



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 6 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE MUGO KIMANI MUTURA (DECEASED)

MARY MUGURE MAINAAPPLICANT

VERSUS

MARGARET MUTHONI MUGO RESPONDENT

R U L I N G

1. Mugo Kimani Mutura died on 22nd March 2013. According to the record he was a radiographer at Molo District Hospital. There was a death and funeral announcement in the newspaper indicating that he would be buried on 28th March 2013 at his Tayari Farm Molo Location Nakuru, Nakuru County, it also announced he was married to Margaret Muthoni Mugo also an employee at the same hospital and father of Stephen Kimani Mugo, David Karigi Mugo and MaryAnn Njambi. According to the burial programme and eulogy on record he was buried on 28th March 2013. In the eulogy the information about his family was the same.

2. On 17th October 2013 Margaret Muthoni Mugo filed **Molo Senior Principal Magistrate's Succession Cause Number 23 of 2013** for grant of letters of administrator intestate. She listed herself and her children as the only beneficiaries to the estate. The only asset, named was gratuity dues and no liabilities were indicated.

3. Grant of letters of administration of estate intestate was made to her on 3rd February 2014.

4. Perusing the file, I came across a document filed on 25th April 2014 headed "objection to the making of a grant" by the firm of A. N. Geke & Company Advocates for Esther Wangui Gachagua describing herself as one of the widows of the deceased. There was also a letter dated 1st October 2014 at filed on 2nd April 2014 by the firm of Waiganjo & Company Advocates on behalf of Mary Mugure Maina, also describing herself as a widow of the deceased.

5. On 30th April 2014 Mary Mugure Maina filed Summons for Revocation Grant in **Miscellaneous Succession Application 6 of 2014**. The matter was brought under the Certificate of Urgency of Waiganjo Mwangi Advocate, of the same date. The application sought orders:-

1. THAT this application be certified as urgent were defective in substance.

2. THAT the grant of letters of administration made to MARGARET MUTHONI MUGO on 3rd February 2014 in Molo SPMC Cause Number 23 of 2013 be revoked on the ground that;

a. The proceedings to obtain the grant were defective in substance.

b. The grant was obtained fraudulently by making of a false statement and or by the concealment from the court of something material to the case.

c. 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. The grant has become useless and inoperative through subsequent circumstances.

3. THAT Molo SPMC Succession Cause No. 23 of 2013 be transferred to the High Court at Nakuru for hearing and determination.

4. THAT pending the hearing and determination of this application the court may be pleased to stay and or suspend the grant issued on 3rd February, 2014 and order the respondent herein to deposit in court Kshs. 1,830,822.20 received from the public trustee on 7th February 2013.

5. THAT the court be pleased to suspend and or freeze further withdrawal by the Respondent for funds in account No. 0230190233690 Equity Bank Molo Branch where the sum of Kshs. 1,830,822.20 was deposited by the Respondent herein.

6. THAT the costs of this application be provided for.

The same was supported by the affidavit of Mary Mugure Maina sworn on 30th April 2014. She deponed that the deceased and her got married in 2000 and had three (3) children;

Rebecca Njambi – Date of birth 25th February 2003

Mugo Kimani – Date of birth 3rd September 2006

Joy Njoki – Date of birth 13th March 2013

She annexed certificates of birth showing that she and one Mugo Kimani Mutura are the parents. That the deceased had put up her matrimonial home at plot 1338 Tayari Farm and she was aware that he had another wife, the respondent at plot number 292 Tayari Farm. That respondent had secretly filed the cause and gone on to receive Kshs. 1,830,822.20 from the Public Trustee and was about to receive another sum of Kshs. 311,742 which was designated to her by the deceased. She annexed the document.

6. The matter was placed before *Emukule J* on 2nd May 2014. She was granted prayers 1, 3, 4 and 5 and the matter fixed for inter partes hearing on 22nd May 2014. For some reason it was before the judge again on 15th May 2014. The respondent was not represented and matter was adjourned to 10th July 2014. Then, Mr. Waiganjo sought that the Molo file be brought to Nakuru. The application was granted with a mention for 10th October 2014. On that date, the applicant and her counsel did not appear, until 25th July 2016 when the matter was fixed for mention before *Ndung'u J*. On 4th October 2016, he directed that the application be heard by way of viva voce evidence.

7. The matter remained like that until 13th June 2018 when Mr. Tengekyon appeared for respondent and Mr. Waiganjo for applicant. A replying affidavit by the respondent was served on Mr. Waiganjo. The matter was fixed for hearing on 11th December 2018. On that date, respondent and counsel were absent. Mr. Waiganjo told the court that the petitioner was present but had disappeared. Matter was fixed for 2nd April 2018. On that date, Mr. Tengekyon was present, Mr. Waiganjo was but his client was not. Matter was adjourned to 18th September 2019. It was mentioned before the Deputy Registrar and fixed for hearing on 14th November 2019. Neither counsel or client was present and Ms. Karuga holding brief for Waiganjo fixed for hearing on 19th February 2020. Waiganjo was present. There was Affidavit of Service that Tengekyon had been served. There was no appearance by himself or client by 11.45 a.m. and the matter was heard in their absence.

8. The applicant merely restated the contents of her affidavit and statement. She claimed that when deceased married her he had separated from the respondent.

9. Since the respondent was absent there is only her affidavit in response on record. She had deponed that and deceased married in a civil marriage on 6th September 1980, she annexed Certificate of Marriage. That upon demise of deceased he was buried at his farm in Molo and the applicant and her children never went there.

10. That it was she and her husband who bought the properties Mau Summit/Molo Block 7/614 and 1388, that the applicant was the deceased's friend and after his death, she unlawfully held to the possession of plot 1338. That she was the only one legally entitled to file the cause and she did so as the deceased's spouse. That she was entitled to receive the payments she received. That the deceased never acknowledged paternity of the children named by the applicant, that the document from the deceased's Afya Sacco nominating the applicant as his next of kin was suspect. That she had done nothing wrong.

11. The issue for determination is whether the grant herein is up for revocation as provided for under **Section 76 of the Law of Succession Act**.

12. It is not disputed that the deceased had a civil marriage with the respondent. The applicant concedes that deceased was married but contends that when he married her he had separated with the respondent. What she may not understand is that that separation had not terminated the marriage between the respondent and the deceased.

13. However, it is also conceded by the respondent that she was aware that applicant lived on deceased's property plot Tayari farm 1338, which she claims she purchased with the deceased and whip she claims further the applicant had held on to as a friend.

14. Nevertheless the respondent in her petition never mentioned the two properties. By doing so she concealed the extent of the deceased's estate and also the fact that there was someone occupying that property. It is noteworthy that by the time the matter came for hearing there is no evidence that she had taken any action to evict her deceased's husband's alleged friend from the said property.

15. This case presents the perennial issue that Kenyan courts have frequently been confronted with in succession matters. A man dies. A

woman or several of them, with or without children show up either at the funeral or at the succession court. The claim? That the was also their husband and father to their children. As courts of law we have continued to apply the letter of the law. In cases such as this or where the deceased was married under the African Christian Marriage Act or the current Marriage Act under a monogamous 'regime' we find that the man did not have the capacity to marry any other woman. Hence there was no marriage between him and this claimant. We have even gone ahead to declare such marriages as null and void, meaning, that as far as the law knows, they never existed. We make these declarations yet the parties there to were two adults, in their right minds and who lived together as husband and wife in the eyes of their society, some socially recognized as such by kin and friends, had children, acquired property together. My greatest concern here is the children born out of such marriages. Yes, the law of succession recognizes them but not their mother. We can tell the couple, hey, you were never married. But we know that it is the notion, the legal concept. We can legally break them up. But we cannot by such a declaration erase the notion of the family the children had known as null and void, to that extent I ask myself, what kind of law is this? Children who had a family where there was Dad and Mum or Mama na Baba are suddenly told that that family as they knew it actually never existed in law? Even if as we do, discard the malfasant woman, grant them their share of their dead father's property's there is something wrong with the whole thing. As a society we watch these families grow in the lifetime of the man, but as soon as he is dead, that family is killed by the law ; Why? Because the woman with who he was made that family was not legally married to him.

16. With regard to the family our Constitution says at **Article 45**.

Family

(1)The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

(4) Parliament shall enact legislation that recognises—

(a) marriages concluded under any tradition, or system of religious, personal or family law; and

(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.

17. We have a law on bigamy **Section 171 of the Penal Code Cap 63**. It is a **felony**. How many complaints have been registered by legally married wives or any other person in the life time of their husbands that their husband has contracted another marriage? In my many years as a judicial officer I have not come across any. Yet the law speaks loudly.

“Any person who, having a husband or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of the husband or wife, is guilty of a felony and is liable to imprisonment for five years:

Provided that this section shall not extend to any person whose marriage with the husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if the husband or wife, at the time of the subsequent marriage, has been continually absent from such person for the space of seven years, and has not been heard of by such person as being alive within that time.”

18. So, why should it come up post-humously? Why should the woman, who a man takes as his wife for all intents and purposes be treated as the one who is in the wrong while he treats his Certificate of Marriage as only evidence of the marriage between him and the woman with him he married either in church or at the registrar's? It appears to me that to these men, the 'contract' of marriage as evidenced by the Certificate of Marriage is only between him and that specific woman. This man can blatantly break this law in his life time and the devil take the consequences? Here is a case where the legally married wife is aware of the her husband's marriage, condones her husband's living with the other woman, siring children with her, but the moment he dies, that woman becomes 'friend or mistress', and the children ? It bothers me that we have a legal system that will recognize that this man sired children, who can inherit from him, but that woman who sired the said children with him is treated as non-existent! Marriage laws as we have them, create this kind of discrimination. The man knew he had a civil marriage, lived with a woman on a piece of land he purchased, long enough to have three children, one of them born a few days before his demise, who are we to declare after his death that that woman was nothing to him? We will protect his wishes written and unwritten as to his property, but the family he deliberately made with another woman must be dismantled. In the matter before me I am not required to determine these issues but they simply popped out of the facts. As the Kenyan we need to have a conversation with ourselves on this issue. It is time to stop burying our heads in the sands of *pilipili usioila yakuashia nini*? This is a situation where we can no longer say ignorance is bliss. The lived realities of the women and children who find themselves in these situations must be addressed. They are not legal concepts. They are people. The law as it is does not recognise this family as a family. Can it be declared away?

19. That said in this case, the respondent was aware of the existence of the applicant living on one of the properties of the deceased. She was even aware of the existence of the children, on the face of it, she did not make true declarations about everything. First, on the extent of the deceased's estate, only the gratuity was mentioned yet there are two (2) properties one occupied by her, the other by the applicant, secondly, there were children whom who were all minors at the time of the he died, if they are the deceased's they deserve to inherit his property, thirdly she was aware that there was a document in which the deceased had nominated the applicant as his next of kin, even if she was suspicious of it was upon her to declare it and have the court determine whether or not it was genuine.

20. In the circumstances I find that she is guilty of material non-disclosure.

21. The grant, issued on, 3rd February 2014 and which has not yet been confirmed is revoked.

22. A fresh grant to issue to both the respondent and the applicant.

23. Both or either of them to file Summons for Confirmation of Grant together with an amended form P&A 5 within forty five (45) days hereof. If either files, to serve the other party immediately upon filing.

24. The matter be mentioned on 29th June 2020 to confirm compliance

25. Each party to bear its own costs

Delivered, Dated and Signed at Nakuru this 7th day of May, 2020.

Mumbua T. Matheka

Judge

In the presence of:-

Edna Court Assistant

Waiganjo & Company Advocates Ms Wangari

Tengekyon Koske and Co Advocates N/A

Mumbua T. Matheka

Judge

7/5/2020