



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 3110 OF 2014

IN THE MATTER OF THE ESTATE OF TITUS MUTIGA WAMWEA (DECEASED)

AGNES WANGUI MUTIGA.....OBJECTOR

VERSUS

PERPETUAH MUTHONI MUTIGA.....1ST RESPONDENT

ANNE WANJIRU MBOGORI.....2ND RESPONDENT

RULING

1. The deceased Titus Mutiga Wamwea died intestate on 9th June 2014. It is evident that on 30th June 1963 he had married the 1st respondent Perpetuah Muthoni Mutiga at the PCEA Church in Nyeri. They obtained a marriage certificate under the **African Christian Marriage and Divorce Act** (now repealed). The widow and her daughter Anne Wanjiru Mbogori (2nd respondent) petitioned the court and were on 27th July 2015 granted joint letters of administration intestate. The grant was confirmed on 18th April 2016. In the certificate of confirmation the deceased's following estate was to be registered in the names of the respondents to hold in trust for the beneficiaries (1st respondent's children):-

(a) Kiambu/Municipality Block 1/253;

(b) LR No. 209/7388/183 Uhuru Estate Phase III, Buruburu Road, House No. U14 E; and

(c) Plot No. 367, Mweiga in Nyeri County.

2. There is an application dated 7th March 2017 by the objector Agnes Wangui Mutiga seeking the revocation of the grant and certificate of confirmation issued to the respondents. Her basis is that the two were fraudulently obtained by the making of false statement and by the concealment of material information, and by untrue allegation of facts essential in point of law. Her case was that she was the second widow of the deceased with whom she had two named children, born in 1982, and 1988, respectively. She stated that the marriage was a customary one which the deceased had acknowledged in an affidavit dated 14th December 2010 ("AW 2"). She produced the children's birth certificates ("AW4(a)" and "AW4(b)") that showed the deceased to be their father. She stated that the deceased and her had set up a matrimonial home in LR No. 209/7385/182, Uhuru Estate Phase III, Buruburu Road, House No. U14E, where, when he died, he left her. The objector further stated that she was the one who took care of the deceased up to the time of his death and she managed his burial. She produced the death advertisement and obituary to show that she was acknowledged as the second widow of the deceased. Her case was that all these facts were known to the respondents who had instead petitioned for the grant without reference to her, and without seeking her consent, with the result that she and her children had now been disinherited.

3. The respondents denied that the deceased was married to the objector, or that he had children with her. According to them, the deceased had left only one widow (the 1st respondent) whom he had married in church; that, consequently, he had no capacity to enter into any other marriage. They stated that the documents relating to the death advertisement and obituary of the deceased had been made up by the objector. It was denied that the house in question was the objector's matrimonial home with the deceased. Their case was that on 1st March 2013 the deceased had given to the 1st respondent a special power of attorney over the house, which house she subsequently rented. However, the objector had subsequently forcefully entered the house.

4. The objector produced proceedings in **ELC No. 1403 of 2016** at Nairobi to show that the 1st respondent had on 14th November 2016 sued her seeking vacant possession and mesne profits over the house, the case alleging that the 1st respondent had by a verbal agreement rented the house to her but that she had refused to pay rent. The objector is defending the suit which has not been heard and determined.

5. The **ELC** case is important because there is before me a second application, this one by the respondents, over this house. The summons seeks the finding that the objector has intermeddled with the house; that she be evicted from the house; and that the property be given to rent payers, and the rent be deposited into an account until such time that the estate is distributed. The application is dated 27th January 2020.

6. I have read the respondents' counsel's written submissions on the application dated 27th January 2020. My view is that, to determine this application (of 27th January 2020) the court has to resolve the dispute whether the deceased left one widow or two widows. The court has to decide whether the house was the matrimonial home between the deceased and the objector, or whether the objector was in the house as a paying tenant who has refused to pay rent and therefore has to be evicted. But before even considering the merits of the application, it is material to point out that the dispute before the ELC court and the dispute in the application dated 27th January 2020 are substantially the same, and seeking the same orders. It is my considered view that, where the respondents file an application knowing that they have filed in **ELC** court a suit seeking the same orders, and which suit is pending, that amounts to an abuse of the process of the court (**Leonard Onyancha –v- Post Bank Credit Ltd, HCCC No. 396 of 2000 of Kisumu**).

7. Further, **section 6** of the **Civil Procedure Act** states that:-

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The **section** embodies the doctrine of *subjudice* which basically provides that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit has not been resolved (**Republic –v- Paul Kihara Kariuki, Attorney General & 2 Others Exparte Law Society of Kenya [2020]eKLR**).

8. To allow the application dated 27th January 2020 to proceed to ruling would be to allow the excessive and improper use of the process of the court. This is in view of the **ELC** suit between the same parties and which is pending. The result is that I strike out with costs the application dated 27th January 2020.

9. Regarding the application dated 7th March 2017, I had asked that it be decided on affidavit evidence and written submissions. However, upon reflection, I have decided that, although affidavit evidence is good evidence, the wider interest of justice would require the court to interrogate in a substantive way the question whether the objector and the deceased went through the required processes of customary law marriage for the former to be said to benefit from the provisions of **section 3(5)** of the **Law of Succession Act (Cap. 160)**. This is because the objector said she was married to the deceased customarily whereas the respondents denied the existence of the marriage. The other issue that requires substantive interrogation is whether the deceased and the objector had children. Further, how the objector found herself in the house subject of this cause. Lastly, whether the objector took part in the burial of the deceased. It would be important for the parties to orally testify on these issues and be cross-examined to enable the court to reach an informed decision on them (**C.B.G. –v- J.L.W. [2017]eKLR**). In reaching this decision, I am mindful of the provisions of **section 47** of the **Act** and **rule 73** of the **Probate and Administration Rules**.

10. Consequently, the decision on the application dated 7th March 2017 is adjourned to allow for the above hearing.

11. Costs on the application dated 7th March 2017 will be made in the decision following the hearing.

12. To allow for the hearing, I order that the estate of the deceased shall be preserved. The *status quo* shall remain.

DATED and DELIVERED at NAIROBI this 9TH NOVEMBER 2020.

A.O. MUCHELULE

JUDGE