taken up by the learned counsel for the applicant in her submissions is that the applicant was the deceased's dependant and

qualified as such under section 29 of the Law of Succession Act, cap. 160. This is obviously is a departure from the applicant's earlier position according to which she had described herself as the deceased's daughter. The only explanation for the applicant's change of position is undoubtedly because it came out clearly in the course of the hearing of the protest that the applicant was only the deceased's wife's niece who happens to have lived with the deceased's wife before she later left and got married. It follows that a claim for a share of the deceased's estate on the basis that the applicant is a child of the deceased couldn't be sustained for the simple reason that there is no factual foundation for such a claim.

The question now is whether the applicant can successfully bid for a share of the estate on the ground that she was a dependant. A claimant of such a description would ordinarily be catered for in section 26 of the Act; a court may, on an application, make provision of the estate of what, in its view, is reasonable to such a person. As to who is a 'dependant' is not a question whose answer is left to speculation; such a person is defined in section 29 of the Act; that section says as follows:

**29. For the purposes of this Part, "dependant" means**

**(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'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; and**

**(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.**

The part referred to in this section is Part III of the Act which deals with provision for the dependants.

In general terms, a 'dependant' would include a host of persons who are not only related to the deceased, in one way or the other, but who were also maintained by the deceased at the time of his demise. Where a claimant to a deceased's estate assumes the description of a dependant as a basis for his claim, then he has to invoke section 26 of the Act which, as earlier noted, allows the court to make a reasonable provision for a dependant out of a deceased person's estate irrespective of whether he died testate or intestate. That section states as follows:

**26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.**

If the applicant's claim is weighed against these two legal provisions, it would be founding wanting in several respects; I am of this humble view because, in the first place, as much as the applicant claims to be a dependant, her application before court is not that for a reasonable provision under section 26 of the Act but, rather, it is a summons for confirmation of grant in which she is claiming a half of the deceased's estate on the ground that she is his daughter. It has been proved that she is nowhere near being the deceased's daughter but she was remotely related to him only to the extent that she was the deceased's wife's niece. The point here is, assuming the applicant was a dependant, there is no appropriate application before court for consideration of her claim.

But a more predicate question is whether the applicant was a dependant of the deceased at all. The evidence shows that she wasn't. It is not in dispute that at some stage in her life the applicant lived with the deceased's wife; according to the applicant's own evidence, she started living with the deceased's wife in 1965 while she was aged either 5 or 8. The deceased's wife took her in because she did not have a child of her own and, for this very reason, she wanted somebody who would assist her in her house chores. The applicant herself testified that indeed for the time she was at the deceased's wife's home, she assisted her and took care of her when she was sick. But she also admitted that she had her own parents who apparently died after the demise of the deceased and his wife. She later got married, more particularly in 2001; her dowry was received, not by the deceased or his wife, but her own parents.

My evaluation of these circumstances is that the applicant lived with the deceased's wife not necessarily out of desperation or a need for maintenance of some sort and which was eventually provided by the deceased or his wife; rather she lived with the deceased as a relative of his wife who, being barren, needed someone who could assist her in her daily house chores. As a matter of fact, she needed the applicant more than the applicant needed her.

I wouldn't conclude that the applicant would fit the description of a dependant in these circumstances. She simply cannot be.

One other thing. The applicant concluded her evidence in chief with these words:

***I should get E's share of the estate by virtue of being the daughter of E.***

The notion that the applicant was the deceased's wife's daughter has since been discounted; if anything, except for this statement, no one has come out clearer on this question than the applicant herself. But even if we were to assume that the applicant is entitled to a share of the E's estate, it is not the latter's estate that is in issue at the moment; the estate, the subject of this cause, is that of E's husband. It follows that if the applicant has any claim on E's estate, it is unfounded to the extent that it is lodged in a wrong cause.

In the ultimate, I find the protestor's protest well-founded and it is allowed. In the same breath, the applicant's summons dated 27 March 2017

is dismissed.

For completeness of record, it is hereby ordered that the deceased's estate shall devolve upon the protestor subject to live interest; in particular, the parcels of land known as Title Nos. Kiine/Nyangio/282 and Title Konyu/Gakuyu/116 shall be transferred and registered in the name of NWK subject to life interest. Parties will bear their respective costs. It is so ordered.

**Dated, signed and delivered this 9<sup>th</sup> day of April, 2020**

**Ngaah Jairus**

**JUDGE**