



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.5 OF 2019

IN THE MATTER OF THE ESTATE OF MONICAH WANJIRU KINYANJUI (DECEASED)

JOSEPH NDERITU MWANGI.....APPLICANT

-VERSUS-

BETH NYOKABI KINYAJUI.....RESPONDENT

J U D M E N T

Monica Wanjiru Kinyanjui alias **Monicah Wanjiru Gitau (the deceased)** died intestate, died on 1/1/2010. On 18/2/2013 **Beth Nyokabi Kinyanjui**, the respondent, was issued with a grant of letters of representation for the deceased's estate and the said letters were confirmed in Nyahururu SPM's Succ.No.217/2012 on 27/8/2013.

On 17/9/2016, the applicant **Joseph Nderitu Mwangi** filed a summons for revocation of the grant issued to the respondent on 18/2/2013 and confirmed on 27/8/2013. He also sought to be restrained from distributing the deceased's estate and the grant be stayed or suspended.

The application was supported by the affidavit of the applicant Joseph Nderitu and the main grounds upon which the application was premised were that the Nyahururu SPM did not have jurisdiction to determine and distribute the estate of the deceased the same being worth over Kshs.100,000/=; that the petitioner was not a dependant of the deceased and that the estate was distributed to people who were not heirs to the deceased; that the respondent misled the court into handling the said matter and did not disclose that the respondent and the listed beneficiaries were not the deceased's dependants; that the deceased was married to **Daniel Kinyanjui** and that the respondent was her co-wife; that the deceased did not have any biological children but adopted one **Samuel Gitau Kinyanjui** but the said child died after the deceased; that the deceased had left a will in which her estate was to go to her son Samuel Gitau; that the respondent did not disclose to the court that the deceased did not have any other child; that as a co-wife the respondent was not a dependant of the deceased nor were her children beneficiaries of the estate; that the applicant is the only beneficiary being a brother to the deceased and had not been aware of the Succession Cause till he learnt that the said property had been put up for sale.

Beth Nyokabi opposed the summons through a replying affidavit dated 9/10/2014 in which she stated that the deceased Monica Wanjiru Kinyanjui was her co-wife, both of them having been married to Daniel Kinyanjui who died on 28/2/1989; that after their husband died, they filed Nakuru Succession Cause 105/1989 **Re: Estate of Daniel Kinyanjui Mukuru** and distributed his estate between them in terms of the certificate of grant dated 20/11/1989 (BNK.2); that the deceased was childless and adopted a boy, Samue Gitau; that when the deceased started ailing, she is the one who used to take care with assistance of her sister in law Agnes Waithira Kamau till her death on 1/1/2010; that during her lifetime, the deceased gave some of her property to Agnes Waithira as appreciation of her efforts taking care of her; that the deceased also sold ½ acre of the land to John Ndaire Kamau; that the properties left by the deceased originally belonged to their husband and therefore her and her children are the rightful owners as the deceased adopted son died.

The matter proceeded to hearing by way of viva voce evidence; the applicant testified as PW1 and called one witness **Joseph Mwangi Muhiu, PW2**.

In his testimony, **Joseph Nderitu Mwangi (PW1)** acknowledged that his sister (the deceased) was married to Daniel Kinyanjui who also later married the respondent. Upon Daniel's death, the two widows shared his property with the deceased getting 9½ acres which she left to her adopted son Samuel Gitau. However, the said Samuel died and the respondent and other people took over the deceased's land.

According to PW1, in 2012, the 9½ acres of land was worth more than One Million Shillings and yet the matter was heard by a court whose jurisdiction was Kshs.100,000/=. PW1 said that the respondent should have included Gitau's family in the list of beneficiaries. He said that he had brothers who are deceased but their three wives are still alive. He admitted that indeed the deceased used to care for the respondent and her children. PW1 was aware that deceased sold half acre of land to one John Ndaire before she died and the same should be given to

him. He also stated that one Agnes Waithera used to assist the deceased and the deceased gave her a place to grace her cattle.

PW2, Joseph Mwangi Muhiu is a cousin to PW1 and the deceased. He corroborated PW1's testimony that the deceased was married to Daniel Kinyanjui, got one child who died early in life; that the deceased adopted a child; that the husband later got married to another wife Elizabeth Nyokabi, the respondent and that the deceased went to settle at Ndungu Njeru where she did business of a hotel and selling second hand clothes and cereals; that the deceased's husband while on his sick bed, called the deceased back home and both the deceased and respondent buried their husband (Daniel), filed a Succession Cause, and shared the land equally; that in 2009, the deceased got sick and called him together with the respondent, PW1 and two wives of the deceased's brothers Agnes Waithera and late Eunice Iregi, a neighbor and two sons of the respondent. The deceased told them what her wishes were and gave all her property to her adopted son and some to the respondent's son, that is, shares in Githunguri Company while that ½ acre was sold to John Ndaire. Agnes Waithera's son, Samuel Gitau, was given Plot 508.

PW2 admitted that him and PW1 visited the sister regularly and they knew that the deceased used to support the respondent and her children. After about 1½ years, the deceased's son was killed in a mysterious fire that burnt the house where he was sleeping; that after burial, they agreed to have a meeting and they agreed that Agnes, Eunice and the respondent go to an advocate to file a Succession Cause. According to PW2, the deceased inherited Nyahururu/Nyandarua/568 and Githunguri/Kiarua/964 from her late husband but the other properties, that is, Plot at Ngunyu Njeru Market, Gatamaiyu Naivasha, land in Gilgil, shares in Safaricom and Muki Sacco Co-operative, were from deceased's own efforts.

Petitioner's case:

DW1 Beth Nyokabi Kinyanjui was the co-wife to the deceased, having been wives of Daniel Kinyanjui; that when the said Daniel died in 1989, they filed a Succession Cause and shared his property as per certificate of grant D.Ex.1; that when the deceased started ailing, she and Agnes, a sister in law to the deceased took care of her and both her family and deceased's family took part in her burial; that the applicant took care of the deceased; that the deceased used to assist the respondent and her children; that the respondent's children called the deceased mother and she treated them as her own; that after the deceased's death, she started caring for Samuel Gitau, deceased's son, but one day, they found him burnt in the house and that she was left with the deceased's box and documents; that upon the death of Samuel, they sent for PW2. She then filed a Succession Cause in which she included Agnes and her children as beneficiaries.

DW1 admitted that the deceased had businesses of a hotel, selling of second hand clothes but that she put money together with their husband to buy the Naivasha land which the deceased registered in her names; that before her death, the deceased gave her two sons the plots – Kiambu and Malewa. She contends that she should get the remainder of Plot 568 because it belonged to her husband.

DW2 Hosea Njuguna Mukuru is a younger brother of Daniel Kinyanjui. He knew the brother's two wives, Monica (deceased) and the respondent; that when his brother Daniel died, the two wives filed a Succession Cause and both inherited their husband's property. It was his view that the deceased's property be left to the respondent's children because the deceased used to assist the respondent in caring for her children; that the respondent's children called the deceased mother.

In his submissions, **Mr. Nderitu**, counsel for the applicant submitted that there is no evidence to suggest that the deceased had adopted the respondent's children like she had adopted Samuel Gitau and cannot be regarded as the deceased's children. He submitted that the deceased having died intestate with no children, the applicable law in dealing with her estate is under Section 39 of the Law of Succession Act which lists the persons that can benefit from the said estate; that the said Section does not recognize the respondent and her children as beneficiaries of the said estate; counsel relied on ***Re: Estate of Sarah Wanjiku Nyaga (2017) eKLR*** where the court explained who is to inherit under Section 39(c) of the Law of Succession Act; that under Section 66 of the Act, the court has a discretion as to who is entitled to inherit and that Section 66 of the Act sets out the order of preference of persons entitled to inherit. He submitted that step children do not share any blood relationship with the deceased and are not entitled to inherit. Counsel relied on the decision in ***Re: Estate of Sarah Wanjiku Nyaga (Supra)***, where the Court of Appeal held that co-wives did not have priority as administrators of the deceased's estate.

Mr. Waichungo, counsel for the respondent, on the other hand submitted that when Section 39 was enacted, the legislature did not envisage a situation where a childless woman, married to a polygamous man would die leaving behind properties to the step children. He relied on Section 29 of the Law of Succession Act which lists step children as dependants; that it was admitted that the deceased supported the respondent's children and left part of her estate to the children in her will and that some of the properties were inherited from her husband, who is the children's father; that there was no evidence that the applicant was a dependant of the deceased; that Agnes Waithera, a sister in law to deceased benefited from deceased's estate because she assisted the deceased when she was ailing; that there was no evidence to prove that the estate was worth Kshs.100,000/= at the time of filing the cause in the lower court.

Having considered all the evidence and the rival submissions, I think that the issues I need to address are:

- 1. Whether the SPM's court had jurisdiction to deal with the deceased's estate;**
- 2. What constitutes the deceased's estate;**
- 3. Whether the requirements of Section 76 Law of Succession Act were met;**
- 4. Who are the deceased's beneficiaries?**

Jurisdiction of SPM's court:

What constitutes the deceased's estate:

According to the certificate of grant, the deceased's estate comprises the following:

1. Nyandarua/Nandarabi/568;
2. Unsurveyed Residential Plot No.214A (Ndungu Njeru Village);
3. Gilgil/Gilgil/5632;
4. Gatamaiyu Plot/328
5. Muki Sacco a/c.01-73-3450;
6. Thome Farmers No.4 Ltd share certificate No.28122

Of Jurisdiction:

This matter was filed before the SPM's court Nyahururu on 17/7/2013.

The respondent indicated in the petition for grant of letters of administration that the value of the estate was Kshs.100,000/=.

However, an agreement for sale of land dated 3/4/2006 whereby the deceased (Monicah) sold ½ acre of land to John Ndaire clearly shows that he paid Kshs.50,000/= for it. It is not in doubt that L.R.Nyandarua/Nandarabi/568 measures 9.5 acres. In 2014, 9.5 acres was worth well over Kshs.100,000/= in value if ½ acre cost Kshs.50,000/= in 2006.

Jurisdiction in Succession matters is provided for by Section 48(1) of the Law of Succession Act Cap.160 Laws of Kenya which provided as follows:

“Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of [section 49](#), a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under [section 7\(1\) of the Magistrates' Courts Act, 2015.](#)”

In 2015, Section 48(1) of the Act was amended by enactment of the Magistrates Court Act, No.26 of 2015. Under Section 23 of the new Act, it repealed Section 48(1) of the Law of Succession Act and substituted it with the following Sections:

“23, the Law of Succession Act is amended by repealing Section 48(1) and substituting therefore the following new subsection:

1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of Section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders thereon as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under Section 7(1) of the magistrate's court Act, 2015.”

Jurisdiction goes to the competency of the court or the root of the court's authority to determine a particular matter. The court in *Owner of the Motor Vessel 'Lilians' v Caltex Oil (Kenya) Ltd (1989) KLR 1* in dealing with the issue of jurisdiction put it aptly as follows:

“I think that it is reasonably plan that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it, a court has no power to make any more step. Where a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence.

Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The subordinate court does not have unlimited jurisdiction in Succession matters and it was incumbent upon the magistrate seized of the matter to enquire into its jurisdiction as a preliminary step before embarking on making orders in the matter. Had the court bothered to do so, it would have realized that the property was worth well over Kshs.100,000/=.

Guided by the decision of *Owners of Motor Vessel 'Lilians' (Supra)*, since the trial court did not possess jurisdiction to make the orders it did in distributing the deceased's estate, there is no valid grant that requires to be interrogated under Section 76 of the Act. The said grant and all the proceedings out of which the grant was issued to **Beth Nyokabi Kinyanjui** on 18/2/2013 and confirmed on 27/8/2013 are hereby declared a nullity.

Who are the beneficiaries of the estate?

Having determined the issue of jurisdiction and Section 76 of the Act, I now proceed to consider who are the beneficiaries of the deceased's

estate?

The deceased had no biological child. She had adopted Samuel Gitau, who it is agreed died under mysterious circumstances when the house he was sleeping in was set ablaze on 30/7/2011. The deceased had made a will dated 25/11/2009 (JNMU) authored by PW2 in the presence of the respondent and others leaving all his property to Samuel Gitau. The said Samuel Gitau having died within a year of the deceased's death, the deceased was left without a beneficiary and is deemed to have died intestate.

Section 29 of the Law of Succession Act defines who a dependant is. It reads as follows:

“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.”**

No doubt the applicant is a brother to the deceased and hence the deceased's beneficiary. The respondent's children are the deceased's step children as the deceased and the respondent were married to the same man, Daniel Kinyanjui.

PW1, DW1 & 2 all admit that during her lifetime, the deceased used to support the respondent and her children.

It means that both the applicant and respondent's children fell under Section 29(b) of the Law of Succession Act as dependants of the deceased.

Section 66 of the Law of Succession Act sets out the order of preference of the persons entitled to administer the estate of an intestate.

Section 66 reads as follows:

“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:-

- a. surviving spouse or spouses, with or without association of other beneficiaries;**
- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- c. the Public Trustee; and**
- d. creditors:**

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

Mr. Nderitu submitted that step children and a co-wife of the deceased are not kin and cannot be ranked in the survivors envisaged under Section 66(b) of the Act.

Mr. Nderitu relied on the decision on *Njeri Mbugua & another v Peter Kariundi Gathuya C.A.141/06* where the court said:

“Although the appellants were co-wives with Rachel, the Law of Succession does not recognize them as having priority as administrators of her estate. The Law recognized her brothers and the ruling of the learned Judge on this aspect is spot on the law.”

In the above mentioned case, the court considered whether a co-wife is entitled to be appointed administrator of a co-wife's estate. Guided by the above decision, I find that the respondent is not envisaged in law as one of the survivors of her co-wife the deceased.

The question is whether the respondent's children are survivors of the deceased:

I have already noted that under Section 29, step children are recognized as dependants and can therefore be administrators of the deceased's estate.

In *Gilbert Otieno Okute v Moses Odera Onditi, (2013) eKLR* the Court of Appeal considered the question, who had priority over the deceased's estate, the nephew of the deceased or a step son. The court found the nephews had the right to administer their aunt's estate but the step son too had a right to inherit.

The Court of Appeal considered the meaning of the term 'child' under Section 3(2) and 3(3) of the Law of Succession Act and concluded:

“The plain language of sub-section 3(2) shows that with respect to a female person, the term ‘child’ includes a child born to her out of wedlock and in the language of subsection 7(3) such child shall have relationship to other persons through her as though the child had been born to her in wedlock. In our view, this definition would not include the appellant or a child of the deceased. The appellant clearly was not born to the deceased out of wedlock. We however observe that the definition of child in Section 3(2) is not exclusive. With the use of the term ‘shall include’ the framers of the statute left open the definition of ‘child’. In our view, therefore, the term child as used in sub-section 3(2) and 3(3) of the Law of Succession Act includes a step son as the appellant in this case. He is the son of the husband (deceased) of the deceased herein. It did not matter that he died before the deceased.”

The Court of Appeal concluded that both nephews of the deceased and the step son were entitled to be issued with grant of representation of the deceased's estate.

In *Re: Estate of Sarah Wanjiku (Supra)*, the High Court found that a step son was not a beneficiary of a deceased who died intestate and left no child or spouse. To the contrary, I find that in view of Section 29, 3(2) and 3(3) of the Law of Succession Act, a step son is a beneficiary of the deceased.

Section 39 of the Law of Succession Act provides how distribution will be done where an intestate has no surviving spouse or children:

Section 39(1) provides as follows:

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:-

- a. father; or if dead;**
- b. mother; or if dead;**
- c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**
- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none**
- e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”**

This is the Section that will guide distribution.

Guided by the decision of the *Court of Appeal in Gilbert Otieno Okute (Supra)*, I find that the respondent's sons are beneficiaries of the deceased and are entitled to be issued with grant of representation together with the applicant who is a brother of the deceased.

The orders that the court will grant are therefore as follows:

- 1. The PM's court Nyahururu did not have jurisdiction to hear and determine this cause;**
- 2. The certificate of confirmation of grant issued to the respondent is null and void and all the consequential subdivisions are rendered null and void too. The grant is hereby cancelled;**
- 3. The applicant is hereby appointed as one of the administrators of the deceased's estate;**
- 4. The deceased's beneficiaries are the applicant, his siblings and the respondent's children;**
- 5. Beth Nyokabi is not a beneficiary of the deceased's estate;**
- 6. The respondent's children to agree on which one of them will be a joint administrator with the applicant;**
- 7. The matter be mentioned to confirm who the 2nd administrator is;**
- 8. This being a family matter, each party to bear their own costs;**
- 9. Either party be a liberty to move the court.**

Dated, Signed and Delivered at NYAHURURU this 19th day of May, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Waichungo for respondent

Eric – Court Assistant