



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 13 OF 2016

IN THE MATTER OF THE ESTATE OF CGM (DECEASED)

JUDGMENT

1. The undisputed facts of this case are that the deceased herein died on 10th April 2015 and was survived by his wife **GWK** and her four minor children, and his parents **PMG** and **LWM**. On 23rd June 2015 **GWK** (hereafter the Petitioner) and one **MKW** petitioned for a grant of letters of administration. Following publication of the petition, a grant was issued on 1st April 2016.

2. It would appear that by the said date, **PMG** (hereafter the 1st Objector) had filed a summons on 21st March 2016 seeking *inter alia* the exclusion of **MKW** as an administrator and his substitution therefor as an administrator, the inclusion of omitted beneficiaries, namely the deceased's parents, namely, **LWM** (hereafter the 2nd Objector) and himself and an alleged daughter of the deceased, known as **LWG** and finally, the inclusion of an asset described as **Muguga/Muguga/***** and liabilities amounting to KShs.2,500,000/= in the estate.

3. The application was supported by the affidavit of the 1st Objector. He deposed that he only learnt that the Petitioner and her co-Petitioner had petitioned for a grant when the said Petitioner was contacted by his advocate to sign the petition whereupon she had informed the advocate that she had already filed her own petition. He contended that the Petitioner had not only failed to disclose the deceased's dependents, including the deceased's first daughter known as **LWG** and the Objectors but also the assets and liabilities of the estate. He asserted that the motor vehicle registration number **KCA ***D** was jointly purchased by his wife and their deceased son. He claimed that the Petitioner had commenced wastage of the estate and hence he ought to be appointed as a co-administrator.

4. By her replying affidavit filed on 13th June, 2016, the Petitioner denied that she had secretly applied for a grant. She deposed that the application was an afterthought as the 1st Objector had all along been aware of her Petition. It was her contention that she included all the assets and liabilities known to her at the time of the deceased's death save for the land parcel LR No. MUGUGA/MUGUGA/**** which was erroneously excluded and that all beneficiaries known to her were included in her Petition. Concerning **LWG**, she swore that she was unaware of her existence and cast doubt on assertions that she was a child of the deceased.

5. She maintained that the motor vehicle registration number **KCA ***D** was the property of the deceased and pointed out that the vehicle was registered in his name. It was her contention that the Objectors were not being maintained by the deceased immediately prior to his death and therefore did not qualify as his dependants. She denied the allegations that she has wasted assets of the deceased's estate and expressed her willingness to include her daughter as a co-administrator rather than the 1st Objector with whom she had a strained relationship.

6. The above application, and an earlier one by the Petitioner seeking the release to herself of a motor vehicle registration number **KCA ***D Leyland Drill Rig** by the 1st Objector (filed on 29th July 2015) were on 25.10.16 compromised in terms that the letters of administration were to be amended to remove the name of **MKW**, while the Objectors would continue to operate the borehole on land parcel **LR No. Muguga/****** and the drilling lorry above. The court subsequently directed the Petitioner to file a summons for confirmation of grant listing the beneficiaries, the assets and liabilities of the estate as well as her proposals for the distribution of the estate. The Objectors were also granted leave to file their own affidavit on the extent of the estate and liabilities as well as proposals on the mode of distribution.

7. Directions were further made to the effect that the case would proceed by way of *viva voce* evidence, the key issues for determination being:

- a) whether the Objectors being parents of the deceased were dependants of the deceased, therefore beneficiaries;
- b) whether **LWG** (erroneously described as **LWG**) was a child of the deceased and therefore a beneficiary;
- c) the assets comprising the estate;
- d) the extent of liabilities of the estate;

e) whether the lorry registration No. **KCA ***D** and land parcel. **LR No. Muguga/Muguga/****** formed part of the estate of the deceased

f) the status of the accounts in Equity Bank Account No. 05702 xxx

8. In compliance with these directions the Petitioner filed the Summons for confirmation of grant supported by her affidavit. The court directed that the Summons be heard by way of *viva voce* evidence.

9. Testifying as **PW1** the 1st Objector relied on his summons and affidavits. In cross-examination he stated that the deceased had a daughter with his deceased first wife. He asserted that though the land parcels LR No. **Muguga/Muguga/****** and **Muguga/Muguga/****** are registered in the deceased's name and his name respectively, he and the deceased had exchanged ownership of the two plots thus enabling the deceased to dispose of LR No. **Muguga/Muguga/****** while the deceased surrendered the title document in respect of land parcel LR. No. **Muguga/Muguga/****** to him, being the parcel holding the family borehole and source of water. He stated that he worked closely with the deceased and even extended financial support to the deceased where necessary.

10. The 2nd Objector then took the witness stand as **PW2**. The sum total of her evidence was that she and the deceased were involved in several business ventures including a joint loan taken to finance the purchase of the lorry rig **KCA ***D** for a water drilling business and that subsequent to the son's death, the loan was settled by the insurance company.

11. In her evidence, the Petitioner (**RW1**) relied on her affidavits on record and the application filed on 21/3/17 as her evidence. She stated that she did not know of the child **LW** or the deceased's previous wife. She explained that she had omitted the land parcel LR. No. **Muguga/Muguga/****** as the title documents were not in her possession initially. She asserted that the properties including LR. No. **Muguga Plot ***** and ******** jointly acquired by her deceased husband and herself should only benefit her children. While admitting the exchange of plot ownership between the deceased and the 1st Objector, she claimed that the borehole on plot No. ******** was financed by her husband. She also admitted that the deceased and his mother had a close relationship and that the said Objector had jointly with the deceased obtained a loan to finance the deceased in the purchase of drilling equipment.

12. At the close of the evidence, parties were directed to file their written submissions. The Objectors reiterated evidence relating to the child **LWG** whom the Petitioner had failed to include as a beneficiary. Further, it was submitted that the Objectors were dependants of the deceased and therefore beneficiaries to his estate. Emphasizing the liabilities of the estate the Objectors defended their proposed mode of distribution as consistent with the interests of the deceased's children.

13. The Petitioner for her part took issue with the alleged child of the deceased and asserted that the only credible proof would be a paternity test. In her view the Objectors did not qualify as beneficiaries to the estate as they were dependent on the deceased their maintenance before his demise. She relied on the case of **In Re Estate of John Musambayi Katumanga (Deceased) (2014) eKLR** for the proposition that a widow has the highest stake in the estate of her deceased husband. The Petitioner maintained that the estate had no outstanding liabilities once the loan in respect of the rigging lorry was cleared by the insurance company.

14. The court has considered the summons to confirm the grant, the affidavits and evidence of the parties alongside their respective submissions. On the first question, it is evident that the parents of the deceased herein are economically independent. They are endowed with financial means and during the lifetime of the deceased financially supported the deceased in his business through allowing him to use their property as collateral for loans, jointly applying with the deceased for business loans and guaranteeing such loans.

15. The definition of a dependent is found in section 29 of the Law of Succession Act. The section provides that:

“(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, stepparents, 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.”

16. The evidence on record shows that, the deceased had a very close relationship with both his parents but that he was not in any way maintaining them. Thus, I have no hesitation in finding that the two Objectors do not qualify as dependants of the deceased and therefore beneficiaries to his estate. Regarding the child **LWG**, the Objectors furnished un rebutted evidence that she was a child born to the deceased and one **VWK** who predeceased the deceased. The copy of birth certificate attached to the Objector's application filed on 21st March 2016 shows that the said child was born on 7th December 1996. The fact that the child was not included in the deceased's eulogy during his burial is neither here nor there. It was not enough for the Petitioner to assert that the Registrar of Deaths and Births did not testify in that regard. In her replying affidavit the widow had stated that she did not know of the existence of **LW** and that she would call the Registrar concerned to shed light on the authenticity of the birth certificate. This, she did not do.

17. In my considered view, the evidence adduced by the Objectors on a balance of probabilities points to the existence of the said child born to the deceased prior to his marriage to the Petitioner herein. Being a child of the deceased, **LWG** is a direct beneficiary of the estate of the deceased whether or not the deceased was maintaining her prior to his death.

18. On the issue of the extent of the estate of the deceased, the only disputed assets were the lorry registration number **KCA ***D** and the

land parcel **LR No. Muguga/Muguga/******. As concerns the latter the Petitioner conceded that it rightfully belonged to the 1st Objector pursuant to an exchange he made with the deceased when the said Objector surrendered to the deceased his own parcel **LR. No. Muguga/Muguga/****** to enable the deceased raise funds for his business. It appears that the former parcel remained in the deceased's name even though he had already surrendered the title deed thereto to his father. The deceased therefore remained a nominal owner but held the asset. In the true sense therefore, the land parcel LR. No. Muguga/Muguga/**** does not form part of his estate save for purposes of facilitating its transmission to the true owner, the 1st Objector.

19. The Petitioner also did concede that the lorry rig registration number **KCA ***D** was purchased through a loan jointly obtained by the deceased and his mother, the 2nd Objector even though it was registered in the name of the deceased. The charge document is annexure "**PM G 5h**" to the affidavit of the 1st Objector in support of the application filed on 21/3/16. The borrowers therein were the deceased and his mother and the loan was guaranteed by the deceased's father. Admittedly, following the death of the deceased, the balance of unpaid loan was paid off by the insurance company. Indeed, according to the 2nd Objector, the duo intended to use the said lorry for a joint rigging business. In light of these facts, the lorry though registered in the deceased's name was beneficially owned by him and his mother, the 2nd Objector.

20. Concerning the deceased's estate liabilities, the copies of chits attached to the affidavit in support of the summons filed on 21/3/16 are unsigned and too scanty to be the basis of a finding that the amounts therein represent debts owed to the individuals stated. In any event none of these alleged creditors have come up to make any claims. The assertion that the deceased owed a sum of KShs.2.5 million to these persons therefore remains unproved. It was undisputed that the Applicant withdrew a sum of KShs.2,467,000/= from the deceased Equity Bank Account No. 05702 xx between his death and 20th May 2015. There is no evidence to support her claims to have used this money to settle the hospital bill "**GWK 4**" annexed to her Replying affidavit filed on 13th June 2016 or that she applied the funds to the purchase of materials for the drilling machine. These sums therefore remain unaccounted for.

21. In view of all the foregoing, the court finds that the beneficiaries to the deceased's estate are:

- a) GWK - Widow
- b) LWG - Child
- c) LWG - Child
- d) MAMG - Child
- e) JWG - Child
- f) JNG - Child

22. Further that the assets comprising his estate at the time of his death included:

- a) Land Parcel LR No. Sigona/***;
- b) Land Parcel LR No. Muguga/Muguga ****;
- c) Land Parcel LR No. Muguga/Muguga/**** – held in trust for the 1st Objector;
- d) Motor vehicle registration no. KCA ***D - owned jointly with his mother the 2nd Objector;
- e) Motor vehicle registration no. KAC ***T;
- f) Funds held in the following bank accounts:
 - i) A/c No. 05702 xxx - Equity Bank
 - ii) A/c No. 10200 xxx - Family Bank
 - iii) A/c No. 10200 xxx - Family bank

23. The Petitioner's advocate has urged the Court to apply the provisions of Section 35 of the Law of Succession Act which provides that:

“(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that

interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will or in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

(a) the nature and amount of the deceased's property;

(b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;

(c) the existing and future means and needs of the applicant and the surviving spouse;

(d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;

(e) the conduct of the applicant in relation to the deceased and to the surviving spouse;

(f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and

(g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.

24. In this instance, the Petitioner is entitled to a life interest in assets listed as items (a) and (b) above. However, the power of appointment under section 35(2) of the Law of Succession shall be jointly exercised by the Petitioner and her co-administrator as appointed below by the Court, in order to secure the interests of the minor children of the deceased. In terms of section 35 (5) of the Law of Succession Act, these assets will devolve upon the five children of the deceased in the event of the Petitioner's death or remarriage. Further, it would appear that the deceased's daughter **LWG** is now an adult. In the circumstances of this case, the said child is at liberty to make an appropriate application for the appointment of her share in the assets listed as items (a) and (b) above in terms of section 35(3) of the Law of Succession Act.

25. The Petitioner is also entitled to the vehicle **KAC ***T** (item (e) above); and a half share in the asset listed in item (d) above. The latter asset being motor vehicle registration no. **KCA ***D** is to be sold and proceeds shared equally by the Petitioner and the 2nd Objector. The immoveable asset listed as item (c) above will devolve upon the 1st Objector.

26. Funds held in the account listed at item (f) (i) appear depleted. The Petitioner will be entitled to any funds held in the accounts listed as items f(ii) and f (iii) above which funds ought to be applied in settling any outstanding liabilities of the estate.

27. Finally, in view of the fact that there is a continuing trust in this matter as the majority of the deceased's children are minors, this court will confirm the grant in the terms above, but in the joint names of **GWK** and **PMG**. The parties will bear own costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 16TH DAY OF JULY 2020

C. MEOLI

JUDGE